JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

IN RE: **APPLICATION OF MARSHALL MOKGATLHE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULES 11.2 AND 3.3.6 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the above-mentioned applicant intends to make an application in the following terms:

1. The late application for the cross examination of General Johan Booysen ("Booysen"), be condoned in terms of Rule 11.2 of the Rules governing proceedings of the judicial commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state (*"the Rules"*).

2. That leave be granted to cross examine Booysen as provided for in terms of Rule 3.3.6 of the Rules.

3. Further and or alternative relief.

KINDLY TAKE NOTICE THAT the affidavit of **MARSHALL MOKGATLHE** together with annexures attached hereto will be used in support of the application for condonation and leave to cross examine.

KINDLY TAKE FURTHER NOTICE THAT the affidavit of **MARSHALL MOKGATLHE** together with annexures attached hereto further serves a statement envisaged in Rule 3.4.

DATED at JOHANNESBURG on the 29 September 2020.

STATE ATTORNEY PRETORIA
ATTORNEYS FOR GEORGE BALOYI
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Ref: 5857/2019/Z16/mp

TO: Ms KB SHABALALA
ACTING SECRETARY
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***IN RE*:** **APPLICATION OF MARSHALL MOKGATLHE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULES 11.2 AND 3.3.6 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

WITNESS AFFIDAVIT IN TERMS OF RULE 3.4

I, the undersigned,

MARSHALL MOKGATLHE

do hereby declare under oath and state that: -

1. I am an adult male employed at the National Prosecuting Authority (*"NPA"*) as Senior Deputy Director of Public Prosecutions, Gauteng Division, Pretoria c/o the State Attorney, Pretoria, 316 Thabo Sehume Street, SALU Building, Pretoria.

2. The facts contained in this affidavit are within my personal knowledge, save where otherwise stated, or where the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. Where I rely on facts and/or statements made by third parties, I do so based on the belief that same is true and correct and I annex to this affidavit the explanatory affidavits of Luyanda Kopman (*"Kopman"*) and Marco Voller (*"Voller"*), respectively marked as annexures **"MM1"** and **"MM2"**.

4. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept as correct.

5. The Chairperson is requested to read the contents of all the annexures referred to herein as if specifically incorporated into this affidavit.

SHORT RESUMé

6. I am a major male person in the employ of the NPA since 2 January 1996. I completed the LLB degree from the University of Bophuthatswana, currently North West, during 1990. I became a Military law officer from 1987 until 1992 when I joined the Department of Justice. I moved from the Mahikeng State Law Advisor's office to the State Attorney's office. During 1996 I became a prosecutor in Odi Magistrates Court until 1998 when I joined the DPP office in Pretoria. In 1999 I joined the newly established Specialised Commercial Crimes Unit ("*SCCU*") until I was appointed a Deputy Director of Public Prosecutions at SCCU Johannesburg in October 2004.

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7. In 2007 I joined the Directorate of Special Operations (*"DSO"*) and became one of the Desks advising the Investigative Director on projects, until the DSO was disbanded. In 2009 I joined the Sexual Offences and Community Affairs Unit (*"SOCA"*) and headed the team tasked with developing the anti-trafficking task teams in the various provinces. In 2012 I was appointed as the Acting Regional Head of SCCU Pretoria office for a period of three years.

8. On 8 June 2015 I was appointed permanently as Regional Head of SCCU Pretoria office, in terms of Section 15(1) of the National Prosecuting Authority, Act 32 of 1998 (*"the NPA Act"*).

9. Below I mention some cases that I was involved in as a Junior where outside Senior Counsel were appointed in terms of Section 38 of the NPA Act:

   9.1. S v Esterhuizen and others. This case involved share manipulation by members of the stock broking company listed on the JSE. The lead prosecutor was Mike Hellens SC and the matter was finalised through a Section 105A of the Criminal Procedure Act, 51 of 1977 before the late Els J in the Pretoria High Court.

   9.2. S v King I. The Accused was charged with racketeering, multiple counts of fraud. In the early stages of the prosecution the lead prosecutor was John Myburgh SC and Etienne Coetzee SC was also part of the prosecuting team. In the interlocutory application, Adv Wim Trengrove SC was briefed to argue the docket application (free disclosure of the docket). The prosecution was stopped in the middle

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of the trial due to the fact that the expert witness had a medical condition and he could not testify.

9.3. S v King II. Accused was charged with multiple counts of fraud, tax evasion and money laundering and racketeering, and contravention of the Exchange Control Regulations. The lead prosecutor at the initial stages of the case was Adv Paul Pretorius SC and the forensic investigator was Adv Jan Swanepoel SC from PWC. The matter was finalised with a guilty plea. The matter was finalised by other prosecutors with a guilty plea.

10. Below are some of the cases that were decided, prosecuted and are being prosecuted by subordinates, whom I supervised:

10.1. Bosasa- corruption and fraud at the Department of Correctional Services;

10.2. On Point tender corruption and fraud;

10.3. Land Bank- corruption, racketeering and fraud by senior officials of the Land Bank;

10.4. Steinhoff- multi jurisdictional fraud on the stock market;

10.5. Tom Moyane investigation – Failure to report in terms of Section 34 of the Prevention of Combating of Corrupt Activities Act, No 12 of 2004 ("PRECCA");

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10.6. Sharemax investigation – Complex financial crimes;

10.7. Venda Building Society ("VBS")- looting of the mutual bank; and

10.8. Tasima investigation – corruption investigation of a former government minister.

11. I list herein below the types of cases that I personally prosecuted:

11.1. Contravention of the Banks Act – Ponzi Scheme;

11.2. Contravention of the South African Reserve Bank Act – Dealing in counterfeit notes;

11.3. Fraud involving syndicates using credit cards, led by a former bank manager;

11.4. Fraud, involving insurance claims by a Senior Correctional Services official;

11.5. Fraud and corruption, involving a Senior Provincial Government Employee in Johannesburg (Gauteng GSSC);

11.6. Contravention of the Attorneys Act and theft of Trust funds;

11.7. Fraud involving common purpose and corruption involving police officers;

11.8. Fraud involving possession of forged identity documents by foreign nationals;

Other work performed

11.9. Advised the then Investigating Director of the DSO, Adv Thanda Mngwengwe, on whether to approve applications by Regional offices for the institution of investigations in terms of Section 28(1)(a) of the NPA Act;

11.10. Drafting of Section 38 Agreements for the appointment of outside counsel, as well as motivations for the extension of such appointments.

Current high-profile cases

11.11. Covid-19 corruption cases.

PURPOSE OF THE AFFIDAVIT

12. The purpose of this affidavit is to:

12.1. support my application for condoning the late launching of the application for the cross-examination of Booysen and the filing of my main affidavit;

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12.2. demonstrate that there is no merit whatsoever in the allegations that I am captured for either political or corrupt reasons, with the result that I did not carry out my legal obligations and duties.

12.3. respond to the allegations made by Booysen against me that I am captured for either political or corrupt reasons, as provided for in Rule 3.4 of the Rules,.

12.4. support my application to cross-examine Booysen;

12.5. specifically address matters which the evidence leader, Adv G Hulley SC (*"Hulley"*) requested me to deal with in my affidavit.

13. Prior to responding to the unfounded and malicious allegations levelled against me, I have been advised, which advice I accept to be prudent, that I should firstly deal with the mandate of the NPA and the process that unfolds prior to making a prosecutorial decision.

14. I note that, apart from one specific complaint that Booysen raised against me, the rest of the allegations that Booysen mentions me in, are of a general and non supported nature, where he lumps me with the rest of my colleagues that he has raised issues against.

15. But for the generalised allegations where my name is mentioned in Booysen's affidavits, my submissions would be very brief and to the point. I am advised, however, that given the general allegations, I am bound to give an elaborate

response, lest I run the risk that the Commission make adverse remarks and or findings against me. In that regard and considering also requests conveyed by Hulley to my legal representatives that our affidavits be as detailed as possible, I will address myself to Booysen's general averments as well.

16. In light of what I have set out above, I will then first deal with the mandate of the NPA, the nature of the matters dealt with by the SCCU, as well as a process that unfolds prior to making a prosecutorial decision.

MANDATE OF THE NPA

17. Before dealing with the various allegations implicating me in wrongdoing that were made by Booysen, expressly or by implication, it is quite important that the purpose, functioning and mandate of the NPA is clarified, to demonstrate that the averments made against me, are unsubstantiated and unfounded.

18. The NPA obtains its mandate in terms of Section 179 of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*). Section 179(1) establishes the NPA as a single prosecuting authority in the Republic of South Africa and structured in terms of an Act of Parliament. The Act of Parliament referred to is the NPA Act.

19. In terms of Section 179(2) of the Constitution, the NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.

20. The preamble to the NPA Act and Section 32(1)(a) of the NPA Act, in line with Section 179(4) of the Constitution, provides for the NPA to exercise its functions without fear, favour or prejudice.

21. The National Director of Public Prosecutions (*"NDPP"*) is the Head of the NPA and is appointed by the President. In such capacity, the NDPP shall have the authority over the exercising of all the powers and the performance of all the duties and functions conferred or imposed or assigned to any member of the NPA by the Constitution, the NPA Act, or any other law.

22. In terms of Section 32(1)(a) of NPA Act, a member of the NPA shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith, without fear, favour or prejudice and subject only to the Constitution and the law.

23. Section 32(1)(b) of the NPA Act provides that:

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

24. Section 41 of the NPA Act provides that:

> *"41. Offences and penalties*

> *(1) Any person who contravenes the provisions of Section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."*

25. It follows from the above that the NPA has the sole preserve in instituting criminal proceedings against any person suspected of having committed an offence. Therefore, without fear, favour or prejudice, any person, regardless of his or her profile or standing, should be prosecuted if there is a reasonable prospect of successful prosecution and/or *prima facie* evidence that such a person has committed an offence. No-one in South Africa is above the law.

26. As I have already indicated, Booysen has brought before the Commission unsubstantiated averments which seek to project me as an officer of the Court who abuses his position and authority with regard to prosecutions, to advance purposes that are ulterior to the mandate, functioning and purpose of the NPA. What is quite disturbing is that the averments are not only unsubstantiated, but they also have been made without giving regard to the constitutional imperatives that define how the NPA is to be structured and operated. Also, these averments are made without giving regard to the considerations that ought to be taken into account, in making prosecutorial decisions, as well as the nature of matters that the SCCU deals with.

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27. Furthermore, as a retired Senior Police officer, Booysen ought to know what avenues are available to anyone who is criminally prosecuted, where, according to him, the prosecution ought not to be prosecuting or have not followed legal prescripts that are applicable to the prosecution processes.

28. Section 179(5) of the Constitution empowers the NDPP to review a prosecutorial decision after following steps which are prescribed in that section.

29. Booysen is aware that even outside of the NPA, the Courts are available to review prosecutorial decisions where it is necessary. In matters involving me, Booysen did not approach the Courts to specifically review any of my prosecutorial decisions that he alleges I unfairly or unlawfully took.

30. Considering the imperative in Section 32(1)(b) of the NPA Act set out above, anyone who seeks to challenge the decision of the NPA to charge a person, should do so through the prescribed and/or available process, with proper substantiation.

MANDATE OF THE SCCU

31. The SCCU mandate is to prosecute commercial crimes and to manage and direct investigations of financial crimes in matters which are:

31.1. serious;

31.2. complex;

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31.3. organised;

31.4. involving corruption;

31.5. cybercrime; and

31.6. money laundering.

NATURE OF MATTERS DEALT WITH BY THE SCCU

32. The nature of the SCCU's mandate dictates that matters dealt with are high profile matters. The SCCU deals with complex, commercial matters which, by their nature, attract more public attention. This is often so because of the amounts involved, the nature of schemes in respect of which prosecutions arise, and sometimes also the suspects/implicated persons.

33. In my sixteen years of service in the SCCU, there have been a wide variety of high profile matters I have had to deal with, which are set out above. In my capacity as Regional Head, I am responsible for directing and overseeing the prosecutions in which all my juniors are involved. I have taken multitudes of decisions either to prosecute or to decline to prosecute.

34. For anyone to pronounce on my integrity, based on the prosecutorial decisions I have taken, a comparative analysis of all the decisions I have taken, ought to be made, and such pronouncements ought then to be made, according to the nature of charges suggested, the evidence available in each instance and the decision taken. It is only then that one can pronounce on whether or not I am captured. It is not proper for Booysen, in particular, to impute ulterior motives regarding my decisions simply based solely on the Jiba matter, from a sea of decisions I have taken over the years. This is so particularly if regard is had also to the fact that two other senior NPA officials, Adv I Thenga (*"Thenga"*) and Adv J J Smit SC (*"Smit"*), working independently of each other and of me came to the same conclusion as I did regarding the withdrawal of the charges against Jiba, as will be demonstrated fully below.

35. As a retired Senior Police official, Booysen knows that, quite regularly, prosecutors would decline to prosecute on matters that investigating officers are convinced are prosecutable. Conversely also, a prosecutor may decide to prosecute a matter that the investigating officer views as bearing poor prospects of success.

36. I challenge Booysen to present to the Commission a process he embarked upon to come to a conclusion that my prosecutorial decisions are influenced by my being captured. It cannot be that I am captured, purely because I happened to be involved in declining to prosecute persons that Booysen would rather have prosecuted.

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37. Thenga prepared a memorandum in terms of which she declined to prosecute Jiba and yet, the same allegations imputed to me, are not levelled against Thenga. Similarly, Smit gave an opinion wherein it is specifically stated that he was of the opinion that, based on the reasons contained therein, he declined to prosecute Jiba and yet, the same allegations imputed to me, are not levelled against Smit.

POWERS OF A DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

38. Sections 20 and 24 of the NPA Act reads as follows:

> *"20 Power to institute and conduct criminal proceedings*
>
> *(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-*
>
> *(a) institute and conduct criminal proceedings on behalf of the State;*
>
> *(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and*
>
> *(c) discontinue criminal proceedings,*
>
> *vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.*

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(2) *Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.*

(3) *Subject to the provisions of the Constitution and this Act , any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of-*

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

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

"24 ***Powers, duties and functions of Directors and Deputy Directors***

(1) *Subject to the provisions of section 179 and any other relevant section of the Constitution , this Act or any other law, a Director referred to in section 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to-*

(a) *institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20 (3);*

(b) *supervise, direct and co-ordinate the work and activities of all Deputy Directors and prosecutors in the Office of which he or she is the head;*

(c) *supervise, direct and co-ordinate specific investigations; and*

(d) *carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act.*

(2) ...

(3) *A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director : Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.*

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to him or her by section 179 of the Constitution, this Act or any other law, a Director referred to in section 13 (1)-

(a) shall, at the request of the National Director, submit reports to the National Director or assist the National Director in connection with a matter referred to in section 22 (4) (a) (ii);

(b) shall submit annual reports to the National Director pertaining to matters referred to in section 22 (4) (g);

(c) may, in the case of a Director referred to in section 13 (1) (a), give written directions or furnish guidelines to-

(i) the Provincial Commissioner of the police service referred to in section 207 (3) of the Constitution within his or her area of jurisdiction; or

(ii) any other person who within his or her area of jurisdiction-

(aa) conducts investigations in relation to offences; or

(bb) other than a private prosecutor, institutes or carries on prosecutions for offences; and

(d) shall, subject to the directions of the National Director, be responsible for the day to day management of the Deputy Directors and prosecutors under his or her control.

(5) Without limiting the generality of subsection (4) (c) and subject to the directions of the National Director, directions or guidelines under that subsection may be given or furnished in relation to particular cases and may determine that certain offences or classes of offences must be referred to the Director concerned for decisions on the institution or conducting of prosecutions in respect of such offences or classes of offences.

(6) The Director shall give to the National Director a copy of each direction given or guideline furnished under subsection (4)(c) .

(7) Where a Director –

(a) is considering the institution or conducting of a prosecution for an offence; and

(b) is of the opinion that a matter connected with or arising out of the offence requires further investigation,

the Director may request the Provincial Commissioner of the police service referred to in subsection (4)(c)(i) for assistance in the investigation of that matter and where the Director so requests, the Provincial Commissioner concerned shall, so far as practicable, comply with the request.

(8) The powers conferred upon a Director under section 20(1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings.

(9) (a) Subject to section 20(4) and the control and directions of a Director, a Deputy Director at the Office of a Director referred to in section 13(1), has all the powers, duties and functions of a Director.

(b) A power, duty or function which is exercised, carried out or performed by a Deputy Director is construed, for the purposes of this Act, to have been exercised, carried out or performed by the Director concerned."

PROCESS FOR PROSECUTORIAL DECISION

39. SCCU prosecutors are specialist prosecutors, experienced in complex commercial cases.

40. In instances where SCCU prosecutors have decided to prosecute, NPA Senior management would request a presentation, if it so elects. In such an instance, the management would not necessarily rely on a docket that could consist of numerous lever arch files. If the senior official to whom the representation is made, is satisfied with either the content of the memorandum or the presentation, the relevant official will approve the prosecutorial decision.

BASES FOR ALLEGATIONS OF CAPTURE

41. It is my case that the basis on which reliance is placed for making allegations that I am captured for political and corrupt reasons, and generally, is without any factual or legal basis. Such allegations are merely made to attack my professional integrity, reputation and good name.

42. It is pertinent to indicate that, despite such serious allegations being levelled against me, to the best of my knowledge, no complaint was directed to the President and the Minister by Booysen. I am aware that Booysen laid criminal charges against me. The status of such matter is unknown to me.

43. It is not sufficient to merely make press statements, write books and articles alleging that I am captured.

44. If Booysen was convinced that there was merit and truthfulness in his allegations, then it was expected of him to ensure that the conduct complained of, was properly dealt with.

45. Booysen presents as his case for state capture, the "*persecution*" of a number of people who investigate politicians and their associates by "*protagonists within the Law Enforcement and the National Prosecuting Authority*" who are seized with protecting certain politically connected individuals. and he lists me as part of the "*protagonists*" group.

46. The other protagonists he names are:

46.1. Riah Phiyega, former National Commissioner of Police;

46.2. Lieutenant-General Mthandazo Ntlemeza;

46.3. Brigadier Nyameka Xaba;

46.4. Brigadier Daniel Ncube;

46.5. Lieutenant-General Mmamonye Ngobeni;

46.6. Adv Nomgcobo Jiba

46.7. Adv Lawrence Mrwebi;

46.8. Adv Shaun Abrahams;

46.9. Adv Sello Maema;

46.10. Adv Anthony Mosing;

46.11. Adv Moipone Noko;

46.12. Adv Torie Pretorius;

46.13. Adv Raymond Mathenjwa;

46.14. Adv Shaun Abrahams

46.15. Other Prosecutors (Adv JJ Mlotshwa, Adv Dawood Adam)

47. Persons projected directly by Booysen as the "persecuted" are:

47.1. Lieutenant-General Anwa Dramat;

47.2. Major-General Shadrack Sibiya;

47.3. Visvanathan "Ivan" Pillay;

47.4. Adv Glynnis Breytenbach

47.5. Robert McBride; and

47.6. Johan Van Loggerenberg

48. It is quite notable that Booysen gave specific details regarding conduct of the majority of persons he lists as being in the protagonist group, and links them in one way or another to those he projects as "persecuted". I hasten to indicate that I am in no way suggesting that Booysen does make out a case against the majority of the so-called protagonists, but it is clear that he does not set out in the same way as he does with the others, facts that show a basis on which he includes me in the list of protagonists.

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49. The only mention Booysen makes of me, is with reference to the judgment of the High Court Gauteng North, Pretoria in the matter of Freedom Under Law v National Director of Public Prosecutions & Others 2018 (1) SACR 436 (GP) (21 December 2017) ("the FUL judgment).

50. In the FUL judgment, adverse credibility findings were made relating to me and Abrahams, who was then the NDPP. Booysen's complaint in this regard is that nothing has happened to me and Abrahams. How this then amounts to me being captured boggles the mind.

51. I deal with the details of the FUL judgment later in this affidavit, It suffices to state at this stage that, as I have already indicated, there is no basis for linking the judgment and allegations of state capture.

BRIEF ENCOUTER WITH IPID OFFICIAL/S AND/OR INVESTIGATION – GENERAL PHAHLANE

52. I was in charge of guiding the investigation of Phahlane that dealt with the renovations to his house and the purchasing of vehicles. Sesoko was in charge of overseeing the investigation. It is during that period that I, for the first time, met Sesoko.

53. During one of the planning meetings, Sesoko insisted that the prosecuting team had to add Keith Keating (*"Keating"*) on the charge sheet as an accused. I was overseeing the prosecution team which included Advocates Andries

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Janse van Rensburg (*"Van Rensburg"*), Chris Smith and Henry Nxumalo. The attitude of the prosecution team was that there was no sufficient evidence against Keating. Sesoko, without our knowledge, went to Advocate Mrwebi (*"Mrwebi"*) and complained that he was not happy with the conduct of the prosecution team for their refusal to charge Keating.

54. Mrwebi then invited me to a meeting with Sesoko. Van Rensburg accompanied me to the meeting with Mrwebi, at which meeting, I suggested that the matter be removed from the SCCU prosecutors in Pretoria because the relationship between the prosecution team and Sesoko had broken down. The matter was then allocated to Advocate Jacob Tloubatla. I have not been involved in this matter from that time.

55. The manner in which I dealt with the Phahlane matter, clearly demonstrates that the allegations that I was captured, are unfounded. By giving in or succumbing to the instructions given by Sesoko, I would not be performing my duties without fear, favour and/or prejudice.

RULE 3.3 NOTICE

56. I received a Rule 3.3 notice, dated 9 April 2019, on 10 April 2019, wherein I was notified that the Commission's legal team intended to present to the Commission the evidence of Booysen during the proceedings of 2 May 2019 or soon thereafter as his evidence might be led which evidence might implicate me in unlawful, illegal or improper conduct.

57. I was further informed, through the Rule 3.3 notice, in what respect the evidence of Booysen implicates me. The notice further informed me that I may attend the proceedings and that in so doing, I may be assisted by a legal representative when Booysen gives evidence.

58. I was further notified, that in terms of Rule 3.3.6.1 to 3.3.6.3 should I wish, I may give evidence myself or call any witness to give evidence on my behalf or even cross-examine the witness, in this case Booysen.

59. I was also notified that, in the event I choose to invoke the provisions of Rule 3.3.6.1 to 3.3.6.3 above, I should bring an application within 14 calendar days in writing to the Commission for leave to do so. In terms of Rule 3.4, an application for cross-examination as provided for in Rule 3.3.6 must be accompanied by a statement from me in response to the allegations of Booysen against me.

RULE 3.4 STATEMENT

60. In order to demonstrate that the allegations levelled against me are unfounded, it is necessary that I deal with the evidence as set out in the affidavit of Booysen, the relevant annexures pertaining to his evidence and to the extent necessary his oral evidence before the Commission. To the extent I do not deal with each and every single averment contained in the affidavit or oral testimony, such failure should not be construed as an admission thereof.

THE PARTS OF BOOYSEN'S STATEMENT AND TESTIMONY DISPUTED

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61. The relevant paragraphs in the affidavit of Booysen where he makes averments about me are paragraphs 96-98, 126, 230.1, 230.2, and by way of reference, paragraph 230.4, where he, *inter alia*, states that:

61.1. *"96. Various disparaging remarks have been levelled at Advocate Jiba by the courts. This culminated in her being prosecuted for fraud, perjury and obstructing the course of justice. When Nxasana was elbowed out by the then President Jacob Zuma, Abrahams withdrew the criminal charges against her. The High Court in Gauteng North found that the withdrawal of the criminal charges was irrational which means that Jiba will have to stand trial. The same court made adverse findings on the integrity of Advocates Abrahams and MOKGATLHE, but there was no action taken as a result of the findings."*[1]

61.2. *"126. In defending the review application by FUL to reinstate the charges against Jiba, Abrahams misled the court by starting it was MOKGATLHE who withdrew the charges against Jiba. The high Court found that it was indeed Abrahams and not MOKGATLHE who withdrew the charges and raised*

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1 Paragraph 96 of Booysen's affidavit

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questions as to Abrahams and MOKGATLHE's integrity. No enquiry was instituted against either MOKGATLHE or Abrahams, consequent to the adverse remarks by the court. This shows how individuals within the faction consistently get away with infringements, while those outside the captured group are ostracised and vilified."

61.3. *"230.1 It is uncontrovertibly so, that it is always the same protagonists within Law Enforcement and the National Prosecuting Authority, who are seized with protecting certain politically connected individuals from facing justice and then to investigate and persecute those who investigate those politicians and their associates. These Law Enforcement officials, namely Phiyega, Ntlemeza, Xaba, Ncube and Ngobeni, were all part of a captured faction together with prosecutors Jiba, Mrwebi, Abrahams, Maema, Noko, Mosing, Pretorius, MOKGATLHE, Adams, Mathenjwa and J J Mlotshwa."*

61.4. *"230.2 In my view, they were all complicit in actively or tacitly promoting state capture. This culminated in institutions like the NPA, HAWKS and SAPS being subverted to ensure the shielding of certain*

individuals from criminal sanction. Their actions have eroded the capacity within these organizations to deal with large scale corruption and organized crime in the country. It will take many years of intensive efforts to restore the damage they have inflicted on these institutions."

61.5. *"230.4 It is my respectful submission to this Commission that the unlawful acts which I describe herein by those that I discuss in this submission are in violation of the Prevention of Organized Crime Act, Act 121 of 1989 chapter 2(1)(e) and (f) in that they either participated or managed the affairs of a criminal enterprise [Racketeering] or for obstructing the course of justice."*

BACKGROUND OF THE FACTS PERTAINING TO THE ALLEGATIONS AGAINST ME

62. The impression created is that Jiba and I had a close working relationship such that in dereliction of my duties I would break my oath of office in order to protect her from facing justice and assist, as alleged, in capturing the state. I contemptuously deny such inferences and conclusions.

63. Below, I set out how I know Jiba and Adv Jan Ferreira (*"Ferreira"*), the prosecutor who gave the opinion that Jiba be prosecuted and my involvement in the matter and how it evolved.

64. Ferreira and I met Jiba in 1999 when she was based at the Office for Serious Economic Offences ("OSEO") and we occupied the same building. Unlike Ferreira, I have never worked with Jiba in the same business unit. After the demise of the DSO, Jiba and Ferreira worked together in the SCCU whereas I was with the SOCA unit.

65. Both prosecutors in the Jiba criminal matter, Ferreira and Adv Gerhard Van Eeden (*"Van Eeden"*) reported to me. Although Ferreira and I are both Deputy Directors of Public Prosecutions, I was appointed as Regional Head and Ferreira reported to me as provided for in the Performance agreement dated the 18th of March 2015. A copy of this agreement is attached hereto, marked as annexure **"MM3"**. Although Ferreira and Van Eeden had a contractual obligation to report to me, they went behind my back and took instructions to prosecute Jiba from Mr Willie Hofmeyr (*"Hofmeyr"*), who headed the Asset Forfeiture Unit (*"AFU"*), a separate business unit from the SCCU. Although Hofmeyr is an admitted attorney, he never served as a prosecutor whilst in the employ with the NPA.

66. Shortly after Abrahams was appointed as NDPP, I received a telephone call from Mrwebi, who was then head of the SCCU. Mrwebi enquired from me whether I knew that two of my prosecutors, Ferreira and Van Eeden were reporting to Hofmeyr on the Jiba matter.

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67. I was surprised by Mrwebi's revelation and I immediately verbally instructed Ferreira and Van Eeden to provide me with all the correspondences relating to the said criminal case. Van Eeden came to see me and volunteered information about how he was appointed to assist Ferreira with the prosecution of Jiba. Among the correspondence I was provided with, was a memorandum addressed to Nxasana and Hofmeyr dated 16 February 2015. I attach hereto a copy of the memorandum, marked as annexure **"MM4"**.

68. Upon perusal of the memorandum, dated 16 February 2015, written by Ferreira to Nxasana and Hofmeyr, it became patently clear that Ferreira had indeed been taking instructions from Hofmeyr without my knowledge.

69. On the 25th of September 2020, I had a telephonic discussion with Mrwebi, and he confirmed his willingness to depose to an affidavit in support of my version on this matter. I attach hereto a copy of his confirmatory affidavit, marked as annexure **"MM4.1"**.

70. I further refer to an e-mail dated the 3rd of June 2015 addressed by Ferreira to Hofmeyr, again without my knowledge, wherein Ferreira requested that Adv Barry Roux SC be appointed in terms of Section 38 of the NPA to prosecute Jiba. I attach such e-mail hereto, marked as annexure **"MM5"**.

71. Subsequent to receiving the correspondences from Ferreira, I wrote a memorandum on the 19th of June 2015, to Abrahams informing him about the

pending criminal case against Jiba. I attach hereto a copy of the memorandum, marked as annexure **"MM6"**.

72. A briefing session was arranged with Abrahams where both Ferreira and Van Eeden would make a presentation about the case. On 22 July 2015, I attended the said presentation and Hofmeyr was also present. Jiba and Mrwebi did not attend.

73. On the same day, 22nd of July 2015, after the presentation, Abrahams gave a verbal instruction to Ferreira and Van Eeden to stop reporting on the matter to Hofmeyr, but to report to me as their supervisor. Abrahams then verbally instructed Ferreira and Van Eeden to hand over to me the legal opinion. Abrahams also verbally instructed me to draft a legal opinion pertaining to the prosecution of Jiba.

74. Subsequent to the presentation of 22 July 2015, on the 5th of August 2015, Abrahams wrote an e-mail to Adv N Mokhatla ("Mokhatla") and copied me, in which e-mail he requested that a legal opinion from the prosecuting team be furnished through me, as the Regional Head of the SCCU. He requested that the opinion of "*the prosecuting team*" be provided to him by 14:00, on Friday, the 7th of August 2015, at the latest. I responded to the email and informed him that I was expecting the report from Ferreira later that afternoon. I attach hereto an e-mail conversation of the 5th of August 2015, marked as annexure **"MM7"**.

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75. I cannot recall whether I sent the opinion of Ferreira and Van Eeden ("*the prosecuting team*"), before the deadline of 7 August 2015. What I do recall is that on 13 August 2015, Abrahams sent me a memorandum dated 13 August 2015, via e-mail, wherein he confirmed his verbal instructions of 22 July 2015 where he directed that I furnish him with my legal opinion. In the e-mail Abrahams copied the Deputy NDPP: NSPS, Mokhatla. In this memorandum, Abrahams stated that he deems it proper that as the Regional Head of SCCU, I should furnish him with my opinion and prosecutorial decision. Further, in the memorandum, Abrahams confirmed that he relieved Hofmeyr of the responsibility of the prosecuting team in the criminal investigation Silverton CAS 622/10/2014 S v N Jiba. In this memorandum, Abrahams is no longer referring to his request for the opinion of the prosecuting team. I attach a copy of Abrahams memorandum dated 13 August 2015, marked annexure **"MM8"**.

76. On the morning of 14 August 2015, I received a telephone call from the then DPP: Northern Cape, Advocate Ivy Thenga ("Thenga") and she asked if I was preparing an opinion pertaining to the Jiba prosecution. I informed Thenga that I was preparing such a memorandum as Abrahams had instructed me to do so. Thenga informed me that Abrahams had also given her the same instruction, and that she furnished Abraham with an opinion and a prosecutorial decision, the previous day, 13 August 2015. The same day, on 14 August 2015, at 08:53 Thenga's PA, Nicolette Smith then emailed me Thenga's opinion and prosecutorial decision, dated 13 August 2015. I attach a copy of the email from Smith (Thenga's PA), Thenga's opinion and

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prosecutorial decision hereto as annexures **"MM9"**, **"MM10"** and **"MM11"**, respectively.

77. On the 14th of August 2015, I addressed an e-mail to Abrahams and Mokhatla, attaching the opinion prepared by Ferreira and Van Eeden as well as the opinion that I prepared dated the 14th of August 2015. I attach hereto, a copy of the email stream between Abrahams, Mokhatla and I as well as my opinion marked as annexures **"MM12"** and **"MM13"**, respectively. Despite a diligent search on my laptop and emails, I was unable to find the opinion of Ferreira and Van Eeden that I emailed when emailing my opinion dated 14 August 2015, to Mokhatla and Abrahams.

78. On the same day, the 14th of August 2015, at 1:39 PM Mokhatla replied to my e-mail and stated that:

> *"The SCCU prosecutors believe they have a strong case against Adv. Jiba and that it must be proceeded with. You, on the other hand are of the view that there are no prospects of a successful prosecution and the matter should be withdrawn. I have suggested to the NDPP that this matter should be allocated to another DPP for obvious reasons. I am not so sure if a DPP has been approached yet for purposes of the consultation process required between SCCU and DPP. I will await the NDPP's decision/approval and confirmation in this regard and inform you accordingly, if not done yet. I will follow up.*

I have looked at both opinions (yours and the prosecutors) and scanned the docket, which I have scanned, read and needs rereading and I feel there is a lot more that needs to be ventilated in both. I will send you my questions in a separate email to keep the NDPP out of it for now." (Underlining my emphasis)

79. I am unable to recall whether Mokhatla emailed the questions as stated in email referred to above. If she did, despite a search of my email archive, I am unable to find an email with such questions. However, it is probable that she either sent the questions or we may have discussed the matter over the phone. I say so because, after I had emailed Mokhatla my opinion dated 14 August 2015, I consulted with Maema and Mathenjwa, who are part of the prosecuting team in the Cato Manor, and thereafter I elaborated my legal opinion and drafted the prosecutorial decision, both dated 17 August 2015. I attach copies of my opinion and prosecutorial decision as annexures **"MM14"** and **"MM15"**, respectively.

80. On 17 August 2015 at 12:55 PM, Ferreira sent me an email asking me whether there was any news regarding the Jiba docket, and the legal opinion sent to the NDPP. On the same day, 17 August 2015, at 3:04PM, I replied to Ferreira's email and informed him that *"I am still waiting for the decision. NDPP was meeting with all the DPP's from this morning and the meeting is still on. Hopefully decision will be taken this afternoon or tomorrow morning."* I attach a copy of the email stream between Ferreira and I marked as annexure **"MM16.**

81. Due to my concerns of media leaks and the widespread media speculation about the decision on the Jiba prosecution, I did not inform Ferreira that I had expatiated my opinion of 14 August 2015 and drafted a prosecutorial decision. I wanted to avoid the risk that the decision would be leaked to the media prior to the announcement by Abrahams the following day, 18 August 2015.

82. As stated above, there was a lot of media speculation around the case and I did not want my decision to be leaked before delivering it to Abrahams. As such, I did not email the opinion and prosecutorial decision to Abrahams, but hand delivered these documents to his office. On arrival, Abrahams was still in the meeting and I left the envelope which had the opinion and prosecutorial decision with his secretary.

83. In the morning of the 18th of August 2015, before attending the media briefing, I sent an e-mail to Jiba's attorney of record, Mr Majavu, advising him of my decision and attaching to that email my prosecutorial decision. I attach a copy of the email I sent to Mr Majavu and a copy of my prosecutorial decision marked as annexure **"MM17"** and **"MM17.1",** respectively.

84. Abrahams conducted a media briefing, informing the media about the fact that I had decided not to prosecute Jiba for the reasons provided in the legal opinion. A copy of the media briefing can be viewed on this link https://youtu.be/Rzq0r_0wGFs.

85. I noted from the press briefing that Abrahams stated that he received my opinion and decision in the afternoon or early evening of the previous day.

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86. The decision not to prosecute Jiba was successfully challenged by Freedom Under Law (FUL) in the North Gauteng High Court, where adverse findings were made by two of the three judges against Abrahams and me.

87. After the judgment was delivered, the NPA launched an application for leave to appeal the judgment. It appears from the contents of an e-mail dated the 26th of June 2018, from Tshifhiwa Mabuda, addressed to Peter Seleka, at the State Attorney Pretoria, that the application for leave to appeal had not been properly enrolled. It appears that subsequent to that, a decision was taken within the NPA to withdraw the application for leave to appeal. On the 3rd of October 2018, the State Attorney was instructed to withdraw the application for leave to appeal the next day, 4 October 2018. This is evident from the e-mail sent from Thobile Chitha (*"Chitha"*) to Peter Seleka.

88. On the 3rd of October 2018, I received an e-mail from Chitha, informing me that the NPA is withdrawing the application for leave to appeal. Chitha informed me that the NPA received an advice from Counsel that an appeal cannot be granted only on factual findings against me and Abrahams.

89. I enquired from Chitha what the legal implications of the decision are to withdraw the appeal. He responded by saying that it will affect my chances of promotion and Abrahams' employability. On the same day I replied and informed Chitha that I have reached the stage where I cannot be promoted, save for a political appointment. By that, I meant that I have reached a career

ceiling. Any position beyond that can only be reached by political appointment by the President.

90. At that stage I made a decision to consult with private Counsel for advice on my options for appealing the judgment.

91. On the 5th of October 2018, I addressed an e-mail to Chitha, informing him that the judgment has serious implications for my continued employment at the NPA. I also informed Chitha that the judgment had credibility findings against me, based on the Court having erred in its factual findings that Abrahams made the decision not to prosecute Jiba. I further informed him that since I am the affected party, and was not consulted, I be furnished with the legal opinion provided by Counsel to Dr Ramaite on the withdrawal of the appeal.

92. On the same day Chitha responded and informed me that, on the 27th of September 2018, he had brought to the attention of Adv Epstein SC ("Epstein") that Abrahams had initiated a process to comply with the Court Order. Epstein then advised the NPA that it could not proceed with the appeal when it has complied with the Order. On the basis of this advice, the NPA instructed the State Attorney to withdraw the application for leave to appeal.

93. My request to Chitha was that I be furnished with the opinion of Epstein on which the NPA's decision was based. To date I have not received such an opinion.

94. I attach hereto an e-mail stream of the entire exchange set out above, marked as annexures **"MM18.1"** to **"MM18.5"**.

95. When I realised that the NPA would not be proceeding with the appeal, I had to consider whether or not to proceed privately. Considering the costs that would be involved, due to lack of financial resources, I then abandoned the thought of instituting a private appeal.

96. On the 6th of May 2019 I forwarded a request to Mokhatla for Counsel to be appointed on my behalf, to apply for condonation of late noting of the appeal.

97. I attach hereto a copy of such e-mail, marked as annexure **"MM19"**. To date I have not received any response to such e-mail.

98. In the hearings of 2 and 3 May 2019, Booysen referred to the adverse credibility findings made against me and Abrahams. In that regard, Booysen said:

> *"And chair not surprisingly you have a High Court finding against Advocate Abrahams and the judges even in their judgment says it raises questions of about integrity, and they also make adverse remarks about Advocate Abrahams and Advocate Mogatle(sic) and I just find it curious that up until today, in spite of those negative aspersions cast by High Court Judges absolutely nothing has happened to Advocate Mogatle (sic) and Advocate Abrahams, neither from the employer at the time who*

was the NPA and neither from - well then the GCB and I believe that there is a new body now"

99. With regard to Booysen's comment that the GCB has not done anything about the credibility findings, I draw the Commission's attention to the fact that the majority judgment had not found it apposite to refer the credibility findings to the GCB, as is normally the case where, I am advised, the courts do where the view is that such findings warrant a probe of the GCB or local Society of Advocates.

100. Finally, to the extent that Booysen relies on the Court's credibility finding against me, to then link me to the criminal enterprise he alleges exists, this is taking the credibility finding too far. What Booysen alleges to be a criminal enterprise was not before the court, and there is therefore no connection between the findings and the alleged criminal enterprise. I reiterate my challenge that he prove my involvement in such enterprise, if he can firstly prove that such enterprise exists.

MATTERS WHICH THE EVIDENCE LEADERS REQUESTED THAT I SPECIFICALLY ADDRESS

101. On 9 September 2020, my instructing attorney together with the team of counsel held a meeting with Hulley. I am advised that, at that meeting, Hulley raised issues that the Commission wishes me to address in my affidavit. These issues primarily pertain to my involvement in the withdrawal of the charges against the former Acting NDPP, Advocate Nomgcobo Jiba ("Jiba")

and the findings made against me by the High Court, Gauteng Division, Pretoria, in the application by Freedom Under Law (FUL).

102. I am advised that Hulley's request was not expressed as specific questions, but as comments in which the information requested of me was reflected. I am advised that, in essence, the questions relate to issues set out below. For ease of reference, I therefore frame my responses in tandem with the issues, as set out below:

102.1. The Commission's evidence leaders are in possession of documents and/or information which seem to suggest that Abrahams sought a legal opinion from me whilst he had the opinion of Ferreira and Van Eeden. According to the evidence leaders, this gives the impression that Abrahams was "shopping" for a favourable opinion, because he appears not to have informed me that he had the opinion of these two advocates.

102.2. To the extent I may have knowledge of whether Abrahams had this opinion when he sought mine, I should give my view with regard to why he sought my opinion whilst he had the legal opinion of Ferreira and Van Eeden.

102.3. Since I was not dealing with the matter, why did Abrahams seek a legal opinion from me? Hulley requested that I explain the allegation that Ferreira and Van Eeden in their handling of the Jiba prosecution were reporting to Hofmeyr, the then head of

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the Asset Forfeiture Unit ("AFU") and why the two did not know about the legal opinion I prepared. Whether there was anything suspicious about Ferreira and Van Eeden reporting to Hofmeyr and if so, what was suspicious about such conduct. Further, I am requested to explain whether Abrahams found such conduct suspicious, if so, why he found it suspicious.

102.4. Hulley has seen a couple of reports I prepared and these reports indicate that when I took the decision to withdraw the charges against Jiba I had a particular view and that I was not merely following what Thenga and Johan Smit SC ("Smit") said in their opinions on the same subject matter. As such, Hulley requested that I explain why I took the decision to withdraw the charges against Jiba.

102.5. With regard to the judgment of the Gauteng Division, Pretoria, whether the court in the FUL judgment made credibility findings against me? I am advised that Hulley is of the view that where it is clear that there are credibility findings, then one cannot argue against it. If it is not clear (implied) then it is open to interpretation, in which case I should proffer my interpretation thereof.

103. I am advised that there was a second meeting held on 16 September 2020 between the evidence leaders and my legal team, as well as colleagues from the NPA who are either implicated persons or are referred to in documents before the Commission. I was unable to attend such meeting due to a bereavement in my family. In this meeting, the only request made relevant to me is that when preparing the affidavits of implicated persons, such as myself, as much facts as possible should be disclosed.

104. To the extent possible, and as far as I have knowledge, I separately deal with each issue raised by the evidence leaders herein below.

THE EVIDENCE LEADER'S IMPRESSION THAT ABRAHAMS HAD FERREIRA AND VAN EEDEN'S OPINION WHEN HE SOUGHT MINE

105. I have fully addressed this above when dealing with the background of the facts pertaining to the allegations against me.

ABRAHAMS' REQUEST FOR MY LEGAL OPINION AND HULLEY'S QUESTION WHETHER FERREIRA AND VAN EEDEN WERE REPORTING TO HOFMEYR

106. I deal with these two issues together, as I deem them inseparable.

107. Although Ferreira and I are both Senior Deputy Directors of Public Prosecutions ("DDPP"), Ferreira and Van Eeden reported to me and thus I was their supervisor, since I am the Regional Head of the SCCU. This is

evidenced by the fact that I was/am tasked with evaluating their performance agreement. Ferreira's such performance assessment is attached hereto as annexure "MM3".

108. Since Ferreira and Van Eeden are prosecutors in the SCCU, whose mandate as fully set out above is to prosecute specialised commercial crimes, it was suspicious that they were tasked to prosecute a charge of perjury and a run of the mill fraud, where the accused is alleged to have misrepresented facts in an affidavit, which misrepresentation has nothing to with commercial crime.

109. A further puzzling fact was that as the Regional Head of the SCCU I was not even aware that they were instructed to prosecute that matter as it was not registered on the SCCU's electronic register.

110. To me, all these facts pointed to some sort of clandestine arrangement between the two prosecutors and Hofmeyr to whom they reported and as well as the then NDPP, Mr Mxolisi Nxasana ("Nxasana") who is said to have been present when Ferreira and Van Eeden were given the mandate in a meeting.

111. The presence of Nxasana at the meeting is recorded in a memorandum of 16 February 2015, which was in the docket, prepared by Ferreira and addressed to Nxasana and Hofmeyr wherein Ferreira stated that he was asked to get someone he unreservedly trusted to work with him in the prosecution. This is a clear indication of lack of trust by Ferreira in some of his colleagues, in particular me, in the NPA. I attach hereto a copy of the memorandum, marked as annexure "MM4".

112. The abovementioned memorandum was handed to me by Van Eeden after Mrwebi had informed me that Ferreira and Van Eeden were reporting to Hofmeyr, and after I had requested all documentation, including the docket relating to the prosecution from Ferreira and Van Eeden.

113. Over and above the memorandum making mention of Nxasana, at the time I instructed Ferreira and Van Eeden to furnish me with the docket and all documentation relating to the matter, Van Eeden informed me that when he attended the meeting, he found other persons present in the room and such persons were Nxasana and Karen Van Rensburg (*"Van Rensburg"*), the then CEO of the NPA.

114. When they brought the docket to me, I checked it on the electronic register and I realised that the docket was not registered in the SCCU's electronic register. The secrecy with which the matter was handled by people whom I supervised made me suspicious as I could not understand the reason for the secrecy. I also found it suspicious that prosecutors whose mandate is to prosecute commercial crime and related matters, were reporting to the head of AFU, Hofmeyr, which unit is mandated to deal with, amongst others, obtaining preservation and forfeiture orders in respect of proceeds of crime. The Jiba matter does not deal with proceeds of crime.

115. My suspicion was fortified by the contents of the memorandum tagged "MM4", which amongst others shows:

115.1. An intention to charge Jiba with corruption and possibly fraud for taking a flight to Durban on 9 September 2010, when the content of the memorandum makes it clear that there was no evidence to support such a charge.

115.2. In Silverton CAS 817/07/2013, an intention to charge Jiba as an accomplice or co-perpetrator when at that time there had been no evidence to charge Jiba.

115.3. Misrepresentation in alleging that in Booysen v Acting NDPP the court found that there is no evidence that links Booysen to the alleged racketeering offences. I will show in due course that this allegation was not just incorrect but misleading when one has regard to paragraph 39 of Gorven's judgment which I shall deal with later.

116. The evidence leaders may find it questionable that I took a decision pertaining to the perjury and fraud charge as the head of the SCCU, based on my assertion that I found it suspicious that prosecutors who prosecute commercial crimes were prosecuting the matter and reporting to the head of the AFU,

117. My response is that I was directed to give an opinion and a decision because the matter was already being handled by Ferreira and Van Eeden reporting to me as the Regional Head of the SCCU. I had already indicated that the prosecution was dealt with by Ferreira and Van Eeden, who were reporting to Hofmeyr in respect of that matter.

118. As I have mentioned above, after I had informed Abrahams about Ferreira and Van Eeden's conduct, Abrahams wrote a memorandum, dated 13 August 2015, attached as "MM8", directing that Ferreira and Van Eeden report to me and that I furnish him with my opinion and prosecutorial decision. My opinion and prosecutorial decision are already attached hereto, marked as annexures "MM14" and "MM15" respectively.

119. Since Hulley requested that I mention whether I was suspicious, it follows that I would be questioned on what I based the suspicion on. I decline to answer questions based on suspicion, as I would be expected to give answers based on speculation and conjecture, which I would not be able to substantiate.

120. I am not in a position to say whether or not Abrahams was suspicious.

WHETHER I TOOK THE DECISION TO WITHDRAW THE CHARGES AGAINST JIBA AND IF SO, WHY?

121. I confirm that I took the decision to withdraw the charges against Jiba even though the Court, in the FUL judgment, found that Abrahams took the decision. Even Ferreira understood that I took such decision, as can be seen from his entry on the face of the docket, which states *"Case withdrawn on instruction of Adv M MOKGATLHE"*. I attach hereto a copy of the face of the docket, marked as annexure **"MM20"**. The docket is currently in the possession of the Investigative Directorate ("ID") prosecutors.

122. I set out my reasoning for taking the decision more fully below.

123. I studied the docket and realised that Jiba was charged with perjury and fraud based on the findings made in the judgment of Booysen vs NDPP [2014] 2 All SA 391 (KZD) (*"the Gorven Judgment"*). A copy of this judgment is attached as "**MM21**".

124. I could not understand the reason Jiba was accused of having perjured herself when she relied on Advocates Anthony Mosing (*"Mosing"*) and Sello Maema (*"Maema"*) when issuing and signing the racketeering certificate and also when deposing to an affidavit opposing the application made by Booysen.

125. I say this because, it is impractical to expect the NDPP to go through volumes and volumes of dockets before signing a racketeering certificate. In practice, an NDPP relies on the presentations and/or memoranda from prosecutors guiding the investigation. As is apparent from the docket that it was the case in the matter in question, it would be difficult for the State to prove the element of intent in both the fraud charges and the perjury charge against Jiba.

126. After studying the docket, I prepared the legal opinion, dated 17 August 2015, which I addressed to Abrahams, attached hereto as annexure "MM14".

127. It is evident at paragraph 2 of the opinion that when preparing it, I had regard to the following documents and or sources:

127.1. The evidence as contained in case docket, Silverton CAS 622/10/2014 investigated by Major General Taioe,

127.2. The charge sheet of State versus Jiba, Case No. 111/83/2015,

127.3. The NPA Policy Directives,

127.4. The provisions of the Prevention of Organised Crime Act, 121 of 1998;

127.5. Judgment of Gorven, Booysen v NDPP and Others [2014] 2 All SA 391 (KZD)

127.6. The affidavit of Booysen,

127.7. The affidavit of Jiba,

127.8. The legal opinion of Ferreira and Van Eeden, and

127.9. Consultations with Maema and Adv Mathenjwa (*"Mathenjwa"*) in the Cato Manor case against Booysen and Others.

128. Having considered the aforementioned sources and consulted with the prosecutors involved in the Cato Manor case, I evaluated the evidence as follows:

128.1. The complainant against Jiba and thus the person who caused the criminal investigation to take place, as set out in the "A1" in the docket, is Theodore Leeuwschut

(*"Leeuwschut"*), a director of administration in the office of the NPA's CEO. I attach a copy of Leeuwschut's sworn statement hereto, marked as annexure **"MM22"**. He stated that he was advised by NPA management to lay a criminal complaint against Jiba. He does not mention the names of the persons alleged to be NPA management. He refers to the remarks made by Gorven J and the legal opinion of Patrick Ellis SC (*"Ellis"*). I attach a copy of Ellis' opinion marked **"MM22.1"**. He concludes his affidavit by alleging that the NPA management is of the view that the matter should be reported to the SAPS with a view to investigate a criminal charge of perjury.

128.2. It is evident from "A1" that he did not act out of his own volition in laying a complaint with the SAPS but was influenced into doing that. I was and still am of the view that his evidence is not sufficient to particularise the offence alleged to have been committed by Jiba.

128.3. Ellis mentions the names of NPA officials he consulted with as Van Rensburg and Mr Gordon Hollamby (*"Hollamby"*). He further states that these NPA officials wanted his advice on the disciplinary measures available against senior NPA officials.

128.4. On 16 February 2015 Ferreira submitted a memorandum to Nxasana and Hofmeyr wherein he alleged that Hofmeyr requested him to be the prosecutor in the case against Jiba. I attach hereto a copy of the memorandum, marked as annexure "MM4".

128.5. There are no sworn affidavits of Ellis, Van Rensburg, Hollamby and Hofmeyr in the docket and yet these persons appear to be instrumental in the decision to initiate a criminal investigation against Jiba.

128.6. The Gorven J judgment attached in the docket as evidence is not preceded by a section 235 certificate as required by the Criminal Procedure Act 51 of 1977.

128.7. Apart from the purported complaint of Leeuwschut, whose statement is "A1", there is no sworn affidavit by the NPA as complainant in the criminal case against Jiba and any averment in the charge sheet that the NPA suffered prejudice as a result of Jiba's alleged misrepresentation cannot be supported by objective facts.

128.8. The statement marked "A2" in the docket is that of Booysen, who was a Deputy Provincial Commissioner with the rank of Major General in the SAPS. He was an applicant in the case of Booysen v NDPP and Others [2014] 2 All SA 391 (KZD)

where he challenged the validity of the decision taken by Jiba to authorise his prosecution for Racketeering on 17 August 2012. I attach Booysen's sworn statement, which is marked "A2" in the docket, hereto marked as annexure **"MM23"**. I must point out that in my opinion at paragraph 10, I incorrectly stated the date as 17 August 2015 instead of 2012, this is obviously a typing error as the date of my opinion is 17 August 2015.

128.9. Booysen accused Jiba of misleading the court and lying under oath. He further alleged that Jiba misrepresented the truth which caused him actual prejudice. He says that in his view, Jiba committed fraud by lying under oath and in the process defeated or obstructed the cause of Justice. All these allegations are not corroborated by objective facts.

128.10. Booysen alleges in paragraph 29 of his Replying Affidavit as follows:

> *"I submit that the only reasonable inference to be drawn from the aforegoing is that none of the statements were in the possession of the First and Second Respondents when the impugned decisions were made. The statements of Aiyer certainly could not have been in their possession by 17 August 2012...(NJ4 is in any event,*

dated 31 August 2015). The same applies in respect of Danikas and Ndlondlo." [The judgment of Gorven was delivered in 2014 and therefore a statement dated 31 August 2015 could not have been before Gorven J. This is clearly a typing error and the date of the statement that was before Gorven J is dated 31 August 2012].

128.11. The prosecutors involved in the matter brought my attention to the fact that paragraph 29 of Booysen's affidavit referred to above could not be true because "NJ2" which is a statement of Aiyer dated 4 August 2012 was placed before Jiba for consideration before she decided to authorize the racketeering prosecution against Booysen. I attach hereto a copy of such affidavit, marked as annexure **"MM24"**.

128.12. Furthermore, the statement of Ndlondlo is dated 31 July 2012 and was also considered by Jiba prior to authorising the racketeering prosecution of Booysen.

128.13. "NJ1" is a document indicating the police officers who received monetary awards and is dated 14 October 2008. It was considered by Jiba prior to deciding to authorise the racketeering prosecution of Booysen. I attach hereto a copy of the list of police officers who received the monetary awards, marked as annexure **"MM25"**.

128.14. Having regard to the dates on the aforementioned documents, Booysen's affidavit was incorrect in so far as he stated that "NJ1", "NJ2" and Ndlondlo's statement were not before Jiba when she made the decision to authorise the racketeering prosecution and therefore she had the intention to mislead the court.

128.15. According to the Monetary Awards ("NJ1" in the docket) dated 14 October 2008, Booysen received an award together with the Cato Manor SVC Section of the Durban Organised Crime Unit for the killing of the Kwa- Maphumulo Taxi Association members.

128.16. The only mistake that Jiba made was to allege in her answering affidavit that she also referred to "NJ3" which is the unsigned statement of Danikas, before deciding to authorise the racketeering prosecution of Booysen. A copy of such statement is attached hereto, marked as annexure **"MM26"**. The mistake referred to can be mitigated by the fact that Jiba's affidavit was drafted by junior counsel, Advocate Manaka ("*Manaka*") and settled by Laurence Hodes SC ("*Hodes*") (who attested to this fact in his affidavit contained in the docket and marked "A8") before she signed it. Jiba's conduct can therefore not be alleged to be fraudulent. I attach a copy of Hodes' sworn statement, "A8" in the docket, and mark it "**MM27**".

128.17. With regard to "NJ4" statement of Aiyer signed on 31 August 2012, there is a valid explanation by Maema, whose affidavit is filed as "A4" in the docket. I attach a copy of Maema's sworn statement and "NJ4" and them marked **"MM28"** and **"MM28.1"** respectively. On page 9 of Maema's sworn statement he stated that:

> *"Although the second of Aiyer's statement was dated 31 August 2012, the prosecution team had already consulted Aiyer and already knew what the contents of Aiyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy to the prosecutors from the consultation and was used on that basis."*

128.18. The prosecutors, Ferreira and Van Eeden, in Jiba's criminal matter appear to have disregarded the abovementioned explanation by Maema but chose instead to believe the unsubstantiated allegations made by Booysen.

128.19. Booysen's evidence has to be approached with caution, since he has a motive. His motive is to ensure that the criminal case instituted against him does not proceed without delay, his evidence is not corroborated by any independent witness.

128.20. Ferreira and Van Eeden's reliance on the fact that Booysen was not at the scene of the crimes and that there was no direct evidence linking him to the individual offences is irrational and indicates a lack of understanding of the requirements necessary for managing an enterprise. The provisions of POCA allow the State to charge any individual with managing the activities of an enterprise, even if the said person is not at the scene of the crime or his conduct is not directly linked to the offences.

128.21. According to section 2(1)(f) of POCA,

> *"(1) Any person who –*
>
> *(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity*
>
> *...*

within the Republic or elsewhere, shall be guilty of an offence."

128.22. The elements required for a contravention of section 2(1)(f) are:

128.22.1. An enterprise must have existed;

128.22.2. The accused managed the operation or activities of the enterprise;

128.22.3. A pattern of racketeering activity must have existed; and

128.22.4. The accused knew or ought reasonably to have known that any person, employed by or associated with that enterprise, must have directly or indirectly conducted or participated in the affairs of the enterprise, through a pattern of racketeering activity.

The Reasons For Charging Booysen With Racketeering

129. In compiling my opinion, I had regard to what was conveyed to me by both Maema and Mathenjwa during the consultations. Maema and Mathenjwa are the sources of what is set out below:

129.1. The prosecutors, Maema *et al,* in the Booysen case had correctly identified Cato Manor SVC Section of the Durban Organised Unit as the enterprise.

129.2. Booysen was the Provincial Commander of Organised Crime in KZN during 2008. Aiyer was the Unit Commander of the Durban Unit of Organised Crime (*"DOCU"*). Under Aiyer was, *inter alia*, Lt Col Olivier who was the Section Commander of the Cato Manor Serious Violent Crime Unit (*"CMS"*). In paragraph 26 of my answering affidavit in the FUL matter, I stated:

> *"Booysen, from his higher position in the chain of command, by-passed Aiyer as a Unit Commander. Effectively, it is alleged, he co-managed the CMS together with its section commander, Olivier. Although Booysen had no operational responsibility for the CMS, he involved himself directly in its operations – reaching over the head of the marginalised Aiyer, to whom the CMS – through its senior officer, Olivier – could rightfully have reported. At times, Booysen allegedly went beyond co-managing the CMS; he participated also in its unlawful activities."*

129.3. Immediately after Superintendent Choncho (*"Choncho"*) was killed on 27 August 2008, seven people who were suspected to have been involved in his murder were all killed by Cato Manor SVC Section of the Durban Organised Crime Unit. These people

who were killed belonged to the Kwa-Maphumulo Taxi Association. Booysen and the Cato Manor SVC Section of the Durban Organised Crime Unit received monetary awards and certificates for this particular operation.

129.4. Booysen knew or ought reasonably to have known that these seven people were killed because they were suspected of having killed a police officer. The killing of the seven people happened in close proximity to the day of the killing of Choncho. The seven people were killed on the following dates:

129.4.1. 3 September 2008

129.4.2. 16 September 2008

129.4.3. 18 September 2008

129.4.4. 18 September 2008

129.4.5. 3 February 2008

129.5. The conclusion by Maema and Mathenjwa that Cato Manor SVC Section of the Durban Organised Crime Unit under the management of Booysen embarked on an ongoing and continuous killing pattern, was, in my view, correct. It was surprising that all the seven deceased are said to have been shot when Cato Manor SVC Section members were attempting to arrest them. The seven deceased are also alleged to have

fired at the Cato Manor SVC Section members, at different scenes but no member of the police was ever shot, and no State property was damaged at all.

129.6. Booysen also assisted Mostert, one of the Cato Manor SVC Section members in tracing the suspects that were later shot dead.

129.7. The deceased Bongani Elpheas Mkhize, in a High Court application case no. 13759/2008 instituted an application interdicting all the respondents including Booysen, not to kill him, citing the murder of his fellow members of Kwa-Maphumulo Taxi Association who were allegedly suspected of involvement in the killing of Choncho.

129.8. Booysen filed an answering affidavit where he defended the actions of Cato Manor SVC Section policemen. This conduct clearly indicates that Booysen had knowledge of the activities of the said policemen. In spite of the Court order in favour of Mkhize, the latter was killed by the same Cato Manor SVC Section of the Durban Organised Crime Unit.

129.9. Based on the above analysis of evidence, I opined that the authorisation of the Racketeering prosecution against Booysen and Cato Manor SVC Section members could not be faulted.

129.10. I opined as aforesaid because, the statement of Booysen when properly assessed constituted evidence of a single witness. However, there are statements made by Mosing and Maema who would corroborate the version of Jiba. The State would not be able to prove that Jiba had the necessary intention to commit the offences of fraud and perjury.

129.11. Mosing, who was head of the Special Projects Unit in the office of the NDPP deposed to two affidavits filed in the docket as "A3" and "A12". In his affidavit, Mosing stated that he advised the NDPP on all the racketeering applications. He met with the prosecution team in the case against Booysen, where the team made a presentation to him. He had to satisfy himself that a prima facie case of racketeering existed including the enterprise and managers and participants. He was satisfied that the application brought by prosecutors, Maema and Mathenjwa was sound and proceeded to draft a certificate and advised Jiba to authorise the racketeering prosecution of Booysen.

129.12. Mosing further stated that Nxasana summoned him to his office and accused him of being loyal to Jiba. Nxasana told him that he felt undermined by the decision to appeal the Gorven J decision as it was meant to protect the reputation of Jiba. Nxasana then ordered the withdrawal of the notice of appeal that had already been filed.

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Nxasana's conduct mentioned above clearly indicates that the relationship between him and Jiba was far from being cordial.

129.13. It is important to note that Jiba authorised the racketeering prosecution of Booysen at the time when she was the acting NDPP and long before Nxasana was appointed as National Director. Nxasana therefore, could not claim to have been undermined since the decision was not taken under his watch.

129.14. I found it puzzling that Ferreira and Van Eeden decided not to charge Maema, Mathenjwa, Mosing and Chauke who all made briefings to Jiba and provided argument in support of the authorisation of the racketeering prosecution of Booysen and the Cato Manorpolicemen.

My Analysis Of The Charge Sheet Against Jiba (Case No. 111/83/2015)

130. According to count 1 of the charge sheet, Jiba is accused of fraud in that she made misrepresentations to Booysen and/or SAPS and/or NPA and/or members of the public and/or the judiciary in KZN.

131. There are no affidavits from any of the mentioned persons above, wherein they allege under oath how Jiba defrauded or made misrepresentations to them.

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132. The evidence of both the complainant, Leeuwschut, whose statement is "A1" in the docket, and Booysen, whose statement is "A2" in the docket, is insufficient to sustain the alleged charge of fraud against Jiba.

133. It will be impossible to prove the existence of a fraudulent intent on the part of Jiba since she acted on advice of Mosing, Chauke, Maema and Mathenjwa.

134. According to count 2 of the charge sheet, Jiba is accused of having committed perjury by unlawfully and intentionally making false statements under oath.

135. It is correct that the statements of Ndlondlo, NJ1 and NJ2 were made under oath and Jiba considered them before deciding to authorise the racketeering prosecution. The alleged falsity of the said statements is only known to Booysen, the veracity thereof can best be adjudicated upon by a trial court.

136. Count 3 of the charge sheet alleged that the evidence Jiba considered for authorising the racketeering prosecution did not justify her decision hence Gorven J set aside her authorisation. The setting aside of a decision cannot result in a criminal offence by the decision maker, but it is legal remedy available to the aggrieved party. Furthermore, Gorven J did not recommend that criminal charges be instituted against Jiba.

137. There is no evidence to prove that Jiba had a fraudulent intent when she made her decision to authorise the racketeering prosecution of Booysen and members of the Cato Manor SVC Section.

The legal position I considered in reaching my opinion

138. The powers of the NDPP are outlined by the provisions of section 22 of the NPA Act, Act 32 of 1998. The NDPP is empowered by legislation to carry out certain functions and duties only relevant to an appointee in his/her position. Section 78 of POCA clearly insulates Jiba from any personal liability for carrying out her functions under the Act. In the event that mistakes are made by the NDPP in carrying out his or her duties, an aggrieved party can approach the courts for appropriate relief.

139. Booysen approached the court to review the decision of Jiba to authorize a racketeering prosecution against him in terms of the POCA legislation. This fact does not nullify the decision taken to prefer the predicate offences. Any mistake or misdirection by the NDPP in exercising her/his functions cannot be criminalized. The setting aside of the authorization is a legal remedy that Booysen successfully exercised. The NDPP can reissue the authorization upon receipt of a properly motivated application by the prosecution team that complies with the standard set by the court.

140. In **S v Brown** (681/2013) [2014] ZASCA 217 (1 December 2014), the SCA severely criticized Veldhuizen J's conduct as tending to bring the administration of justice into disrepute. The SCA did not criminalize his conduct because the appeal process was the remedy available to the NPA.

141. If the courts criminalised every exercise of public power simply because the functionary erred, then the functioning of the State would be paralysed because no public official would make decisions for fear of facing criminal charges. It is only in the clearest of cases where *mala fides* can be shown that such course ought to be considered.

142. Jiba was charged with the offences of fraud and perjury. After assessing the evidence against the alleged charges, I was left wondering how the prosecution intended proving the element of intention in both counts.

143. With regard to fraud, the prosecution must prove that Jiba had a fraudulent intent when she authorized the racketeering prosecution of Booysen. The prosecutors seem to be relying on *dolus eventualis* in both instances.

144. Both Maema, in his statement marked "A4" in the docket, and Mosing whose statements are marked "A3" and "A12" in the docket, stated that they are the ones who advised Jiba through verbal briefings and a prosecutorial memorandum to issue the authorization. I attach "A3" and "A12" and mark them "**MM28.2**" and "**MM28.3**", respectively. The senior counsel who settled Jiba's affidavit, Hodes SC, whose statement is "A8" in

the docket, would disprove the perjury charge by testifying that he settled Ms Jiba's affidavit after it was drafted and compiled Manaka.

145. The doctrine of *dolus eventualis* cannot find application since Jiba could not have foreseen the possibility that her decision-making will lead to an unlawful outcome. She acted on the legal advice of counsel as a litigant in review proceedings. She could not have reconciled herself to the ensuing result since her conduct was not reckless. She might have erred or misdirected herself in believing that the motivation as contained in the prosecutorial memorandum was sufficient to justify her decision to issue the racketeering authorization.

The conclusion I reached in my opinion

146. I opined that the decision arrived at by Ferreira and Van Eeden to prosecute Jiba for exercising her statutory obligations in terms of the law was not supported by objective facts. The predicate offences preferred against Booysen stand to be adjudicated upon by the trial court. If this prosecutorial decision were to stand, prosecutors will not be able to carry out their duties without fear of being victimized.

147. As such, I was and still am of the view that there were no reasonable prospects of a successful prosecution in the matter and I accordingly recommended that the case against Jiba be withdrawn.

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148. As more fully set out in an e-mail dated the 28th of May 2020 from Ferreira to Baloyi and Van Jaarsveld, it is clear that, according to Ferreira, the decision to re-enroll the Jiba matter was not informed. I say so because, in the e-mail, the following is set out:

> *"In light of such a serious dispute between Senior members of the NPA, on the reasonable prospects of success, it could have been prudent for the NPA to look at the merits and to have even taken representations from all relevant role players, so that an informed decision could be taken."*

149. I attach hereto a copy of an e-mail stream, marked as annexure **"MM29"**.

150. From the aforesaid, it is clear that the prosecution of Jiba was and is contrary to the Prosecution Policy, the Code of Conduct and the Guidelines on the Role of Prosecutors, in that it is a requirement that, prior to initiating criminal proceedings against a suspect, the decision maker must satisfy him or herself that there are reasonable prospects of success which, in my view, did not happen in this matter. Reasonable prospects of success can only be considered after the merits of a case have been properly analysed and considered. *In casu* it is clear that the merits of the matter were never considered at any stage.

151. The above submissions are premised on the Prosecution Policy, the Code of Conduct and the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of

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Offenders, Havana, Cuba, from 27 August to 7 September 1990 ("the Guidelines"). These Guidelines, which have also been adopted by the NPA, article D ("the role of prosecutors in the administration of justice"), under item1(d) which requires of a prosecutor to:

> *"... institut[e] ... criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence."*

152. My version in this regard is corroborated by a number of e-mails, set out in "MM29". I discuss the various e-mails more fully below:

152.1. In an e-mail dated 28th of May 2020, from Baloyi to Van Jaarsveld, Ferreira and myself, it is stated: *"As the merits were not canvassed ...".*

152.2. In an e-mail dated 28th of May 2020, from Ferreira to Baloyi, Van Jaarsveld and myself, it is stated: *"The merits of the case was not the main issue.".*

153. The charges preferred against Jiba do not involve the interpretation of any legal instrument and it is wrong for Van Jaarsveld to contend that Jiba should be prosecuted, because *"There may be room for a different interpretation but that can be aired in court".*

154. It is not the function of the Court to make a determination on a matter because officials of the NPA have a different interpretation. What is expected to be placed before a Court, are facts demonstrating that there is a *prima facie* case against Jiba.

155. This recommendation is set out in my opinion, which is a separate and different document to my prosecutorial decision. The latter is a one paged document where a prosecutor sets out his/her decision. My opinion was accompanied by a prosecutorial decision, where I took a decision not to prosecute Jiba.

156. As mentioned above, I received a telephone call from Thenga, on the 14th of August 2015, who asked me whether it was true that Abrahams had asked me to prepare an opinion on the charges preferred against Jiba. I informed her that it was correct I had prepared a legal opinion. Thenga informed me that she had also been requested by Abrahams to prepare such an opinion. I was somewhat surprised. On the same day, Thenga's PA forwarded to me an e-mail that her PA sent to Abrahams with Thenga's legal opinion. I already attached hereto a copy of such e-mail, marked as annexure "MM9". I do not know the reason why Abrahams requested my opinion if he had that prepared by Thenga and I never asked him.

157. What I do find mind boggling is the fact that Thenga formed part of the panel that reviewed the issuing of the racketeering certificate in the Cato Manor case

("De Kock panel"). The De Kock panel found that the process and procedure followed in issuing the certificate was not proper, and consequently found that the certificate issued by Jiba was not valid. The De Kock panel's finding casts serious aspersions on the persons of Jiba and the other prosecutors involved. However, five years ago, on 13 August 2015, Thenga prepared an opinion that the process that was followed when Jiba issued the certificate, was the norm. In her opinion she also stated that the State had no case against Jiba in its charges of perjury and fraud. I attach hereto a copy of the De Kock report, dated 27 June 2019, marked as annexure **"MM30"**.

THE OPINION PREPARED BY THE THEN DPP OF NORTH WEST, JJ SMIT SC

158. I deem it apposite to also bring it to the attention of the Commission that Smit, the DPP of North West, prepared an opinion in which he found that there was no reasonable prospect of successfully prosecuting Jiba. I attach hereto a copy of Smit's opinion, marked as annexure **"MM31"**.

159. I deem it apposite to refer the Commission to the opinion prepared by Smit. As far as I am aware, he is the most senior, by way of experience, in the entire NPA. I say this as at the stage I started working in the office of the State Attorney in 1992, he was the Attorney General of the former homeland of Bophuthatswana.

160. A further consideration is that as far as I am aware, Smit is not implicated in the Commission and yet he came to a similar opinion as mine. At the very least his opinion on the case ought to be considered as objective.

161. Smit, in furnishing his opinion, took a different approach to that taken in my opinion and the one taken by Thenga and still arrived at the same conclusion as Thenga and I.

162. The relevant portions of the opinion state that:

162.1 The answering affidavit consisting of 28 pages was presented to Jiba and signed by her on 3 July 2013. It is this affidavit that now forms the basis of this case against her, as it is alleged that she lied in the affidavit.[2]

162.2 Before the matter went to court, the prosecuting team realised that there were certain errors in the affidavit of Jiba.[3]

162.3 These errors were listed in a memo, compiled by the prosecuting team, dated 15 August 2013, and presented to Hodes. It also contained additional information to explain in more detail the case against Booysen.[4] Despite a diligent search, I could not locate this memorandum and thus I do not attach it.

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[2] See Smit's opinion at paragraph 11.
[3] Ibid, para12.
[4] Ibid, para 13.

162.4 The statement that forms the core of Jiba's alleged lies, a statement by one Aiyer, referred to in the papers as "NJ4," was specifically dealt with in the memorandum on page three.[5]

162.5 However, Hodes apparently thought it fit not to attempt to file a supplementary affidavit by Jiba, and as a result the errors in her answering affidavit prevailed. Had the supplementary affidavit been filed, almost all the criticisms levelled by the court in its judgment of 26 February 2014 against Adv Jiba, would not have existed.[6]

162.6 In the judgment of Gorven J he criticized Adv Jiba for:[7]

162.6.1 Not disclosing all the facts on which she relied in deciding whether to issue the authorisation;

162.6.2 For stating that she considered the statement by Aiyer (NJ4) when taking her decision, whereas NJ4 was only taken after 17 August when she signed the authorisation, thereby showing that she could not have considered this statement, thereby implying that she lied about this in her

[5] Ibid, para 14.
[6] Ibid, para 15.
[7] Ibid, para 16.

affidavit. However, the judgment does not go so far as to say that she did lie; and

162.6.3 That she did not correct any inaccuracies in the affidavit when she was afforded the opportunity to do so.

162.7 Smit emphasised that had a supplementary statement been filed, as envisaged by the investigating team when they provided Hodes with the memorandum dated 15 August 2013, these three criticisms would not have existed

163. Smit went on to consider the decision of the NPA, taken immediately after the judgment, to appeal and stated that:

163.1. After the judgment was delivered, a meeting was held between Hodes and the investigating team. Hodes explained that there were a number of misdirections in the judgment and that reasonable prospects existed to succeed, on appeal against the outcome.

163.2. It was decided to appeal against the judgment and papers were prepared to facilitate this, but

the then newly appointed NDPP, Mr Nxasana, ordered the process not to proceed and to be stopped immediately.

163.3. Consequently, the judgment prevailed and as a result of this, Leeuwschut laid a charge of perjury against Adv Jiba, on 23 October 2014.

163.4. Prior to laying a charge, a legal opinion was obtained from Ellis, by the then CEO, Van Rensburg.

163.5. Ellis advised that a criminal investigation for perjury be opened against Jiba.

163.6. However, Smit was of the view that Ellis' opinion was not of any value in this matter because:

163.6.1. He based his opinion entirely on the judgment and on the alleged conduct of Adv Jiba in previous (other cases) and

163.6.2. He obviously had none of the relevant documents available to complete the whole picture, like the memorandum of 15 August 2013.

164. After considering the decision to withdraw the appeal and the legal opinion of Ellis that was obtained by the then CEO of the NPA, Van Rensburg, Smit evaluated the facts of Jiba's case and stated that:

Evaluation of the facts

164.1. In his opinion there is nothing wrong in Jiba stating that she had considered the "information under oath and the evidence as contained in the dockets" because surely, the only inference to be made from the document, setting out facts of the case by Maema, is that it was compiled from the evidence and statements in the docket.

164.2. Nobody can expect Adv Jiba to have read each and every statement, and to have studied each and every document contained in the docket when she considered the application. It does not work that way and nobody, surely, could have thought so. Surely, as happens every day, she had to rely on the summary compiled by Maema and this summary does represent the evidence and statements in the docket. Her statement surely cannot be construed to mean that she in fact studied, herself, all the statements and

documents in the docket.

164.3. Having regard to the statement "NJ4" referred to in paragraph 17 of her affidavit, it is clear that it was included in the bundle of documents submitted by the prosecuting team to Hodes, in order for him to draft Jiba's affidavit.

164.4. It is also very likely that Manaka, who actually drafted Jiba's affidavit, inadvertently included it in paragraph 17 of the affidavit, not realising that it was a supplementary statement from Aiyer and that it was obtained after 17 August 2012, when Jiba signed the authorisation. Aiyers "main statement" formed part of the documents as "NJ2" and was obtained on 3 August 2012.

164.5. Important is to note what Maema explained in regard to "NJ4":

> *"A further statement dated 31 August 2012 was taken by the investigators after Colonel Aiyer was consulted by the team. The contents of the statement dated 31 August 2012 was conveyed by Col Aiyer in the consultation that he had with the prosecution team earlier in that month and*

the prosecution team did use the information in briefing sessions with the Acting NDPP (Jiba), as we expected the information just to be captured in writing and under oath by the investigators"

164.6. So, Jiba did have knowledge of the contents of "NJ4" even, so it seems, before 17 August.

164.7. Smit noted that it may be argued, although he was not prepared to do so himself, Adv Jiba was negligent in not realising that "NJ4" was included in par 17 of her affidavit before she signed it, but really, in a case of this magnitude is this a valid and reasonable argument? I submit not.

165. After analysing the facts, Smit applied the law to the facts and stated that:

The Law

165.1. Perjury consists in the unlawful and intentional making, upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker knows to be or foresees may be false.

165.2. The essential elements are:

165.2.1. Unlawful

165.2.2. statement

165.2.3. false

165.2.4. oath

165.2.5. judicial proceedings; and

165.2.6. intention.

165.3. The last element that poses the main problem in this case. Intention in the context of perjury, means that the accused must have intended (actual or legal) to give false evidence. This means that he must at least actually foresee the possibility that what he says may be false. Similar to Smit, I had also stated that this element would be impossible to prove and I simply did not comprehend how Ferreira and Van Eeden had intended proving same.

165.4. Based on these facts, Smit was of the opinion that there are no reasonable prospects of success in the state proving that Jiba had the intention to give false evidence.

165.5. Smit went on to observe that a factor that also militates an intention to lie, is the fact that "NJ4" was attached to her affidavit for all, including the

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court, to see. One does not decide to lie, and then, in or attached to your lie, you include proof that you are doing so. (lying)

165.6. The element that the statement must be false, could also pose a problem, considering the explanation given by Maema.

165.7. As regarding a charge of fraud, the elements of misrepresentation and intention, just like in the case of perjury, will not be proved by the state, for the same reasons as described.

165.8. Smit also noted that, in addition, the prosecuting team still maintains that the court misdirected itself and that sufficient evidence exist to justify the authorisation of 17 August and the prosecution of Booysen.

165.9. Smit submitted that it was therefore incorrect to state in the preamble of the charge sheet on which Adv Jiba appeared in the Regional Court, Pretoria, on 21 April 2015 that:

> *"The State alleges that there was no evidence whereupon the racketeering prosecuting against Major-General Booysen should have been instituted and*

that the accused in deposing to the affidavit of 3 July 2013 committed perjury"

165.10. Smit stated these as his reasons for declining to prosecute in this matter.

166. Regard being had to the three opinions mentioned above, it appears that there was a concerted effort amongst some officials of the NPA to have Jiba charged despite the glaring weakness of the charges preferred against her. It is telling that management relied on the opinion of Ellis while, according to Smit's opinion Ellis solely based his opinion on the judgment and other matters and not the entire source documents in the relevant case.

167. What is even of greater concern, is that all these three opinions have been ignored by the NPA which has taken the decision to reinstate the charges against Jiba. This decision was taken despite the fact that no new evidence is available and the difficulties in proving the State case I pointed out in my opinion and that of Smit still exist. How, the NPA intends to overcome those insurmountable difficulties remains an enigma.

THE FINDINGS OF THE MAJORITY JUDGMENT OF THE NORTH GAUTENG HIGH COURT

168. As stated above, my legal representatives advised me that Hulley also requested that I deal with the finding made by the North Gauteng High Court in the FUL judgment.

169. In this judgement the court considered the review application instituted by FUL, pursuant to an announcement made by Abrahams at a media briefing on 18 August 2017, that the NPA had decided to withdraw the charges against Jiba.

170. To put context to the allegations which were made with regard to this complaint by Booysen, it is necessary that I give a brief background on the charges in respect of which the judgement relates. I do so here below.

CHARGES AGAINST JIBA: CASE NUMBER 111/83/2015

171. Jiba is facing three charges under the above case number, namely:

171.1. fraud in that Jiba unlawfully, falsely and with intent to defraud misrepresented to Booysen and/or the South African Police Service, the National Prosecuting Authority, members of the public and/or the Judiciary in KwaZulu–Natal that there was a reasonable prospect of success in securing a conviction against Booysen;

171.2. perjury, in that Jiba falsely stated in her answering affidavit that:

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171.2.1. she gave due and careful consideration to information under oath that there was a *prima facie* case against Booysen;

171.2.2. the facts deposed to fall within her personal knowledge and were, to the best of her knowledge, true and correct;

171.2.3. information under oath before her indicated that Booysen knew or ought to have known that his subordinates were killing suspects instead of arresting them:

171.2.4. the killings were motivated by the CMS's desire to enrich themselves;

171.2.5. statement showed that Booysen was aware of the matters, and played an instrumental part in these crimes;

171.2.6. Booysen was in *de facto* command of the CMS; and

171.2.7. that there was a *prima facie* proof that Booysen was involved in racketeering activities.

171.3. fraud, in that the evidence that Jiba considered in authorising the racketeering prosecution did not justify her decision.

172. The majority court, per Tlhapi and Mothle JJ, made some adverse findings against me and Abrahams stating that we were disingenuous whilst the minority judgment, per Wright J, expressly decided not to make such finding instead electing to see our explanations as an error in our interpretation of the law.

173. Booysen has referred to the adverse credibility finding in the FUL judgment in his affidavit.

174. In paragraph 96 of his affidavit, Booysen states that *"the same court made adverse findings on the integrity of Abrahams and Mokgatlhe, but there was no action taken as a result of the findings."*

175. In response to the review application brought by FUL, I filed a substantial affidavit as I was cited as the second respondent in the matter. In the affidavit I gave a full account of what I took into consideration in taking the decision to decline to prosecute Jiba. I attach herewith the said answering affidavit, marked as annexure **"MM32"**.

176. In my affidavit I dealt fully with the reasons for my decision to decline to prosecute Jiba and withdraw charges against her as well as the basis on which I made that decision.

177. I also made reference in the answering affidavit, to the opinion of Ferreira and Van Eeden upon which the charges against Jiba were initially preferred.

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178. I also indicated to the court that Abrahams did not consider the opinion of Ferreira and in that regard I submitted *"I understand that the NDPP did not consider the Ferreira opinion itself, but expected that I would do so in the course of making the decision as to whether to pursue the charges against Jiba. The NDPP, I understand, deliberately avoided taking the decision, because he anticipated that, whichever way it went, it would be subject to review under section 22 (2)(c) of the NPA Act."*

179. I also indicated to the court that while I took into consideration the Ferreira opinion, I was obliged to carefully consider it, give due weight to it but was not bound by the said opinion. I further indicated the basis on which I came to a conclusion that the Ferreira opinion was flawed, highlighting the four reasons why I considered the Ferreira opinion to be flawed.

180. A reading of the answering affidavit I filed in the **FUL** matter indicates that I had reached a conclusion that charges against Jiba could not be sustained and it was on that basis that I declined to prosecute her and decided to withdraw the charges against her.

181. I made it clear to the court that the decision to withdraw the charges against Jiba and to decline to prosecute her was mine. I refer the Chairperson to paragraph 234 of my answering affidavit wherein I stated, in response to averments made in paragraph 109 of the founding affidavit therein, that:

"regarding the contents of the report, I refer to what is stated above, and note that it is (sic) confirms that it was myself, and not the NDPP, who made the operative decision."

182. In its decision however, the court concluded that the decision was made by Abrahams. The Court further held that Abrahams' and my assertions to the court, that I am the one that made the decision, "*raises serious questions of credibility*"

183. It is this statement made by the court that Booysen refers to in his allegations in paragraph 96 that the court made adverse findings on the integrity of Abrahams and myself.

184. It follows then that from a reading of Booysen's allegations above, Booysen holds the view that the court made an adverse credibility finding against Abrahams and me. For that reason, Booysen expected that there shall be a process followed to sanction us.

185. I appreciated the gravity of the credibility finding that the Court made against me. I have referred to hereinabove my attempts to have the NPA prosecuting an appeal against the decision. It will be recalled that the NPA had noted an application for leave to appeal which was subsequently withdrawn. It will further be recalled that I considered prosecuting the appeal from my own funds, but considering the prohibitive legal costs, I was dissuaded from proceeding. I also considered that in every litigation there is a possibility of an

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adverse costs order, and it was quite clear to me that I would not be able to finance an adverse costs order if it was to be made against me.

186. I have also previously alluded to the view that Epstein expressed to the effect that, the matter is not appealable as Abrahams had taken steps to implement the judgment and further that an appeal does not lie against a factual finding. I have now been advised by my current legal team that it is incorrect that an adverse credibility finding is a factual finding against which an appeal does not lie. Be that as it may, I am saddled with that adverse finding that hangs over my head. It is for that reason that on 6 May 2019 I requested the NPA to appoint Counsel on my behalf to apply for condonation of late noting of the appeal.

187. However, unbeknown to me, the NPA sought legal advice and was apparently advised that it cannot appeal findings of fact and based on that advice it took a decision to withdraw the appeal. I was only informed of the decision to withdraw the appeal on 3 October 2018, the same day that the State Attorney was instructed to withdraw the appeal the next day. This is set out in the emails referred to above in this affidavit. I requested a copy of the opinion so received and to date hereof, I have not been furnished with same.

188. As such, there was nothing I could do about the findings that were made by the court as my request for an appeal had no fruition.

189. Against this context, I now proceed to specifically reply to the averments that the rule 3.3 notice drew to as implicating or may implicate me.

AD SERIATIM RESPONSE TO BOOYSEN'S ALLEGATIONS

Ad paragraph 94

190. The contents of this paragraph are denied insofar as they purport that I was part of Jiba's faction.

Ad paragraph 96

191. I have dealt extensively with the allegations herein relating to the adverse credibility findings in the FUL judgment. To the extent necessary, I incorporate herein the relevant submissions contained in the previous paragraphs.

Ad paragraph 126

192. I have already dealt with the contents of this paragraph and it is not necessary to repeat myself.

Ad paragraph 230

193. I have set out clearly how Booysen me lumps together with colleagues in the NPA as well as former high-ranking officials in the SAPS. He calls me and the named persons "*protagonists*" who are bent on protecting some politically connected persons. Booysen has to be crossed examined on the basis on which he includes me in the listed "protagonists". Such basis is not set out in his affidavit.

194. I have dealt with the contents of this paragraph relating to the concept of protagonists and the persecuted and I incorporate the submission relating thereto herein.

APPLICATION TO CROSS-EXAMINE BOOYSEN

195. In paragraph 128 Booysen alleges that he was the complainant in the matter that culminated in Jiba's prosecution. It is incorrect that Booysen was the complainant in Jiba's criminal case. The complainant was Leeuwschut.

196. Although paragraph 130 does not make any reference to me I feel obliged to raise an issue with the contents thereof, in the interests of the Commission and of justice. Booysen alleges that *"the High Court ruled 'Booysen v Acting NDPP' that there is no evidence linking me to the commission of an offence as purported by Jiba in 2012. Despite the court's findings, Abrahams re-authorised my prosecution in 2016."*

197. In the memorandum dated 16 February 2016, which is annexure "MM4", Ferreira and Van Eeden submitted that:

> *"The court found that there was NO evidence linking Booysen to the commission of the alleged racketeering offences."*

198. Booysen's allegations and the submission of Ferreira and Van Eeden are in stark contrast to Gorven J's judgment, on which they rely. In paragraph 39 Gorven J held that:

> *"[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one and two and eight to twelve. That can only be decided by way of a criminal trial. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions."*

199. It is clear from paragraph 39 that Gorven J did not make a finding that Booysen was not guilty of an offence, let alone a finding that there was no evidence linking Booysen to the commission of a racketeering offence. Gorven J stated that his findings do not amount to a finding that Booysen is not guilty of the offences set out in counts one and two [racketeering offences] and eight to twelve [predicate offences].

200. It is clear from the contents of the emails exchanged in October 2018 that the decision to withdraw the appeal was taken without soliciting my consent despite the fact that the adverse findings were made against me. The NPA took such decision, which is now being used against me to substantiate untruthful averments. For this reason I beseech the Commission to grant me leave to cross examine Booysen in order to clear my name from the generalised accusations levelled against me simply because of findings made in a judgment I had no control over the decision to appeal. I am advised, that it is in the interest of justice that my right to practice my profession as protected

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by Section 22 of the Constitution and my right not to be wrongly accused ought to weigh heavily in considering my request.

CONDONATION

201. In terms of Rule 11.2 the Commission may condone non-compliance with or extend, any timeframe provided for in the Rules on good cause shown or when in the interest of the work of the Commission.

202. I set out below the grounds on which the Chairperson is requested to grant condonation for the admission of this affidavit, together with it's annexures.

In the interest of the work of the commission

203. I am advised that it is in the interest of the work of the Commission that the truth be revealed, as the Chairperson has repeatedly stated during the hearings of the Commission. I respectfully submit that it will be a miscarriage of justice that persons, such as myself, who are incorrectly brushed with the same generalised brush of state capture, simply because I could not take the decision to challenge adverse remarks passed by a court, when it is trite that even courts make errors of fact and law, and those errors are set aside on appeal.

204. I say so because, the allegations levelled against me are based only on the adverse remarks made by the court, and no other incident and/or objective and/or independent evidence indicating impropriety against me.

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Good cause

205. I am further advised that good cause require that I set out reason for the delay and prospects of success. With regard to the latter, I respectfully submit that the reasons advanced for the interest of the work of the Commission also speak to the latter requirement.

206. In establishing good cause for the granting of the relief prayed for in the Notice of Motion, I also rely on the contents of the explanatory affidavits of Kopman and Voller, attached hereto, respectively marked as annexures "MM1" and "MM2".

207. The contents of annexures "MM1" and "MM2" fully set out the process that unfolded since I received the Notice in terms of Rule 3.3, the internal processes that ensued in the NPA regarding instructions to the State Attorney, the appointment of the State Attorney, the internal processes that ensued in the State Attorney, which lead to the appointment of Counsel, the various consultations that took place and the reasons why the application for cross-examination of Booysen and the condonation is only launched at this stage.

208. It is respectfully submitted that the launching of this application and the late filing of my main affidavit at this stage is neither due to negligent and/or intentional conduct on my part or that of my legal team. It was as a result of circumstances beyond our control.

CONCLUSION

209. The basis on which Booysen alleges that I am a "*protagonist*" is not set out in his affidavit nor in his oral evidence before the commission. As such, Booysen has to be crossed examined on the basis on which he includes me in the listed "*protagonists*".

210. As stated above, I have previously requested the head of NPA's Legal Administration Division ("LAD), Mokhatla to assist me with legal representation, to note an appeal against the FUL judgement. I did not receive any meaningful response. I am desirous to have the unfavourable judgement taken on appeal, since the decision to withdraw same was taken without consulting me as an affected party.

211. I respectfully submit in the premises that the allegations made by Booysen to the Commission as they relate to me, should be challenged and Booysen be thoroughly cross-examined.

MARSHALL MOKGATLHE

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at on this day of and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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LIST OF ANNEXURES		
ANNEXURE	**DESCRIPTION**	**PARAGRAPH**
MM1	Explanatory affidavit Kopman	Para 3, 206, 207
MM2	Explanatory affidavit Marco Voller	Para 3, 206,207
MM3	Performance Agreement of Ferreira	Para 65,107
MM4	Memorandum from JW Ferreira and G Van Eeden addressed to Nxasana and Hofmeyer dated 16 February 2015	Para 67,111,115,128.4, 197
MM4.1	Confirmatory affidavit of Lawrence Sithembiso Mrwebi	Para 69, 128.4
MM5	Email dated 3 June 2015, from Ferreira to Hofmeyr and Karen Van Rensburg, recommending the appointment of Barry Roux SC	Para 70
MM6	Memorandum dated 19 June 2015 from Mokgatlhe to Abrahams and Mokhatla, informing Abrahams that Ferreira and Van Eeden were reporting to Hofmeyr	Para 71
MM7	Email dated 5 August 2015, from Abrahams to Mokhatla copying Mokgatlhe and others	Para 74
MM8	Abrahams' memorandum, dated 13 August 2015, to Mokgatlhe and copy Mokhatla	Para 75, 118
MM9	Email from Nicollete Smith (Thenga's PA) to Mokgatlhe, dated 14 August 2015	Para 76, 156

MM10	Thenga's opinion dated 13 August 2015	Para 76
MM11	Thenga's prosecutorial decision dated 13 August 2015	Para 76
MM12	Email stream, dated 14 August 2015, from Mokgatlhe to Abrahams and Mokhatla, attaching the opinion prepared Ferreira and Van Eeden as well as the opinion prepared by Mokgatlhe	Para 77
MM13	Legal opinion of Mokgatlhe dated 14 August 2015 (5 pages)	Para 77
MM14	Legal opinion of Mokgatlhe dated 17 August 2015 (11 pages)	Para 79, 118, 126
MM15	Prosecutorial decision of Mokgatlhe dated 17 August 2015	Para 79, 118
MM16	Email stream from Ferreira to Mokgatlhe dated 17 August 2015 at 12:55 PM, response from Mokgatlhe 3:04PM	Para 80
MM17	Email from Mokgatlhe, dated 18 August 2015, to Majavu, Jiba's attorneys informing him of decision to withdraw charges against Jiba	Para 83
MM17.1	Mokgatlhe's prosecutorial decision, dated 18 August 2015	Para 83
MM18.1 to MM18.5	Email stream between Mokgatlhe and Chitha from 3 October 2018 to	Para 94

MM19	Email, dated 6 May 2019, from Mokgatlhe to Mokhatla copy Baloyi, requesting the condonation of the late noting of an appeal	Para 97
MM20	Face of the docket wherein Ferreira has an inscription that charges withdrawn on instruction of Mokgatlhe	Para 121
MM21	Gorven Judgement pertaining to Booysen review against the decision of Jiba to issuing of racketeering certificate	Para 123
MM22	"**A1**" in the docket-sworn statement of **Leeuwscht**	Para 128.1
MM22.1	The opinion Ellis SC	Para 128.1
MM23	"**A2**" in the docket-Affidavit of **Booysen**	Para 128.8
MM24	"**NJ2**" in the docket-Affidavit of **Aiyer** dated 4 August 2012	Para 128.11
MM25	"**NJ1**" list of police officers who received monetary awards, dated 14 October 2008	Para 128.13
MM26	**"NJ3"** Unsworn Statement of Danikas	Para 128.16
MM27	"**A8**" Sworn statement of Hodes SC	Para 128.16
MM28	"**A4**" Sworn statement of Maema	Para 128.17
MM28.1	"**NJ4**" sworn statement of Aiyer dated 31 August 2012	Para 128.17
MM28.2	**"A3"** sworn statement of Mosing	Para 144

MM28.3	A4 sworn statement of Mosing	Para 144
MM29	Email stream dated 28 May 2020 between Baloyi and Van Jaarsveld	Para 149, 152
MM30	De Kock report, dated 27 June 2019	Para 157
MM31	Opinion of JJ Smith dated 27 August 2018	Para 158
MM32	Answering Affidavit of Mokgatlhe in the FUL application	Para 175

ANNEXURE "MM1"

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

***IN RE*:** **APPLICATION OF MARSHALL MOKGATHLE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULES 11.2 AND 3.3.6 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

EXPLANATORY AFFIDAVIT

I, the undersigned,

LUYANDA KOPMAN

do hereby declare under oath and state that: -

1. I am an adult male duly admitted Attorney, employed as such at the State Attorney, Pretoria, 316 Thabo Sehume Street, SALU Building, Pretoria.

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2. The facts herein contained in this affidavit are within my personal knowledge and unless stated to the contrary or is evident from the context, are to the best of my knowledge and belief both true and correct.

3. I have read the witness affidavit deposed to by **MARSHALL MOKGATLHE** together with annexures and confirm the correctness and veracity of the contents thereof insofar as same relates to me.

PURPOSE OF THIS EXPLANATORY AFFIDAVIT

4. The purpose of deposing to and delivering this affidavit is to demonstrate just cause for the late filing of George Baloyi's affidavit and why the condonation application is launched at this stage.

5. The Pretoria State Attorney received a letter of instruction on the 1st of October 2019. After receipt of the letter of instruction, administrative processes were followed and office files were open on the 2nd of October 2019. The office file was allocated to me on the 21st of October 2019.

6. Adv Mathibedi SC ("Mathibedi"), Adv K Tsatsawane SC ("Tsatsawane"), Adv K Ramaimela ("Ramaimela") and Adv Z F Madlanga ("Madlanga") were briefed on 24th of October 2019. Tstatsawane and Madlanga were to specifically deal with the evidence of members of Independent Police Investigative Directorate ("IPID"), whilst Mathibedi and Ramaimela were to deal with the evidence of Gen Johan Booysen ("Booysen"), Trevor White ("White") and P du Plooy ("Du Plooy").

7. The files were delivered to Counsel on the 24th of October 2019. Counsel was given an opportunity to peruse the files prior to a consultation with the implicated officials. A consultation was held on the 6th of November 2019 during which consultation I was present. An agreement was concluded that the implicated officials will draft responses to the allegations levelled against them, to be submitted during the middle of January 2020.

8. The only implicated officials that submitted their responses are Adv G Baloyi ("Baloyi"), Adv M Mokgathle ("Mokgathle"), Adv A Mosing ("Mosing") and Adv M Mashuga ("Mashuga").

9. The draft response of the Applicant was forwarded to the legal team on the 17th of January 2020 for their consideration in preparation for consultation, drafting and settling the necessary papers.

10. I am advised by Mathibedi that numerous telephone calls were made between himself and Adv P Pretorius SC ("Pretorius"), the evidence leader, with the view to schedule a meeting for the purpose of discussing the strategy and the way forward regarding the delivery of the affidavits of the implicated officials.

11. A meeting was held with the evidence leaders on the 22nd of January 2020. During the meeting, the following were *inter alia* discussed:

    11.1. Mathibedi enquired about the missing second supplementary affidavit of Booysen (annexure "ZF");

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11.2. Adv September, who was leading the evidence of Booysen indicated that the document is not yet available to implicated persons because the evidence in that affidavit has not yet been led and therefore not yet made public. Pretorius stated that as soon as affidavits that implicates any NPA official that the legal team represents, become available, a copy of such affidavit will be made available.

11.3. The issue of when the notices were served and on whom, was also discussed, as some of the implicated officials indicated that they did not receive the required notices.

11.4. Mathibedi enquired whether there will be any other witnesses that will implicate NPA officials, as the NPA's view was that a consolidated condonation application should be used for all the implicated officials.

12. The evidence leaders requested that the instructing attorney should send them a letter, indicating which implicated NPA officials the State Attorney was given instruction to represent. Such will enable the evidence leaders to liaise and communicate with the State Attorney regarding matters and/or issues that affects the NPA officials who are represented by the State Attorney.

13. I was requested by Mathibedi to write a letter to the evidence leaders addressing some of the matters that were dealt with during the aforesaid meeting. I enclose a copy of the letter marked as annexure **"LK1"**.

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14. On various occasions, I wrote letters to Marco Voller ("Voller") as Mathibedi wanted to know as to what is happening with the other implicated NPA officials, as they have not yet submitted their responses. I attach hereto copies of such letters, marked as annexures **"LK2.1"** to **"LK2.2"** respectively.

15. I am advised that in February 2020, the legal team had other matters from which they could not extract themselves, and, at the same time, they were waiting for the information from other NPA officials who, at that stage, had not furnished the requested information.

16. Such was due to the instruction of client that a combined condonation application should be launched. I am advised that Counsel intended to consult with the implicated NPA officials who submitted their responses towards the end of March 2020. The intended consultation did not take place as a result of the announcement by the President of the National Lockdown due to Covid 19, which commenced on the 27th of March 2020. During Level 5 of the National Lockdown, consultations could not take place and it was also practically impossible to hold any consultations by means of an alternative method. There was severe restriction of movement which, *inter alia*, prohibited movement between municipal areas. Myself, the legal team and the implicated NPA officials reside in different municipal areas.

17. A consultation was held with Mosing by the legal team on the 28th of May 2020. The purpose of this consultation was to address a letter from the evidence leaders dated the 22nd of May 2020. Mosing presented the legal team with 19

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arch lever files which Counsel had to peruse, in order to identify matters to be addressed in Mosing's affidavit. A perusal and analysis of the 21 files took up a considerable time.

18. Whilst considering the 19 files provided by Mosing, I provided the legal team with a letter in terms of which certain information and/or documentation was required from Mosing.

19. I am advised that towards the end of May 2020, the legal team perused the papers with the view to settle the affidavits of Mosing, Baloyi, Mashuga and Mokgathle.

20. The legal team, at the same time, had to attend to other matters from which they could not extricate themselves.

21. On the 12th of June 2020, I received an e-mail from Voller, attaching an application drafted by Adv J P Pretorius ("Torie") to cross-examine a witness at the Commission. In the same e-mail, Voller instructed me to extend the mandate of Counsel to include Adv Andrew Chauke ("Chauke") as one of the implicated officials that they must represent. I forwarded the e-mail with the attachment to Counsel.

22. On the 9th of July 2020, I received an e-mail from the evidence leaders, indicating that Torie was granted permission to cross-examine McBride and Khuba, and the hearing would take place on Wednesday, the 29th of July 2020.

I provided Counsel with this e-mail. A copy of this e-mail is attached hereto, marked as annexure **"LK3"**.

23. Initially, Tsatsawane was tasked, together with Madlanga, to deal with IPID matters. It is only at that stage that Tsatsawane advised me that he is no longer available to deal with this matter. In view of Tsatsawane's unavailability, Mathibedi SC was instructed to deal with the matter involving Torie, which would have been dealt with by Tsatsawane. It is because of that, that the settling of the affidavits of Baloyi and Mokgathle had to be shelved in the meantime, to enable the legal team to fully concentrate on the affidavit of Torie.

24. On the 14th of July 2020, I received an e-mail from an official of the Commission, attaching a notice of set down, dated the 13th of July 2020, which reflected the hearing date as the 29th of July 2020. A copy of the notice of set down is attached hereto, marked as annexure **"LK4"**. The notice of set down stated that Torie was granted leave to cross-examine McBride and Booysen.

25. After receipt of this notice of set down, a consultation was arranged for the 20th of July 2020 for Counsel to meet with Torie, in order to prepare for the cross-examination. At the consultation I brought to the attention of Counsel the discrepancy between the e-mail I received on the 9th of July 2020, where Torie was granted leave to cross-examine McBride and Khuba, whereas, in the notice of set down, he was granted leave to cross-examine McBride and Booysen. Mathibedi phoned the evidence leader to inform him of the

discrepancy and determine whether he intended to cross-examine Torie on the evidence of Khuba. Hulley SC confirmed that indeed he would cross-examine Torie on the evidence of Khuba.

26. Mathibedi SC informed Hulley SC that Torie had not applied to cross-examine Khuba because he was served with Rule 3.3 notices indicating that he was implicated by Booysen and McBride. As such, he had not perused or considered the affidavit and evidence of Khuba that allegedly implicated him. Mathibedi SC informed Hulley SC that the evidence of McBride is intricately linked with that of Khuba and Sesoko, and therefore they will need to be cross-examined. In order for Torie to cross-examine Khuba and Sesoko, an application to cross-examine had to be prepared. The telephone conversation that Mathibedi SC had with Hulley SC was confirmed in a letter that I addressed to the evidence leaders. I attach hereto such letter, marked as annexure **"LK5"**.

27. The legal team therefore had to shelve the affidavits of Baloyi, Mokgathle and Mashuga, in order to draft Torie's application to cross-examine Khuba and Sesoko. In order to draft the application to cross-examine Khuba and Sesoko, a substantive application for a postponement of the hearing had to be drafted and settled.

28. Due to the fact that Torie's matter was already set down, it was decided that Torie's matter should take preference over the drafting and settling of the

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affidavits of Baloyi and Mokgathle, which the legal team had already commenced.

29. The consultation with Torie, which culminated in the postponement application, commenced on the 20th of July 2020 and the application for postponement was finalised on the 26th of July 2020. The affidavit was deposed to on the 27th of July 2020 and the application was served on the same day.

30. Having noted the nature, extent and load of the work involved in this regard, a request was made to me for the briefing of another Counsel to beef up the then existing legal team. Adv L Vilakazi ("Vilakazi") was briefed on the 31st of July 2020.

31. As more fully set out in Torie's postponement papers, Torie was requested to specifically address the matters as set out in an e-mail dated the 26th of July 2020, from Hulley SC to the legal team, a copy of which is attached hereto, marked as annexure **"LK6"**.

32. Such matters were fully addressed in Torie's supplementary affidavit. Naturally the result thereof was that, in addressing the aforesaid matters, more time than anticipated was taken.

33. The preparations for the drafting and settling of the supplementary affidavit commenced on the 1st of August 2020 and the papers were settled on the 16th of August 2020, and deposed to on the 17th of August 2020. It is critical to

LK MM

indicate that in between, some members of the legal team had commitments from which they could not extricate themselves from.

34. Flowing from the fact that a detailed supplementary affidavit of Torie was filed to address the unfounded allegations levelled against him, it became apparent that the affidavits of Baloyi, Mokgathle, Mosing and Mashuga should also address the unfounded allegations against them, in detail. It is important to indicate that Counsel only received instructions to deal with the matter of Chauke on the 12th of June 2020 and they have not yet commenced with dealing with his affidavit.

35. Although Mashuga submitted his response in January 2020, similarly, I am advised by Counsel that they have not commenced with dealing with his affidavit.

36. The legal team had to carefully peruse the documents in order to identify issues that effect them, even those which were not contained in the Rule 3.3. notices.

37. A consultation occurred between the legal team and Baloyi, whereat he was advised of the strategy to be adopted in dealing with his matter. In view of the extensive and voluminous amount of work, quite a considerable time is required for fully identifying matters to be addressed in my affidavit.

38. In the morning on the 4th of September 2020, the legal team and myself consulted with the Applicant and advised him of the strategy to be adopted

and that his affidavit will be dealt with immediately after the finalisation of the affidavit of Baloyi. During the course of the day, I am advised that a consultation was held with Baloyi, advising him of the strategy that is to be adopted in settling his affidavit.

39. The legal team commenced with the reading of the relevant papers applicable to Baloyi on the 4th of September 2020. In between then and the 21st of September 2020, numerous consultations were held between Baloyi and the legal team. Baloyi's papers were finalised on the 21st of September 2020.

40. During these consultations, drafts of his affidavit was discussed with Baloyi and his input was required.

41. On the 9th of September 2020, a meeting was held with Hulley, at which stage Hulley indicated that the Commission was under pressure due to time constraints to finalise the proceedings. He further indicated that, in order to finalise the functions of the Commissions, there is that possibility that the Commission may adopt an approach akin to motion proceedings and that if that happens, the Chairperson will determine the issues on the papers submitted to the Commission. As such, whoever is implicated, is expected to set out detailed information in the affidavit, even those not referred to in the Rule 3.3. notices, as long as such information is germaine to the issues to be decided by the Commission.

42. During that meeting, the legal team was provided with topics of matters that Baloyi was requested to deal with. Such matters have been fully addressed in Baloyi's main affidavit.

43. A further meeting was held on the 16th of September 2020, which meeting lasted the whole day. The meeting was attended by the evidence leaders, investigators, Baloyi, Mosing, Chauke and other NPA officials, who are not represented by the State Attorney, and the legal team for the implicated NPA officials represented by the State Attorney.

44. During this meeting, questions and clarifications were sought from Baloyi regarding cases in which he was involved, decisions that he took for either prosecuting or refusing to prosecute matters that were referred to him, the correction of his juniors' decisions to prosecute and his decision for the charging of Adv N Jiba, the clarification of the phrase "bite the bullet".

45. All such matters have been fully addressed in Baloyi's main affidavit. Time frames were discussed and proposed for the delivery of various affidavits for the implicated NPA officials.

46. With regard to Baloyi, the proposed delivery date is 21 September 2020.

47. Since the 21st of September 2020, the legal team perused and analysed the documents pertaining to the Applicant and had consultations with the Applicant. The Applicant's papers were only finalised on the 28th of September 2020.

48. I am further advised by Mathibedi that he telephoned Hulley on the 19th of September 2020, with a request that the condonation application of Baloyi be delivered during the course of the week of the 21st of September 2020, due to time constraints. Hulley agreed to the request. The application was delivered on the 23rd of September 2020.

49. From a perusal of the objective facts of this matter, it is clear that the late launching of Baloyi's condonation application was not as a result of negligent and/or intentional conduct on the part of both Baloyi and his legal representatives. Such was as a result of the circumstances fully set out above, for which no-one can be blamed.

LUYANDA KOPMAN

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this 29th day of **SEPTEMBER 2020** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

MASIXOLE NGQUMSHE
Practising Attorney
Commissioner Of Oath
Office No N205 JSL Towers
259 Pretorius Street
Pretoria, 0001

LK1

Office of the State Attorney
Pretoria

Private Bag X 91
PRETORIA
0001

Salu Building
Ground Floor
Cnr Thabo Sehume & Francis Baard Str

Tel: (Switchboard): (012) 309 1500
(Direct Line): (012) 309 1564
(Secretary): (012) 309 1566
Fax: (General) (012) 309 1649/50

23rd JANUARY 2020

Enquires: MR L KOPMAN
Email: lkopman@justice.gov.za

My Ref: Kopman
Your Ref: NEW MATTER

ZONDO COMMISSION OF ENQUIRY
EVIDENCE LEADERS

Attention: Mr L Groenewald

CC: Ms Shannon Van Vuuren

We refer to the above matter and confirm that we are representing the following NPA officials.

THe follwoing NPA personnel are seeking opportunity to cross examine Mr Mcbride and Booysen.

1. George D. Baloyi
2. Ivy Thenga
3. Sibongile Mzinyathi
4. Anthony Mosing
5. Sello G.Maema
6. Torie Pretorius
7. Adelaide M.A. Modubu
8. Raymond R. Mathenjwa
9. Moipone Noko
10. Matric Lupondo
11. Bulelwa B. Vimbani
12. Marshall Mokgatlhe
13. Molatlhwa M. Mashuga

Please be advised that there is a real likelihood that this list may be extended to include other NPA personnel as a result of the evidence that has been provided by Mr Johan van Loggerenberg and instructions to make application to cross examine Mr Loggerenberg may be forthcoming shortly.

Regards.

L KOPMAN
For: State Attorney (PRETORIA)

LK 2.1

Kopman Luyanda

From: Kopman Luyanda
Sent: 26 November 2019 09:22 AM
To: 'Marco MP. Voller'
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller
So in total they are 8 and 6 who will attend the meeting?
Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 26 November 2019 05:20 AM
To: Kopman Luyanda
Subject: Re: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Mr Kopman

The following people have confirmed their attendance.

1. Gladstone Sello Maema
2. Marshall Mokhatle
3. Moipone Noko
4. Ivy Thenga
5. Molatlwa Mothagu
6. Anthony Mosing

Adv. George Baloyi cannot attend as he has a management meeting.

Adv. Toerie Pretorius is attending at chemo therapy at the time of the consultation.

I trust that this assists.

Regards

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Thursday, November 14, 2019 8:14:28 AM
To: Marco MP. Voller <MVoller@npa.gov.za>
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller
Please make sure that they are all available on the 29, so that we have one consultation.
I know that our counsel they are busy after 29 Nov 2019 they might be available next year February 2020.
Please confirm their availability on time so that I can also confirm with Counsel.
Thank you

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Sent: 14 November 2019 09:28 AM
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Subject: Re: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Kopman

I have distributed your email and requested affected prosecutors to make themselves available.

I will let you know how many are available.

Regards.

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Wednesday, 13 November 2019 4:15 PM
To: Marco MP. Voller
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller

I refer to our telephonic conversation of today.
Counsel they would like to consult on the 29 November 2019 at 10h00 in Adv Mathibedi's Chambers, Protea 1A, Sandton.

Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 04 November 2019 08:47 AM
To: Kopman Luyanda
Subject: FW: Rule 3(3) Notices iro National Prosecuting Authority Officials
Importance: High

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Sent: Thursday, 25 April 2019 16:46
To: Torie Pretorius (JP) <jppretorius@npa.gov.za>; Adelaide M.A. Modubu <Modubua@npa.gov.za>; Raymond R. Mathenjwa <Raymond.Mathenjwa@npa.gov.za>; Sello G.Maema <gsmaema@npa.gov.za>; Sibongile Mzinyathi <smzinyathi@npa.gov.za>; Moipone Noko <MNoko@npa.gov.za>; Anthony Mosing (A) <amosing@npa.gov.za>; Matric <MLuphondo@justice.gov.za>; Bulelwa B. Vimbani <BVimbani@npa.gov.za>; George D. Baloyi <gdbaloyi@npa.gov.za>; Ivy Thenga <Ithenga@npa.gov.za>; Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>; Molatlhwa M. Mashuga <mmashuga@npa.gov.za>
Subject: Fw: Rule 3(3) Notices iro National Prosecuting Authority Officials
Importance: High

Good day colleagues

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I will follow up with them tomorrow to secure a response from them in this regard and keep you abreast of further communication.

Regards.

Marco Voller

From: Marco MP. Voller
Sent: Tuesday, 23 April 2019 12:54 PM
To: PaulP@commissionsc.org.za
Cc: secretary@commissionsc.org.za; andrel@commissionsc.org.za; Nomvula NF. Mokhatla; Nomthetho Gcingca (NG)
Subject: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Adv. Pretorius SC

I am a legal adviser to the National Prosecuting Authority and been assigned to deal with matters relating to the Rule 3(3) Notices to Na officials arising out of submission before the "Zondo" Commission of Enquiry. In this regard, I attach hereto correspondence in this regard requesting a particular mechanism to apply to NPA officials, which may prove more convenient than piecemeal representations from NPA officials.

Please have regard to the attachment and return to me at your soonest?

Sincerely

Marco Voller
Legal Adviser
Leal Affairs Division

Tel: 012 845 6747

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This e-mail transmission, including the attachments (hereinafter collectively referred to as this e-mail) contains information that is confidential and subject to legal privilege intended only for use by the individual or entity to which it is originally addressed. Access by anyone else is unauthorised. If you are not the intended recipient or a person responsible for delivering this e-mail to the intended recipient, be advised that you have received this e-mail in error and you must delete this e-mail in its entirety immediately. Any unauthorised disclosure, dissemination, reliance, use, interception, alteration, tampering or any other form of corruption of this e-mail or any part hereof is strictly forbidden. E-mails cannot be guaranteed to be secure or free of errors or viruses. As such, NPA advise you to carry out your own virus checks, as neither NPA nor the sender accept any liability whatsoever, arising from this e-mail or for any consequence of its use or storage. No stated, tacit or implied view, opinion, advice or position of the sender necessarily represents that of the NPA. If verification of this e-mail is required, please request a hard-copy version on an official letterhead of the NPA. Copyright in this e-mail is and remains vested in the NPA and/or in the sender. NPA fully reserves the right, without notice, to monitor outgoing and incoming e-mail and other transmissions or communications on, in, through or by means of its e-mail and telecommunications systems.
The National Prosecuting Authority of South Africa

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Kopman Luyanda

From: Kopman Luyanda
Sent: 09 January 2020 08:23 AM
To: 'Marco MP. Voller'
Subject: RE: FW:

Dear Marco
Noted and thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 08 January 2020 06:48 PM
To: Kopman Luyanda
Subject: Re: FW:

Good day Mr Kopman

I will forward your email to the Prosecutors concerned and secure a response from them. Thereafter I will revert to you.

Regads.

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Wednesday, 08 January 2020 9:17:53 AM
To: Marco MP. Voller
Subject: FW:

Morning Mr Voller

Please find herewith our letter for your urgent attention.

Thank you

From: minolta@justice.gov.za [mailto:minolta@justice.gov.za]
Sent: 08 January 2020 11:24 AM
To: Kopman Luyanda
Subject:

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LK2.2

Kopman Luyanda

From: Kopman Luyanda
Sent: 23 January 2020 08:55 AM
To: 'Marco MP. Voller'
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller
Can you please call me urgent.
I tried to call you and there was no answer
I need urgently the names of those officials that we are representing so that I can send the list to Zondo evidence leaders now.
Thank you

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Sent: 26 November 2019 05:20 AM
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Subject: Re: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Mr Kopman

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Importance: High

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From: Marco MP. Voller
Sent: Tuesday, 23 April 2019 12:54 PM
To: PaulP@commissionsc.org.za
Cc: secretary@commissionsc.org.za; andrel@commissionsc.org.za; Nomvula NF. Mokhatla; Nomthetho Gcingca (NG)
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Please have regard to the attachment and return to me at your soonest?

Sincerely

Marco Voller
Legal Adviser
Leal Affairs Division

Tel: 012 845 6747

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The National Prosecuting Authority of South Africa

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Kopman Luyanda

From: Kopman Luyanda
Sent: 23 January 2020 11:18 AM
To: 'Marco MP. Voller'
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 23 January 2020 10:58 AM
To: Kopman Luyanda
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Good day Mr Kopman

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3. Sibongile Mzinyathi
4. Anthony Mosing
5. Sello G.Maema
6. Torie Pretorius
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10. Matric Lupondo
11. Bulelwa B. Vimbani
12. Marshall Mokgatlhe
13. Molatlhwa M. Mashuga

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1. Gladstone Sello Maema
2. Marshall Mokhatle
3. Moipone Noko
4. Ivy Thenga
5. Molatlwa Mothagu
6. Anthony Mosing

Adv. George Baloyi cannot attend as he has a management meeting.

Adv. Toerie Pretorius is attending at chemo therapy at the time of the consultation.

I trust that this assists.

Regards

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Thursday, November 14, 2019 8:14:28 AM
To: Marco MP. Voller <MVoller@npa.gov.za>
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller
Please make sure that they are all available on the 29, so that we have one consultation.
I know that our counsel they are busy after 29 Nov 2019 they might be available next year February 2020.
Please confirm their availability on time so that I can also confirm with Counsel.
Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 14 November 2019 09:28 AM
To: Kopman Luyanda
Subject: Re: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Kopman

I have distributed your email and requested affected prosecutors to make themselves available.

I will let you know how many are available.

Regards.

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Wednesday, 13 November 2019 4:15 PM
To: Marco MP. Voller
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller

I refer to our telephonic conversation of today.
Counsel they would like to consult on the 29 November 2019 at 10h00 in Adv Mathibedi's Chambers, Protea 1A, Sandton.

Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 04 November 2019 08:47 AM
To: Kopman Luyanda
Subject: FW: Rule 3(3) Notices iro National Prosecuting Authority Officials
Importance: High

From: Marco MP. Voller
Sent: Thursday, 25 April 2019 16:46
To: Torie Pretorius (JP) <jppretorius@npa.gov.za>; Adelaide M.A. Modubu <Modubua@npa.gov.za>; Raymond R. Mathenjwa <Raymond.Mathenjwa@npa.gov.za>; Sello G.Maema <gsmaema@npa.gov.za>; Sibongile Mzinyathi <smzinyathi@npa.gov.za>; Moipone Noko <MNoko@npa.gov.za>; Anthony Mosing (A) <amosing@npa.gov.za>; Matric <MLuphondo@justice.gov.za>; Bulelwa B. Vimbani <BVimbani@npa.gov.za>; George D. Baloyi <gdbaloyi@npa.gov.za>; Ivy Thenga <Ithenga@npa.gov.za>; Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>; Molatlhwa M. Mashuga <mmashuga@npa.gov.za>
Subject: Fw: Rule 3(3) Notices iro National Prosecuting Authority Officials
Importance: High

Good day colleagues

Please find attached my communication to the Adv. Paul Pretorius SC and the secretariat of the Zondo Commission, as well as the covering email. I am awaiting a response from them in this regard. They have telephonically and electronically acknowledged receipt of the communication.

I will follow up with them tomorrow to secure a response from them in this regard and keep you abreast of further communication.

Regards.

Marco Voller

From: Marco MP. Voller
Sent: Tuesday, 23 April 2019 12:54 PM
To: PaulP@commissionsc.org.za
Cc: secretary@commissionsc.org.za; andrel@commissionsc.org.za; Nomvula NF. Mokhatla; Nomthetho Gcingca

(NG)
Subject: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Adv. Pretorius SC

I am a legal adviser to the National Prosecuting Authority and been assigned to deal with matters relating to the Rule 3(3) Notices to Na officials arising out of submission before the "Zondo" Commission of Enquiry. In this regard, I attach hereto correspondence in this regard requesting a particular mechanism to apply to NPA officials, which may prove more convenient than piecemeal representations from NPA officials.

Please have regard to the attachment and return to me at your soonest?

Sincerely

Marco Voller
Legal Adviser
Leal Affairs Division

Tel: 012 845 6747

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The National Prosecuting Authority of South Africa

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LK3

Kopman Luyanda

From:	Garth Hulley <GarthH@commissionsc.org.za>
Sent:	09 July 2020 05:13 PM
To:	Kopman Luyanda; kopmanluyanda@gmail.com; mathibedi@thulamelachambers.co.za; zuko.madlanga@gmail.com
Cc:	William Nicholson; Susan Wentzel
Subject:	J. P. PRETORIUS, SC

Dear Mr Kopman / Adv. Mathibedi SC

As discussed a moment ago, please note that the chairperson of the Commission, the Honourable Deputy Judge President Zondo, has granted leave for your client, Adv. J. P. Pretorius, SC, to lead evidence and cross-examine Messrs R. McBride and I. Khuba. The hearing will take place on Wednesday, 29 July 2020. I will be the evidence leader and will be assisted by Susan Wentzel and W. Nicholson, who are copied in on this email. Please feel free to contact any one of us should you require any assistance.

I understand that Adv. Tebogo Mathibedi, SC will be assisted by Advocates Zuko Madlanga and K. Ramaimela. I have copied Adv. Madlanga in on this email but have been unable to locate the details of Adv. Ramaimela. Please provide me with Adv. Ramaimela's details, please.

I will also make sure that you have all the documents and are prepared to proceed.

Yours faithfully,

Garth I. Hulley, SC

COMMISSION OF INQUIRY INTO STATE CAPTURE |Hillside House, 3rd Floor, 17 Empire Road, Parktown, Johannesburg, 2193|Gauteng| South Africa|
mobile: (083) 442-8291|email: GarthH@commissionsc.org.za | www.sastatecapture.org.za

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LK 4

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2193
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Email: inquiries@sastatecapture.org.za
Web: www.sastatecapture.org.za

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION")

NOTICE OF SET DOWN

ADVOCATE JACOBUS PETRUS PRETORIUS

---

13 July 2020

To: Mr. Luyanda Kopman
THE STATE ATTORNEY PRETORIA
Client: Advocate Jacobus Petrus "Torie" Pretorius (hereinafter referred to as "your client")

Email: LKopman@justice.gov.za
CC: jppretorius@npa.gov.za

Dear Sir

1. Please be advised that:

Wednesday, 29 July 2020 at 10h00

has been set down as the date on which your client is required to appear before the Commission to give evidence, answer questions and cross-examine Mr. Robert John McBride and Major-General Johan Booysen.

LK6 JPP

Tebogo Mathibedi

From: Garth Hulley <GarthH@commissionsc.org.za>
Sent: Sunday, 26 July 2020 9:35 AM
To: Tebogo Mathibedi; zuko.madlanga@gmail.com; Kgaogelo Ramaimela; Jacobus Pretorius; Marco MP. Voller; luyanda kopman
Cc: Susan Wentzel
Subject: ADV. J. P. PRETORIUS SC: HEARING DATE 29 JULY 2020

Hi Frank

Pursuant to our discussion this morning, I note your indication that you have instructions to bring an application for a postponement. As previously advised, it was our intention to oppose such an application if it were brought. I have since then being considering your concerns and the issues you have previously raised and how I might be of assistance to you. I have discussed it also with Susan. I wish to propose a way forward that may be mutually beneficial and, no doubt, may assist in reducing the issues in dispute and make it easier to get to the truth. First, a bit of background to my proposal.

Adv. Pretorius, SC has been implicated by several people, including Messrs McBride, Sesoko and Khuba and Gen. Booysen. I imagine he has been implicated by other people, as well, although I cannot identify all the people at this point in time. The essence (and without limiting this) of the allegations against him in respect of the aforesaid witnesses relates to Adv. Pretorius' role as the head of the Priority Crimes Litigation Unit and that Unit's role in prosecuting certain people. In a nutshell (and I merely give a short list, there may be more), the allegation is that the Unit was involved in the prosecution relating to:

1. The so-called SARS Rogue Unit.
2. The Cato Manor "*hit squad*" and particularly Gen. Booysen.
3. McBride, Sesoko and Khuba on charges of Defeating the Ends of Justice, Fraud and Perjury and other charges.
4. Paul O'Sullivan and Sarah-Jane Trent.
5. Glynnis Breytenbach.
6. SAA.
7. The Rendition matter.

The Unit was also involved in many prosecutions where the investigations were conducted by Crimes Against the State (CATS).

Against this backdrop, what I propose is the following:

1. Adv. Pretorius file a new affidavit within a specified time period. I'm happy with 10 August 2020.
2. The affidavit should be specific and not vague. It should be prepared in the active voice and not the passive. In other words, if an allegation is made, it must be clear whether Adv. Pretorius is making the allegation or the allegation is made by somebody else. If he relies upon another person, he should state who that person is. He should provide corroboration for his assertions including documentary. If he knows of the existence of a document but does not have it, he must state where it is and who has control over it.

3. Where either McBride or Booysen has made an allegation that he feels is either vague, unsubstantiated or hearsay, he must nevertheless deal with it.

I trust this is of assistance to you.

Best regards,

Garth I. Hulley, SC

COMMISSION OF INQUIRY INTO STATE CAPTURE | Hillside House, 3rd Floor, 17 Empire Road, Parktown, Johannesburg, 2193 | Gauteng | South Africa |
mobile: (083) 442-8291 | email: GarthH@commissionsc.org.za | www.sastatecapture.org.za

LK 7 JM

Office of the State Attorney

Pretoria

Private Bag X 91
PRETORIA
0001

Salu Building
Ground Floor
Cnr Thabo Sehume & Francis Baard Str

Tel: (Switchboard): (012) 309 1500
(Direct Line): (012) 309 1564
(Secretary): (012) 309 1566
Fax: (General) (012) 309 1649/50

20 July 2020

Enquires: MR L KOPMAN
Email: lkopman@justice.gov.za

My Ref: 5857/2019/Z16/mp
Your Ref: RPS18/0193/WN

Acting Secretary,
Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector ("*the Commission*")
2nd floor, Hillside House
Empire Road,
Parktown
Johannesburg
2193

Dear Ms. Brigitte Shabalala

RE: HEARING OF 29 JULY 2020- DR PERTORIUS SC

1. We refer to the abovementioned matter in particular the telephonic conversation between, the evidence leader, Adv Hulley SC and our lead counsel Adv Mathibedi SC of 20 July 2020.

2. The understanding of the legal team and that of our client is that the purpose of the Commission is to:

1.1 To determine the truth,

1.2 To give implicated persons such as our client a proper and fair hearing,

1.3 To ensure that the full process as set out in the Rules unfolds which *inter alia* includes the serving of the required notices,

1.4 The giving of fair opportunity to cross examine the witnesses who implicated our client, and

1.5 The application of the principle audi alteram partem rule.

3. Absent one or all of the aforesaid principles will amount to a miscarriage of justice. You have advised us that our client's evidence in chief, cross examination, the cross examination of Mr RJ McBride and Major General Booysen will all be concluded on 29 July 2020. A perusal and analysing of the transcribed record demonstrate that the evidence in chief of RJ McBride took four (4) days namely 11, 12, 15 and 16 April 2019. The evidence of Major General Booysen also took four (4) days namely 17, 18 April, 2 and 3 May 2019. In total the evidence of the aforesaid witnesses took eight (8) days and therefore it will be unjust, unfair and a miscarriage of justice to expect our clients evidence in chief, his cross examination, the cross examination of Mr McBride and Major General Booysen to be concluded in one day. Our client's right in this regard are protected by section 33 and 34 of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*).

4. With regard to the evidence of Messrs Khuba and Sesoko the notice of set down does not even deal with that. It came to the attention of the legal team and our client for

the first time today that reference of their evidence will be during the cross examination of our client.

5. Since receiving the notice of set down dated 13 July 2020, the legal team's preparation only focused on the evidence of Mr McBride and Major General Booysen. It is very worrying that had the telephone conversation not been made the legal team together with our client were going embarrassed in an open forum relating to the evidence of Messrs Khuba and Sesoko which is intended to be put to our client.

6. It is not in the interest of justice and our client that litigation by ambush should be conducted. We are of the firm view that, the fact that, the Commission is under pressure to finalise its workings at the expense and detriment of our client is not in the interest of the Commission. Similarly, our client's rights should not be trumped by the fact that the workings of the Commission were affected by Covid-19. It is not only the Commission's workings that were affected by Covid-19. There are no reasons why a request is not be made to the President to extend the lifespan of the Commission in order to ensure that persons whose rights, like our client, are affected are given a proper and fair opportunity to present his case. It should be borne in mind that the evidence already led against our client has serious reputational, professional and personal implication. Not only is our client affected by such evidence but also hard working and dedicated career prosecutors.

7. Be advised that unless our client is given fair and proper hearing he reserves his rights not to take part in the proceedings, as such capped participation will not achieve the desired result.

8. Further be advised that despite request we have not be provided with the following documents:

MM2.

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

EXPLANATORY AFFIDAVIT

I, the undersigned,

MARCO VOLLER

do hereby declare under oath and state that: -

1. I am an adult legal adviser employed as such at the Legal Affairs Division of the National Prosecuting Authority, of Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

2. The facts herein contained in this affidavit are within my personal knowledge and unless stated to the contrary or is evident from the context, are to the best of my knowledge and belief both true and correct.

3. I have read the affidavit deposed to by **MARSHALL MOKGATLHE** together with annexures, and confirm the contents thereof insofar as same relates to me.

L

BACKGROUND

4. Adv Marshall Mokgatlhe (*"Mokgatlhe"*) was the first to be issued with a Rule 3(3) notice in relation to the evidence of General Johan Booysen (*"Booysen"*).

5. This notice was received electronically on 10 April 2019 from Boipelo B. Ratshikana of the Zondo Commission.

6. Mokgatlhe was assigned to the Specialised Commercial Crimes unit at the time and escalated the correspondence and Rule 3(3) notice to his supervisor, Adv. Mpho Doubada, on onward referred the matter to the Head of the Legal Affairs Division. Legal Affairs Division deals with all civil matters against the NPA and the NDPP.

7. Adv. Nomvula Mokhatla, the Head of Legal Affairs Division (LAD) then allocated the file to me to deal with.

8. I attach hereto copies of the emails that I received along with the Rule 3(3) notice in respect of Mokgatlhe, marked as annexure **"MV1"**.

9. Later that morning I received 24 such e-mails with Rule 3(3) notices attached to them as relates to the evidence of both Robert McBride and Johan Booysen.

10. The latter emails related to the following NPA officials:

    10.1. Adv. Sibongile Mzinyathi,

    10.2. Adv. Marshall Mokhatlhe,

10.3. Adv. Anthony Mosing,

10.4. Adv. Bulelwa B. Vimbani,

10.5. Adv. Matric Luphondo,

10.6. Adv. George D. Baloyi,

10.7. Adv. Molatlhwa M. Mashuga,

10.8. Adv. Ivy Thenga,

10.9. Adv. Moipone Noko,

10.10. Adv. Vernon Nemaorani,

10.11. Adv. Torie Pretorius (JP), and;

10.12. Adv. Sello G.Maema.

11. The emails were records of interactions between various parties within the NPA regarding the appropriate manner to deal with the Zondo Commission evidence and challenging the correctness of it.

12. All these emails predated my involvement with these matters.

13. On 15 April 2019, I received an email instruction that the matters involving "implicated prosecutors" would be allocated to me. At the time, it was my second week at LAD.

14. I attach hereto email to me evidencing the same, marked as annexure **"MV2"**.

15. I consulted telephonically and in person with some of the "implicated" prosecutors regarding the way forward and their enthusiasm or lack thereof in some cases to cross examine witnesses that had been before the Commission. I cannot recall the specific individuals that I consulted. Having held these brief consultations and been involved in litigation for the NPA and NDPP, I quickly realised that opposing the evidence in the manner allowed by the evidence leaders would plunge the opportunity and presentation of the opposition to the evidence and witnesses, Booysen and McBride in particular, into chaos.

16. I immediately attempted to engage with the evidence leader at the time, Adv. Paul Pretorius, SC but was advised that I should make written representation to him, which I did on 23 April 2019.

17. On 30 April 2019, I sent a follow up email to Adv. Pretorius SC, since I had not had a response from him to my email of 23 April 2019.

18. I attach hereto a copy of both emails and the letter that I sent to him, marked as annexure **"MV3"** and **"MV4"**, respectively.

19. My letter to Adv. Pretorius, SC is self-explanatory.

20. In essence I had suggested an alternative method where the NPA officials would minimise duplication of opposition and indeed appointment of multiple

Counsel to cross examine witnesses and challenge evidence before the Zondo Commission.

21. The suggestion in essence was for the NPA to given special consideration, because of the number of "implicated officials", and I anticipated that other evidence would be heard at a later time from other witnesses, that would "implicate" other NPA officials which had not been heard been placed before Judge Zondo at that time.

22. This culminated into a meeting with Adv. Pretorius, SC at the office of the Zondo Commission at 16:30 at Hillside House, in Parktown, Johannesburg.

MEETING EVIDENCE LEADER, ADV PAUL PRETORIUS SC, 17 APRIL 2019

23. The meeting with Adv. Pretorius, SC, was to discuss the matters that I had raised in the letter sent to him and the difficulty and unique nature of the evidence that would be led against the NPA officials and more specifically the difficulty that presented in that evidence against prosecutors would be ongoing by several witnesses who may have had an axe to grind agisnt prosecutors.

24. Having watched broadcasts of the Zondo Commission proceedings it was evident that some "evidence" placed before it was of very little substance, hearsay and not limited to the affidavits submitted.

25. Accordingly, heavy reliance would have to be placed on the transcripts of the hearings and analyses of the transcripts would be time consuming as

witnesses had been allowed to stray so far from their written representations, in some cases for hours.

26. This matter was also raised with Adv. Pretorius SC who took copious notes and advised that he would return to me after addressing the challenge with the Commissioner.

27. I attach hereto a copy of the Feedback Report that I compiled regarding my meeting with Advocate Pretorius SC, marked as annexure **"MV5"**.

28. In the interim I had finalised the memorandum to cause the State Attorney to engage Counsel to represent "implicated" NPA officials which was finally signed off on 13 May 2019.

29. A copy is attached hereto, marked as annexure **"MV6"**.

MEETING EVIDENCE LEADER, ADV. PAUL PRETORIUS SC, 9 SEPTEMBER 2019

30. Having not heard back from Adv. Pretorius SC regarding the matter raised in our meeting of 17 April 2019, and the fast approaching end of the year 2019, arranged another meeting with Adv. Pretorius SC, which took place at the Commission venue on 9 September 2019.

31. Again, I raised challenges that I had raised in April 2019, to which Adv. Pretorius SC in essence advised would have to be heard in 2020, as the year was drawing to an end and that the Zondo Commission's diary was full for the balance of what remained of the year 2019.

32. I attach hereto, marked as annexure **"MV7"**, a copy of my record of the meeting with Adv. Pretorius SC which I addressed to him on 11 September 2019 which is self-explanatory.

APPOINTING PRESENT COUNSEL

33. After meeting with the "implicated" officials in person and in camera, it was resolved that present Counsel be engaged to represent "implicated" NPA officials.

34. On 30 September 2019, I addressed an e-mail enclosing instructions to the office of the State Attorney to engage with present Counsel and necessary mandates and documents were signed and forwarded appropriately to the State Attorney.

35. I attach hereto a copy of said instructions and acknowledgment of the same from the State Attorney, marked as annexure **"MV8"** respectively.

36. By this time, I had not heard back from Adv. Pretorius SC regarding the proposed mechanism for dealing with NPA matters specifically and have not at the time of signing this memorandum, heard back from the Zondo Commission regarding the proposal.

37. Accordingly, I am unaware if this proposal was ever tabled with the Commissioner.

38. After meeting with Counsel and "implicated" officials, I left these matters on Counsel's hands for further attention and consideration.

MARCO VOLLER

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this ___ day of **SEPTEMBER 2020** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

MM3

Annexure A

QUALITY ASSESSMENT CHECKLIST FOR PERFORMANCE AGREEMENTS OF SMS MEMBER

Name of the SMS Member: Jan Ferreira PMDS Cycle: 2015/2016

No.	Key Element	Yes/No	Remark(s)
1.	**Cover page should indicate:**		
	• Both name of the supervisor and employee,	Yes	
	• Designation of parties to agreement	Yes	
	• Period of agreement (performance cycle)	Yes	
2.	**Job Details should indicate:**		
	• Personal Particulars		
	• Component	Yes	
	• Location		
	• Salary Level	✓	
	• Notch (package)		
	• Occupational Classification		
	• Designation		
3.	**Job Purpose should indicate:**		
	• The purpose of the Job clearly formulated?	✓	
4.	**Job Functions should indicate:**		
	• The Job functions describe the key functions of the Jobholder?	✓	
5.	**Reporting requirement:**	✓	
	• The PA indicates the name of the supervisor?		
6.	**Performance Appraisal Framework:**		
	6.1. Key Results Areas (KRAs)		
	• The KRAs aligned to the Strategic plan; APP and operational plan?	✓	
	• All KRAs are weighted?	✓	
	• Are the KRAs appropriately weighted (i.e. *i.t.o. KRAs should be prioritised and weighted according to the impact and importance - the higher the important & impact = the higher the weight to the KRA and visa verse*		
	• Check KRA with weight that exceeds 30%		
	• The KRAs total weight adds up to 100%?		
	• The KRAs include Batho Pele Principles?		
	Note: KRAs that are almost similar or share similar indicators should be collapsed into one. Activities and outcomes that could possibly be covered as CMCs should be excluded under the KRAs		
	Obligatory KRAs for HODs/DG Integrated governance	N.a.	
	Regional Integration		
	Minimum Information Security Standard		
	6.2. Core Management Criteria (CMCs)		
	• The PA indicate the 3 compulsory CMCs?		
	• The CMCs weighted?	✓	
	• The CMCs include Batho Pele Principles?		
	• The CMCs total weight add up to 100%?		
7.	**Developmental Requirements**		
	• The PA indicates developmental areas?	✓	

732001/2/13362/07

SENIOR MANAGEMENT PERFORMANCE AGREEMENT

NATIONAL PROSECUTING AUTHORITY

BETWEEN

JAN MAATJAN FERREIRA

SMS MEMBER/LP 10 SPECIALIST LITIGATOR
(REPORTING TO REGIONAL HEAD)

AND

MARSHALL MOKGATLHE

ACTING REGIONAL HEAD: PRETORIA
(SUPERVISOR)

SPECIALISED COMMERCIAL CRIME UNIT

PERIOD OF AGREEMENT:
1 April 2015 to 31 March 2016

National Prosecuting Authority SMS/LP 10 Reporting to Regional Head Performance Agreement

Surname	Ferreira	Initials	JM
Name	Jan Maatjan	Persal No.	11354836
Job Title	Deputy Director of Public Prosecutions	Salary Band/level	14
Supervisor	M Mokgatlhe	Department	SCCU Pretoria
Office/Unit	Pretoria	Performance Year	2015/2016
Date of 3 month informal review	Mid July 2015	Date of formal 6 month review	Mid October 2015
Date of 9 month informal review	Mid January 2016	Date of final assessment	April 2016

1. REPORTING REQUIREMENTS/LINES & ASSESSMENT LINES

Continuous evaluation and discussions between the supervisor and employee are critical factors in the success of performance management.

The employee shall report to Marshall Mokgatlhe Deputy Director of Public Prosecusions as her/his supervisor on all parts of this agreement. The employee shall:

1. Timeously alert the supervisor of any emerging factors that could preclude the achievement of any performance agreement undertakings, including the contingency measures that she/he proposes to take to ensure the impact of such deviation from the original agreement is minimised.

2. Establish and maintain appropriate internal controls and reporting systems in order to meet performance expectations.

3. Discuss and thereafter document for the record and future use any revision of targets as necessary as well as progress made towards the achievement of performance agreement measures.

In turn the supervisor shall:

1. Create an enabling environment to facilitate effective performance by the SMS member/LP10.
2. Provide access to skills development and capacity building opportunities.
3. Work collaboratively to solve problems and generate solutions to common problems within the department that may be impacting on the performance of the SMS member/LP10.

4. Make sure that the workload of the employee is manageable and comparable to that of other employees on the same rank and level.
5. The supervisor acknowledges that the effective execution of the job functions outlined in Section 3 may be affected by:
   a) Reprioritising of targets or target dates;
   b) CEO, the DCEO, and/or other stakeholders;
   c) The availability of the following resources:
      i) Finance,
      ii) Human resources (suitably qualified, trained and capacitated personnel),
      iii) Equipment, and
      iv) Accommodation; and
   d) Timeous decisions on key milestones to enable projects to progress.

6. The parties further acknowledge that any of the above may directly or indirectly affect the officer's functions, responsibilities, attainment of targets and that the same will in such instance have to be amended where and when required. Any such amendments must be agreed upon by the parties and thereafter incorporated in this agreement and /or the relevant workplan/s.

2. JOB PURPOSE, JOB DESCRIPTION/DETAILS AND JOB FUNCTIONS

Personal Particulars	JM FERREIRA	**Component**	SCCU
Location	PRETORIA	**Salary Level**	14
Notch (Package)	R1129866.00	**Occupational Classification**	DDPP
Designation	SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTION		
Job purpose	As the SMS member/LP 10 reporting to the Regional Head, the SMS member/LP 10 is responsible to assist the Regional Head in managing the prosecution of commercial crime as well as managing and directing investigation and prosecution of serious, organised and complex financial crime and corruption. The SMS member/LP 10 has also the responsibility to assist the Regional Head in overseeing, training and giving guidance in commercial criminal matters and / or represent the State in complex/high profile matters in the Regional Court; High Court, the Supreme Court of Appeal and the Constitutional Court. He/she must also assist the Regional Head to communicate/ liaise with stakeholders/others at high level. He/she has to assist the Regional Head in ensuring the development and implementation of the operational plan of the Regional Office and must assist the Regional Head with the proper management and utilization of resources according to the strategic objectives. He/she also must assist the Regional Head to manage and assess the performance of the Regional Office, the staff members and seeing to their general training and developmental needs. [1]The purpose of this position further is to provide legal services in specialised fields of law affecting the NPA which may include but is not limited to the conducting of complex and specialised prosecutions, civil and legal drafting.To this end the Specialist Litigant, having the right to appear in a High Court as contemplated in Section 2 and 3(4) of the Right of Appearance in Courts Act, 1995 (Act No 62 of 1995) and having outstanding litigation skills (legal knowledge, legal drafting skills and advocacy skills) with extensive experience in both criminal and civil matters in the High Court as well as management experience, will oversee, train and give guidance in criminal and civil matters and / or represent the State in complex / high profile matters in the High Court, the Highest Court of Appeal and the Constitutional Court; communicate/ liaise with stakeholders / others at high levels; work independently and make independent decisions; align resources according to the NPA strategic objectives and mentor and train State Advocates.		

[1] This part must be inserted after the part above in respect of LP10s.

Job functions/ responsibilities	To assist the Regional Head in managing and directing the activities of the Regional Office; To assist the Regional Head in exercising oversight on any decisions to prosecute and to assist the Regional Head in giving any necessary advice and reports to the Special Director; To ensure that all decisions to prosecute comply with all relevant legal prescripts, the Constitution and all applicable policies, procedures and directives; To assist the Regional Head in ensuring that plans are in place to promote good stakeholder and partner engagement; To assist the Regional Head in monitoring delivery of the Regional Office in line with the strategy and plans; In order to ensure that the Regional Office meets its targets, to assist the Regional Head in continuously analysing, reviewing and monitoring the operational performance of the office in order, *inter alia*, to identify any operational deficiencies and to monitor the achievement of strategic objectives and annual targets; To assist the Regional Head in developing any performance or delivery improvement plans or to assist the Regional Head to make such interventions as circumstances may require; To assist the Regional Head in overseeing the development and implementation of appropriate employee development plans as well as appropriate employee performance management systems; [2]To conduct specialised litigation of complex / high profile criminal and civil matters in the High Court, the Highest Court of Appeal and the Constitutional Court; To study case dockets and other documents relating to criminal matters, make and review decisions with regard to the institution of criminal proceedings; To prepare cases for court including the acquisition of additional evidence and drafting charge sheets, indictments and other court documents; To present the state's case in court, including examination and cross-examination of witnesses and addressing the court on conviction and sentence;. To study appeals and reviews, prepare opinions and heads of argument and argue cases in the appropriate court; To appear in motion applications pertaining to criminal and civil matters; To conduct research and provide advice / legal opinion / case law relevant to specialised field of law; To manage the portfolio assigned by the Regional Head; To train and guide Advocates, Prosecutors and stakeholders in respect of all specialised matter.

3. PERFORMANCE APPRAISAL FRAMEWORK

Performance will be assessed according to the information contained in the work plan (attached as Appendix A) and the Core Management Criteria (CMC) framework (attached as Appendix B). The specific KRAs and CMCs together with their weightings are set out in the tables below.

KEY RESULT AREAS (KRAs)	Weight (%)
1. Court work	50
2. Chamber work	40
3. Operations management and governance	10

[2] This part must be inserted after the part above for LP10s.

KEY RESULT AREAS (KRAs)	Weight (%)
TOTAL	**100**

CORE MANAGEMENT CRITERIA	Weight (%)
1. People Management & Empowerment	20
2. Client Orientation & Customer Focus	20
3. Service Delivery Innovation	20
4. Strategic Capability and Leadership	20
5. Honesty and Integrity	5
6. Communication	10
7. [3]Financial Management	5
TOTAL	100

3.1 The SMS member/LP 10 undertakes to focus and to actively work towards the promotion and implementation of the KRAs within the framework of the laws and regulations governing the Public Service. The specific duties/outputs required under each of the KRAs are outlined in the attached work plan.

3.2 The SMS member/LP 10's assessment will be based on her/his performance in relation to the duties/outputs outlined in the attached work plan as well as the CMCs indicated above.

4. DEVELOPMENTAL REQUIREMENTS

Areas in which development is required for the current contract period includes:

The plan for addressing developmental gaps is attached as Appendix C.

5. TIMETABLE AND RECORDS OF REVIEW DISCUSSIONS AND ANNUAL APPRAISAL

The Performance **Progress Review** and Feedback Session – between the SMS member and the supervisor - will occur at the end of every quarter, while the **Annual Evaluation** Session will occur at the end of **March 2016**.

6. MANAGEMENT OF PERFORMANCE OUTCOMES

[3] The SMS Handbook stipulates that this CMC must be in all SMS members' contracts.

Both superior and/or under performance of the SMS member/LP 10 will be managed in accordance in terms of paragraphs 32 to 43 of the SMS Performance Management and Development System, dated 1 April 2002 as amended/ processes for the Public Service.

8. DISPUTE RESOLUTION

7.1 Any disputes about the nature of the senior manager/ specialist litigant's PA, whether it relates to key responsibilities, priorities, methods of assessment and/or salary increment in this agreement, shall be mediated by a suitably qualified person nominated by the Department of Public Service Administration.

7.2 If this mediation fails, the dispute-resolution procedures referred to in Chapter 4 of the SMS Handbook / formal dispute process for the Public Service will apply.

9. AMENDMENT OF AGREEMENT

Amendments to the agreement should be in writing and can only be effected after discussion and agreement by both parties.

10. SIGNATURES OF PARTIES TO THE AGREEMENT

The contents of this document have been discussed and agreed with the SMS member / LP 10 concerned.

Name of SMS member/LP 10:

Signature: .....

Date: 18/5/2010

AND

Name of supervisor of SMS member/LP 10:

Signature: .....

Date: 18/5/2010

Appendix A

Work plan: Key Responsibility Areas (total weight 100%, 4/5th of overall score)

It is agreed that the SMS member/LP 10 will directly contribute to the NPA's vision and mission, the NPA's Strategic Plan, Annual Performance Plan and Strategic Objectives and efficient operation management in the region by doing the following:

	Objectives, Deliverable/Indicators targets *(objectives and Deliverable/Indicators/ indicators from unit annual plan as applicable to official)*	**Activities/Outputs** *(activities and outputs from unit annual plan and other activities/outputs/special assignments as applicable to official)*	**Weight For each Deliverable/Indicator**
KRA 1: Court work			**Total weight:**
1	Deliverable/Indicator: % of the following regional targets met: Conviction rate Number of convictions Number of cases finalised with verdict Number of criminal matters finalised Number of accused convicted of corruption where amount benefited is more than R5m Number of govt officials convicted of corruption or offences related to corruption Value of compensation orders obtained	▪ Assist the Regional Head to maintain processes to co-ordinate complex commercial crime in the region, inclusive of managing and coordinating the information regarding the cases ▪ Assist the Regional Head to implement pre-trial conferencing ▪ Assist the Regional Head in escalating where appropriate bottlenecks and challenges which inhibit the speedy prosecution of cases ▪ Assist the Regional Head in the development, implementation, and monitoring of strategies to deal with the cases including corruption by constant engagement with the judiciary and SAPS. ▪ Assist the Regional Head in contributing to effective court management ▪ Assist the Regional Head in engaging with the judiciary regarding case flow management ▪ Assist the Regional Head in contributing to the REEC	50%
	Target 70 % of targets reached (5/7)		

2	Deliverable/Indicator[4] % of gaps in prosecutors' court work addressed by mentoring, coaching and training	▪ Assist the Regional Head to train prosecutors with regard to court work ▪ Assist the Regional Head in mentoring and coaching of prosecutors with regard to court work ▪ Assist the Regional Head in doing spot checks of prosecutors' court work	
	Target 100 % of gaps in prosecutors' court work addressed by mentoring, coaching and training		
3	Deliverable/Indicator: Own conviction rate:	▪ Conduct quality trial proceedings	
	Target **93%** As agreed with HoU		
4	Delive:able/Indicator: Number of own finalised cases	▪ Conduct trial proceedings in a timely manner	
	Target: **9** Number as agreed with HoU		
5	Deliverable/Indicator: % success rate in own appeals	▪ Deal with appeals	
	Target: **100%** % success rate as agreed with HoU		
6	Deliverable/Indicator: % success rate in civil proceedings dealt with	▪ Deal with civil proceedings	
	Target **94%** % success rate as agreed with HoU		
7	Deliverable/Indicator Asset forfeiture	▪ Assist the Regional Head to monitor chapter 5 AFU	

[4] Legal work has been highlighted in yellow

	Target 100 % of cases referred to AFU accepted by AFU Quarterly meetings with AFU (4) % of successful Chapter 5 & 6 applications as agreed with HoU	applications (section 18 confiscation applications) ▪ Assist the Regional Head in extending the use of asset forfeiture ▪ Assist the Regional Head in liaising with AFU • Bring Chapter 5 & 6 applications	
8	Deliverable/Indicator % Satisfactory court work as demonstrated by evidence submitted to supervisor (record of court proceedings, recommendations received, spot checks by supervisor, etc.)	▪ Conduct trial proceedings in effective and competent manner	
	Target: 100% satisfactory court work		

Resource requirements for indicators above:

- Sufficient prosecutors
- Sufficient dedicated courts
- Sufficient space on dedicated and NPS court rolls
- Sufficient magistrates/judges
- Sufficient SAPS members
- Sufficient WPO, AFU personnel
- Not too many cases.
- Not too many F1 cases.

Enabling conditions for indicators above:

- Vacant prosecutors posts filled
- Dedicated courts established
- Enough courts
- Amount of cases
- Difficulty level of cases
- Co-location of courts, prosecutors and SAPS
- Screening of cases
- Enough cases investigated to trial-ready stage
- Regular interaction with SAPS, the judiciary and other stakeholders
- Prosecutor Guided Investigation Methodology
- Procedure for liaison with WPO/AFU
- Availability and amenability of judiciary and legal aid to discuss speedy finalization
- Judiciary amenable to discuss case flow management

	• Existence of PEEC		
KRA 2: Chamber work			**Total weight:**
1	Deliverable/Indicator: Drafting of court documents Target Quality court documents: 100 % satisfactory work	▪ Draft court documents, e.g. charge sheets, indictments, further particulars, section 105A plea- and sentence agreements, heads of argument, Heads of argument to be timeously filed, concise, logical and well-structured reflecting proper evaluation of the evidence and law, with reference to appropriate and most recent authorities, and with accurate, complete list of authorities and properly indexed	40%
2	Deliverable/Indicator: Preparation for trial: Consultation with witnesses, preparation of documentary evidence Target Consultation with witnesses timeously and thoroughly; Thorough preparation of documentary evidence: 100 % satisfactory work	▪ Consult with witnesses ▪ Prepare documentary evidence	
3	Deliverable/Indicator: Legal opinions drafted Target 100 % satisfactory work	▪ Draft legal opinions with proper evaluation and thoroughly researched law	
4	Deliverable/Indicator: Draft applications for Mutual Legal Assistance, Racketeering Authorisation, Centralisation Authorisation	▪ Draft applications for Mutual Legal Assistance, Racketeering Authorisation, Centralisation Authorisation with a proper summary of facts, evaluation of	

	Target 100 % satisfactory work in accordance with NPA instructions	evidence and motivated recommendation/request	
5	Deliverable/Indicator: Draft recommendation with respect to representations	▪ Draft thorough, well-motivated recommendation with respect to representations with reference to case law if applicable	
	Target 100 % satisfactory work % of recommendations followed by HoU (as agreed with HoU)		
6	Deliverable/Indicator: Attend to High Profile and complex decision dockets	▪ Attend to High Profile and complex decision dockets	
	100 % proper assessment, quality decision in timely fashion and in accordance with NPA Policy Directives and Prosecution Policy		
7	Deliverable/Indicator: Case plan cases	▪ Case plan cases	
	100 % adherence to PGI methodology, proper case plan drafted, case plan meetings and follow up meetings held timeously		
8	Deliverable/Indicator: Ensure quality of case planning by prosecutors	▪ Assist the Regional Head in doing case plan audits for quality assurance	
	% of prosecutors whose case plans were checked		
9	Deliverable/Indicator: Quality assurance of charge sheets, further particulars, heads of argument, etc. by prosecutors	▪ Assist the Regional Head in doing quality assurance of charge sheets, further particulars, heads of argument, etc. by prosecutors	
	% of prosecutors whose work were checked		
10	Deliverable/Indicator	▪ Assist the Regional Head in	

	% of gaps in prosecutors' chamber work addressed by mentoring, coaching and training Target 100 % of gaps in prosecutors' chamber work addressed by mentoring, coaching and training	training prosecutors with regard to chamber work ▪ Assist the Regional Head in mentoring and coaching prosecutors with regard to chamber work ▪ Assist the Regional Head in doing spot checks of prosecutors' chamber work	
15	Deliverable/Indicator: Comply with Batho Pele principles: ▪ Consultation ▪ Service standards ▪ Access ▪ Courtesy ▪ Information ▪ Openness and transparency Target 80 % of complaints received resolved 100 % of representations finalised timeously: Report and docket submitted to head office within 7 days of request 1 Training session with prosecutors on Batho Pele principles Implement and execute the Service Delivery Improvement Plan project	▪ Assist the Regional Head to resolve complaints ▪ Assist the Regional Head to monitor turnaround time of representations ▪ Assist the Regional Head to finalise representation report and submit copy of docket ▪ Assist the Regional Head to hold training session of prosecutors on Batho Pele principles ▪ Assist the Regional Head in implementing and executing the Service Delivery Improvement Plan project	
Resource requirements: • Corporate services support • Sufficient prosecutors • Sufficient SAPS members • Stakeholder support • Manageable case load			

Enabling conditions:

- Vacant prosecutor posts filled
- Case dockets expeditiously brought in by SAPS
- User-friendly environment
- RH available to public
- Prosecutors trained in Batho Pele
- Service Delivery Improvement Plan project in place
- Prosecutor Guided Investigation Methodology followed by prosecutors and SAPS members
- Co-location of courts, prosecutors and SAPS
- Screening of cases
- Regular interaction with SAPS, the judiciary and other stakeholders
- Joint strategy with SAPS
- 'Deadwood' clean-out sessions with SAPS

KRA 3: Operations management and Governance			Total Weight:
1.	Deliverable/Indicator: Ensure that case planning by prosecutors is done timeously and case plan meetings and follow up meetings are held according to PGI methodology	▪ Assist the Regional Head to maintain the timeliness of case planning	10%
	Target Quarterly case audits: 4		
2.	Deliverable/Indicator: Analyse performance information and implement mitigation plans	▪ Assist the Regional Head to improve Operations Management through regular and on-going analysis of performance data and devising intervention mitigation plans when necessary. ▪ Assist the Regional Head to document same in monthly and quarterly reports	
	Target Analysis conducted and mitigation plans implemented as reflected in monthly and quarterly reports: 100%		
3	Deliverable/Indicator: Monitoring turnaround times and intervention in operations:	▪ Assist the Regional Head in ensuring compliance with performance standards (turnaround times)	

	• Trial Enrolment • Reviews • Appeals enrolment • MLA		
	Target: Turn-around times adhered to with respect of • Trials-75% not longer than 18 months on court roll • Reviews 3 days in 90% of matters • Appeals-Receipt of complete record to enrolment for hearing – 6 weeks (90% of matters)		
4.	Deliverable/Indicator: Performance Monitoring and Evaluation	• Assist the Regional Head in the facilitation of Individual Performance Reviews • Assist the Regional Head in ensuring that staff members are continuously trained on performance management system • Assist the Regional Head to determine staff needs and make appropriate recommendations • Assist the Regional Head in consistency in the application of performance evaluation - Recognition and reward for performance - Manage poor performance - Transparency, communication and feedback towards the employee in performance reviews and the process - Ensure accessibility of managers	
	Target 100% reviews each quarter 2 formal coaching sessions during performance assessment 2 informal coaching sessions during performance assessment Gaps identified during assessments addressed by coaching, mentoring and training-documented Developmental needs of employees established from Individual Development Plans and staff needs audit supplied to HO Number of awards/time off rewards		

5.	Deliverable/Indicator: Compliance with policies and regulations	• NPA policies and procedures – - Assist the Regional Head to communicate and educate officials - Assist the Regional Head in informing officials where the policies/ procedures can be accessed - Assist the Regional Head in contributing to the development of NPA policies and procedures - Assist the Regional Head in the ethical, consistent and equal application of policies and procedures	
	Target 100% compliance with policies and regulations		
6	Deliverable/Indicator: Effective People Management	• Assist the Regional Head in fair and equitable treatment of employees • Assist the Regional Head to create an enabling environment • Assist the Regional Head in fair distribution of work • Assist the Regional Head in fair and consistent discipline • Assist the Regional Head with compliance of with the Labour Relations Act • Assist the Regional Head in communicating the employment equity plan if applicable/available and to support the implementation thereof • Assist the Regional Head in early identification of staff that require "EWP" • Assist the Regional Head in ensuring that there is no victimization and stigmatization of people affected • Assist the Regional Head in facilitating the implementation of HIV/ AIDS assistance, training and awareness for employees • Assist the Regional Head in managing	
	Target Number of justified complaints received by staff System for work allocation in place 1 Awareness session on EWP 1 Awareness session on HIV/Aids		

		absenteeism • Assist the Regional Head to determine and implement a system to ensure fair and equitable allocation of work in the region • Assist the Regional Head in ensuring the efficient allocation of cases inclusive of allocating cases to RHs and DDPPs where applicable • Assist the Regional Head to in consultation with head office explore alternative and innovative ways to recognize and reward performance, e.g. award ceremonies • Assist the Regional Head to explore, develop and apply methods to motivate staff such as team building initiatives	
7	Deliverable/Indicator: Ensure effective use of human resources by training prosecutors Target 1 skills audit in place 1 regional mentoring and training plan in place	• Assist the Regional Head to determine and document skills and experience of all prosecutors in the region • Assist the Regional Head to in consultation with head office, put in place regional programmes [e.g. training & mentoring] aimed to address any skills and experience levels as identified- provide training in complex commercial crime, inclusive of corruption and cyber crime • Assist the Regional Head to use the personal development plan as a basis to plan and implement training. • Assist the Regional Head to make use of coaching and mentoring to develop career path and transfer of skills. • Assist the Regional Head to contribute to the development and implementation of the Skills Development Plan	
8	Deliverable/Indicator: Ensure good governance Target SCCU APP and joint SCCU and SAPS strategy implemented in the region within 1 month of	• Assist the Regional Head in ensuring that the region is properly governed in line with the SCCU APP, Joint Strategy with SAPS and Governance Calendar	

	APP/strategy supplied to region. Governance Calendar followed.		

Resource requirements

- Enough trained, experienced and skilled prosecutors to mentor juniors
- Enough prosecutors
- Enough SAPS members
- Enough support from HO
- Support from Corporate Services
- Support from training division HO
- Enough prosecutors to free up RH and statistics functionaries
- Data capturers

Enabling conditions

- Filling of vacant posts
- Strategic planning session with SAPS
- Signed off SCCU APP
- Signed off regional operational plan
- Skills plan
- Regional mentoring and training plan
- Team structures
- System to allocate work
- Deputy at HO dedicated to training
- Effective EWP program
- NPA Employment Equity Program
- Easy availability of NPA policies on NPA Intranet
- Governance Calendar in place
- HO Deputy allocated to Performance Management
- Consent and encouragement by HoU to award time off and certificates
- Retention of staff
- Reasonable workload
- Training available
- Training strategy by HO
- Communications strategy by HO
- Liaison with NPA spokesperson by HO

Appendix B

Competencies/Core management criteria[5] (total weight 100%, 1/5th of overall score)

It is agreed that the SMS member/LP 10 will develop, maintain and enhance the following competencies:

Name	Definition	Required proficiency level	Weight
1. **People management and empowerment**	Manages and encourages people, optimises their outputs and effectively manages relationships in order to achieve organisational goals	▪ Seeks opportunities to increase personal contribution and level of responsibility; ▪ Supports and respects the individuality of others and recognises the benefits of diversity of ideas and approaches; ▪ Delegates and empowers others to increase contribution and level of responsibility; ▪ Applies labour and employment legislation and regulations consistently; ▪ Facilitates team goal setting and problem solving; ▪ Recognises individuals and teams and provides develop-mental feedback in accordance with performance management principles; ▪ Adheres to internal and national standards with regards to HR practices; ▪ Deals with labour matters; ▪ Identifies competencies required and suitable resources for specific tasks; ▪ Displays personal interest in the well-being of colleagues; ▪ Able to manage own time as well as time of colleagues and other stakeholders; and ▪ Manages conflict through a participatory transparent approach.	20
2. **Client orientation and customer focus**	Willing and able to deliver services effectively and efficiently in order to put the spirit of customer service (Batho Pele) into	▪ Develops clear and implementable service delivery improvement programmes; ▪ Identifies opportunities to exceed the expectations of customers; ▪ Designs internal work processes to improve customer service; ▪ Adds value to the organisation by	20

	practice. Comply with Batho Pele principles: ▪ Consultation ▪ Service standards ▪ Access ▪ Courtesy ▪ Information ▪ Openness and Transparency	providing exemplary customer service; ▪ Applies customer rights in own work environment.	
3. **Service Delivery Innovation**	Champions new ways of delivering services that contribute to the improvement of organisational processes in order to achieve organisational goals.	▪ Consults clients and stakeholders on ways to improve the delivery of services; ▪ Communicates the benefits of service delivery improvement opportunities to stakeholders; ▪ Identifies internal process improvement opportunities to SDI; ▪ Demonstrates full knowledge of principles on service delivery innovations; ▪ Identifies and analyses opportunities where innovative ideas can lead to improved service delivery; ▪ Creates mechanisms to encourage innovation and creativity within functional area and across the organisation; and ▪ Implements innovative service delivery options in own department/organisation.	20
4. **Strategic Capability and Leadership**	Provides a vision, sets the direction for the organisation and/or unit and inspires others to deliver on the organisational mandate	▪ Gives direction to team in realising the organisation's strategic objectives; ▪ Impacts positively on team morale, sense of belonging and participation; ▪ Develops detailed action plans to execute strategic initiatives; ▪ Assists in defining performance measures to evaluate the success of strategies; ▪ Achieves strategic objectives against specified performance measures; ▪ Translates strategies into action plans; ▪ Secures co-operation from colleagues and team members; ▪ Seeks mutual benefit/win-win outcomes for all concerned; ▪ Supports stakeholders in achieving their goals; ▪ Inspires staff with own behaviour – "walks the talk";	20

20

		▪ Manages and calculates risks; ▪ Communicates strategic plan to the organisation; and ▪ Utilises strategic planning methods and tools.	
5. **Honesty and Integrity**	Displays and builds the highest standards of ethical and moral conduct in order to promote confidence and trust in the Public Service.	▪ Conducts self in accordance with organizational code of conduct; ▪ Admits own mistakes and weaknesses and seeks help from others where unable to deliver ▪ Reports fraud, corruption and maladministration; ▪ Honours the confidentiality of matters and does not use it for personal gain or the gain of others; ▪ Discloses conflict of interests issues; ▪ Establishes trust and shows confidence in others; ▪ Treats all employees with equal respect; ▪ Undertakes roles and responsibilities in sincere and honest manner; ▪ Incorporates organizational values and beliefs into daily work; ▪ Uses work time for organizational matters and not for personal matters; and ▪ Shares information openly, whilst respecting the principle of confidentiality	5
6. **Communication**	Must be able to exchange information and ideas in a clear and concise manner appropriate for the audience in order to explain, persuade, convince and influence others to achieve the desired outcomes	▪ Communicate high risk sensitive matters to all relevant stakeholders ▪ Balances political views with organizational needs when communicating differing viewpoints on complex issues ▪ Develops well defined communication strategy ▪ Steers negotiations around complex issues and arrive at a win/win situation ▪ Markets and promotes the organization to external stakeholders ▪ Communicates with the media without compromising the integrity of the organization	10
7.Financial Management[6]	Compiles and manages budgets, controls cash flow,	• Demonstrates knowledge of general concepts of financial planning, budgeting and forecasting and how they interrelate; • Manages and monitors financial risk;	5

[6] The SMS Handbook stipulates that all SMS-members must have a core competency of Financial Management

	institutes risk management and administers tender procurement processes in accordance with generally recognised financial practices in order to ensure the achievement of strategic organisational objectives.	• Continuously looks for new opportunities to obtain and save funds; • Prepares financial reports and guidelines based on prescribed format; ▪	

Appendix C
Personal development plan

It is agreed that the SMS member/LP 10 undertakes to contribute to the knowledge base of the NPA and his/her own set of competencies by taking the following personal development steps:

Development area 1	Responsibility	Completion date	Expected outcome
Actions planned: 5 days compulsory deployment to the coal face of service delivery[7]	○ M Mokgatlhe	○ March 2016	Knowledge Gained
Development area 2	Responsibility	Completion date	Expected outcome
Actions planned: Time Management Course	○ M Mokgatlhe	○ March 2016	Better time Management
Development area 1	Responsibility	Completion date	Expected outcome
Actions planned: Civil drafting skills	○ M Mokgatlhe	○ March 2016	Better drafting in motion proceedings

Employee Signature:	**Supervisor Signature:**
Name: JM FERREIRA	**Name:** M MOKGATLHE
Designation: DDPP	**Designation:** DDPP

[7] Please note that this is compulsory

Date: 18/5/2015	Date: 18/5/2015
Quality control check signed by SMS member	Quality control check signed by supervisor
SMS signature:	Supervisor signature:
Date: 18/5/2015	Date: 18/5/2015
Quality control check by HRM	
Signature:	Date:
Signature:	Date:
Comments by SMS member	Comments by supervisor
Comments by HRM	

QUALITY CONTROL CHECK FORM ATTACHED HERETO

L

Performance contract for SMS member/LP 10 (Specialist Litigant)

SMS member: Regional Head
LP 10 (Specialist Litigant): Regional Head
SMS member: reporting to Regional Head
LP 10 (Specialist Litigant): reporting to regional head

1. NB: this is a ***generic*** contract and must be ***individualised*** for the SMS member/LP 10 (Specialist Litigant). The environments of the different SCCU regions differ vastly and thus the job functions of Regional Heads and SMS-members/LP 10's reporting to the Regional Head will differ
2. If a SMS members/LP 10 for example has been allocated a specific portfolio this must be inserted into the contract with relevant activities, indicators (deliverables) and targets
3. **NB**: to qualify for **LP 10 (Specialist Litigant) legal work** done with respect to relevant indicators under court work and chamber work must have a **weight of at least 80%**
4. A person not qualifying for LP 10 (Specialist Litigant) must have a weight of less than 80% legal work with respect to relevant indicators under court work and chamber work
5. Any activities not done by the SMS member/LP 10 (Specialist Litigant) must be *deleted* from the contract
6. Any extra activities done by the SMS member/LP 10 (Specialist Litigant) and not reflected in the contract must be *added* to the contract
7. The work has been divided in three key result areas: court work, chamber work and governance/operation management
8. Each of these KRA's must be allocated a total weight as agreed by the member and the supervisor
9. Each indicator under the KRA must be weighted in agreement with the supervisor
10. The total weighting of the indicators must add up to the total value of the KRA
11. The job purpose and job functions must be checked and relevant additions/deletions made
12. With respect to targets; numbers and percentages must be agreed with supervisor
13. In general weights for timeous completion of work will be of a lesser weight than for indicators relating to quality
14. If no work was done with regard to an activity below, no weight must be attached to the performance indicator, i.e. it must not be measured. The weight for that performance indicator must then be added to other performance indicator/s

MM 421

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

IN RE: **APPLICATION OF MARSHALL MOKGATLHE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULES 11.2 AND 3.3.6 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION"**

CONFIRMATORY AFFIDAVIT

I, the undersigned,

LAWRENCE SITHEMBISO MRWEBI

do hereby declare under oath and state that: -

1. I am an adult male duly admitted Advocate, and previously in the employment of the NPA in my capacity as the Special Director and Head of the Specialised Commercial Crimes Unit at the NPA at c/o The State Attorney, Pretoria, 316 Thabo Sehume Street, SALU Building, Pretoria.

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S. M.

2. The facts herein contained in this affidavit are within my personal knowledge and unless stated to the contrary or is evident from the context, are to the best of my knowledge and belief both true and correct.

3. I have read the affidavit deposed to by **MARSHALL MOKGATLHE** together with annexures, and confirm the correctness and veracity thereof insofar as same relates to me.

LAWRENCE SITHEMBISO MRWEBI

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at GARSFONTEIN on this 29 day of **SEPTEMBER 2020** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2020 -09- 29
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS 13.35
(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS
SERGEANT MARKET
VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS
277 Johnny Coetzee Street
BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)
GARSFONTEIN
SERGEANT
SA POLISIEDIENS

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CONFIDENTIAL INTERNAL MEMORANDUM

16 February 2015

TO: MR. MSO NXASANA
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: MR. WILLIE HOFMEYR
DEPUTY NASIONAL DIRECTOR OF PUBLIC PROSECUTION

FROM: JM FERREIRA
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS (SCCU)

G VAN EEDEN
STATE ADVOCATE (SCCU)

RE: REPORT ON THE COMPLAINTS AGAINST THREE SENIOR NPA PERSONNEL, NAMELY MS JIBA, MR MWREBI and MR MZINYATHI.

SILVERTON CAS 817/07/2013

(I/O- Colonel Magobosha)

ACTT ENQ 1/12/2014

(I/O - Captain De Klerk)

PTA CENTRAL CAS 56/08/2014

(I/O - Captain De Klerk)

SILVERTON CAS 688/10/2014

(I/O- Col Botha)

A. INTRODUCTION

1. I received a verbal request from Mr Hofmeyr in November 2014 regarding this case and I agreed to be the prosecutor in the matter.
2. Due to the individuals involved and my current workload at the SCCU I requested Mr Hofmeyr whether I could get somebody to assist me. He agreed but added that it must be somebody that I trust unreservedly.
3. Adv. Gerhard van Eeden a person whom I know for more than 22 years is assisting me. He is a very experienced litigant; who also spent approximately 14 years in private practice, and because we have more than one matter that we are dealing with find it convenient to work together; also on this matter since we have ample time to discuss this matter and strategize, specifically when dealing with other matters away from Pretoria.
4. I had a meeting with Brigadier Moodley at his offices on 12 February 2015 at 13:00 regarding unresolved problems in the investigation and a lack of communication from their side.
5. Brigadier Moodley informed me that he had instruction from Gen.

Ntlemeza that they will investigate the case until *finalisation*, where after they will submit the dockets (the ones Captain de Klerk is dealing with) to the NDPP for decision. They will apparently also request the NDPP to remove me from this prosecution. I was not provided with any reason and believe that no cogent reasons could exist for this as the General do not know me at all and have had no interaction with me regarding this case at all.

6. Knowing the history of the Mdluli matter and General Ntlemeza' s links to General Mdluli and his links to Ms Jiba and Mr Mwrebi, one could perhaps venture a guess as to who possibly could in fact want me removed as prosecutor.

7. Another aspect to be raised in this introduction is the fact that one must perhaps point out that there are three investigating officers from different units, with Col Botha the only one not reporting to Gen. Ntlemeza.

8. If the SAPS follow through with this approach it will definitely cause a delay in the matter.

9. Ms Jiba has also had a meeting with Lt. Gen. Moonoo the head to whom Col Botha report; this meeting was apparently sparked by Col Botha attempting to obtain a warning statement from Ms Jiba.

10. No decision to prosecute has been made as yet as there are various outstanding aspects at this point in time.

B. BACK GROUND

5. The original complaint follows the disciplinary hearing of Ms Breytenbach and is also intertwined with the application launched by Freedom under Law (FUL), first in the North Gauteng High Court and thereafter in the Supreme Court of Appeal.

6. The charges related to negative findings made by the Supreme Court of Appeal in the FUL matter against Ms Jiba, Mr Mwrebi and Mr Mzinyathi.

7. There were also negative comments made by the KZN High Court against Ms Jiba in the unsuccessful attempt to prosecute Lt-Gen. Booysen for racketeering.

C. SILVERTON CAS 817/07/2013.

8. The investigating officer is Colonel Magobosha and the charges are Defeating the ends of justice and contravening section 32 (1) (b) of the NPA Act.

9. Col. Roelofse, the investigating officer in the Mdluli case, is the complainant.

10. The case entails the instruction by Mr Mwrebi (SDPP) to the SCCU Pretoria to withdraw the Mdluli prosecution at a time (December 2011) when the SCCU reported to the DPP Pretoria and ***not*** to the Special Director Mr Mwrebi. The prosecution against Gen. Mdluli was also instituted by the DPP and not the SDPP and at a time prior to the appointment of Mr Mwrebi as

SDPP.

11. Section 24 (3) of the NPA Act on which the SDPP relied both in the Breytenbach disciplinary hearing as well as in the FUL matter was simply not applicable to the Mdluli case for the reasons stated above. Mr Mwrebi' s instruction improperly interfered with, hindered or obstructed the DPP, North Gauteng and/or Mr Chris Smith and/or Ms Glynnis Breytenbach in the exercise, carrying out or performance of their powers and duties in relation to the Mdluli prosecution.

12. The proclamation whereby he was appointed cannot save Mr Mwrebi in this regard as the NPA Act is quite clear on the fact that the DPP in a specific province is the primary seat of power insofar as prosecutions in that province are concerned.

13. Although the SDPP (Mr Mwrebi) was initially the only suspect, we believe that a case could perhaps be made out that Ms Jiba may also be involved either as a co-perpetrator or an accomplice.

14. Initially these charges would have been dealt with by Mr Pieter Luyt of the DPP office in Pretoria. However he has requested us to deal with it as part of our case also involves the FUL matter. It would therefore make much more sense to deal with it along with the FUL perjury complaints.

15. Mr Luyt would therefore only proceed in his case against Mr Mwrebi (which is already on the roll) with the complaints where Mr Nathi Mncube (former spokesperson of the NPA) is the complainant.

16. The outstanding issues are:

16.1. Finding evidence whether the memo by Ms Breytenbach calling on Ms Jiba to review the Mdluli decision came to the knowledge of Ms Jiba before the FUL litigation. Here we need assistance of NPA Exco to inform us if the Breytenbach memo was ever discussed *at* a NPA Exco meeting or with any NPA Exco member in the presence of Ms Jiba. Ms Jiba' s failure to act when she became aware of the memo and its contents could make her an accessory after the fact to Mr Mwrebi' s alleged illegal and unlawful interference in the Mdluli prosecution.

16.2. We are struggling to get I-Africa to certify the record in the disciplinary proceedings.

16.3. If the SAPS push through with their intention to finalise the investigation ***"on their own"*** before providing the docket to the NDPP, a lot of time will be wasted and further aspects to investigate will only be identified after the docket is provided to the NPA.

D. **ACTT ENQ 1/12/2014**

17. The investigating officer is Captain De Klerk.

18. On 9 September 2010, while working at the SCCU, Pretoria Ms Jiba undertook a flight to Durban during the day. (SAA 563 departing Johannesburg at 15:00) She returned on SAA 563 at

19:40). This flight was paid for from the account of Crime Intelligence (CI) and Gen. Mdluli was on both these flights, even though they did not sit in adjacent seats.

19. The ticket was originally requested and approved on the basis that it was another person (a known agent - SA71 – *not Ms Jiba*) that would fly. There was thus clearly fraud committed by somebody in the Crime Intelligence environment. The cost amounted to R3 784.00.

20. If Ms Jiba went to Durban on official business then the NPA should have paid for her flight, if she went on private business then she should have paid for her flight.

21. The value of the airfare could therefore be seen as an unauthorised gratification and she could well be guilty of corruption. Alternatively, the ticket was obtained by fraudulent means and because she was the beneficiary of the fraud she could be held accountable for the fraud depending on her knowledge of the facts.

22. One problem is that there was a lot of alleged fraud, where family members of Mdluli and other people were allowed to fly on tickets bought by UTE, the front company of CI. As such the identities of passengers were deliberately withheld in the purchasing process.

23. What is outstanding:

23.1. Because of the secrecy in CI there is no ID number to link to Ms Jiba so if she dispute that it was her that flew

to Durban on that day the State will have to counter it.

23.2. There is a small spelling mistake in her name.

23.3. South African Airways alleges that it was only somewhere after 2011 that they can certify that every passenger's ID or drivers licence was used to verify the identity of the passenger.

23.4. There are severe resistance in the SAPS to investigate this as apparently numerous people had free flights on the budget of CI and it is felt that it would be unfair to prosecute only this one beneficiary. However, if dockets against other beneficiaries are opened we can look at all cases on their merit.

23.5. Further/other evidence that Ms Jiba was indeed in Durban on that day.

E. PTA CENTRAL CAS 55/08/2014

24. The investigating officer is Captain De Klerk and it relates to the alleged perjury committed by Ms Jiba, Mr Mwrebi and Mr Mzinyathi when the last two mentioned individuals contradicted in the FUL affidavits their oral evidence in the Breytenbach disciplinary hearing.

25. We have had many problems with the investigating officer who doesn't seem to be up to the task and lately the SAPS having also

taken unilateral decisions referred to in the introduction above.

26. It has also come to light that during evidence Mr Mwrebi gave at the trial of Mr Ledwaba (A former DPP in the scorpions) Mr Mwrebi made certain admissions to the effect that he committed perjury while testifying in the Selebi trial. Both records are available and need to be filed in the docket. Showing the court more than one instance of perjury on the part of Mr Mwrebi would be of assistance to the State in any possible prosecution.

27. What is outstanding:

27.1. The whole issue of Mr Mwrebi's evidence in the Selebi case and the Ledwaba case.

27.2. Transcription certificates of the record of the disciplinary hearing regarding the evidence of Mr Mwrebi and Mr Mzinyathi.

27.3. Statements from Mr Motau SC (and Mr Halgryn SC) on of the counsels of the NPA in the FUL matter as well as that of his junior Ms Manaka. They have requested the Bar Council to give them permission to depose to affidavits.

27.4. Statements form the state-attorney who instructed the various sets of counsel. This has been outstanding for quite some time and we get the impression the members of the State Attorney is hesitant to become involved.

F. **SILVERTON CAS 688/10/2014**

28. The investigating officer is Col Botha ("Botha") and this case is about the General. Booysen ("Booysen") racketeering prosecution in which Ms Jiba, the then ANDPP were severely criticised about her affidavit and the fact that she instituted a prosecution against the Booysen in the first place.

29. The court found that there was NO evidence linking Booysen to the commission of the alleged racketeering offences.

30. A statement was obtained from Mr Maema a DDPP from Mmabatho who was one of the designated prosecutors on the Booysen team. In this statement Mr Maema tries to justify that there is indeed a case for Booysen to answer, however the highlight of the so-called evidence is that on one occasion Booysen came to the scene of a shooting afterwards in a helicopter and congratulated the SAPS members and in some instances some SAPS members got monetary rewards.

31. The monetary rewards was not applied for by Booysen and only approved by him at the request of another SAPS official. The fact that on one occasion Booysen arrived after the event could not seriously be regarded as "evidence" for purposes of a racketeering prosecution.

32. A more sinister motive for the prosecution of Booysen could have been to discredit him as he was a prime witness against a well-known businessman (Thoshan Panday) arrested for corruption.

That case was withdrawn and so far the businessman (and a member of SAPS) has escaped justice.

33. Although Mr Maema has deposed to an affidavit a decision will have to be made whether he should be called as a witness, should any prosecution follow. The same is true for the DPP Johannesburg Mr Chauke and Mr Mosing from the National Office as they all supported the failed racketeering prosecution of Booysen and in fact still support it.

34. Ms Jiba will without any doubt place *some*; if not all, the blame for her perjury on the Booysen prosecution team.

35. However, supporting the failed prosecution does not *per se* make them guilty of any criminal offence, unless one can prove that they knew the contents of the affidavit in which Ms Jiba perjured herself, before it was signed and that they let her sign it; well knowing the false facts contained therein. We simply have no evidence of that at this stage.

36. What is outstanding:

36.1. Statement from Ms Manaka one of the counsels who acted for the NPA in this matter as well as from Mr Laurence Hodes SC, her senior.

36.2. A copy of the racketeering docket, specifically the investigating diary to draft a timeline and to see exactly when which affidavits were filed.

36.3. It is suggested that we would need to go through the whole docket to gauge the precise evidence allegedly available at the time of making the decision to prosecute Booysen.

36.4. Statements from possibly:

- Mr Chauke the DPP of Johannesburg, and
- Mr Mosing a DDPP at this office, who were both intimately involved in the failed racketeering prosecution.
- To consult the investigating officer in the racketeering prosecution of Booysen

G. OTHER ASPECTS OF IMPORTANCE.

Challenges experienced

37. As explained above we are experiencing a number of challenges with the SAPS including, but not limited to, the fact that we have three different investigating officers from three different SAPS units investigating various aspects of the same case.

38. We believed that a small task team would have been much more focussed and effective in this regard and would appreciate any assistance the NDPP can/may give by engaging the Commissioner of SAPS in this regard.

39. Originally the case of General Booysen was also investigated by

Captain De Klerk. However, on the same day he obtained a statement from the General in Durban the Commissioner of SAPS intervened and directed that, that investigation should move to the unit of General Moonoo. It may of course simple be because General Booysen is also a member of the Hawks and that it could be frowned upon that they investigate "one of their own".

Workload of prosecutors

40. Even though Gerhard van Eeden and I are completely swamped with other work as well, this has not caused any delay as the delays are caused by the slow pace of the SAPS investigation, specifically that of Captain De Klerk. Complaints to Brigadier Moodley have unfortunately not speeded up the pace of the investigation.

41. Gerhard van Eeden is involved; along with me, in:

41.1. The ***Tannenbaum matter*** in which one suspect is in Australia and one in Switzerland. The Tannenbaum scheme is probably one of the biggest investments fraud matters in the South African legal history.

41.2. A part heard matter in Limpopo (***Mankele Bridge matter***) regarding a bridge built over the Olifant's river between Penge and Mankele. In this matter a section 174 discharge was refused by the trial court recently and the accused will have to testify later in the year.

41.3. The ***Bongaveli-project*** where farms were purchased in Mpumalanga and then sold to the government at hugely inflated prices. In some instances the transfer to the "middle man" and from them to the government took place on the same day at the deeds office, mere minutes apart.

41.4. Apart from this, Gerhard Van Eeden also has 53 other cases under investigation and 8 cases on the court roll.

42. As for myself I am involved in the ***Porritt prosecution*** in Johannesburg where the Supreme Court of Appeal have recently overturned the ruling of Mailula, J to remove Etienne Coetzee SC (Private Counsel and section 38 (3) appointee) and me as prosecutors in this matter with a very long, protracted and colourful legal history. The Judge President has very recently appointed Judge Vally to do case management of this matter which will hopefully start in the third or fourth quarter of 2016. This is a massive matter in which the indictment is 1400 pages long and it has been to the Supreme Court of Appeal three times and on the High Court roll in Johannesburg since January 2006.

43. I furthermore have 16 cases under investigation and 9 cases on the court roll.

Outside Counsel

44. Consideration could perhaps be given to appoint an outside silk to

give an opinion as to the fact whether there is a prima facie case or not on the anticipated charges ***and or*** to lead the prosecution in light of the fact that this is a case involving very senior NPA personnel; *all of whom*, are more senior than Gerhard van Eeden and I.

45. The suspects will most probably allege that their possible prosecution is a purge by the NDPP, in light hereof, the opinion of an independent senior counsel of good standing can go a long way in showing that the NPA and its personnel is acting completely transparently and taking every precaution that the decision is based only on the relevant facts and law and on nothing else.

46. One possible problem with this is that the Minister of Justice will have to agree with the appointment of outside counsel in terms of section 38 (1) and 38 (2) of the NPA Act, however, very cogent reasons could be put forward which would make it very difficult to deny such request.

47. Due to the fact that both Gerhard van Eeden and I have worked for Ms Breytenbach previously at the SCCU Pretoria, it should be pointed out that the suspects; should they be charged, would suggest ulterior motives, conspiracy or launch some sort of personal attack on us and our involvement in this matter.

48. However, we are **willing and able** to deal with the matter on our own; should it be unachievable or impractical or undesirable to

have an outside senior counsel appointed.

49. It could perhaps be advisable to temporarily arrange that Gerhard van Eeden and I be accommodated in facilities similar to that of Mr Broughton and Mr Rossouw at (*but not in*) VGM for the duration of this matter and that we report to Mr Hofmeyr until finalisation of this matter.

H. CONCLUSION

50. Gerhard van Eeden and I have not been reporting to our acting regional head ***on this matter.*** Mr Mokgatlhe reports to, and has regular interactions with Mr Mwrebi, who is still the SDPP and as such responsible for the whole of the SCCU.

51. We require guidance in this regard as to whom we report to on this matter. At this stage we are reporting to Mr Hofmeyr and we have no problem proceeding to do so.

52. Insofar as the clear impression is that there are certain segments in the SAPS not willing to do the best they can in this investigation, possible escalation of this to the Commissioner of SAPS by the NDPP should seriously be considered. Col. Botha is more than able to investigate these matters and he and Col. Magobosha could potentially form a small task team to deal with all of the dockets referred to in this report.

TMM5

Jan Ferreira (JM)

From: Jan Ferreira (JM)
Sent: 03 June 2015 09:06 AM
To: Willie Hofmeyr (WA); Karen H. van Rensburg
Subject: Ms Jiba et al

Dear Willie and Karen,

I have been giving a lot of thought to the matter of Ms Jiba that is on the roll next week (10 June).

I know and understand that in the matter against Mr Mwrebi, that Pieter Luyt dealt with, Barry Roux SC has been appointed as a section 38 prosecutor. I believe that one must agree that when such high profile people of the NPA are being prosecuted it is important to show independence and to prevent any idea of bias or victimisation. The question my very well be asked why did the NPA opt for the appointment of a section 38 prosecutor in that matter while not in the two cases Gerhard van Eeden and I am dealing with. Is there enough facts to distinguish the cases and the individuals involved?

Gerhard van Eeden and I are willing and able to do the prosecution in both matters our self and have no problems dealing with the two matters, however both in light of the appointment of Barry Roux SC in the other matter and the fact that it may look and be perceived to be more independent and objective if a non-NPA prosecutor, deal with the matter. A SC from the bar, like Barry Roux have the stature and experience to bring an independent mind to the prosecution.

Please consider and discuss with Dr Ramaite, the possibility of also appointing Barry Roux SC to do the prosecution of Ms Jiba (matter that is on the roll) and for the matter against all three, that is not on the roll yet.

My situation is made more difficult in that Gerhard van Eeden and I are on the Tannenbaum matter and that we may very well have to go to Australia later in the year pursuant to an MLA and will have to start extradition proceedings shortly thereafter. I am also on the Porritt matter and the JP (Judge Mlambo) has indicated that he may want to place the matter for trial on 27 July 2015. I carry quite a case load, some part heard and some ready to be enrolled for trial soon.

Please accept that notwithstanding what is said above, I am willing and able to deal with the two matters under discussion and will do so, however I believe it would be in the best interest of justice and the NPA that the top structure of the NPA make an informed decision regarding this issue. I know that a lot of my colleagues have expressed doubt as to why I am dealing with the matter, and that is right minded, middle of the road colleagues not aligned to me or the suspects. If they entertain doubts as to the correctness of a DDPP prosecuting two DPP's and one DNDPP, then many other people may entertain the same doubts. Even though that aspect is not the only issue to consider it may be an important consideration. As certainly is the fact that I have worked with Glynnis and my involvement in the Mdluli matter previously. Also the fact that I work in the unit of Mr Mwrebi and in the division of the DPP North Gauteng, Mr Mzinyathi.

I will leave this issue in your hands. It would be preferable if one could have an indication as soon as possible, whether such application will be made so that any potential trial date to be organised next week, can be organised with Barry Roux, while awaiting the appointment. If a decision is made that Gerhard and I will proceed with the matter, we will certainly do so.

Regards

Jan Ferreira

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MML

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

TO: **ADV SHAUN K ABRAHAMS**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: **ADV NOMVULA MOKHATLA**
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: **ADV M.P MOKGATLHE**
SPECIALISED COMMERCIAL CRIME UNIT

DATE: **19 JUNE 2015**

RE: **REPORT ON THE CASE OF STATE / ADVOCATE N JIBA**

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1.

PURPOSE

The purpose of this memo is to provide a report to the National Director on the abovementioned matter as requested, to look at the totality of the evidence and to make certain recommendations. Attached to the report is a memorandum from the prosecutor, Jan Ferreira dated 11 June 2015.

2.

SUMMARY OF EVIDENCE

2.1

A1 in the case docket, Silverton CAS 688/10/2014 is Theodore Leeuwschut who is based in the office of the CEO at the NPA head office. He alleges that he was authorized by NPA **management** to depose of his affidavit dated 23/10/2014. He relies on the comments made by Gorven J in the matter Booysen v Acting National Director of Public Prosecutions [2014] 2 All SA 391 (KZN) wherein Gorven J was critical of Adv. Jiba for the manner

in which she arrived at her decision to authorize the racketeering prosecution of Maj. Gen Booysen. He concludes by alleging that the NPA **management** is of the view that the matter should be referred to the SAPS with a view to investigate a criminal charge of perjury.

2.2

A2 is Maj. Gen Booysen who brought a review application in the High Court in KZN to set aside the decision of Adv. Jiba. He alleges that Adv. Jiba could not have considered evidence under oath that did not exist at the time of taking the decision and as a result thereof she committed fraud.

2.3

A 3 and A12 are affidavits of Anthony Mosing, a Senior Deputy Director of Public Prosecutions and head of the Special Projects Unit in the office of the NDPP. He submitted the file dealing with applications for racketeering, including the one of Booysen to Danie Schmidt, a Director of Administration in the office of the NDPP on 10/11/2014.

He further states that his duties include advising the NDPP on all applications for authorization in terms of section 2(4) of POCA. He was the only one in his team who dealt with the Booysen matter due to its sensitivity. He interacted with the prosecution team in the Booysen matter made up of two Senior Deputy Directors, Adv.(s) Maema and Mathunjwa on racketeering issues.

He received the application for racketeering authorization of the Booysen case from the prosecution team on 15/08/2014. On 16/08/2014 he drafted his memorandum and forwarded it to Adv. Jiba advising the latter to grant the requested authorization.

2.4

A4 contains several documents including, internal memos between the prosecution team and Adv.(s) Chauke and Hodes SC; application for authorization of racketeering from DPP South Gauteng dated 10/7/2012; authorization by Adv. Jiba dated 17/8/2012 and the affidavit of Adv. Maema. Adv. Maema explains how the prosecution team was formed, the meetings they held, discussion with Mosing on the racketeering issues, that he prepared a prosecution memo and signed the application for authorization and forwarded it to Mosing for Jiba's attention. He further states that the

team consulted with Col Aiyer earlier in the month and had used the information during a briefing session with Jiba as they expected the information to be captured under oath by the investigators. He further explains how Booysen was involved in the actions of the group accused of murders.

2.5

A5 is Captain Maletswa who commissioned Jiba's statement on 3/7/2013.

2.6

A6 is Julian Knight who states that his client, Aris Danikas did not sign his affidavit.

2.7

A7 is Maema who informs A6 that Danikas will not be called as a witness.

2.8

A8 is Laurence Hodes SC, the outside counsel for the NPA during the review application. He states that he did not make the concessions attributed to him by Gorven J and that they proceeded to prepare and file a Notice of Appeal, only for the notice to be withdrawn at Mr Nxasana's instruction.

2.9

A9 is Karen van Rensburg, the CEO of the NPA who received section 205 subpoena, to hand over the documents of Booysen in possession of Mosing. The said documents were handed to Col Botha.

2.10

A11 is Adv. Noko DPP of KZN. She was instructed by Nxasana to take over from Chauke and to oversee the prosecution of Booysen and others.

2.11

A13 is Adv. Mlotshwa who alleges that he did not sign the indictment sent to him at the time he was Acting DPP in KZN because it was not accompanied by a prosecution memo.

3.

ANALYSIS OF THE EVIDENCE

3.1

The case against Adv. Jiba seems to be based on the following:

3.1.1 Critical statements made by Gorven J

3.1.2 The statement of Leeuwschut, a junior employee in the NPA

3.1.3 Jiba's response to the founding affidavit of Booysen

3.1.4 Booysen's statement

3.2

The opinion expressed by a judge while delivering judgment in interlocutory proceedings cannot constitute evidence in a criminal trial as it has not been given under oath and is not open to cross examination. Gorven J did not recommend that criminal charges be laid against Jiba. Adv. Hodes SC disputes the concessions attributed to him by Gorven J.

3.3

A1 is a junior employee within the NPA structure and fails to specify the persons who allegedly authorized him to lay a criminal charge against Adv. Jiba. This conduct constitutes a serious misconduct and must be investigated fully and remedial action implemented.

3.4

Jiba's response to the founding affidavit of Booysen must be viewed in the context in which it was made. At face value, her response depicts a classic case of common law perjury, but when considered together with Maema's statement that information obtained from consultation with Col Aiyer was relayed to Jiba and that Col Aiyer only confirmed such information through an affidavit under oath at a later date. Furthermore, Jiba could not formulate responses on her own but acted on the advice of a Senior Counsel briefed by the State Attorney.

3.5

Booysen's statement cannot be relied upon for the sole reason that his evidence is not objective since he was the subject of a racketeering authorization set aside by Gorven J. The allegation by Booysen that Jiba committed fraud has no legal basis and cannot be supported by objective facts.

4.

EVIDENCE IN FAVOUR OF JIBA

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4.1

As the Acting NDPP at the time, she had statutory powers to authorize racketeering prosecutions. The application put before her was a well drafted legal document with a summary of the case, prepared by two Senior Deputies in consultation with Adv. Mosing (also a Senior Deputy) who advised her to grant authorization.

4.2

The prosecution team together with Adv. Chauke will testify that Adv. Jiba was briefed on the need for racketeering and consultations did take place.

4.3

Advocates Hodes SC and Chauke will testify that a notice of leave to appeal Govern J's decision had already been filed and that Mr Nxasana instructed that it be withdrawn as he viewed the decision taken by Adv. Jiba to be undermining his authority.

5.

PROSECUTOR'S MEMORANDUM

5.1

On 16 Feburary 2015 Adv. Ferreira submitted an internal memo to Mr Nxasana reporting on several cases including the case against Jiba. On page 2 paragraph 1, he states that during November 2014 he received a verbal request from Mr Willie Hofmeyr to be the prosecutor in the Jiba matter. He was further requested to rope in somebody to assist him and that it was supposed to be somebody that he trusted unreservedly, and Adv. Van Eeden became his junior.

5.2

In paragraph 44 of the memo referred to supra, he recommended the appointment of outside counsel to give an independent opinion.

5.3

In paragraph 50 of the same memo he acknowledges the fact that they have not been reporting to their immediate supervisor on the matter as they have been reporting to Hofmeyr. This indicates a clear violation of protocol for which Hofmeyr's request is no excuse.

5.4

The prosecutor agrees that Jiba's response to the General Council of the Bar has not been obtained by the investigating officer.

6.

GENERAL COMMENTS

6.1

This matter emanates from the Breytenbach disciplinary hearing wherein Webster J made adverse findings against three Senior members of the NPA resulting in perjury charges being preferred against them.

6.2

The current prosecutors in the Jiba matter were Breytenbach's subordinates and as a result they might not be perceived by Jiba to be impartial, but acting solely to please their former supervisor.

6.3

The question to be addressed is whether the instructions given to both Leeuwschut and Ferreira were lawful under the circumstances necessitating compliance therewith. If the answer is no, then the disciplinary mechanism has to be introduced against everybody involved.

6.4

It is undesirable to charge a very senior member of the organization as it tarnishes the reputation of the organization and brings it into disrepute. The negative media coverage of the case has portrayed a dysfunctional organization run by incompetent people.

6.5

The matter was hastily enrolled before any response on the appointment of outside counsel could be obtained.

7.

RECOMMENDATIONS

7.1

It is recommended that an African female Senior Counsel from the Pretoria Bar be appointed on an urgent basis to review the decision taken to prosecute Adv. Jiba and to recommend remedial action against any member of the NPA who might be implicated in any wrongdoing.

I trust that you will find the above in order.

Regards

MP MOKGATLHE
REGIONAL HEAD: SCCU PRETORIA

COMMERCIAL

MM 7

Johanna Nel

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Saturday, 26 September 2020 3:09 PM
To: jneljrts@law.co.za
Subject: FW: S v Jiba

From: Marshall Mokgatlhe
Sent: Wednesday, August 5, 2015 8:39 AM
To: Shaun SK. Abrahams <skabrahams@npa.gov.za>; Nomvula NF. Mokhatla <NMokhatla@npa.gov.za>
Cc: Dawood I. Adam <DAdam@npa.gov.za>; Kim Benjamin <KBenjamin@npa.gov.za>; Jan Ferreira (JM) <janferreira@npa.gov.za>
Subject: RE: S v Jiba

Morning NDPP

I am expecting the report from Jan Ferreira later this afternoon.

Kind Regards

Marshall Mokgatlhe
Regional Head, SCCU PRETORIA, National Prosecuting Authority
p: +27 (0) 12 401 0425 | m: +27 (0) 83 775 2114 |
e: mpmokgatlhe@npa.gov.za | w: http://www.npa.gov.za
a: SCCU Pretoria, 228 Visagie street, Bothongo Building, Pretoria, Gauteng, ZA

From: Shaun SK. Abrahams
Sent: 05 August 2015 08:36 AM
To: Nomvula NF. Mokhatla
Cc: Dawood I. Adam; Marshall Mokgatlhe; Kim Benjamin
Subject: S v Jiba

Good morning Adv Mokhatla

The briefing by the Prosecuting Team on 22 July 2015 has reference.

At the conclusion of the meeting I requested to be provided with a legal opinion from the Prosecuting team through their Regional Head, Adv Mokgatlhe, along with the docket once the outstanding witness statements had been obtained. The trial is scheduled to commence on 19 & 20 August 2015.

As such, I would appreciate if same can be provided to me by 14h00, Friday, 7 August 2015 at the latest.

I trust you find same in order.

Kind regards,

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MM 8

Office of the National Director of Public Prosecutions

NATIONAL PROSECUTING AUTHORITY
South Africa

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INTERNAL MEMORANDUM

TO : ADV. M MOKGATLHE
REGIONAL HEAD: SCCU

CC : ADV. N MOKHATLA
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: NSPS

FROM : ADV. SHAUN ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE : 13 AUGUST 2015

RE : CRIMINAL INVESTIGATION: SILVERTON CAS 622/10/2014
STATE v N JIBA

Dear Adv. Mokgatlhe

My email dated 5 August 2015 refers. (A copy of which is annexed hereto)

As you are aware the prosecutors in this matter were appointed by my predecessor Mr MSO Nxasana and Mr Willie Hofmeyr. During the briefing of the prosecuting team on 22 July 2015 I relieved Mr Hofmeyr of the responsibility of the prosecuting team reporting to him hereon and directed that the prosecuting team should report to you instead as the Regional Head of SCCU.

As such I only deem it proper that you as the Regional Head provide me with your opinion and decision in respect of the criminal investigation into Silverton CAS 622/10/2014 on or before 17 August 2015.

Yours sincerely,

Adv. Shaun Abrahams
National Director of Public Prosecutions **Date:** 13/8/2015

MMS

Johanna Nel

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Sunday, 27 September 2020 3:28 PM
To: jneljrts@law.co.za
Subject: FW: Legal opinion: S v N Jiba
Attachments: Legal opinion - S v N Jiba.pdf

From: Ivy Thenga
Sent: Friday, August 14, 2015 8:53 AM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: FW: Legal opinion: S v N Jiba

Morning

From: Nicolette N. Smith
Sent: 13 August 2015 04:10 PM
To: Shaun SK. Abrahams
Cc: Ivy Thenga
Subject: Legal opinion: S v N Jiba

Dear Adv Abrahams

Attached please find the legal opinion as requested.

Kind regards

Nicky Smith
PA to Adv M I Thenga
DPP Northern Cape
Tel: 053 807 4559
Fax: 053 832 9434

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The National Prosecuting Authority of South Africa

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SEQ 34/2020-203

MMJO

National Prosecuting Service
Director of Public Prosecutions

The National Prosecuting Authority of South Africa
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INTERNAL MEMORANDUM

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TO: **Adv S. Abrahams**
National Director of Public Prosecutions

FROM: **Adv M.I. Thenga**
Director of Public Prosecutions

DATE: **13 August 2015**

RE: **LEGAL OPINION – S v NOMGCOBO JIBA**

Dear Adv Abrahams

A. Background leading up to the charges against Adv Jiba

1. A policeman known as Johan Booysen who was the Commander of the Cator Manor Unit in KZN, together with other SAPS members under his command, were charged for crimes committed in KZN. The Commander was one of the members charged with racketeering.

   For the racketeering charge to be sustained, section 2(4) of the Prevention of Organised Crime Act No 121 of 1998 stipulates that *"A person shall only be charged with committing an offence contemplated in subsection (1) if the prosecution is authorised in writing by the National Director."*

2. Part 46 of the NPA Policy Directives paragraph 3 also stipulates that a person may only be charged with committing an offence relating to racketeering if the prosecution is authorised by the National Director.

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Presently, an amended Part 46 of the NPA Policy Directives which came into being from 15 June 2015, contains the same directive though in paragraph 2 and no longer paragraph 3.

For our purpose, paragraph 3 of Part 46 is applicable in this instance.

3. Section 2(2) of POCA stipulates that *"The court may hear evidence including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

B. Is there liability arising out of any action by any authorised person during the performance of his/her duties as stipulated in this law (POCA) Prevention of Organised Crime Act?

4. **Section 78 of POCA – Liability**

The above-named section in the Act provides that *"Any person generally or specifically authorised to perform any function in terms of this Act, shall not in his or her personal capacity be liable for anything done in good faith under this Act."*

C. Is the National Director one of the authorised persons as stipulated in this Act?

5. In this instance, the National Director can authorise in writing a DPP, Investigating DPP and Special DPP, to deal with a specific case or in general.

6. In real terms a certificate to authorise racketeering charges must be authorised in writing by the National Director. This is also provided for in the NPA Policy Directive Part 46 paragraph 3 as stipulated above. Because of this, section 2(4) of POCA must therefore be read with section 78 of the same Act.

D. Are there any steps to be taken by prosecutors prior to the signing of the Racketeering Certificate by the National Director?

7. My experience is that the prosecution team together with the investigation team have series of meetings to fully discuss the

case in order to give prosecutors the opportunity to guide the investigation along the way.

As soon as the prosecution team is able to draft the Indictment plus the Prosecution Memorandum, they have to make an appointment for a meeting with Adv Anthony Mosing tasked with the coordination of the cases that have racketeering charges among others.

8. The purpose for the meeting is basically to do a presentation to Adv Mosing with a view to get further advise if there is any need to make certain changes in the Prosecution Memorandum or the Indictment, and further to assess the existence of a *prima facie* case of racketeering plus the enterprise and managers or participants in the enterprise.

9. In some instances, Adv Mosing will allow the prosecution team to do the same presentation to the National Director, his/her Deputies plus the Asset Forfeiture DNDPP.

   In the event the presentation take the direction as stated at paragraph 9, any of the Senior Managers present with the National Director pose questions to the team to have any issue(s) clarified or corrected.

10. The prosecution team will be given an opportunity to do the corrections and a further date will normally be given to see if suggested corrections were implemented or a need to do further corrections exists.

    There is also a need to listen to the police, be it the Investigating Officer and his team, so that the same route to try and understand the case or suggest further investigation takes place.

11. When all is done and a corrected document exists, a certificate is normally drafted, requesting that the National Director authorise in writing the racketeering prosecution of such person(s) in accordance with section 2(4) of the POCA.

    Basically the Prosecutor's Memorandum plus the Indictment comply with the provisions of section 2(2) of POCA, evidence around hearsay, similar facts, as long as such evidence would not render the trial unfair.

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I refer to an affidavit of Adv Mosing paragraphs 11 and 12 where the same procedure as explained above, was followed before a certificate for racketeering could be signed by the National Director.

Annexure "A" being copy of the Judgment in *Brenton Frank and 3 others v National Director* paragraph 12 at 11.5 – 11.6, it was explained by Ms Bissessur on affidavit that *"Although the Prosecutor's Memorandum is prepared by the prosecutors who deal with the matter in Court (in casu by Gangai and I), it is the product of many minds."* 11.6 *"In this case it is the product of many telephonic discussions, consultations, emails, meetings and research by and between the aforementioned prosecutors and/or the investigators and/or advocate Johan Kruger (Kruger) and Elijah Mamabolo (both Senior State Advocates from the Office of the NDPP) and/or DDPP (Sankar) and Advocate Kalaivani Govender (Govender)."*

The above is confirmation on how the section 2(4) certificate by the NDPP ended up being signed.

An important aspect of the above referred case was *"the decision arrived at by the court that in considering the contents of the Prosecution Memorandum and its possible negative impact on proper prosecution of this case if disclosed. My view is that the State was entitled to refuse to furnish it in its entirety. It is therefore correct that the NDPP did not intend to detail all the information that was placed before her."* Per court.

E. Coming to the Statement provided by Adv Maema, who was leading the prosecution team, he confirmed various consultations and briefings made by the prosecution team and the investigation team to the NDPP. The above was already explained by the Head of the Special Projects, Adv Mosing.

All the necessary consultations with the NDPP, as already explained by Adv Mosing, led to the written authorisation of the Racketeering Certificate by the NDPP, Adv Jiba.

General Booysen, after he was arrested and later released on bail, launched the application challenging the racketeering decision on the basis of the principle of legality in accordance with section 172 (1)(a) and (b) of the Constitution Act, Act 108 of 1996, that the decision was irrational and not supported by evidence.

A decision to oppose the application by the accused in the main case Adv Jiba led to the consultation between their lawyers and such prosecution team where they were advised that:

(i) The decision to prosecute was not reviewable in terms of the Promotion of Access to Information Act 3 of 2000.

(ii) The Prosecution Memorandum should not be made available to the applicants as it is privileged communication between the DPP and ANDPP.

(iii) The court lacked jurisdiction.

The prosecution team then prepared a proposed response to the application of the accused in the main case plus an arch lever file which contained:

(i) Unsigned Statement of Danikas.

(ii) Statement of Ndlondlo.

(iii) Statement of Aiyer.

(iv) Monetary awards.

(v) High Court interdict of a taxi driver who ended up killed by police.

(vi) Clarified role of General Booysen in the management of the enterprise.

Applicant, General Booysen, filed a replying affidavit and that led the team to meet and sent a proposal to Adv Hodes to respond, that never happened till court made a decision on the matter.

Apparently, the judgment indicated that counsel for the State made several concessions and the team then met with counsel who confirmed that he only conceded on the issue around jurisdiction and the court therefore got it all wrong. See paragraphs 14 and 15 of Adv Maema's affidavit.

It is important to note that Adv Chauke confirms Adv Hodes who had under oath in his affidavit said that he only made one concession around the jurisdiction. Adv Chauke was in court when the matter was argued. Adv Hodes is prepared to have a record of

the proceedings obtained, which will substantiate his contentions in this matter. See paragraphs 7 and 8 of Adv Hodes' affidavit.

On the other hand, Adv Maema's contention is that *"It cannot be correct that the ANDPP could have lied under oath. She acted on the advice of the DPP and the prosecution team and that inaccuracies about the dates in the statements was caused by counsel's failure to show the team the statements before filing them."*

What he, Adv Maema is saying is that had counsel provided the draft statement before filing, proper corrections could have been made.

F. Charges preferred against Adv Jiba justified or not

(i) I have already referred to the procedure that had to be followed before a request for the Racketeering Certificate could be authorised in writing by the NDPP.

(ii) The requirements stipulated by section 2(2) of POCA around the type of evidence that a court hearing a case of racketeering may entertain.

(iii) In the case in issue, the affidavits of Adv Maema, Mosing, Chauke and the legal representative of the then Acting NDPP, Adv Hodes contain a lot of information and clarify what actually took place that led to the non-filing of the other information crucial in making the racketeering charge more clearer.

(iv) The advise which the legal representative provided the prosecution team plus Adv Jiba, more particularly the fact that the Prosecution Memorandum is a privileged communication between the DPP and ANDPP and therefore should not be made available to the applicants. See Adv Maema's affidavit paragraph 8 bullet 2.

(v) Both Adv Chauke and Hodes confirm in their separate affidavit that the only concession made in court by Adv Hodes before Gorven J was around the jurisdiction and nothing more. See Adv Hodes' affidavit paragraphs 7 and 8.

Apparently Adv Chauke was the only member of the team present in court when the case was argued and he

personally heard Adv Hodes making one concession around the jurisdiction of court.

(vi) There is also an important affidavit around the availability or non-availability of a witness, Mr Aris Danikas. His lawyer in South Africa explained in detail the reason why his statement was never signed under oath. (See affidavit by Julian Bret Knight – lawyer.)

G. <u>The incomplete information before court</u>

In paragraph 34 line 6-8 the court as per Gorven said that *"If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate correct any inaccuracies."*

The above is a confirmation that the court did not have full information on hand which information was unfortunately sitting with the legal representative and not properly filed as it was supposed to be. See the affidavit of Adv Maema, paragraphs already cited in this document.

The NPA had, out of the above, prevented Adv Jiba from appealing. She in fact had to remove papers already filed for purposes of an appeal because the then NDPP instructed that the matter must never be appealed.

In conclusion, Adv Jiba was merely performing her function as provided for in the POCA and as a result must never be demoralised in her functions.

She is moreover protected by the provision as already indicated in section 78 of POCA.

This is why it is my respectful opinion that Adv Jiba should not be prosecuted and that the charges against her be withdrawn.

Kind regards

M I THENGA
DIRECTOR OF PUBLIC PROSECUTIONS
NORTHERN CAPE

SEQ 34/2020-210

MM IC

National Prosecuting Service
Director of Public Prosecutions

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

TO: **Adv S. Abrahams**
National Director of Public Prosecutions

FROM: **Adv M.I. Thenga**
Director of Public Prosecutions

DATE: **13 August 2015**

RE: **S v NOMGCOBO JIBA**
SILVERTON CAS 622/10/2014

Dear Adv Abrahams

This case has to be dealt with in terms of Part 8 : Prosecution of Certain Categories of Persons – NPA Policy Directives, paragraph 6(c).

1. I decline to prosecute Adv Nomgcobo Jiba in all the 3 charges preferred against her.

2. Reasons for my decision are fully contained in my opinion.

THUS DONE AND SIGNED IN KIMBERLEY ON 13 AUGUST 2015

MZ

M I THENGA
DIRECTOR OF PUBLIC PROSECUTIONS
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MM12

Johanna Nel

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Sunday, 27 September 2020 9:02 PM
To: jneljrts@law.co.za
Subject: FW: Scanned from a Xerox Multifunction Device

-----Original Message-----
From: Nomvula NF. Mokhatla
Sent: Sunday, September 27, 2020 4:44 PM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: FW: Scanned from a Xerox Multifunction Device

-----Original Message-----
From: Nomvula NF. Mokhatla
Sent: Friday, 14 August 2015 13:39
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>; Shaun SK. Abrahams <skabrahams@npa.gov.za>
Subject: RE: Scanned from a Xerox Multifunction Device

Received. Thank you.

The SCCU prosecutors believe they have a strong case against Adv. Jiba and that it must be proceeded with. You, on the other hand are of the view that there are no prospects of a successful prosecution and the matter should be withdrawn. I have suggested to the NDPP that this matter should be allocated to another DPP for obvious reasons. I am not so sure if a DPP has been approached yet for purposes of the consultation process required between SCCU and DPP. I will await the NDPP's decision/approval and confirmation in this regard and inform you accordingly, if not done yet. I will follow up.

I have looked at both opinions (yours and the prosecutors) and scanned the docket, which I have scanned, read and needs rereading and I feel there is a lot more that needs to be ventilated in both. I will send you my questions in a separate email to keep the NDPP out of it for now.

Regards.

-----Original Message-----
From: Marshall Mokgatlhe
Sent: Friday, August 14, 2015 9:58 AM
To: Shaun SK. Abrahams
Cc: Nomvula NF. Mokhatla
Subject: FW: Scanned from a Xerox Multifunction Device

Dear NDPP

Please find the attached for your attention.

Regards

L

Marshall Mokgatlhe
Regional Head, SCCU PRETORIA, National Prosecuting Authority
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-----Original Message-----
From: xerox@npa.gov.za [mailto:xerox@npa.gov.za]
Sent: 14 August 2015 09:35 AM
To: Marshall Mokgatlhe
Subject: Scanned from a Xerox Multifunction Device

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The National Prosecuting Authority of South Africa

MM13

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

TO: ADV SHAUN K ABRAHAMS
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: ADV NOMVULA MOKHATLA
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV M.P MOKGATLHE
SPECIALISED COMMERCIAL CRIME UNIT

DATE: 14 AUGUST 2015

RE: LEGAL OPINION ON DECISION TO PROSECUTE N JIBA

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Introduction

[1] I have read the contents of case docket, Silverton CAS 622/10/2014, in order to advise the NDPP on the veracity of the prosecutorial decision of Advocate(s) Jan Ferreira and Gerhard van Eeden, who are SCCU prosecutors reporting under writer hereof.

[2] According to the NPA Prosecution Policy, the decision of whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families.
Prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. This test must be applied objectively after careful deliberation to avoid unjustified prosecutions.

Scope of the case

[3] The decision by A1 to lay a criminal complaint allegedly arose after the NPA management advised him to do so. It is interesting to note that such NPA officials are not mentioned by name. On 16 February 2015 Adv. Ferreira submitted an

internal memo to Mr Nxasana reporting on several cases including the case against Jiba. He states that during November 2014 he received a verbal request from Mr Willie Hofmeyr to be the prosecutor in the Jiba matter.
[3.1] In the introduction of Adv Ellis SC's legal opinion, he refers to consultations he held with the CEO Ms Karen Van Rensburg and CFO Mr Gordon Hollomby who approached him for legal advice on the disciplinary measures available against senior NPA officials. The involvement of the three NPA officials is therefore clearly articulated.

[4] The basis for the allegations made by A1 appears to seek corroboration from the court findings of Gorven J in the review application of Booysen / ANDPP and Others, the legal opinion of Ellis SC and the advice of the three NPA officials mentioned above. It is therefore evident that A1 did not independently decide to lay a complaint with the SAPS, but was influenced into doing that.

[5] Sworn affidavits of Gorven J, Ellis SC, Ms Van Rensburg, Gordon Hollomby and Willy Hofmeyr are conspicuous by their pronounced absence. The pronouncements by Gorven J and the legal opinion by Ellis SC are just recommendations that cannot be regarded as evidence under oath to be used in a criminal trial to prove the guilt of an accused beyond reasonable doubt.

[6] The evidence of A2, Maj Gen Booysen has to be treated with extreme caution, since he has a motive to pursue a criminal case in order to ensure that the prosecution instituted against him does not proceed. He received monetary reward and assisted Mostert in tracing suspects that were later killed. The fact that he was not on the scene of the killings does not preclude the State from alleging that he was managing the enterprise. The version of Booysen seems to have been adopted by the prosecution in the Jiba matter resulting in their judgment being clouded.

[7] Adv. Maema (A4) explains how the prosecution team was formed, the meetings they held, discussion with Mosing on the racketeering issues, that he prepared a prosecution memo and signed the application for authorization and forwarded it to Mosing for Jiba's attention. He further states that the team consulted with Col Aiyer earlier in the month and had used the information during a briefing session with Jiba as they expected the information to be captured

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under oath by the investigators. He further explains how Booysen was involved in the actions of the group accused of murders.

[8] A8 is Laurence Hodes SC, the outside counsel for the NPA during the review application. He will testify that he settled Ms Jiba's affidavit after it was drafted by his junior counsel, Adv Manaka. This clearly indicates that Ms Jiba was not the author of her statement although she attested her signature to the document. He states that he did not make the concessions attributed to him by Gorven J and that they proceeded to prepare and file a Notice of Appeal, only for the notice to be withdrawn at Mr Nxasana's instruction.

[9] A3 and A12 are affidavits of Anthony Mosing, a Senior Deputy Director of Public Prosecutions and head of the Special Projects Unit in the office of the NDPP. He states that his duties include advising the NDPP on all applications for authorization in terms of section 2(4) of POCA. He was the only one in his team who dealt with the Booysen matter due to its sensitivity. He interacted with the prosecution team in the Booysen matter made up of two Senior Deputy Directors, Adv(s) Maema and Mathenjwa on racketeering issues.

[9.1] He received the application for racketeering authorization of the Booysen case from the prosecution team on 15/08/2014. On 16/08/2014 he drafted his memorandum and forwarded it to Adv. Jiba advising the latter to grant the requested authorization.
[9.2] He was summoned by Mr Nxasana to his office where the latter was hostile to him and accused him of being loyal to Ms Jiba. The then NDPP told him that he felt he was being undermined and was angry about the decision to file the notice of appeal as it was meant to protect Ms Jiba's reputation. A12 was traumatized by the experience to such an extent that he was booked off sick by a physician. Mr Nxasana then ordered the withdrawal of the notice of appeal against Gorven J's ruling.

[10] It would be naïve to pretend that we are oblivious to the fact that the relationship between Mr Nxasana and Ms Jiba was far from being cordial. It is clear that there was no cogent reason advanced by Mr Nxasana to withdraw the notice of appeal.

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The legal position

[11] The powers of the NDPP are outlined by the provisions of **section 22** of the NPA Act, Act 32 of 1998. The NDPP is empowered by legislation to carry certain functions and duties only relevant to an appointee in his/her position. **Section 78** of POCA clearly insulates Ms Jiba from any personal liability for carrying out her functions under the Act. As an officer of the court, the NDPP can make mistakes in carrying out her functions and aggrieved parties can approach the courts for appropriate relief.

[11.1] In this particular case, Booysen approached the court to review the decision of Ms Jiba to authorize a racketeering prosecution against him in terms of the POCA legislation. This fact does not nullify the decision taken to prefer the predicate offences. It is submitted that any mistake or misdirection by the NDPP in exercising his functions cannot be criminalized. The setting aside of the authorization is a legal remedy that Booysen successfully exercised. The NDPP can reissue the authorization upon receipt of a properly motivated application by the prosecution team that complies with the standard set by the court.

[11.2] In **S v Brown** (681/2013) [2014] ZASCA 217 (1 December 2014), the SCA severely criticized Veldhuizen J's conduct as tending to bring the administration of justice into disrepute. The SCA did not criminalize his conduct because the appeal process was the remedy available to the NPA.

[12] Ms Jiba has been charged with the offences of Fraud and Perjury. Upon assessing the evidence against the alleged charges, one is left wondering as to how the prosecution intends proving the element of intention in both counts. With regard to Fraud, the prosecution must prove that Ms Jiba had a fraudulent intent when she authorized the racketeering prosecution of Booysen. The prosecutors seem to be relying on *dolus eventualis* in both instances. Both A4 and A12 will testify that they are the ones who advised Ms Jiba through verbal briefings and a prosecutorial memorandum to issue the authorization. A8 will disprove the Perjury charge by testifying that he settled Ms Jiba's affidavit after it was drafted and compiled by Adv Manaka.

[13] The doctrine of *dolus eventualis* cannot find application in this particular instance since Ms Jiba could not have foreseen the possibility that her decision-

making will lead to an unlawful outcome. She acted on the legal advice of counsel as a litigant in review proceedings. She could not have reconciled herself to the ensuing result since her conduct was not reckless. She might have erred or misdirected herself in believing that the motivation as contained in the prosecutorial memorandum was sufficient to justify her decision to issue the racketeering authorization.

[14] The decision arrived at by both prosecutors to prosecute Ms Jiba for exercising her statutory obligations in terms of the law is not supported by objective facts. The predicate offences preferred against Booysen stand to be adjudicated upon by the trial court. If this prosecutorial decision were to stand, prosecutors will not be able to carry out their duties without fear of being victimized.

There are no reasonable prospects of a successful prosecution in this matter and a solution will be to withdraw the case.

MP MOKGATLHE
REGIONAL HEAD: SCCU PRETORIA

NMI4

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

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TO: ADV SHAUN K ABRAHAMS
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: ADV NOMVULA MOKHATLA
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV M.P MOKGATLHE
SPECIALISED COMMERCIAL CRIME UNIT

DATE: 17 AUGUST 2015

RE: LEGAL OPINION ON DECISION TO PROSECUTE N JIBA

Introduction

1. On 13 August 2015 I was requested by the National Director of Public Prosecutions, Advocate Shaun Kevin Abrahams to furnish him with a legal opinion and a decision on the veracity of the prosecutorial decision of Advocates Ferreira and Van Eeden, who are prosecutors reporting under writer hereof.

2. I consulted the following sources:

   2.1 The evidence as contained in case docket, Silverton CAS 622/10/2014 investigated by Major General Taioe,

   2.2 The charge sheet of State versus Nomgcobo Jiba, Case No. 111/83/2015,

   2.3 The NPA Policy Directives,

   2.4 The provisions of the Prevention of Organised Crime Act, 121 of 1998,

2.5 Judgment of Gorven J in Booysen v NDPP and Others [2014] 2 All SA 391 (KZD),

2.6 The affidavit of Johan Booysen,

2.7 The affidavit of Nomgcobo Jiba,

2.8 The legal opinion of Ferreira and Van Eeden, and

2.9 Consultations with prosecutors in the Cato Manor case against Booysen and Others.

Evaluation of the Evidence contained in Silverton CAS 622/10/2014

3. **A1- Theodore Leeuwschut**, who is a director of administration in the office of the CEO. He will testify that he was advised by NPA management to lay a criminal complaint against Jiba. He does not mention the names of the persons alleged to be NPA management. He refers to the remarks made by Gorven J and the legal opinion of Patrick Ellis SC. He concludes his affidavit by alleging that the NPA management is of the view that the matter should be reported to the SAPS with a view to investigate a criminal charge of perjury.

4. It is evident from A1 that he did not act out of his own volition in laying a complaint with the SAPS but was influenced into doing that. His evidence is therefore not sufficient to particularise the offence alleged to have been committed by Jiba.

5. Patrick Ellis SC mentions the names of NPA officials he consulted with as Ms Karen Van Rensburg and Mr Gordon Hollanby. He further states that these NPA officials wanted his advice on the disciplinary measures available against senior NPA officials.

6. On 16 February 2015 Jan Ferreira submitted a memorandum (copy) to Mr Nxasana wherein he alleged that Mr Willie Hofmeyr requested him to be the prosecutor in the case against Jiba.

7. Sworn affidavits of Ellis SC, Van Rensburg, Hollomby and Hofmeyr are conspicuous by their absence.

8. The Gorven J judgment attached in the docket as evidence is not preceded by a section 235 certificate as required by the Criminal Procedure Act 51 of 1977.

9. Apart from the purported complaint of A1, there is no sworn affidavit by the NPA as complainant in the criminal case against Jiba and any averment in the charge sheet that the NPA suffered prejudice as a result of Jiba's alleged misrepresentation cannot be supported by objective facts.

10. **A2- Johan Booysen**, who is a Deputy Provincial Commissioner with the rank of Major General in the SAPS. He was an Applicant in the case of Booysen v NDPP and Others [2014] 2 All SA 391 (KZD) where he challenged the validity of the decision taken by Jiba to authorise his prosecution for Racketeering on 17 August 2015.

11. Johan Booysen is accusing Jiba of misleading the court and lying under oath. He further alleges that Jiba misrepresented the truth which caused him actual prejudice. He says that in his view, Jiba committed fraud by lying under oath and in the process defeated or obstructed the cause of justice. All this allegations are not corroborated by objective facts.

12. Johan Booysen alleges in paragraph 29 of his Replying Affidavit as follows:

    "I submit that the only reasonable inference to be drawn from the aforegoing is that none of the statements were in the possession of the First and Second Respondents when the impugned decisions were made. The statements of Aiyer certainly could not have been in their possession by 17 August 2012……(NJ4 is in any event, dated 31 August 2015). The same applies in respect of Danikas and Ndlondlo."

13. The aforementioned submission cannot be true because NJ2 which is a statement of Aiyer dated 4 August 2012 was placed before Jiba for

consideration before she decided to authorise the racketeering prosecution against Johan Booysen.

14. Furthermore, the statement of Ndlondlo is dated 31 July 2012 and was also considered by Jiba prior to authorising the racketeering prosecution of Johan Booysen.

15. NJ1 is a document indicating the police officers who received monetary awards, and is dated 14 October 2008. It was considered by Jiba prior to deciding to authorise the racketeering prosecution of Booysen.

16. Can it then be said that the false affidavit filed by Johan Booysen in the court papers, where he says that NJ1, NJ2 and Ndlondlo's statement were not before Jiba when she made the decision to authorise the racketeering prosecution, was made with the intention to mislead the court?

17. According to the Monetory Awards (NJ1) dated 14 October 2008, Booysen received an award together with the Cato Manor SVC Section of the Durban Organised Crime Unit for the killing of the Kwa-Maphumulo Taxi Association members.

18. The only mistake that Jiba made was to allege in her Answering Affidavit that she also referred to NJ3 which is the unsigned statement of Danikas, before deciding to authorise the racketeering prosecution of Booysen. The mistake referred to can be mitigated by the fact that Jiba's affidavit was drafted by junior counsel, Adv. Manaka and settled by A8- Laurence Hodes SC before she signed it. Jiba's conduct can therefore not be alleged to be fraudulent.

19 With regard to NJ4 statement of Aiyer signed on 31 August 2012, there is a valid explanation by A4- Advocate Maema, on page 9 of his affidavit wherein he mentions that,

"Although the second of Aiyer's statement was dated 31 August 2012, the prosecution team had already consulted Aiyer and already knew what the contents of Aiyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy to the prosecutors from the consultation and was used on that basis."

20. The prosecutors in Jiba's criminal matter appear to have disregarded the abovementioned explanation by Sello Maema but chose instead to believe the unsubstantiated allegations made by Johan Booysen.

21. Johan Booysen's evidence has to be approached with caution, since he has a motive. His motive is to ensure that the criminal case instituted against him does not proceed without delay. His evidence is not corroborated by any independent witness.

22. The prosecutors' reliance on the fact that Booysen was not at the scene of the crimes and that there was no direct evidence linking him to the individual offences is irrational and indicates a lack of understanding of the requirements necessary for managing an enterprise. The provisions of POCA allows the State to charge any individual with managing the activities of an enterprise, even if the said person is not at the scene of the crime or his conduct is not directly linked to the offences.

23. According to section 2(1)(f) of POCA,

(1) *Any person who.....(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity.....*
within the Republic or elsewhere, shall be guilty of an offence.

The elements required for a contravention of section 2(1)(f) are: *An enterprise must have existed; * The accused managed the operation or activities of the enterprise; * A pattern of racketeering activity must have existed; and * The accused knew or ought reasonably to have known that any person, employed by or associated

with that enterprise, must have directly or indirectly conducted or participated in the affairs of the enterprise, through a pattern of racketeering activity.

The reasons for charging Johan Booysen with Racketeering

24. The prosecutors in the Johan Booysen case had correctly identified Cato Manor SVC Section of the Durban Organised Unit as the enterprise.

25. According to Aiyer, Johan Booysen was the Provincial Commander of Organised Crime in KZN during 2008, bypassed Aiyer and managed the operations of Cato Manor SVC Section.

26. Immediately after Supt Choncho was killed on 27 August 2008, 7 people who were suspected to have been involved in his murder were all killed by Cato Manor SVC Section of the Durban Organised Crime Unit. These people who were killed belonged to the Kwa-Maphumulo Taxi Association. Johan Booysen and the Cato Manor SVC Section of the Durban Organised Crime Unit received monetary awards and certificates for this particular operation.

27. Johan Booysen knew or ought reasonably to have known that these 7 people were killed because they were suspected of having killed a police officer. The killing of the 7 people happened in close proximity to the date of the killing of Supt Choncho. The 7 people were killed on the following dates:

- 3 September 2008
- 16 September 2008
- 18 September 2008
- 18 September 2008
- 3 February 2008

28. In this regard, the conclusion that Cato Manor SVC Section of the Durban Organised Crime Unit under the management of Johan Booysen embarked on an ongoing and continuous killing pattern. It is surprising that all the 7 deceased are said to have been shot when Cato Manor SVC Section members were attempting to arrest them. The 7 deceased are also alleged to have fired at the Cato Manor SVC Section members, at different scenes but no member of the police was ever shot and no State property was damaged.

29. Booysen also assisted Mostert, one of the Cato Manor SVC Section members in tracing the suspects that were later shot dead.

30. In a High Court application case no. 13759/2008 brought about by one deceased, Bongani Elpheas Mkhize, interdicting all the Respondents including Booysen, not to kill him, citing the murder of his fellow members of Kwa-Maphumulo Taxi Association who were allegedly suspected of involvement in the killing of Superintedent Choncho.

31. Booysen filed an answering affidavit where he defended the actions of Cato Manor SVC Section policemen. This conduct clearly indicates that Booysen had knowledge of the activities of the said policemen. In spite of the Court order in favour of Mkhize, the latter was killed by the same Cato Manor SVC Section of the Durban Organised Crime Unit.

32. Accordingly, the authorisation of the Racketeering prosecution against Johan Booysen and Cato Manor SVC Section members cannot be faulted.

33. The statement of Booysen when properly assessed constitutes evidence of a single witness, however, there are statements of several witnesses who will corroborate the version of Jiba. The State will not be able to prove that Jiba had the necessary intention to commit the offences of fraud and perjury.

34. **A3 and A12- Anthony Mosing** who is head of the Special Projects Unit in the office of the NDPP. He will testify that he advises the NDPP on all the racketeering applications. He met with the prosecution team in the case against Booysen, where the team made a presentation to him. He had to satisfy himself that a prima facie case of racketeering existed including the enterprise and managers and participants. He was satisfied that the application brought by prosecutors, Advocates Maema and Mathenjwa was sound and proceeded to draft a certificate and advised Jiba to authorise the racketeering prosecution of Booysen.

35. Mosing will further state that Nxasana summoned him to his office and accused him of being loyal to Jiba. Nxasana told him that he felt undermined by the decision to appeal the Gorven J decision as it was meant to protect the reputation of Jiba. Nxasana then ordered the withdrawal of the notice of appeal that had already been filed. Nxasana's conduct mentioned above clearly indicates that the relationship between him and Jiba was far from being cordial.

36. It is important to note that Jiba authorised the racketeering prosecution of Booysen at the time when she was the acting NDPP and long before Nxasana was appointed as National Director. Nxasana therefore, cannot claim to have been undermined since the decision was not taken under his watch.

37. It is surprising that Ferreira and Van Eeden decided not to charge Maema, Mathenjwa, Mosing and Chauke who all made briefings to Jiba and provided argument in support of the authorisation of the racketeering prosecution of Booysen and the Cato Manor policemen.

38. According to count 1 of the charge sheet, Jiba is accused of fraud in that she made misrepresentations to Johan Booysen and/ or SAPS and/ or NPA and/ or members of the public and/ or the judiciary in KZN.
39. There are no affidavits from any of the mentioned persons in par 38 above, wherein they allege under oath how Jiba defrauded them.
40. The evidence of both A1 and A2 is insufficient to sustain the alleged charge of fraud against Jiba.
41. It will be impossible to prove the existence of a fraudulent intent on the part of Jiba since she acted on advice of Mosing, Chauke, Maema and Mathenjwa.

42. According to count 2 of the charge sheet, Jiba is accused of having committed perjury by unlawfully and intentionally making false statements under oath.
43. It is true that the statements of Ndlondlo, NJ1 and NJ2 were made under oath and Jiba considered them before deciding to authorise the racketeering prosecution. The alleged falsity of the said statements is only known to Booysen. The veracity thereof can best be adjudicated upon by a trial court.

44. Count 3 of the charge sheet alleges that the evidence Jiba considered for authorising the racketeering prosecution did not justify her decision hence Gorven J set aside her authorisation. The setting aside of a decision cannot result in a criminal offence by the decision maker, but it is a legal remedy available to the aggrieved party. Furthermore Gorven J did not recommend that criminal charges be instituted against Jiba.

45. There is no evidence to prove that Jiba had a fraudulent intent when she made her decision to authorise the racketeering prosecution of Booysen and members of the Cato Manor SVC Section.

The legal position

47. The powers of the NDPP are outlined by the provisions of section 22 of the NPA Act, Act 32 of 1998. The NDPP is empowered by legislation to carry certain functions and duties only relevant to an appointee in his/her position. Section 78 of POCA clearly insulates Ms Jiba from any personal liability for carrying out her functions under the Act. As an officer of the court, the NDPP can make mistakes in carrying out her functions and aggrieved parties can approach the courts for appropriate relief. (review)

48. In this particular case, Booysen approached the court to review the decision of Ms Jiba to authorize a racketeering prosecution against him in terms of the POCA legislation. This fact does not nullify the decision taken to prefer the predicate offences. It is submitted that any mistake or misdirection by the NDPP in exercising his functions cannot be criminalized. The setting aside of the authorization is a legal remedy that Booysen successfully exercised. The NDPP can reissue the authorization upon receipt of a properly motivated application by the prosecution team that complies with the standard set by the court.

49. In **S v Brown** (681/2013) [2014] ZASCA 217 (1 December 2014), the SCA severely criticized Veldhuizen J's conduct as tending to bring the administration of justice into disrepute. The SCA did not criminalize his conduct because the appeal process was the remedy available to the NPA.

50. Ms Jiba has been charged with the offences of Fraud and Perjury. Upon assessing the evidence against the alleged charges, one is left wondering as to how the prosecution intends proving the element of intention in both counts. With regard to Fraud, the prosecution must prove that Ms Jiba had a fraudulent intent when she authorized the racketeering prosecution of Booysen. The prosecutors seem to be relying on *dolus eventualis* in both instances. Both A4 and A12 will

testify that they are the ones who advised Ms Jiba through verbal briefings and a prosecutorial memorandum to issue the authorization. A8 will disprove the Perjury charge by testifying that he settled Ms Jiba's affidavit after it was drafted and compiled by Adv Manaka.

51. The doctrine of *dolus eventualis* cannot find application in this particular instance since Ms Jiba could not have foreseen the possibility that her decision-making will lead to an unlawful outcome. She acted on the legal advice of counsel as a litigant in review proceedings. She could not have reconciled herself to the ensuing result since her conduct was not reckless. She might have erred or misdirected herself in believing that the motivation as contained in the prosecutorial memorandum was sufficient to justify her decision to issue the racketeering authorization.

Conclusion

52. The decision arrived at by both prosecutors to prosecute Ms Jiba for exercising her statutory obligations in terms of the law is not supported by objective facts. The predicate offences preferred against Johan Booysen stand to be adjudicated upon by the trial court. If this prosecutorial decision were to stand, prosecutors will not be able to carry out their duties without fear of being victimized.

There are no reasonable prospects of a successful prosecution in this matter and I accordingly recommend that the case against Ms Nomgcobo Jiba be withdrawn.

MP MOKGATLHE
REGIONAL HEAD: SCCU PRETORIA

MM15

Specialised Commercial Crime Unit

The National Prosecuting Authority of South Africa
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TO: **ADV SHAUN K ABRAHAMS**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: **ADV NOMVULA MOKHATLA**
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: **ADV MP MOKGATLHE**
SPECIALISED COMMERCIAL CRIME UNIT

DATE: **17 AUGUST 2015**

Dear Adv. Abrahams

Your email dated 13 August 2105 refers.

The decision taken by the then acting NDPP, Adv. Jiba to authorize the racketeering prosecution of Johan Booysen and Others was arrived at after briefings by the prosecution team and presentation of a prosecutonal memorandum for her perusal.

Section 78 of the Prevention of Organised Crime Act No 121 of 1998 (POCA) provides that "*Any person generally or specifically authorised to perform any function in terms of this Act, shall not in his or her personal capacity be liable for anything done in good faith*".

The aforementioned provision clearly absolves Ms Jiba from any liability, including criminal prosecution, for having exercised her power in terms of the empowering provisions of POCA.

There are no prospects of a successful criminal prosecution and I accordingly decline to prosecute Adv. Nomgcobo Jiba for Fraud and Perjury.

Adv Marshall Mokgatlhe
Deputy Director of Public Prosecutions

MM16

From: Jan Ferreira (JM)
Sent: 17 August 2015 12:55 PM
To: Marshall Mokgatlhe
Subject: Ms Jiba

Dear Marshall,

Any news regarding the docket (and opinion) that was forwarded to the NDPP.

As mentioned this morning, my trial starts Wednesday and I really need the docket and the decision as soon as possible.

Regards

Jan Ferreira

Senior Deputy Director of Public Prosecution

Specialised Commercial Crime Unit: Pretoria

0847025290

0124010420 (Switch Board)

0124010453 (Direct landline)

0866751337 (fax to mail)

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The National Prosecuting Authority of South Africa

Johanna Nel

From: Kgaogelo Ramaimela <adv.kaygee@gmail.com>
Sent: Monday, 28 September 2020 1:32 PM
To: Johanna Nel
Subject: Fwd: FW: Ms Jiba

Annexure to paragraph 8, email stream

Kind regards,

Kgaogelo Ramaimela
Club Advocates' Chambers
30 Pinaster Avenue
Hazelwood
Tel: 012 9479005
Cell: 079 524 3260

---------- Forwarded message ---------
From: **Marshall Mokgatlhe** <mpmokgatlhe@npa.gov.za>
Date: Mon, 28 Sep 2020 at 12:42
Subject: FW: Ms Jiba
To: adv.kaygee@gmail.com <adv.kaygee@gmail.com>, kgaogelo@clubadvocates.co.za <kgaogelo@clubadvocates.co.za>

From: Marshall Mokgatlhe
Sent: Monday, August 17, 2015 3:04 PM
To: Jan Ferreira (JM) <janferreira@npa.gov.za>
Subject: RE: Ms Jiba

Dear Jan

I am still waiting for the decision. NDPP was meeting with all the DPP's from this morning and the meeting is still on.

Hopefully decision will be taken this afternoon or tomorrow morning.

Marshall

L

MM17

Johanna Nel

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Monday, 28 September 2020 10:35 AM
To: jneljrts@law.co.za
Subject: FW: STATE / N JIBA
Attachments: LETTER TO MAJAVU.pdf

Please find the attached email.

From: Marshall Mokgatlhe
Sent: Tuesday, August 18, 2015 8:59 AM
To: zola@majavuattorneys.co.za
Cc: Tsholofelo P. Moja <TMoja@npa.gov.za>
Subject: STATE / N JIBA

Dear Mr Majavu

Please find the attached document for your attention.

Regards

Marshall Mokgatlhe
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The National Prosecuting Authority of South Africa

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SEQ 34/2020-234

MM17.1

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY
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18 August 2015

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Zola Majavu Attorneys
170 Columbine Avenue
Mondeor

Dear Mr Majavu,

STATE versus NOMGCOBO JIBA

1. I refer to the abovementioned criminal matter involving your client Adv. Jiba.
2. Pursuant to a request by the prosecution team to the National Director, for the appointment of outside counsel to give an opinion as to the fact whether there is a prima facie case or not, writer hereof as Regional Head, was requested by the National Director to provide an opinion and decision.
3. I have duly considered the evidence as contained in the case docket, Silverton CAS 622/10/2014, the NPA Policy Directives and the applicable legislation.
4. I have come to the conclusion that there are no reasonable prospects of a successful prosecution.
5. I decline to prosecute Adv. Nomgcobo Jiba on all 3 charges preferred against her.
6. The criminal charges will be formally withdrawn in Court on 19 August 2015.

Yours sincerely

Adv. Marshall Mokgatlhe
Regional Head SCCU Pretoria

MM 18.1

Subject: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)
Date: 26 June 2018 at 15:00:11 SAST
To: Seleka Peter <PSeleka@justice.gov.za>
Cc: Sebelemetsa Joseph Ramathiti <RSebelemetsa@justice.gov.za>, Hilton Epstein SC <hillex@law.co.za>, Hilton Epstein <hiltonepstein@gmail.com>

Dear Peter

I refer to the above matter and to our discussion earlier today.

Judges Tlhapi, Mothle and Wright have indicated that the application for leave to appeal (a copy of which is attached hereto) has not been properly enrolled.

It appears that there is a practice at the Pretoria High Court for enrolling applications for leave to appeal, which requires a party setting down the application to *inter alia* sign a register and to uplift the court file. The judges have indicated that the practice has not been complied with. The Court file has also not been paginated.

The judges have requested that you prepare an affidavit explaining why the practice was not complied with and further that the file be indexed and paginated as soon as possible.

Please prepare a draft affidavit for Hilton an I to consider. I confirm your advise that you will send the draft by 3 July 2018.

Should you want to discuss the matter further, please give me a call.

Regards.

Adv Tshifhiwa Mabuda
Member of the Johannesburg and
Polokwane Societies of Advocates
Maisels Chambers 3
4 Protea Place
Sandown
[tel]: +27 (0) 11 535 1800
[fax]: +27 (0) 11 535 1865
[cell]: +27 (0) 72 510 0161
[e-mail]: mabuda@law.co.za and
adv@tmabuda.com

MAISELS CHAMBERS 3

Confidentiality and Disclaimer

MM 18.2

Acting on the direction of Acting NDPP, Dr Ramaite, you are instructed to withdraw the application for leave to appeal tomorrow.

The grounds for withdrawal are that Adv. Abrahams initiated a process for the reconsideration of the charges against Adv Jiba. The matter on Dr. Ramaite's desk for further consideration in compliance with the Court Order. It would be fruitless to pursue the appeal on this matter any further.

I look forward to your assistance.

Regards

Thobile

From: Thobile T. Chitha
Sent: Monday, August 20, 2018 2:49 PM
To: PSeleka@justice.gov.za
Subject: FW: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

From: Tshifhiwa Mabuda <mabuda@law.co.za>
Sent: Monday, August 20, 2018 7:38 AM
To: Thobile T. Chitha <tchitha@npa.gov.za>
Subject: Fwd: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Regards.

Adv Tshifhiwa Mabuda
Member of the Johannesburg and
Polokwane Societies of Advocates
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4 Protea Place
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adv@tmabuda.com

MAISELS CHAMBERS | 3

Begin forwarded message:

From: Tshifhiwa Mabuda <mabuda@law.co.za>

L

MM18.3

The judge used the word disingenuous. The issue Adv Abrahams did was to initiate a process in compliance with the court order. Then you cannot appeal a judgment that you have complied with.

I do not know how you can obtain a chance to rectify this comment.

From: Marshall Mokgatlhe
Sent: Wednesday, October 3, 2018 1:12 PM
To: Thobile T. Chitha <tchitha@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Thobile,

What are the legal implications of such action?

Sincerely,

NATIONAL PROSECUTING AUTHORITY
South Africa

Marshall Mokgatlhe
Regional Head:
Specialised Commercial Crimes Unit:
Pretoria

228 Visagie Street, Bothongo Building
Pretoria, 0001

Tel: +27 12 401 0425
Ext: 12 0425
Cell: +27 83 775 2114
E-mail: mpmokgatlhe@npa.gov.za
Web: www.npa.gov.za

From: Thobile T. Chitha
Sent: 03 October 2018 11:44 AM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: FW: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Marshall,

Kindly be advised that the NPA is withdrawing the appeal. The grounds of withdrawal are set out in my email below.

There were factual findings against you and Adv Abrahams, counsel advised that an appeal cannot be granted on them only.

Regards

Thobile

From: Thobile T. Chitha
Sent: Wednesday, October 3, 2018 9:13 AM
To: PSeleka@justice.gov.za
Cc: Hilton Epstein SC <hillex@law.co.za>; 'Tshifhiwa Mabuda' <mabuda@law.co.za>; Nomthetho Gcingca (NG) <Ngcingca@npa.gov.za>; Marco MP. Voller <MVoller@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Peter,

L

MM 18.4

Marshall Mokgatlhe
Regional Head:
Specialised Commercial Crimes Unit:
Pretoria

228 Visagie Street, Bothongo Building
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From: Thobile T. Chitha
Sent: 03 October 2018 02:58 PM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Marshall,

I am happy you have not issue with that. You are the only person I was worried about mostly. You didn't deserve this comment.

Regards

Thobile

From: Marshall Mokgatlhe
Sent: Wednesday, October 3, 2018 2:46 PM
To: Thobile T. Chitha <tchitha@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Thobile,

I have reached a stage where I cannot be promoted save for a political appointment.

Marshall Mokgatlhe
Regional Head:
Specialised Commercial Crimes Unit:
Pretoria

228 Visagie Street, Bothongo Building
Pretoria, 0001

Tel: +27 12 401 0425
Ext: 12 0425
Cell: +27 83 775 2114
E-mail: mpmokgatlhe@npa.gov.za
Web: www.npa.gov.za

From: Thobile T. Chitha
Sent: 03 October 2018 02:34 PM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Marshall,

The adverse comments made by Montlhe J remain. It will affect your chances for promotion and Adv. Abrahams employability.

MM18-5

<msramaite@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Marshall,

On 27 September 2018, I brought to the attention of Adv. Epstein SC, that Adv. Abrahams had initiated a process to comply with the court order of Montlhe J. He then advised that NPA could not proceed with the appeal when it has complied with the court. He asked me to communicate his advice on the matter to Dr. Ramaite. On 28 September 2018, after I have informed Dr. Ramaite Hilton's advice on NPA continuing with the appeal, he then asked for court papers, heads of argument and the judgment, which I provided to him. After having studied the application for leave to appeal, judgment and referral to the DPP Adv. Smit he took the decision that the application for leave to appeal be withdrawn. I communicated Dr. Ramaite's decision to the state attorney and Adv Epstein who then informed the judges about the new developments.

I trust that this will give clarity to the questions you raised.

Regards

Thobile

From: Marshall Mokgatlhe
Sent: Friday, October 5, 2018 8:54 AM
To: Thobile T. Chitha <tchitha@npa.gov.za>
Cc: Lawrence S. Mrwebi <lsmrwebi@npa.gov.za>; Nomgcobo Jiba <NoJiba@npa.gov.za>; Silas Ramaite <msramaite@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Thobile,

It is my understanding that the judgment has serious implications for my continued employment in the NPA.

The judgment was not only about the court order but had credibility findings based on Mohle J having erred in his factual findings that adv Abrahams made the decision not to prosecute adv
Jiba.

Since I am the affected party and was not consulted, can I be provided with the legal opinion provided by counsel to Dr Ramaite on the withdrawal of the appeal.

Your urgent response will be appreciated.

Sincere Regards,

MM 19

Zuko Madlanga

From: Marshall Mokgatlhe
Sent: Monday, 06 May 2019 12:13 PM
To: Nomvula NF. Mokhatla
Cc: George D. Baloyi
Subject: FW: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Importance: High

Categories: Red Category

Dear Advocate Mokhatla,

I refer to the trailing e-mails as well as the evidence as presented by Johan Booysen on 2 and 3 May 2019.

It is my respectful submission that the decision by the NPA to withdraw an application for leave to appeal was not sound in law.

The two judges in the North Gauteng high court had made credibility findings against Shaun Abrahams and myself.

You will appreciate that such an indictment to any legal practitioner is career ending on its own.

I am obliged to appeal the said decision.

Can Counsel be appointed on my behalf to apply for late condonation of and noting of the appeal.

Sincere regards,

NATIONAL PROSECUTING AUTHORITY
South Africa

Marshall Mokgatlhe
Regional Head:
Specialised Commercial Crimes Unit:
Pretoria

228 Visagie Street, Bothongo Building
Pretoria, 0001

Tel: +27 12 401 0425
Ext: 12 0425
Cell: +27 83 775 2114
E-mail: mpmokgatlhe@npa.gov.za
Web: www.npa.gov.za

From: Thobile T. Chitha <tchitha@npa.gov.za>
Sent: Friday, October 5, 2018 12:04 PM
To: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Cc: Lawrence S. Mrwebi <lsmrwebi@npa.gov.za>; Nomgcobo Jiba <NoJiba@npa.gov.za>; Silas Ramaite <msramaite@npa.gov.za>
Subject: RE: Freedom Under Law (RF) NPC // National Director of Public Prosecutions and Others (Case No: 89849/2015)

Dear Marshall,

SEQ 34/2020-241

CASE DOCKET • SAAKDOSSIER

Silverton

CR No. / MR No. ..... / ..... / ..... (DD MM YY/JJ)

CAS No. / MAS No. 622 / 10 / 2014 (MM / YY/JJ)

Control Register No. / Beheerregister No. 860 2014

Case Register No. / Sakeregister No.

X: Case docket / Saakdossier [X] | Inquest Docket / GDO Dossier [ ] | Court number / Hofnommer [ ] | Court Case Number / Hofsaaknommer

Investigator / Ondersoeker: Sgt. Botha Tel. No 0796950293

Investigator / Ondersoeker: ..... Tel. No .....

Investigator / Ondersoeker: ..... Tel. No .....

Investigator / Ondersoeker: ..... Tel. No .....

Investigator / Ondersoeker: ..... Tel. No .....

Date of offence / Incident / Datum van misdryf / voorval: 2013/07/03 (DD MM YY/JJ) and / en ..... on / op .....

or Period - Between / of Tydperk: Tussen ..... (HR MM) and / en ..... on / op .....

Day of week / Dag van week: SU MO TU WE TH FR SA / SO MA DI WO DO VR SA

Entrance gained / Circumstances of death / Toegang verkry / Omstandighede van dood: Deposing a false affidavit

Document used / gebruik: Dokument / Vonnis Address of offence / Adres van misdryf: UPA, 123 Westlake, Pretoria

Initials and surname / Voorl. en van: J. Leeuwschut Tel. No. (H) 079 315 0420

Tel. No. (W) 012 845 6087

Description of offence / Beskrywing van misdryf	Crime code / Misdaadkode	Nature of property / injuries / Aard van eiendom / beserings	Value / Damage / Waarde / Skade	Value recovered / Waarde teruggevind
ing by ing a false vit on 2014-07-03 UPA				

Fees ... See ... Vir verdere misdrywe – Sien

FINDING/RESULT OF TRIAL - BEVINDING/UITSLAG VAN VERHOOR

Finding / Bevinding:

CONVICTED OF / AND SENTENCE or FINDING OF MAGISTRATE / SKULDIG BEVIND EN VONNIS of LANDDROS SE BEVINDING:

k withdrawn
nstmann of Pty M
gatt Ltd

3/2015
Date / Datum

Prosecutor / Aanklaer

COURT DATES / HOFDATUMS	REASONS FOR POSTPONEMENT / REDES VIR UITSTEL
10/6/2015 - VRS	
19/8/2015 - Trial	

FOR FURTHER REMAND DATES SEE PAGE 6

EXHIBITS - BEWYSSTUKKE

SAPS 13 No. / SAPD 13 No. ..... SAPS 13 No. / SAPD 13 No.

POSITIVE / NEGATIVE after elimination FP forwarded
POSITIEF / NEGATIEF Datum uitskakeling VA versend .....

DOCKET / DOSSIER	B/F Dates / V/V Datums	Initials / Paraaf	B/F Dates / V/V Datums	Initials / Paraaf

Date / Datum

Officer / Station Commissioner / Commander
Offisier / Stasiekommissaris / Bevelvoerder

MM21

REPORTABLE

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4665/2010

In the matter between:

JOHAN WESSEL BOOYSEN — Applicant

and

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE PUBLIC PROSECUTOR — Second Respondent

COLONEL PHARASA DANIEL NCUBE — Third Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Fourth Respondent

THE DEPUTY NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Fifth Respondent

THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Sixth Respondent

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JUDGMENT

GORVEN J

[1] On 18 August 2012 the first respondent issued two written authorisations to charge the applicant (Mr Booysen) with contraventions of s 2(1)(e) and (f) respectively of the Prevention of Organised Crime Act (POCA).[1] In terms of s 2(4) of POCA, a person may only be charged with committing any of the offences created by s 2(1) if a prosecution is authorised in writing by the National Director of Public Prosecutions. Pursuant to the authorisations, Mr Booysen, a Major General in the police at the time, was arrested on 22 August 2012 and has been served with an indictment which confronts him with seven counts, the first two of which relate to the alleged contraventions of POCA. Although the first respondent was, at the time, the Acting National Director of Public Prosecutions, she fulfilled the functions of the National Director and I will refer to her in this judgment as the NDPP.

[2] Mr Booysen seeks to review and set aside the decision to issue the authorisations in question (the first impugned decision) and the decision to prosecute on the counts confronting him (the second impugned decision). Mr Booysen states pertinently that he does not rely on the provisions of the Promotion of Administrative Justice Act (PAJA)[2] but does not enter the debate as to whether the first impugned decision might be excluded from the operation of PAJA.[3] He bases the application directly on the Constitution of the Republic of South Africa, 1996 (the Constitution) and, in particular, relies on the principle of legality. Section 172(1) of the Constitution reads as follows:

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[1] Act 121 of 1998.
[2] Act 3 of 2000.
[3] Section 1(b)(ff) of PAJA provides that administrative action does not include 'a decision to institute or continue a prosecution'.

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable....'

The NDPP and the second respondent have opposed the application. The remaining respondents have not entered the lists.

[3] The relief sought by Mr Booysen is in the following terms:

'(a) Declaring the decisions taken by the first respondent purportedly in terms of the provisions of s 2(4), read with s 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA"), on 17 August 2012 to authorise the applicant's prosecution on charges of contravening sections 2(1)(e) and 2(1)(f) of POCA inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(b) Reviewing and setting aside the aforesaid decisions taken by the first respondent on 17 August 2012;

(c) Declaring the decision(s) taken by the first respondent, alternatively second respondent, alternatively first and second respondents, to prosecute the applicant on the charges contained in counts 1and 2 and 8 to 12 of the indictment served upon the applicant on 29 October 2012 ("the indictment") inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(d) Setting aside the first respondent's, alternatively second respondent's, alternatively first and second respondents', decision(s) to prosecute the applicant on the charges contained in counts 1 and 2 and 8 to 12 of the indictment;

(e) Interdicting the first respondent and her successors from authorising the prosecution of the applicant on any charge referred to in s 2(1) of POCA unless and until facts under oath implicating the applicant in the commission of such offences and justifying such prosecution are placed before the first respondent or her successors by an official or officials whose duty it is to place such facts before the first respondent.

(f) Ordering the first respondent and any other respondent who opposes this application to pay the applicant's costs of suit, which costs are to include the costs consequent upon the employment of two counsel.'

Prayers (a) & (c) are sought pursuant to s 172(1)(a) of the Constitution and prayers (b) and (d) pursuant to s 172(1)(b). Mr Booysen submitted in argument that the interdict sought in prayer (e) should be granted within the discretion afforded by the provisions of s 172(1)(b). I will return to this submission later.

[4] Mr Booysen's heads of argument submit, in summary, that:

(a) The impugned decisions are arbitrary and irrational and that such irrationality offends the principle of legality and the rule of law; and

(b) His right to dignity is impaired merely by having to face a prosecution where there are no facts to support a rational decision to authorise his prosecution and to indict him in the first place.

It is clear that a 'rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen … are rationally connected to the ends sought to be achieved.'[4] Mr Booysen therefore need not show an impairment of his rights, such as the right to dignity, in order to succeed on the first ground. The infringement of his right to dignity was not pressed in argument and I do not intend to say anything more about it.

[5] The two counts under POCA allege that Mr Booysen participated in the conduct of an enterprise through a pattern of racketeering activity[5] and

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[4] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2 (20 February 2014) para 7.
[5] Section 2(1)(e).

managed the operations of such an enterprise.[6] This is alleged to have been done whilst he was in charge of a specialised unit based at the Cato Manor Police Station. The other five counts allege criminal activity conducted with certain members of the South African Police Service who were under his command comprising murder, housebreaking with intent to commit murder, assault, defeating or obstructing the course of justice and unlawful possession of firearms and ammunition. Twenty-nine others were arrested although two of these have since died. There are a total of 116 counts which confront one or more of those presently accused. The trial has not yet commenced.

[6] A point *in limine* raised by the respondents is that, since the impugned decisions were taken in Pretoria and the respondents reside there, this court does not have jurisdiction to entertain the application. Mr Booysen submits that because he has been charged in this division, this court does have jurisdiction. During argument the respondents conceded that this division has jurisdiction, on the basis set out in *Estate Agents Board v Lek*.[7] In my view the concession was appropriate. It was submitted, however, that it is the trial court which should determine an application such as this and that the application is accordingly premature and has been brought in the wrong forum.

[7] The Constitutional Court has expressed itself against pre-trial applications. In an application alleging that evidence had been obtained in a manner which violated a right in the Bill of Rights of the Constitution, Langa CJ said the following:

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[6] Section 2(1)(f).
[7] 1979 (3) SA 1048 (A).

'I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to the investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants.... But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and considered together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35(5) and by the possibility of civil and criminal liability.'[8]

[8] The respondents submit that the trial court would be best suited to deal with the authorisations since the issue whether the NDPP had information before her justifying rational decisions to authorise Mr Booysen's prosecution on charges of racketeering 'can only be adjudicated upon' in a trial context. In *S v Chao & others*[9] it was held that a challenge to such a decision making process should be brought by way of a substantive application. In *S v de Vries & others*[10] an attack was launched on authorisations under s 2(4) of POCA during the trial, after the accused had pleaded and evidence had been led. The court held that a special entry would have to be made and that the time to launch any attack on the authorisations was prior to the accused pleading. The court could then assess the matter without, in effect, being asked to review its own proceedings.

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[8] *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v* National *Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) para 65.
[9] 2009 (1) SACR 479 (C) para 57.
[10] 2008 (4) SA 441 (C).

[9] I am in respectful agreement that a proliferation of applications brought prior to a criminal trial must be discouraged. If an accused person has properly been brought before a trial court, that court should generally deal with applications which bear on the outcome of the trial such as admissibility of evidence, the validity of search warrants and the like. However, this matter is clearly distinguishable from a situation where the admissibility of evidence is challenged, as took place in *Thint*. I am in respectful agreement with the reasoning in *Chao* and *De Vries* which addresses the nature of a challenge such as that dealt with in this matter. The issue raised in this matter can and should be dealt with prior to the commencement of the trial since the question is whether Mr Booysen can be charged with the two POCA counts. For this to be competent, the validity of the issuing of the authorisations must be determined. If they are not valid, they may be reviewed and set aside, in which case, an application must make use of Rule 53 as has been done. In addition, because this application relates to only one of a number of accused persons, it can most conveniently be dealt with in a separate application which does not affect the conduct of the trial. I am of the view that in this narrow instance, this court is the appropriate forum and that the appropriate procedure has been adopted. The point *in limine* must therefore fail.

[10] I should mention that there is only evidence as to the date on which, and the person by whom, the first impugned decision was made. None of the parties dealt in evidence with these issues in relation to the second impugned decision. It appears to be accepted, however, that the fate of the second impugned decision must follow that of the first one. I shall therefore deal only with the first impugned decision in analysing the facts. The factual matrix on which the application must be determined will be analysed in due

course. It will be useful to first set out the legal framework governing an application of this nature.

[11] The position of National Director of Public Prosecutions is established by s 179 of the Constitution in the following terms:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive....

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'

[12] The definition of 'administrative action' in PAJA specifically excludes a decision to prosecute or continue a prosecution. It is thus not reviewable under PAJA. Without this exclusion, such a decision would clearly amount to administrative action since the definition includes a decision by an organ of state when exercising a power in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation.[11] The impugned decisions are also not policy matters but involve the implementation of legislation.[12]

[13] In *National Director of Public Prosecutions v Zuma*, Harms DP held that a decision to prosecute 'is not susceptible to review'.[13] Despite this unequivocal wording, it is clear that the dictum was limited to a review under PAJA because that was what Harms DP was dealing with in that paragraph

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[11] Section 1(a) of PAJA.
[12] This distinction was drawn in the pre-PAJA era in *President of the Republic of South Africa and others v South African Rugby Football Union & others* 2000(1) SA 1 (CC) para 143.
[13] 2009 (2) SA 277 (SCA) para 35.

and because he went on to hold that the principle of legality nevertheless applies to such a decision.[14] This is clearly correct. It has been said that the 'Constitution constructs and restrains the exercise of public power in our democracy'.[15] The relationship between the common-law grounds of review and the Constitution was considered in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others*[16] on the basis that the control of public power is always a constitutional matter. In summing up, Chaskalson P said:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[17]

After all, one of the foundational values of the Constitution is the supremacy of the Constitution and the rule of law.[18] These concepts seem to me to have similar, if not identical, content.

[14] The principle of legality is an aspect of the rule of law.[19] In *Fedsure* it was said that the principle of legality expresses the fundamental idea that 'the exercise of public power is only legitimate where lawful'.[20] It is clear that the NDPP exercised a public power in arriving at the impugned decisions. The impugned decisions are therefore subject to the scrutiny of the court based on

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[14] Ibid, para 36.
[15] Per O'Regan J in *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 85.
[16] 2000 (2) SA 674 (CC) paras 33-45. It is of interest to note that the common law was invoked to successfully review and set aside a decision to prosecute. See *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order & others* 1994 (1) SA 387 (C) at 394C-H where the court applied the grounds of review set out in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642. These grounds of review were held to be 'consistent with the foundational principle of the rule of law enshrined in our Constitution' in *Pharmaceutical Manufacturers*, para 83. See also *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 30.
[17] Para 44. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 22.
[18] Section 1(c) of the Constitution.
[19] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 56.
[20] Loc cit.

the principle of legality. This begs the question as to the content of the principle of legality in the context of the impugned decisions. The detailed content of the principle of legality must be worked out from the Constitution as a whole. This is an ongoing, incremental process which has been addressed by the Constitutional Court in a series of cases involving non-administrative action. Sachs J, in a minority judgment in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others*,[21] described the principle of legality as 'an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner'.[22]

[15] In turn, the principle of legality requires that the exercise of public power 'must be rationally related to the purpose for which the power was given.'[23] This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power.[24] 'Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[25] A rational connection means that 'objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved'.[26] The test is therefore twofold, 'Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the

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[21] 2006 (2) SA 311 (CC).
[22] Para 614. The last phrase echoes that used by O'Regan J in *Rail Commuters Action Group* para 85 as to the approach to be adopted by courts in determining the scope of public power and the duties attached to it.
[23] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 75.
[24] *Pharmaceutical Manufacturers* para 90.
[25] Loc cit.
[26] Per Van der Westhuizen J in *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (5) SA 171 (CC) para 62.

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power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'[27]

[16] Professor Hoexter comments that the use of the principle of legality may well give rise to 'a complete parallel universe of administrative law' alongside PAJA.[28] A timely note of caution has been sounded in a recent article regarding the need for courts to respect the separation of powers and to be conscious of not intruding into the territory of either the executive or the legislature.[29] The learned author argues that the principle of legality, and in particular its requirement of rationality has brought about a 'subversion of the Promotion of Administrative Justice Act ... and its underlying scheme as laid down in s 33 of the Constitution through trending "parallelism"'.[30] In addition, she argues, 'the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront' to the doctrine of the separation of powers.[31] Whether the latter statement is correct or not, it is important to recognise that 'the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'[32] In other words, the courts are themselves constrained to act within the bounds of the powers accorded to them by the Constitution.[33] I prefer to think of it as deference or respect directed, not at the legislature or executive, but at the Constitution and the rule of law. Along with the other

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[27] Per Moseneke DCJ in *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 81.
[28] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 124.
[29] Lauren Kohn *The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?* (2013) 130 *SALJ* 810.
[30] Op cit at 812.
[31] Loc cit.
[32] Per O'Regan J in *Bato Star* para 46.
[33] The constitutional 'job description' of courts has been said to be 'primarily twofold: it requires the courts to uphold zealously the tenets of our Bill of Rights, and it demands that every exercise of public power be subjected to constitutional control'. Per Kohn, op cit at 821 citing Kate O'Regan 'Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court.' (2012) 28 *SAJHR* 116 at 126.

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tests developed in the jurisprudence of the Constitutional Court, it seems to me that this understanding provides a valuable touchstone for when courts are requested to exercise their judicial review function.

[17] As Professor Hoexter points out,[34] the Constitutional Court has applied the principle of legality in an increasing range of contexts. First, in *Fedsure*, where the municipality was held obliged to exercise its legislative function within the powers lawfully conferred on it.[35] Secondly, in *President of the Republic of South Africa v South African Rugby Football Union*,[36] where it held that 'the [holder of public power] must act in good faith and must not misconstrue [his or her] powers'.[37] Thirdly, in *Pharmaceutical Manufacturers*, where it held 'that the exercise of public power…should not be arbitrary' or irrational.[38] Fourthly, and most extensively, in *Albutt v Centre for the Study of Violence and Reconciliation & others*,[39] where it treated procedural fairness as a requirement of rationality.

[18] In the present matter, as I indicated earlier, Mr Booysen's contention is that the NDPP acted arbitrarily and irrationally and accordingly offended the principle of legality. It is accordingly the need for rationality, arising from the third example referred to in the preceding paragraph, on which Mr Booysen primarily relies.

[19] As regards the first impugned decision, the legislature introduced two formal requirements. First, the decision must be taken by the National Director of Public Prosecutions. For the purpose of s 2(4) of POCA this is

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[34] Op cit at 122-3.
[35] *Fedsure* paras 56 and 58.
[36] Note 12 supra.
[37] Para 148.
[38] *Pharmaceutical Manufacturers* paras 85 & 86.
[39] 2010 (3) SA 293 (CC).

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defined to include a Director of Public Prosecutions and a Special Director of Public Prosecutions referred to in s 1 of the National Prosecuting Authority Act.[40] In that Act, a definition is given of the word 'Director' as being a Director of Public Prosecutions appointed under s 13(1). This section refers to the two named officials. It is clear that the National Director, a Director and Special Director are high-ranking officials within the National Prosecuting Authority. Accordingly, the purpose for which the power in s 2(4) of POCA was conferred is to ensure that the decision making process is limited to a few high ranking officials within the National Prosecuting Authority. It seeks to exclude other persons who would be entitled to make such a decision in respect of other offences. The object is clear. The decision should be made by a person of higher position, presumably due to their qualifications and experience.

[20] In the second place, it requires written authorisation as opposed to any other form of authorisation to prosecute. The purpose for this provision also seems clear. It is to facilitate an ability to prove that the requisite, empowered, person has in fact made the decision in question. The existence of writing is a jurisdictional fact required to be in place before a prosecution can proceed. It would be clear from the content of the writing that, first, a decision has been made and, secondly, the person with the requisite authority made the decision.[41] In the present matter the NDPP was the person who took the decision and the authorisations were issued in writing. This was not disputed or placed in issue by Mr Booysen.

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[40] Act 32 of 1998.

[41] In *National Director of Public Prosecutions v Moodley & others* 2009 (2) SA 588 (SCA) para 12, the court held that as long as the requisite authorisations existed at the time of trial, this was sufficient. It left open the question as to the time that it can be said that the accused have been charged as that word is used in s 2(4) of POCA.

[21] The first impugned decision therefore qualifies under the *Fedsure* approach, namely that the person who made the decision was authorised to do so by the legislation in question and did so in the manner specified in the legislation. These criteria satisfy the first aspect of the twofold test referred to by Moseneke DCJ in *Masetla*.[42] The respondents argue that the principle of legality is therefore satisfied and that is an end of the matter. Mr Booysen goes further, however. He submits that, notwithstanding the compliance with the formalities of the legislation, the NDPP must, in addition, have adequately assessed 'the sufficiency and admissibility of evidence to provide reasonable prospects of a successful prosecution' as is required by policy directives issued pursuant to the provisions of s 21 of the National Prosecuting Authority Act.

[22] I do not intend to deal with the specific content of this submission of Mr Booysen. What is actually at issue is whether the second part of the twofold test, the rationality aspect, was satisfied. As we have seen in the legal framework explored earlier, the question is whether the decision of the NDPP, viewed objectively, was rational. This decision is not a polycentric one[43] or one involving the formulation or implementation of policy[44] so the rationality test is somewhat less variable.[45] In the context of the first impugned decision, my view is that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken.

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[42] See footnote 27 supra.
[43] Such as was the case in *Bato Star* where O'Regan J, in dealing with the meaning of reasonableness (not rationality) under s 6(2)(h) of PAJA, recognised that s 2 of PAJA only requires decision makers who have to consider a range of factors to strike a reasonable equilibrium in doing so (para 49).
[44] *Ronald Bobroff and Partners Inc* para 6.
[45] Yacoob J, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2007 (1) SA 343(CC) para 29 said, as regards variability of the test for rationality 'It must … be borne in mind that the requirement of legality may be more complex in relation to judicial decisions and executive action both of which undoubtedly represent the exercise of public power.'

[23] Mr Booysen submits that the first impugned decision lacked a rational basis since, at the time it was made, the material relied on by the NDPP could not, viewed objectively, support a decision to prosecute him for those offences. He submits that the material did not include any evidence at all of his having contravened the relevant provisions of POCA.

[24] The Notice of Motion in this matter is in the form provided for in Rule 53 and requests a copy of the record and reasons for the impugned decisions, indicating that Mr Booysen may thereafter supplement the founding papers. No record was put up or reasons given by the NDPP or the second respondent. As is evident from their affidavit, they were of the view that because PAJA excluded a decision to prosecute or to continue a prosecution from its operation, the impugned decisions were not reviewable at all. Two requests for any further documents leading to the impugned decision were made prior to the launch of the application. These requests were declined. The approach that the impugned decisions were not subject to judicial review was echoed in their heads of argument and only during argument did they concede that a review based on the principle of legality was competent.

[25] It is common cause that after the indictment was served on Mr Booysen, the NDPP was requested to make available all the documents on which the state intended to rely. In compliance with that request, 23 dockets were made available. These were the only documents furnished to him prior to the launch of this application. Of the 23 dockets, he is mentioned in only two. Of 290 statements in all of the dockets, only three statements even mention him. Two of these say he arrived on the scene of a shooting in a helicopter after the event and the third states that he was noticed on the scene of a shooting after it had taken place. In response to Mr Booysen's assertion that no statements in the dockets implicate him, the NDPP says that she

relied on four statements on oath, copies of which she says she annexed to her answering affidavit. I will return to this response below. What is clear, however, is that this in no way challenges the averment of Mr Booysen that none of the documents in the dockets implicates him in the offences in question.

[26] It is necessary to set out fairly fully what the NDPP says in her answering affidavit about what she considered in arriving at the first impugned decision. Below is what she says in response to the challenge of Mr Booysen that there was no material before her at the time she made the first impugned decision linking him to the offences with which he is now confronted:

'16. After due and careful consideration of the information under oath and the evidence as contained in the dockets (copies of which were made available to the Applicant), the Respondents were, and still are satisfied that there is *prima facie* evidence that an offence has been committed and Applicant is implicated in that:

16.1 From January 2007 to March 2010, the Applicant was a Provincial Commander in charge of KwaZulu-Natal Organised Crime. Subsequent thereto, and in 2010, he was appointed as the Provincial Head of the newly established Directorate for Priority Crime Investigations ("DPCI") in KwaZulu-Natal.

16.2 During 2006, the Serious Violent Crime ("SVC") Section based at Cato Manner was incorporated into the Durban Organised Crime Unit. The Durban Organised Crime Unit form part of the KwaZulu-Natal Provincial Organised Crime structure. The Applicant then conducted it as an enterprise as defined in the Prevention of Organised Crime Act 121 of 1998 ("POCA").

16.3 During 2010, the Organised Crime structures became part of DPCI and as indicated above, the Applicant was heading DPCI in KwaZulu-Natal.

16.4 During May 2008 to September 2011, members of the South African Police Service ("SAPS") under the Applicant's command killed members of the KwaMaphumulo Taxi Association who were in conflict with the Stanger

Taxi Association, as well as ordinary civilians and/or criminal gangs who were suspected of being involved in ATM bombings.

16.5 The information before me suggested that these members of the SAPS, would in most of the killings place a fire-arm next to the deceased person to create the impression that s/he was armed and had attacked the police by shooting at them or endangering their (police) lives.

16.6 The information under oath which was placed before me also indicated that the Applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.

16.7 The information further revealed that the unlawful activities of killing suspects and/or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim documented as "NJ1" in which *inter alia* the Applicant is recommended for such an award resulting from the deaths of suspects.

17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, Mr Aris Danikas, and Mr Ndlondlo from which it is apparent that the Applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on YouTube. I annex copies of the statements as "NJ2"; "NJ3", "NJ4" and "NJ5", respectively....

21. These are only some of the instances that are referred to in the above-mentioned statements, which were considered together with the other information in the docket before the impugned decisions were made. In this affidavit, I do not intend to detail all of the information that was placed before me prior to me making the decisions in issue. I submit with respect that the aforementioned information is *prima facie* proof that the Applicant was involved in racketeering activities.'

[27] From this it can be seen that the NDPP says that she relied on 'information under oath and the evidence as contained in the dockets' and that the instances relied on by her are 'referred to in the above-mentioned statements, which were considered together with the other information in the docket (*sic*) before the impugned decisions were made.' Whilst she says that she will not detail all the information placed before her prior to her making the first impugned decision, she does not say that any of that undisclosed information was relied on by her. In argument the respondents submitted that because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. The insurmountable difficulty with this submission is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. She limits herself to the documents dealt with above. Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application. The provisions of POCA allow for hearsay and similar fact evidence to be led in certain circumstances.[46] Once again, however, the NDPP does not indicate that any reliance was placed on any such evidence.

[28] On a factual level, therefore, she states that there were only two categories of information on which she based the first impugned decision. First, the contents of the dockets. Secondly, statements under oath which she says are annexed as NJ2, NJ3, NJ4 and NJ5.

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[46] Section 2(2) provides that 'The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.'

[29] As regards the contents of the dockets, the respondents conceded in argument that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.

[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath. She says, in addition, that they implicate Mr Booysen in one or more of the offences in question.

[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows. Two of the annexures are sworn statements made under the name of one Colonel Aiyer. These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern 'office politics' and submits that they in no way implicate him in any of the offences with which he has been charged. The second of these, in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The document referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen. As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[33] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate.

[32] In his replying affidavit, Mr Booysen submits that the NDPP is 'mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the "docket" before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision'.

[34] Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the

documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively.

[35] Although the question has been left open,[47] a decision to stop a prosecution probably falls within the ambit of PAJA. Professor Hoexter argues that the legislature distinguished between decisions to prosecute and decisions not to prosecute because when a decision is made to stop a prosecution, the public interest requires a review. In a decision to prosecute, however, the public interest would be catered for by a trial in due course.[48] I agree with these observations. An additional consideration may be that a person who is prosecuted will have an action in delict if the prosecution was a wrongful one. Professor Hoexter also argues that 'review in terms of the principle of legality…is currently more limited and less searching than review in terms of the PAJA or s 33, which is what one would expect of a general constitutional principle'.[49]

[36] It is not necessary to attempt to set a threshold for the rationality test applying to the decision to issue authorisations to prosecute under s 2(4) of POCA. Kate O'Regan says that rationality boils down to the 'rhyme or reason' test. 'As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'[50] Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law and were unconstitutional.

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[47] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* para 27.
[48] Hoexter op cit at 242.
[49] Hoexter op cit at 124.
[50] Kate O'Regan op cit p127.

[37] Having come to this conclusion, s 172(1)(a) of the Constitution obliges me to declare the impugned decisions invalid. Mr Booysen is therefore entitled to relief in terms of prayers (a) and (c) referred to in paragraph 3 of this judgment. In addition, I am given a discretion by s 172(1)(b) of the Constitution to make a decision which is just and equitable. Since I have found that there was, at the time the first impugned decision was made, no material which was considered by the NDPP on which to rationally authorise a prosecution of Mr Booysen, the just and equitable consequence of making such declarations of invalidity is to review both of the impugned decisions and set them aside. Mr Booysen is thus entitled to prayers (b) and (d).

[38] I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute under s 2(4) of POCA. If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The 'rhyme or reason' test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. *De Vries* found that the consideration of a request for authorisation 'forwarded to the NDPP under cover of a letter summarising the form and content of the

charge-sheet, setting out a detailed background to the charges and summarising the evidence' was sufficient. It is certainly not necessary to disclose every detail of the state's case, strategy or evidence where this is not subject to the criminal discovery process. In the light of the provisions of POCA, it is also not necessary to have before her sworn statements from witnesses on which the state intends to rely. I expressly refrain, however, from making a positive finding as to the level of disclosure necessary in meeting an application such as the present one or the detail required. This can only be assessed on a case to case basis.

[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one and two and eight to twelve. That can only be decided by way of a criminal trial. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions.

[40] Prayer (e) in paragraph 3 of this judgment seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. The requisites for a final interdict are well established. A clear right must be shown, an injury actually committed or reasonably apprehended and an absence of an alternative remedy.[51] Mr Booysen has a clear right to a lawful decision making process. He certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. A further difficulty is found in the other

[51] *Setlogelo v Setlogelo* 1914 AD 221.

two requirements for an interdict. There is no evidence that Mr Booysen has a reasonable apprehension of suffering an injury. Neither can it be said that there is no alternative remedy available to him. It is clear, therefore, that there is no basis for the interdict sought by Mr Booysen in paragraph (e), either in the form sought or in any other form. Outside of the requisites for an interdict and if indeed I have a general discretion to grant such an order (on which I make no finding), I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. No order shall therefore issue in terms of prayer (e).

[40] In the result, an order is granted in terms of paragraphs (a), (b), (c), (d) and (f) referred to in paragraph 3 of this judgment.

DATE OF HEARING:	7 February 2014
DATE OF JUDGMENT:	26 February 2014
FOR THE APPLICANT:	A Katz SC with M Collins, instructed by CARL VAN DER MERWE & ASSOCIATES INC.
FOR THE RESPONDENTS:	LM Hodes SC with N Manaka, instructed by THE STATE ATTORNEY.

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AFFIDAVIT

I, **Theodore Clint Leeuwschut** a Director: Administration in the Office of the Chief Executive Officer at the National Prosecuting Authority, Silverton Pretoria with contact number 012-845 6087 or 079 315 0420, hereby declare under oath and in English as follows:

I have been duly authorised by the Management of the National Prosecuting Authority to depose of this affidavit and to the best of my knowledge the information contained herein is correct unless otherwise stated.

On 18 August 2012 Adv Nomgcobo Jiba, at that stage the Acting National Director of Public Prosecutions, issued two written authorisations to charge the Head of the Hawks in KZN, Major-General Johan Booysen with contraventions of section 2(1)(e) and (f) respectively of the Prevention of Organised Crime Act (POCA).[1] In terms of section 2(4) of POCA, a person may only be charged with committing any of the offences created by section 2(1) if a prosecution is authorised in writing by the National Director of Public Prosecutions.

In ***Booysen v Acting National Director of Public Prosecutions and Others*** (4665/2010) [2014] ZAKZDHC 1; [2014] 2 All SA 391 (KZD) (26 February 2014), Mr Booysen seeks to review and set aside the decision to issue the authorisations in question and the decision to prosecute him.

Adv Jiba and the second respondent (prosecutor) opposed the application and Adv Jiba submitted an answering affidavit to the Court.

[1] Act 121 of 1998.

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In respect of this answering affidavit, the Court (per Gorven J) in paragraph 34 of the judgment remarked as follows:

"*Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively*.". (Emphasis added)

At paragraph 36 of the judgment, Gorven J continued as follows:

"*It is not necessary to attempt to set a threshold for the rationality test applying to the decision to issue authorisations to prosecute under s 2(4) of POCA. Kate O'Regan says that rationality boils down to the 'rhyme or reason' test. 'As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.' Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her*

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explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law and were unconstitutional.". (Emphasis added)

In paragraph 38 he continued as follows:

"*As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day*.". (Emphasis added)

In its evaluation of the matter, the NPA holds the view that the Constitution requires that public administration must be governed by the democratic values and principles enshrined in the Constitution. These include, among others, the principles that a high standard of professional ethics must be promoted and maintained; services must be provided impartially, fairly, equitably and without bias; and public administration must be accountable. The mentioned principles apply to the administration in every sphere of government; organs of state; and public enterprises. Therefore, the principles set out in the Constitution are also applicable to the NPA and all its members.

The NPA also wish to refer to the Code of Conduct for Prosecutors, which Code was developed taking into account the values and principles enshrined in the Constitution; the crucial role of prosecutors in the administration of criminal justice; and the essential need for prosecutions to be fair and effective, and for prosecutors to act without fear, favour or prejudice. Furthermore, the Code serves to inform the public of what is expected of prosecutors and is aimed at ensuring public confidence in the integrity of the criminal justice process. Finally, the Code requires all prosecutors to respect human dignity and human rights, and to perform their professional duties with full recognition of the supremacy of the Constitution and the rule of law. Taking into account the values and principles

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enshrined in the Constitution, the Code of Conduct for Prosecutors, the findings of the High Court and the integrity requirements expected from members of the NPA the NPA Management is of the view that the matter should be reported to the South African Police Service with a view to investigate a criminal charge of perjury.

In support of this affidavit, I attached hereto a copy of the above judgment and a legal opinion of Senior Counsel as per **"TCL1"**.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath as binding on my conscience.

Signed at Silverton on this 23rd day of October 2014.

23/10/14.

Deponent: Theodore Clint Leeuwschut
Director: Administration
Office of the Chief Executive Officer
National Prosecuting Authority

de Klerk CAPT.

Commissioner of Oaths
Theunis Jacobus de Klerk
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TO: STATE ATTORNEY

REF.: MR J.M. MATLADI / 3775/2014 / Z36 /SC

DATE: 7 JULY 2014

IN RE: **NATIONAL PROSECUTING AUTHORITY**

MEMORANDUM

1. I refer to your brief dated 26 June 2014 and the consultation with Ms CH Van Rensburg (CEO of the National Prosecuting Authority ("*NPA*")) and Mr GO Holamby (CFO of the NPA) on 30 June 2014.

2. I was briefed to render an opinion on:

   2.1 The disciplinary procedures available in respect of senior personnel at the NPA; and

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2.2 The question whether disciplinary steps ought to be taken against Advv Nomcgobo Jiba, Lawrence Mrwebi, Sibongile Mzinyathi, and Moipone Noko, primarily as a result of the findings made in the judgments in **Freedom Under Law v National Director of Public Prosecutions & Others 2014 (1) SA 254 (GNP)**, by Murphy, J, on appeal by Brand JA, reported as **National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA)** and the judgment in **Booysen v Acting National Director of Public Prosecutions & Others (unreported: 4665/2010 KZN Division, Durban)** by Gorven J.

3. Section 4 of the National Prosecuting Authority Act, Act 32 of 1998, (hereinafter referred to as "the Act") provides that the Prosecuting Authority comprises the:

3.1 National Director;
3.2 Deputy National Directors;
3.3 Directors;
3.4 Deputy Directors; and
3.5 Prosecutors.

4 The power to appoint, and therefore also to dismiss, the National Director, Deputy National Directors and Directors rests with the President. Acting Directors and Deputy Directors are appointed by the Minister and Prosecutors are appointed in terms of the Public Service Act, 1994 upon the recommendation of the National Prosecuting Authority or a person to whom he or she has delegated that authority.

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5 Sections 12(6) and (7) provide for a procedure in terms of which the National Director and Deputy National Directors may be removed from office by the President and Parliament. In terms of section 14(3) of the Act, the same procedures apply to Directors.

6 In respect of Deputy Directors and Prosecutors, section 19 of the Act, makes the Public Service Act, 1994 applicable. The Senior Management Service Handbook (*"SMS Handbook"*) deals in Chapter 7 with disciplinary procedures, which consequently apply to them.

7 It must also be borne in mind that most professional staff members of the National Prosecuting Authority are either admitted attorneys or advocates. As such, they are also subject to the discipline of the High Court. Applications to discipline errant members of the professions may be brought by the relevant provincial Law Society, Bar Council or the General Council of the Bar, who are duty bound to investigate professional misconduct and to place such facts before the High Court[1].

8 In addition to the aforesaid powers and procedures the National Director according to section 22(1) of the Act *"shall have authority over the exercising of all the powers and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law."*

1 See section 7 of the Admission of Advocates Act, 74 of 1964, and section 22 of the Attorneys Act, 53 of 1979.

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9 Section 22(4)(a) of the Act provides:

"In addition to any other powers, duties and functions conferred or imposed on or assigned to the national director by section 179 of any other provision of the Consiitution, this Act or any other law, the national director, as the Head of the Prosecuting Authority –

(a) With a view to exercising his or her powers in terms of sub-section (2), may –

(i) ...

(ii) Direct the submission of and receive reports or interim reports from a director in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a director in terms of this Act; and

(iii) Advise the Minister on all matters relating to the administration of criminal justice."

10 I am of the view that these powers are restricted to be exercised when the National Director intends to exercise his or her powers in terms of section 22(2) of the Act, i.e. when he or she intends to *"intervene in any prosecution process when policy directives are not complied with"* or *"to review a decision to prosecute or not to prosecute after consulting the relevant director and after taking representations within the period specified by the National Director of the accused person, the complainant and any other person or party whom the National Director considers be relevant."* That power cannot, in my view, be used to investigate the aftermath of such intervention, where the intervention or review of the decision to prosecute or not to prosecute had already taken place.

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11 Finally, the National Director as Head of the National Prosecuting Authority has, in terms of section 179(2) of the Constitution, the power to institute criminal proceedings on behalf of the State. The powers listed in paragraphs 8 and 9 *supra* are therefore also available to the National Director in cases where any member of the National Prosecuting Authority is suspected of having been involved in criminal activity.

12 I shall now deal with the individuals concerned.

Ms Nomgcobo Jiba:

13 According to her *curriculum vitae* as published on the official website of the NPA, the following appears:

- She received a BJuris degree from the Walter Sisulu University (formerly the University of Transkei in 1987.
- She received an LLB degree from the same University in 1989.
- In 1988 she was appointed as a prosecutor in the Peddie Magistrate's Court in the Eastern Cape. She served in that position later at Tsolo and Mthatha.
- In 1994 she received an Industrial Relations Diploma at Damelin College.
- In 1996 she received an LLM degree in Commercial Law and became an articled clerk with a firm of attorneys.
- In 1998 she qualified as an attorney.
- In 1999 she was appointed as senior forensic consultant at the audit firm Deloitte & Touche as they were then known.

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- In 1999 she was appointed as *"senior state advocate"* in the investigating directory for serious economic offences in Pretoria.
- In 2001 she was appointed as Deputy Director of Public Prosecutions.
- In 2006 she was appointed as Senior Deputy Director of Public Prosecutions.
- On 22 December 2010 she was appointed Deputy National Director of Public Prosecutions (Strategy, Operations and Prosecutions).
- Although no date is mentioned, her CV also indicates that she is <u>now</u> an admitted advocate of the High Court. Her name does, however not appear on the official Roll of Advocates published by the Department of Justice and Constitutional Development, which I have consulted.[2]

14 Ms Jiba is no stranger to controversy. A number of incidents were reported which, if found to be true, would cast serious doubt as to whether she is a fit and proper person to hold office in the NPA, but I shall limit my comments to the findings that were made against her by the High Courts referred to above as well as the judgment by Van Niekerk J in the Labour Court in the matter between **<u>Jiba v National Director of Public Prosecutions (Unreported: J169/09).</u>**

15 In January 2009 Ms Jiba brought an urgent application in the Johannesburg Labour Court to interdict certain disciplinary proceedings against her. The application was dismissed by Van Niekerk, J. The disciplinary matter was, however, settled some time afterwards and she was then transferred to the Pretoria Specialized Commercial Crimes Court.

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2 That fact, in itself, is insignificant, since it is a notorious fact that the Roll of Advocates kept by the Department is not complete; as it was damaged by a computer virus years ago. Please confirm her admission date and particulars.

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When Mr Simelane was relieved of his duties as National Director, following a Court challenge to his appointment, first in the Gauteng Division of the High Court (Pretoria) and thereafter in the Supreme Court of Appeal, she was appointed as Acting National Director of Public Prosecutions.

16 In **Freedom Under Law v NDPP & Others 2014 (1) SA 254 (GNP)** Murphy J made scathing credibility findings against Ms Jiba. The judgment was the result of an application instituted by Freedom Under Law against *inter alia* the NDPP to review and set aside the decisions not to pursue charges including murder and corruption against Lieutenant General Richard Mdluli, the then head of Crime Intelligence at the South African Police Services and also to review and set aside the decision of the National Commissioner of the South African Police Service to terminate a disciplinary inquiry into his conduct.

17 Murphy J severely criticised Ms Jiba (and others) in that judgment for the manner in which the proceedings were conducted by her (and them):

> *"Suffice it to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service and especially worrying in the case of the NDPP, a senior officer of this Court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold."*

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18 This criticism stems from Ms Jiba's failure to file a proper review record as she was obliged to do in terms of the Rules of Court, which left the applicant to rely upon various other sources of information about the impugned decisions. Such sources included evidence led at the disciplinary proceedings of Adv Glynnis Breytenbach and the affidavits filed in subsequent Labour Court proceedings. Having analysed those, Murphy J came to the conclusion that Ms Jiba had known of certain representations made by Mdluli's legal team, that they were considered and dealt with by her, that Ms Breytenbach later made written representations to her to revise the decision taken by Mrwebi not to pursue criminal charges of fraud and corruption against Mdluli, the decision to withdraw the murder case against Mdluli, the decision to convene an inquest and the finding of the Magistrate who presided over the inquest that the case against Mdluli was *"overwhelmingly probable"*.

19 After a comprehensive evaluation of the evidence, Murphy J found that Ms Jiba, as an officer of the High Court, had misled the Court under oath. *"One of the cardinal duties owed by an officer of the Court is not to mislead the Court in any way"*, said Wallis JA in **General Council of the Bar v Geach & Others 2013 (2) SA 52 (SCA) at 102A – C**. See also **Rondel v W [1966] 1 All ER 467 (QB) at 479; Natal Law Society v N 1985 (4) SA 115 (N) at 121 I – 122 B.**

20 The judgment of Murphy J was confirmed on appeal in **National Director of Public Prosecutions & Others v Freedom Under Law 2014 (4) SA 298 (SCA)** and the conduct of Ms Jiba was again criticised by Brand JA in para 37 of the judgment:

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"In this case we know that Adv Breytenbach made a request early on to the NDPP which was supported by a 200 page memorandum that the latter should intervene in Mrwebi's decision to withdraw the fraud and corruption charges. In addition, the dispute had been on-going for many months before it eventually came to Court and during that period it was widely covered by the media, but despite this wide publicity, the high profile nature of the case and the public outcry that followed, the NDPP never availed herself of the opportunity to intervene. Against this background FUL could hardly be blamed for regarding an approach to the NDPP a meaningless and illusory in a matter of some urgency."

21 This finding confirms, in my view the finding by the Court a *quo* that it was misled by Ms Jiba's conduct.

22 A similar finding was made against Ms Jiba in **Booysen v Acting National Director of Public Prosecutions & Others** where the learned Judge said the following in paragraphs 32 and 34 (sic):

"32. In his replying affidavit Mr Booysen submits that the NDPP is 'mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the 'docket' before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision.

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> 34. *Mr Booysen is clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is after all an officer of the Court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the Court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this the invitation of Mr Booysen was not taken up by the NDPP by way of request or application to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the Court is entitled to draw an inference adverse to the NDPP."*

23 Leave to appeal was initially sought but later abandoned.

24 It is my considered view that these very serious findings against Ms Jiba cannot be allowed to pass by without disciplinary steps being taken against Ms Jiba. The fact that she was prepared to lie under oath in two very important cases before the High Court, where her conduct was placed under scrutiny, not only indicates a strong *prima facie* case of serious misconduct[3], but also casts grave doubt on her fitness to hold public office.

25 Her assertion in her *curriculum vitae* published on the NPA's official website that she has been admitted as an advocate, whilst her name does

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3 See para A(a), (b), (e), (g) and D.1(a), (c), 2(d), read with para F.2 of the Code of Conduct for Members of the National Prosecuting Authority under section 22(6) of the Act.

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not appear on the Roll of Advocates, as published on the official website of the Department of Justice and Constitutional Development, must also be investigated.

26 I am advised, that Ms Jiba, upon the appointment of the present National Director of Public Prosecutions, reverted to the post of Deputy National Director of Public Prosecutions.

27 I consequently recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Ms Jiba, pending an inquiry into her fitness to hold the office of Deputy National Director of Public Prosecutions to be presided over by a retired judge of the High Court.

28 I also recommend that a criminal investigation for perjury be opened against Ms Jiba.

29 Finally, I recommend that the findings against Ms Jiba made in the judgments referred to above be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against her in terms of section 7 of the Admission of Advocates Act.

Mr Lawrence Mrwebi:

30 I am not in possession of the *curriculum vitae* of Mr Mrwebi. I am instructed that he was admitted as an advocate in the *"Supreme Court of Ciskei"* on

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22 May 1987.[4] He currently holds the post of Special Director of Public Prosecutions: Specialized Commercial Crimes Unit in the office of the NPA.

31 In **Freedom Under Law v National Director of Public Prosecutions** Murphy J also made a scathing credibility finding against Mr Mrwebi. Mr Mrwebi was the person who took the decision and gave instructions to withdraw charges of fraud and corruption against Mdluli. The comment of Murphy J regarding the conduct of the case by the respondents included Mr Mrwebi[5].

32 Murphy J in the **Freedom Under Law**-case found in paragraph 41 that Mr Mrwebi had failed to disclose relevant documents which formed part of the record of his decision. Those documents included a memorandum and a *"consultative note"*. In paragraph 55 of the judgment Murphy J made the following finding:

> *"In the light of the contemporaneous evidence, Mr Mrwebi's averment in the answering affidavit that he consulted and reached agreement with Mzinyathi before taking the decision (to withdraw the charges of fraud and corruption against Mdluli) is equally untenable and incredible to a degree that it to falls to be rejected."*

4 I point out that his name too does not appear on the Roll of Advocates, as published by the Department of Justice and Constitutional Development, and this omission ought to be rectified.

5 See para 12 *supra*.

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33 In paragraphs 59 to 61 of the judgment, Murphy J made the following findings against Mr Mrwebi:

"59. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in the case. He implied that had she done her job, the charges would have been reinstated.

60. FUL was justifiably sceptical in its reply to these allegations. Paragraph 106 and 107 of the reply read:

'106 Adv Mrwebi's version as set out in this paragraph is, I submit, palpably implausible and in conflict with his ipsisima verba. In its ordinary meaning, closed is unequivocal as it is used in Adv Mrwebi's letter to General Dramat. Seen in the context there can in my submission be no doubt that Adv Mrwebi was implacably opposed to any prosecution against General Mdluli.

107 Indeed I submit that the very attempt to adhere to the untenable casts serious doubt on the veracity of the deponent and moreover casts a shadow over the propriety of his decision to block the prosecution of General Mdluli.'

61. The attempt to blame Breytenbach is frankly disingenuous and unconvincing as is Mr Mrwebi's subsequent claim that investigations

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into the charges are continuing. Three experienced commercial prosecutors and two senior police investigators were satisfied in early December 2011 that there was sufficient evidence to prosecute Mdluli on these charges immediately. Breytenbach was an experienced Prosecutor with more than two decades of experience in the Criminal Court, accused Mr Mrwebi in her founding affidavit in the Labour Court application of 'blind and irrational adherence to his instruction that the charges be withdrawn' and of frustrating her efforts to prosecute to the extent of having her suspended on spurious charges. The assertion that Breytenbach agreed that the case against Mdluli was defective is irreconcilable with the contemporaneous evidence particularly a threat made by her in a memo to the NDPP to seek legal relief to compel the NPA to pursue the charges and is accordingly wholly improbable."

34 In paragraphs 39 to 41 of the judgment in the Supreme Court of Appeal this finding of Murphy J is confirmed:

"[40] An even more serious problem with the version presented in Mr Mrwebi's answering affidavit is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the Court a quo (paras 47 – 48). I find a repetition of that recordal unnecessary. What appears in some is that Mr Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5 December 2011; at

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that stage he did not know what Mzinyathi's views were; and that he only realized on 8 December 2011 that Mzinyathi did not share his views at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting on 9 December 2011 that the charges had been finally withdrawn and that he was functus officio because he had already informed Mdluli's attorneys of his decision.

[41] In these circumstances I agree with the Court's conclusion (para 55) that Mr Mrwebi's averment in his answering affidavit to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone, the decision cannot stand."

35 I am of the considered view that the findings of Murphy J, as confirmed by Brand J in the Supreme Court of Appeal constitute compelling justification for disciplinary proceedings against Mr Mrwebi. In view of the fact that he has been appointed as Special Director of Public Prosecutions, the provisions of section 12(6) and (7) read with section 14(2) and (3) are applicable.

36 I consequently recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Mr Mrwebi, pending an inquiry into his fitness to hold the office of Deputy National

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Director of Public Prosecutions, to be presided over by a retired judge of the High Court.

37 I also recommend that a criminal investigation for perjury be opened against Mr Mrwebi.

38 Finally, I recommend that the findings against Mr Mrwebi made in the judgments referred to above be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against him in terms of section 7 of the Admission of Advocates Act.

39 I have also been advised that Mr Mrwebi has been accused of interference with the arrest of one Terrence Joubert, who was implicated in the alleged irregular awarding of a R20 million security tender and that he has been requested to make submissions why he should not be criminally charged. I am of the view that the National Director should use his powers of review of the decision not to prosecute Joubert, as set forth in section 22(2)(c) and (4)(a).

Mr Sibongile Mzinyathi

40 Mr Mzinyathi is the Director of Public Prosecutions in Pretoria and featured prominently in the **Freedom Under Law**-cases. He is one of the senior members of the NPA whose general conduct in the legal proceedings instituted by Freedom Under Law was severely criticized by Murphy J in

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paragraph 24 of his judgment. According to the Roll of Advocates, he was admitted as an advocate in 1999.

41 Mr Mzinyathi's conduct came under scrutiny in the disciplinary matter against Adv Glynnis Breytenbach where he initially corroborated the evidence of Mrwebi that he was not consulted by the latter before the decision was made to withdraw the fraud and corruption charges against Mdluli.

42 In the **Freedom Under Law**-matter his involvement was dealt with comprehensively. In paragraphs 52 to 54 of the judgment Murphy J had the following to say about his conduct:

"52. *Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary inquiry (or for that matter with any of the averments in the supplementary founding affidavit). His account of the events between 5 December 2011 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific allegations in the supplementary founding affidavit. He nonetheless maintained that he had consulted Mzinyathi. The answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi who therefore initially did not confirm Mrwebi's general account. In his confirmatory affidavit filed at the 11th hour, the day before the hearing without any explanation whatsoever for it being filed six months after the delivery of the supplementary founding affidavit, Mzinyathi differing from his evidence at the hearing, confirmed the allegations in Mrwebi's affidavit as they relate*

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to him, thus saying in effect for the first time that he had indeed concurred in the decision.

53. Mzinyathi elaborated further in paragraphs 7 to 9 of the affidavit that Mrwebi approached him at his office on 5 December 2011, told him that he was dealing with representations regarding Mdluli and needed to consult him. Mrwebi mentioned to him that he was busy researching the Intelligence Services Oversight Act, and then left his office. The impression created as mentioned earlier is that no substantive discussions took place that day and hence clearly there was no concurrence before Mrwebi wrote the consultative note and communicated with Mdluli's attorneys. Later Mzinyathi heard from Smith that Mrwebi had instructed the prosecutor to withdraw the charges. He then wrote the e-mail of 8 December 2011 to Mrwebi and met him on 9 December 2011 together with Breytenbach. At the meeting he was persuaded that the matter was not ripe for trial and agreed to the provisional withdrawal of the charges. This differs materially from his original position that he was unable to influence the decision because it had been finally taken but conceded to the characterization of the withdrawal as provisional as a compromise partially addressing his concerns.

54. Taking account of how it was placed before the Court by Mzinyathi after FUL's heads of argument were filed without explanation for its lateness and its inconsistency with his testimony at the disciplinary hearing that he was presented with a fait accompli and was unable to influence the decision because Mrwebi claimed to be functus officio. This evidence of the DPP of North Gauteng to the effect that

he ultimately concurred must regrettably be rejected as uncreditworthy. The affidavit is a belated, transparent and unconvincing attempt to rewrite the script to avoid the charge of unlawfulness. ..."

43 Brand JA in the Supreme Court of Appeal Judgement in paragraph 40 to 41 concurs with this finding:

"[40] An even more serious problem with the version presented in Mrwebi's answering affidavit is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the Court a quo (paras 47 – 48). I find the repetition of that recordal unnecessary. What appears in sum is that Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5 December 2011; that at stage he did not know what Mzinyathi's views were; that he only realized on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was functus officio, because he had already informed Mdluli's attorneys of his decision.

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[41] in these circumstances I agree with the Court a quo's conclusion (para 55) that Mrwebi's averment in his answering affidavit to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone the decision cannot stand."

44 As in the case of Mrwebi, I am of the considered view that the findings of Murphy J, as confirmed by Brand JA in the Supreme Court of Appeal constitute compelling justification for disciplinary proceedings against Mr Mzinyathi. In view of the fact that he has been appointed as Director of Public Prosecutions, the provisions of section 12(6) and (7) read with section 14(2) and (3) are applicable.

45 I consequently recommend that the President should in terms of section 12(6)(a) of the NPA Act consider to provisionally suspend Mr Mzinyathi pending an inquiry into his fitness to hold the office of Director of Public Prosecutions in the Gauteng Division, to be presided over by a retired judge of the High Court.

46 I also recommend that a criminal investigation for perjury be opened against Mr Mzinyathi.

47 Finally, I recommend that the findings against Mr Mzinyathi made in the judgments referred to above be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be

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brought against him in terms of section 7 of the Admission of Advocates Act.

Ms Molpone Noko:

48 Ms Noko was appointed as acting Director of Public Prosecutions in Kwazulu Natal. Although she is referred to as "Adv Noko" her name also does not appear on the Roll of Advocates. She was involved in various controversial events, but I shall confine my comments to her conduct in the matter of **Democratic Alliance v Acting Director of Public Prosecutions:KZN (Case no. 4962/2013)**. In that case the Democratic Alliance launched an application to review and set aside Ms Noko's decision to withdraw charges including charges of racketeering and corruption instituted in terms of the Prevention of Organized Crime Act, 121 of 1998, and the Prevention and Combatting of Corrupt Activities Act, 12 of 2004, which had been instituted against various accused persons upon the direction of the National Director at the time, Adv M Simelane.

49 In that case, Ms Noko filed an affidavit in which she admitted that she took the decision to withdraw the prosecution against certain of the accused, but refused to divulge the facts on which her decision was based. In my respectful view a Director of Public Prosecutions has no authority in terms of any legislation to intervene in or withdraw a prosecution instituted under those Acts, at the instance of the National Director.

50 I therefore recommend that the National Director uses his powers in terms of Section 22(4)(a)(ii) read with section 24(4)(a) of the Act to review Ms

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Noko's decision and to require her to submit a record to him or her regarding:

50.1 The legal basis on which she contends she was authorised to make that decision; and

50.2 The reasons why she made it.

51 Depending on her response, further action should be considered.

52 I trust that you find the matter in order.

ADV P ELLIS SC

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IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4665/2010

In the matter between:

JOHAN **WESSEL**

SILVERTON CAS 688/10/2014

mm23

I, the undersigned

JOHAN WESSEL BOOYSEN

do hereby make oath and state as follows:

1.

I am an adult male South African citizen.

2.

The facts deposed to herein are within my personal knowledge and belief save away the context indicates otherwise in which event I believe the averments made to be true and correct.

3.

I joined the South African Police Service in 1976 and have served as a member for an uninterrupted period of 38 years.

4.

I am currently a Deputy Provincial Commissioner of the South African Police Service with the rank of Major General.

5.

I was arrested on 22 August 2012 on charges which allegedly related to the conduct of certain members of the Cato Manor Serious and Violent Crime section of the SAPS, which was a section of Durban Organised Crime Unit.

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6.

I was subsequently indicted in the High Court together with 29 other accused (two of whom have since passed away) on some 116 different charges. The charges generally relate to:

6.1 contravening sections 2(1)(e) and 2(1)(f) of POCA(racketeering);

6.2 housebreaking with intent to commit murder;

6.3 assault;

6.4 defeating or obstructing the course of justice;

6.5 unlawful possession of firearms and ammunition; and

6.6 murder.

7.

In February 2013 I approached the High Court of South Africa, KwaZulu-Natal local Division, Durban to obtain an order by the High Court to review and set aside the decision of the acting NDPP, Advocate Jiba to prosecute me in terms of the Prevention of Organised Crime Act. The acting NDPP was cited as the first respondent.

8.

I duly deposed an affidavit in which I gave a detailed exposition and set out the reasons for the application. (Founding Affidavit). I annex this statement marked "A". In response to my founding affidavit Advocate Jiba deposed an affidavit (answering

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affidavit) which I annex to this statement marked "B". I refer specifically to paragraphs 3, 16, 17 of her statement.

9.

I then filed a replying affidavit which I annex marked "C". I refer in particular to paragraph 12, 13, 20, 21, 22, 23, 24, 29, 66.3. In these paragraphs I detail that Advocate Jiba could not have had the statements she claimed she had had, when she took the decision to prosecute me.

10.

In paragraph 30.2 I accuse Advocate Jiba of been mendacious. I invited her to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision. In spite of this invitation she never responded.

11.

On the 7th of February 2014 the matter was heard in the High Court, KwaZulu-Natal. During argument Advocate A Katz SC who appeared for me accused Advocate Jiba of lying to the court.

12.

On the 27th February 2014 the High Court ruled in my favour and set aside the decision of Advocate Jiba to prosecute me under the Prevention of Organised Crime Act. I annex the findings of the Honourable Judge Gorven J marked "D".

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I refer in particular to paragraph 26, 27, 28, 29, 30, 31, 32, 33 and more specifically paragraph 34 which I repeat in this statement (par 34 judgement)

Par 34 - "Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to ensure the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies (own underlining). Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw a inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be brawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s2(1)(e) and (f) respectively".

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14.

From the above it is evident that Advocate Jiba mislead the court and had in fact lied under oath. The statement of Advocate Jiba was commissioned by MR Maletswa wherein he state inter alia that "she having acknowledged that she knows and understands the contents of this affidavit and consider it to be true and correct.

15.

Advocate Jiba misrepresented the truth which caused me actual prejudice. In my view she committed fraud by lying under oath and in the process defeated or obstructed the cause of justice. She also contravened the Commissioner of Oaths Act by making a false statement under oath.

16.

I reserve my right to add to this statement in the future.

17.

I know and understand the content of this statement.

I have no obligation to take the prescribed oath.

I render the prescribed oath to be binding on my conscience.

I hereby swear that the contents of this declaration is the truth, the whole truth and nothing but the truth, so help me God.

.....

JW BOOYSEN

L

Silverton CAS 688/10/2014 A-2

I certify that the above statement was taken by me and that the deponent has acknowledged that he/~~she~~ knows and understands the contents of this statement. This statement was sworn to/~~affirmed~~ before me and the deponent's signature was placed thereon in my presence at DURBAN on 2014-10-13 at 13:00

COMMISSIONER OF OATHS

FULL NAMES : THEUNIS JACOBUS DE KLERK

RANK : CAPTAIN : SAPS.

BUSINESS ADDRESS : ACTT : DPCI, 74 WATERMEYER STREET, MEYERSPARK, PRETORIA.

ANTI-CORRUPTION TASK TEAM
PRIVAATSAK / PRIVATE BAG X 1800
2014 -10- 13
SILVERTON 0127
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

MM24

[redacted]

"NJ2"

I HEREBY STATES IN ENGLISH UNDER OATH

RAJENDRAN SANJEEVI AIYER

I AM COLONEL IN THE SAPS IN KZN. MY CONTACT DETAILS AS FOLLOWS : 0827730046

I WISH TO STATE THE FOLLOWING ;

ON THURSDAY 2012-08-02 AT 08:45 I MEET WITH BRIGADEIR MOKOENA IN MY OFFICE AT 3RD FLOOR IN SERVAMUS BUILDING. I WAS REQUESTED TO SUBMIT A STATEMENT. REGARDING THE STRUCTURES OF ORGANISED CRIME SINCE DECEMBER 2006 ON APPOINTMENT AS UNIT COMMANDER DURBAN ORGANISED CRIME

SHORTLY THEREAFTER IN JANUARY 2007 THE SERIOUS AND VIOLENT CRIMES UNIT CLOSED THE NATIONAL COMMISSIONER. ONLY FOURTEEN MEMBERS (14) FROM SERIOUS AND VIOLENT CRIME UNIT WERE RESTRUCTURED INTO THE DURBAN ORGANISED CRIME. IN TERMS OF THE ORGANISED CRIME MANDATE THE SERIOUS AND VIOLENT CRIME INVESTIGATION BECAME THE MANDATE ORGANISED CRIME.

I WAS INFORMED THAT THEN DIRECTOR JW BOOYSEN WAS APPOINTED AT PROVINCIAL COMMANDER OF ORGANISED CRIME IN KZN IN FEBRUARY 2007 . ALL FOUR UNIT COMMANDERS OF ORGANISED CRIME HAD REPORT TO THEN DIRECTOR JW BOOYSEN, DIRECTLY IN KZN , THEN DIRECTOR JW BOOYSEN WAS ACCOUNTABLE TO PROVINCIAL HEAD OF DETECTIVE SERVICES ,THEN ASSISTANT COMMISSIONER PT BROWN (RETIRED IN 2011) .

AS UNIT COMMANDER OF DURBAN ORGANISED CRIME HOLDING THE RANK OF SENIOR SUPERINTENDENT (COLONEL), I HAD THREE SUPERINTENDENT (LT COL.) WHO HAD TO REPORT TO ME AND WERE ACCOUNTABLE ME , AS SECTION COMMANDERS , NAMELY SUPERINTDENT (F) TT DUBE SUPPORT AND ADMINISTRATION. THE SUPERINTENDENT WC OLIVIER IN CHARGE OF SERIOUS AND VIOLENT CRIMES SECTION. THE ANOTHER BEING SUPERINTENDENT GART LE ROUX IN CHARGE OF DRUG, FIREARMS, VEHICLES AND GOLD DIAMOND .

BETWEEN THESE TWO SECTION COMMANDERS (WC OLIVIER AND GART LE ROUX) ,ALL OPERATIONS CONDUCTED UNDER THEIR SUPERVISION.

UNDER THE COMMAND OF SUPERINTENDENT WC OLIVIER HE HAD THREE CAPTAINS ACCOUNTABLE TO HIM, NAMELY CAPTAINS VAN TONDER ,SMITH, LOCKHEM . TOTAL , ALL INCLUSIVE OF 14 MEMBERS TO BE PLACED AS A TEAM TO ADDRESS SERIOUS AND VIOLENT CRIMES IN THE POST AT THE UNIT AND ALSO ATTEND TO OTHER CRIMES . DURING FEBRUARY 2007 THESE MEMBERS WERE PLACED INTO THOSE POSTS IN DURBAN ORGANISED CRIME.

SHORTLY THEREAFTER PROBLEMS STARTED TO SURFACE WITH SERIOUS AND VIOLENT CRIME SECTION. AFTER A INSPECTION CONDUCTEDS BY THEN DIRECTOR NCHINGA (HAWKS)OF THE NATIONAL ORGANISE CRIME OFFICE, IN HER INSPECTION REPORT , SHE WANTED TO KNOW WHY

WAS UNIT SPILT INTO TWO.,HER INSTRUCTION WAS THAT ALL MEMBER MUST REPORT TO ONE OFFICE NAMELY 136 VICTORIA EMBANKMENT WERE MY OFFFICES HAD BEEN.

I TRIED TO EXPLAIN SUPERINTENDENT WC OLIVIER WHO WAS NOT TOO HAPPY REGARDING THE DECISION. I FULLY AWARE THAT SUPERINTENDENT WC OLIVIER WAS CLOSE THEN DIRECTOR JW BOOYSEN. I TOLD SUPERINTENDENT WC OLIVIER MERGER HAS TAKE PLACE ON THE INSTRUCTION OF NATIONAL OFFICE. SUPT WC OLIVIER CHANGED HIS ATTITUDE TOWARDS ME.

I NOTICED THAT SUPT. WC OLIVIER REPORTING ALL INCIDENT DIRECTLY TO THEN DIRECTOR JW BOOYSEN . I WAS MERELY INFORMED AFTERWARDS OR LONG AFTER ANY SHOOTING INCIDENT HAD TAKEN PLACE HIS SECTION . ALMOST EVERY WEEK THE CATO MANOR OFFICES WERE VISITED BY THEN DIRECTOR JW BOOYSEN WITHOUT ME BEING INFORMED. I KEPT TELLING HIM TO REGISTER ALL OPERATION OR RAIDS ON CAS SYSTEM BUT NOTHING OF THAT HAPPENED . HE STARTED FRUSTRATE ME AS UNIT COMMANDER. IT CLEAR THAT SUPTRENTENDENT OLIVIER WAS ACTING ON OWN ACCORD,HE WAS FORMING HIS OWN UNIT AT CATO MANOR AND HE HAD BACKING OF THEN DIRECTOR JW BOOYSEN WHO CONSTANTLY VISIT THE CATO MANOR OFFICE.

THE TROUBLE STARTED TO SURFACE WHEN I NOTICED STRANGE FACES AND MEMBERS ALLEGING TO BE MEMBERS OF DURBAN ORGANISED CRIME UNIT AT CATO MANOR OFFICES.SOME OF THESE MEMBERS AND RESERVIST CLAIMED TO BE MEMBERS OF DURBAN ORGANISED CRIME UNIT . I HAD NO INDICATION WHO THESE MEMBERS EG CAPTAIN EVA REPORTED TO CATO MANOR WITHOUT ANY WRITTEN DOCUMENT, MEMBERS LIKE SGT G PADAYCHEE ,WARRANT OFFICER GHANESS MANY MOVED WITHIN UNIT WITHOUT MY PERMISSION . THESE MEMBERS STARTED BEHAVE AS THEY FELT AND BECAME HOSTILE TOWARDS ME. INFORMATION WAS THAT ALL THESE MEMBERS ARE ONLY ACCOUNTABLE TO THEN DIRECTOR JW BOOYSEN.I HAD SNO SUPPORT FROM THEN DIRECTOR JW BOOYSEN .

WHEN I EVENTUALLY INFORMED THEM WE CANNOT RUN TWO OFFICE AND I SERVED THOSE MEMBERS WITH NOTICES TO MOVED FROM CATO OFFICES THAT IS WHEN THE AGGRESSION AND ANGER SURFACED . ALL OF THEM RAN TO THEN DIRECTOR JW BOOYSEN OFFICE AT PROVINCE . THEN DIRECTOR JW BOOYSEN CAME DOWN ON ME HEAVILY. HE WALKED INTO MY OFFICE ON THAT DAY RAISED HIS VOICE AND STATED THAT THE DECISION REGARDING CATO MANOR IS IN HIS HANDS AND I SHOULD NOT INTERFER ANYMORE AND HE LEFT FOR THE AIRPORT. IT WAS VERY CLEAR THAT I WAS NOT IN COMMAND OF THE CATO MANOR OFFICES. I SHOCKED THAT SINCE THAT DAY SUPT WC OLIVIER OPERATED ON HIS OWN THEY DID NOT REPORT TO ME.

I WAS VICTIMISED ,MY SON WAS ATTACKED IN SCHOOL AGAIN THEN DIRECTOR BOOYSEN, TARGET ME NOTHING CAME OF THE DEPARTMENTAL CHARGES . I WAS NOT GUILTY AND CHAIRMAN MADE BRIG MS MOODLEY MADE SERIOUS REMARKS AGAINST THE CONDUCT OF DIRECTOR BOOYSEN , AGAIN NOTHING CAME OF IT.

MY CELLPHONE WAS ILLEGALLY BUGGED FROM THE 13TH FLOOR SERVAMUS BUILDING IN DIR JW BOOYSEN BOARD ROOM . I RECEIVED A CALL ON A CELLPHONE WHICH WAS ILLEGALLY BUGGED WITH USE OF THREE CORRECTIONAL OFFICERS NAMELY BRIG MOHAN AND CAPT GOVENDER OF WESTVILLE PRISON AND ANOTHER MEMBER AND WITH DIRECTOR BOOYSEN .I HAVE SUPPORTING DOCUMENT TO PROVE THE BUGGING . NOW MAJOR GENERAL NGOBO DETECTIVES SERVICES WAS INFORMED TO INVESTIGATE ME ON INSTRUCTION COMMISSIONER PT BROWN.

PSA.

THE SECTION UNDER LT COLONEL WC OLIVIER STARTED TO CALL THEMSELVES THE CATO MANOR ORGANISED CRIME UNIT. STATE RESOURCE, EMAILS AND FINANCIAL WERE SENT DIRECTLY TO THEN DIRECTOR JW BOOYSEN . ALTHOUGH I WAS THE UNIT COMMANDER, I WAS NOT IN CONTROL OF THEM. I REPORTED THIS TO VERY SENIOR OFFICER THAT DID NOT HELP.

THE MORE I TRIED THE ACT ON ISSUE THE MORE I WAS VICTIMISED BY NOW MAJOR GENERAL JW BOOYSEN, HE TRIED EVERYTHING POSSIBLE TO SUPEND ME AND MISUSED THE DEPARTMENTAL PROCEDURE TO TARGET ME. HE TRIED EVERYTHING IN HIS POWER TO MOVE ME OUT OF UNIT .HE RECOMENDED THAT I MUST BE MOVED OUT FROM MY POST SO THAT HE COULD PUT SOMEONE HE WANTS TO RUN THE UNIT.

EVENTUALLY HE DID GET ME OUT. BRIG ZAKHALI WAS MOVED OUT OF PROVINCIAL HAWKS AND ACTED IN MY POST . I TRIED TO FIGHT MY CASE BUT ODDS WERE STACKED AGAINST ME UNTIL NOVEMBER 2011 I RECEIVED A OFFICIAL NOTICE THAT I BEING TRANSFERRED WITH POST. THIS IS A UNFAIR LABOUR PRACTICE BUT I COULD DO NOTHING.

IT CLEAR THAT MAJOR GENERAL JW BOOYSEN WAS UNTOUCHABLE IN THE POLICE AND HE HAD THE BACK UP SENIOR OFFICERS IN THE SAPS. HE COULD DO WHAT HE WANTED TO DO WITH ME. HE WAS EVEN PROMOTED TO MAJOR GENERAL AS DEPUTY PROVINCIAL HEAD OF THE HAWKS KZN.

TO THIS VERY DAY I AM FACING HUMILATION OF ACTION AND I WAS FORCFULLY MOVED OUT OF HAWKS ENVIROMENT AS UNIT COMMANDER. I FELT ABUSED BY THE SYSTEM BECAUSE SO MANY OF THEM GANGED UP AGAINST ME. THEY MADE IT SEEM LIKE I WAS TROUBLE MAKER. ALL I WAS TRYING TO DO WAS JOB AS UNIT COMMANDER. I FOLLOWED ALL PROTOCALLS, RIGHT UP MINISTER OFFICE WITH MY COMPLAINT. I WAS THEATEN WITH DEPARTMENTAL ACTION AND INFORMED BY A BRIG KADWA HE HAS BEEN APPOINTED TO INVESTIGATE ME FOR ADRESSING MY COMPLAINT TO THE MINISTER OFFICE. THOSE MEMBERS AT CATO MANOR OFFICE ACTED UNDER COMMAND OF MAJOR GENERAL BOOYSEN ALL THE TIME . ALL MEDIA REPORTS ON ALL INCIDENTS CAME FROM M/GENRAL BOOYSEN AND NOT ME. ALL GRAHIC PICTURE OF SHOOTING ON CRIME SCENE WAS PUT IN BY JOURNALIST CALLED MR ANIL SINGH (A FRIEND OF BOOYSEN) OF DAILY SUN NEWSPAPER . I DO NOT KNOW HOW THIS JOURNALIST GOT TO THOSE CRIME SCENE AND WERE HE OBTAINED THOSE PICTURES.

I AM VICTIM AND THAT MAJOR GENERAL BOOYSEN ABUSED HIS POSITION TO TARNISH MY IMAGE SAPS AND HAVE ME REMOVED AS UNIT COMMANDER OF ORGANISED CRIME DURBAN, IT IS SHOCKING THAT EVERYTIME I HAVE RAISED THIS ISSUE I WAS TARGETED. I HAVE BEEN THREATEN AND EVIDENCE IS POINTED AT THEM YET THEY WALKING FREELY. MY LIFE IS IN SERIOUS DANGER RELATING THOSE TO ISSUES ABOVE

I AM WILLING TO CLEAR ANY OMISSION OR ANY UNCLEAR ISSUE WHEN CALLED UPON TO DO SO .

I KNOW UNDERSTAND CONTENTS OF THIS STATEMENT

I HAVE NO OBJECTION TO TAKING THE PRESCRIBED OATH

I NO OBJECTION TO TAKING THE PRESCRIBED OATH

.....RS AIYER COLONEL DATED : 2012-08-03

3. JUL. 2013 12:47 SANDTON ADVOCATES CHAMBERS 3 NO. 677 P. 10

I CERTIFY THAT DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS STATEMENT. THIS STATEMENT IS SWORN TO BEFORE ME AND DEPONENTS SIGNATURE WAS PLACED THEREON IN MY PRESENCES AT SERVAMUS BUILDING ON FRIDAY

2012-08-04 AT TIME :09:00

COMMISIONER OF OATHS

RANK: LT COLONEL RICHARD RAMUKOSI

ADDRESS:1 OCKERSE STREET KRUGERSDORP

WEST RAND GAUTENG

I PREFER TO EXPOSE FACTS IN COURT IF MY LIFE IS GOING TO BE EXPOSED ,TO THIS KIND OF DANGER. THERE ARE LOTS OTHERS, WHO NOT BEEN ARRESTED . GOING AROUND IN PUBLIC PLACES CREATING PERCEPTIONS YE'T EMPLOYED BY THE STATE IN ORGANISED CRIME AND SAPS IN KZN .THERE LOT OF PRESSURE PUT ON MB ,AS I STILL WORK IN THE SAPS IN KZN.

I WILL STILL ADD TO WHAT I HAVE SAID AND WILL CLEAR OUT ANY OMISSION IF THAT NEED BE .I WILL ADD TO MY STATEMENT UNDER CROSS EXAMINATION IN COURT.

R. S. AIYSA 2012-08-31

I CERTIFY THAT DEPONENT HAS ACKNOWLEDGED THAT KNOWS AND UNDERSTANDS THE CONTENTS OF THIS STATEMENT . THIS STATEMENT WAS SWORN BEFORE ME AND DEPONENTS SIGNATURE PLACED THEREON IN AT DURBAN ON FRIDAY 2012-08- 31 AT 10:45

.....COMMISSIONER OF OATHS
LT COLONEL RICHARD RAMUKOSI
ADDRESS: 1 OCKERSE STREET KRUGERSDORP
WEST RAND GAUTENG

2008 Nov 27 8:37 HP LASERJE

Annexure "MM25"

[redacted]

SAP 21

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

136 Victoria Embankment
Durban, 4000

Verwysing Reference	12/18/2
Navrae Enquiries	S/Supt Alyer Supt W Olivier
Telefoon Telephone	(031) 333 8043 (031) 203 7323
Faksnommer Fax number	(031) 203 7318 ( )

OFFICE OF THE
TACTICAL COMMANDER
ORGANIZED CRIME
DURBAN

2008-10-14

THE PROVINCIAL COMMANDER
ORGANIZED CRIME
KWA-ZULU NATAL

ATT: DIR BOOYSEN

MONETARY AND NON-MONETARY AWARDS

MAPHUMULO CAS 99/08/2008: MURDER AND ATTEMPTED MURDER ON SAPS MEMBERS SUPT CHONCO AND INSP M KHANYILE

1. Details of candidates:

0070031-2	Dir JW Booysen
0057260-8	Supt W Olivier
0425495-3	Capt SJ Smith
0410381-5	Capt N Eva
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0615350-0	Insp MW Thabethe
0450710-0	Insp Tango
0464815-3	Insp BA Magwaza
0429170-1	Insp E Nel
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0603646-5	Insp M Panday
0173585-3	Insp PW George
0523900-1	Insp B Zondi
0608191-6	Insp RC Maharaj

0492770-2 Sgt Mkhwanazi
0536844-8 Cst S Naidoo
0443522-2 Capt V Auerbach (Brighton Beach SAPS) From: 2008.09.03

(21)

Each of the above candidates played a role in the successful apprehension of the suspects. Some of the candidates played a role in the apprehension of the suspects whilst others assisted at the scene.

2. **Summary of events:**

On Wednesday 2008/08/27 at approximately 10H00, Supt Chonco was in the company of Insp Khanyile, they were attached to the Provincial Taxi Task Unit. The same day they were on route from SAPS Kranskop to KwaDukuza Court. Ahead of them was a marked police vehicle with two accused also on route to take the two accused to KwaDukuza Court.

Whilst Supt Chonco travelled along the R74, approximately 20 kilometers before KwaDukuza on a detour along the R74, he was led into an ambush and was accosted by armed males armed with AK47 and R4 – R5 rifles. He was fatally shot and killed behind the steering of the police vehicle whilst Insp Khanyile, who was in his company, also sustained gunshot wounds but miraculously managed to fight off the suspects, shooting the one about six meters from him. Insp Khanyile was later removed and taken to Umhlanga Hospital by helicopter.

The scene was attended by Supt Minaar, the Station Commissioner of Kranskop SAPS as well as other members of nearby police stations. The same day at 11H00, members of Organised Crime, Cato Manor, was summoned and tasked to the scene and took over from Supt Minaar. The scene was thoroughly secured and a thorough investigation was done at the scene with extensive enquiries made by the members on the scene. Statements were obtained from the local community and other persons nearby.

The same day 2008/08/27, the investigation team which at this stage consisted of Supt W Olivier, Capt S Smith, Capt N Eva, Capt Van Tonder, Insp Mostert, Mdlalose, Zondi, Makhanya, P George, Thabethe, Panday, Stolz and Sgt Mkhwanazi, concluded their investigation at the scene. At the time the deceased, who was shot at the scene by Insp Khanyile, was removed and possession was taken of his cell phone. Capt Eva, Insp Mostert and Cst Naidoo extracted vital information from the phone. It was during this time that Insp Mostert contacted Crime Intelligence and requested immediate assistance. Supt Olivier, Capt Eva, Van Tonder, Stolz and Panday returned to the office whilst Insp Mostert, Mdlalose, Makhanya, Zondi and Mkhwanazi remained at the scene to conduct further enquiries. Later the members departed to Kranskop and Greytown areas and the same day at 23H00 the investigation team still consisting of the above members met at Greytown. From Greytown the above investigation team proceeded to the area called Matimatolo near Maphumulo, however it proved to be a fruitless exercise. The team then returned to the office.

During this time all avenues were utilized to gather the intelligence that was analysed and on 2008/09/03 the first breakthrough was made by the investigation team with the assistance from Crime Intelligence. The investigation team now consisting of Supt Olivier,

Capt Eva, Smith, Van Tonder, Lockem, Insp Mostert, Panday, Nel, Makhanya, Mdlalose, Magwaza, RC Maharaj, Zondi, Sgt Mkhwanazi and Cst Naidoo as well as Capt V Auerbach of SAPS Brighton Beach, proceeded to the KwaDukuza area. The informer pointed the house out to the investigation team which was situated next to the R74 at 59 Rose Avenue, KwaDukuza. The same evening at 23H30, the same investigation team proceeded to 59 Rose Ave. The following members penetrated the house:

0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0536844-8	Cst S Naidoo
0443522-2	Capt V Auerbach (Brighton Beach SAPS)

whilst the remaining members took guard outside the house. As the above members entered the house a gun fight ensued and the first suspect, Lindani Buthelezi, was fatally shot and found next to him was a 9mm pistol with the serial number erased. The case is being investigated by KwaDukuza SAPS vide CAS 150/08/08. The investigation team then returned to the office.

Insp Mostert continued to gather information with the assistance of Crime Intelligence.

3. The Apprehension of two more suspects

Details of candidates:

0070031-2	Dir JW Booysen
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0429170-1	Insp E Nel

Summary of events:

On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he had information pertaining to the suspect that had organized the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

On Tuesday 2008/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 08H30, the investigation team still consisting of the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the

investigation team, the occupants being two persons, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted of Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva whom followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his body guard. The following firearms were found in the vehicle; one AK47 Rifle with loaded magazine, one Ruger Mini 14 Automatic Rifle and two magazines as well as two 9mm Norinco Pistols, both with loaded magazines.

The following cases were opened:
Howick CAS 106/08/08: Attempted Murder and possession of unlicensed firearms
Howick CAS 107/08/08: Inquest

The above members returned to the office and continued to gather further information.

4. Apprehension of two more suspects

Details of candidates:

0426991-8	Capt Lockem
0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0523900-1	Insp B Zondi
0492770-2	Sgt Mkhwanazi
0536844-8	Cst S Naidoo

Summary of events:

On 2008/09/18 at 13H00, Insp Mostert received information about the hideout of two more suspects in the Mandini area. The investigation team consisting of the above members proceeded to Mandini where the house was pointed out by the informer to Insp Mostert. Insp Mostert returned and briefed the members and at 15H10 the investigation team proceeded to 4 Oribi Place, Mandini. The following members entered the house:

0084512-4	Insp P Mostert
0413171-1	Insp A Stolz
0536844-8	Cst S Naidoo

whilst the remaining members stood guard outside the house. At the door, Insp Mostert found a black male and while in the process of identifying himself to this person, this male ran into the house. Insp Mostert, Stolz and Cst Naidoo then entered the house and

systematically proceeded through the house starting in the lounge area and proceeding down the passage. Turning left into the next passage a young school child was found standing in the one doorway who pointed to a closed door and informed Insp Mostert that "they are hiding there". The child was asked to depart from the house for his own safety. Once the investigation team reached the closed door, they found it to be locked and proceeded to announce themselves stating "It is the police, open up". This was repeated several times but no response was received. The door was then kicked in by Insp Mostert and at the same time a shot was fired from the room towards the investigation team and the sound of glass breaking was heard. The team then entered the room and a shootout took place between the police and the suspects, fatally wounding two suspects. The two suspects were positively identified as Nathi Mthembu and Mdu Khopoloto Ntuli. Found in the room was one Z88 9mm Pistol loaded with the serial number erased and one CZ75 9mm Pistol also loaded with the serial number intact. Insp Mostert was in possession of a warrant of arrest for the suspect Mdu Khopoloto Ntuli vide Maphumulo CAS 2/02/05: Murder which was being investigated by Supt Chonco.

During the investigations it was clear that Supt Chonco was a thorn in the side of these criminals who did not hesitate to take the law into their own hands. Investigations also revealed that the following suspects were directly involved in the assassination of Supt Chonco:

Dumisani Ndlovu who was shot by Insp Khanyile, one of Supt Chonco crew
Lindani Buthelezi who was shot by the investigation team
Nathi Mthembu who was shot by the investigation team
Mdu Khopoloto Ntuli who was shot by the investigation team and who was also wanted on Maphumulo CAS 02/02/2005: Murder (Attached, find J50 Warrant of arrest)
Timson Magojela Ndimande and his body guard, Sibusiso Tembe, who were shot by the investigation team and who orchestrated the hit on Supt Chonco.

Attached find newspaper clippings from the Daily Sun, The Natal Mercury and the Daily News as well as statements of members who were involved in the individual scenes.

As depicted in this report, it is clear that several members contributed and played an important role of which some members were continuously confronted with the dangers of the apprehensions of the suspects whilst other members played their individual roles which contributed to the success. These members should receive a benefit.

Comments: Recommended that members receive a certificate of commendation from the national Commissioner and the amount of R10 000.

PROV HEAD: DET SERVICES KWAZULU-NATAL
PROVINCIAL COMMANDER ORGANIZED CRIME
DIRECTOR J.W. BOOYSEN

ASST. COMM. P.C. BROWN
Provincial Head Detective Service KZN.

5. Award Options:

5.1 Monetary Awards

5.1.1 South African Police Service Gold Cross for Bravery
R35 000.00 (plus applicable tax)

5.1.2 South African Police Service Silver Cross for Bravery
R30 000.00 (plus applicable tax)

5.1.3 South African Police Service Commendation Medal
R25 000.00 (plus applicable tax)

5.1.4 Certificate of Commendation by the Minister for Safety and Security
R15 000.00 (plus applicable tax)

5.1.5 Certificate of Appreciation from the Minister for Safety and Security
R15 000.00 (plus applicable tax)

5.1.6 Certificate of Commendation by the National Commissioner
R10 000.00 (plus applicable tax)

5.1.7 Certificate of Appreciation from the National Commissioner
R10 000.00 (members of the public : tax not applicable)

5.2 Non-Monetary awards

5.2.1 Commendation by the Divisional Commissioner or Provincial Commissioner

5.2.2 Certificate of Appreciation from the Divisional/Provincial Commissioner

"MM26" [redacted]

STATEMENT OF ARIS DANIKAS

I Aris Danikas with identity number _____ residing at _____ and employed at _____ with home telephone _____ and work telephone _____ would like to hereby state under oath/ or affirm to the contents as stated below:

1.

I, Aris Danikas age of 41 years old ex owner of Technotronic Electronics in South Africa would like to make the following statement about criminal acts by members of the Cato Manor Organized Crime Unit that I witnessed as a police reservist attached to the unit from 1999 to 2008. I would like to stress that I am very concerned that making this statement outlining the criminal acts I have witnessed, could put my life and that of my immediate family, including my wife's relatives in South Africa, in danger, and I make this statement on the understanding that the South African authorities will do everything in their power to ensure the safety of my immediate family and myself. Moreover, I am also very concerned that outlining these acts will make me a target of false accusations and being implicated in the crimes by the Cato Manor unit members that I witnessed but did not participate in. It must also be stressed that these falsehoods aimed at attacking my credibility and discrediting my character will be orchestrated by the very people I witnessed committing these crimes who are also seasoned police officers fully capable and in possession of the means to manipulate evidence against me. I therefore also make this statement on the understanding that I will be legally protected and indemnified from any of these efforts to falsely implicate in any crimes.

2.

I was a very close family friend of Gert Booysen. He purchased stock from me at a favorable price. I had a romantic relationship with Booysen's daughter, Natalie Booysen. Gert Booysen was the man in charge of some of the incident that happened at Cato Manor Organised Crime unit. He was always called for any serious shooting incident which involved the killing of suspects by his members. Booysen will often phone me to come with him when they called him for crime scenes.

3.

During the week of 15 October 2001 I had lunch with Johan Booysen at the News Café in Musgrave shopping centre in Durban. Booysen showed me a photograph of an escaped crime suspect who he alleged had faxed threatening material to senior justice officials that had convicted the suspect previously for various crimes. Booysen identified the suspect as Jabulani and he told me that if I saw the

1

man in the photo I should put a bullet in his head. I asked him why. He told me that an order had come out from high up in the magistrate circles not to take him alive because he will escape from prison again. Then he continued to explain the story. He continued to give me the background of the suspect and he briefed me to details of his alleged criminal activities.

4.

On 15 October 2001 at 12.30am I drove to Cato Manor police station and drove in a car with Booysen to a township. I believe it was Umlazi. We were followed by several Cato Manor members in unmarked vehicles. Booysen stayed in the car and I joined the members conducting house to house penetration searching for the suspect (Jabulani). We found an alleged relative of the suspect, who took us to a house in Umlazi. I can not recall who was using what type of firearm. What I can recall is Jeremy Martin carried an R 5 rifle. I can recall that the man killed was Jabulani. Plus minus ten members arrived at the house of the suspect. I saw Jeremy Martin kick the door in, and I saw the suspect dragged outside by Martin. At the time of his arrest, I was positioned close to the entrance of the house and could see a female and children lying in a bed. Martin dragged him out of the house into the rain in his underpants and we stood around him in a circle while Martin was trying to handcuff him. The suspect was lying on his stomach. Suddenly Jeremy said to the suspect to stop moving and he went for the suspect and grabbed him. The suspect and Jeremy then slid down a 2 meter slope out of the circle. At that point another officer, I believe his name was Eddie van Ransburg, told me in abusive language to "get the fuck out of here". Then I heard shots and the suspect was dead. It is my personal belief that the suspect, up to his death, did not have a firearm. Booysen was the overall commander of the operation. I remember that I phoned Booysen after the shooting, because he stood by the cars up the hill. He came to the scene and congratulated the members.

The members claimed later that the suspect had produced a firearm hidden somewhere in the vicinity. A claim I seriously doubt as he was surrounded by more or less 12 police officers armed with assault rifles.

5.

The only crime scene that I can remember is when I used Booysen's firearm. I was involved in the incident that took place in my shop in Durban in 2001. I shot the suspect in the stomach with the firearm of Booysen. The investigating officer was Jack Muller. He was also instructed to change my statement by Booysen.

6.

2

On 26 February 2004 I called Cato Manor officers to come to my shop Technotronic in Smith Street to arrest a man who came to collect a stolen laptop. He was taken to Cato Manor police station. I accompanied them. At the offices of the Serious and Violent Crime Unit at Cato Manor, they stripped the suspect of his clothes, tied him to a chair and proceeded to torture him by choking and hitting the suspect. I recall that members present included RC Maharaj and Varesh Pandey. I recorded the event secretly and showed it to Booysen soon afterwards. He just laughed and said "That's how things are done to get results." He also warned me not to show it to anybody or I would get into trouble. He requested a copy and a colour photo of a specific frame showing Varesh Pandey, which he told me he wanted to use to incriminate Pandey, with whom he was in a personal dispute. To my knowledge he never took disciplinary action against his members, but I believe he warned them against the possibility of my taking recordings of future torture because they henceforth avoided taking me to interrogations. In 2008, after I left South Africa, I placed clippings of the recordings on YouTube REFF CASE NO 297/02/04 (FILE "torture in pmb")

7.

On 30 March 2004 a drunk man was harassing the owner of the Pie Shop next door to my shop in Smith Street. Booysen happened to be in my shop and went to grab the suspect and dragged him through my shop, with my help (FILE workshop blood VIDEO 1). Booysen took the suspect to the back of my shop where I saw Booysen assault the suspect with his fists and knock him down unconscious, leaving a lot of blood on the floor. Later on police members arrived and under Booysen's direction collected the suspect. Soon afterwards, it may have been the next day, Booysen either dictated or gave me a statement, I don't recall which. This statement falsely stated that the suspect had attacked one of us and tried to murder one of us, I don't recall whether it was me or him, with a screw driver in my workshop. This never happened, but I had to sign it because Booysen ordered me to in order to justify his use of unnecessary and excessive force. (reference 30-03-04 15:45 30-03-04 1900 SUSPECT ARRESTED AT BROAD STR POLICE STATION)

8.

On 21 January 2006 Booysen came to my shop and I related a story to him of being in a car with Willa Olivier and Eugene van Tonder, senior members of the Cato Manor unit. They were driving around Smith Street in a black Lumina, a state unmarked car used by the unit, with tinted windows. Van Tonder wound down the window and started shooting with a sized air handgun at pedestrians, specifically targeting black pedestrians for entertainment, laughing as he shot them. I recall he knocked down a man on a bicycle and wounded a few others, including females. When I related this to Booysen, he described in detail how he and his colleagues had frequently done this, and that he participated in this himself, laughing while telling this story. He also said that a civilian who was injured had opened a case and provided the registration number of the vehicle where the shots were fired from, that I was in, and that

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this number had been traced to the Cato Manor unit. Booysen said the complaint was sent to his office and he said he "took care of it". By that I understood that he had covered it up. (see video 2)

9.

On 27 October 2008 at around 9am four suspects were arrested by Cato Manor members at Durban airport arrival lounge. Some of the members I remembered who were present during these arrests were: Booysen, Mostert, Van Tonder, Vick Panday, Peter George, Shane Naidoo, Mukesh Panday, Anton Lokum, Sgt R Lee and Adele Sonnekus took part in this arrest too, at Booysen's invitation. They were taken to Cato Manor police station and interrogated one by one. I was present during this interrogation. I witnessed one being questioned and subsequently tortured in my presence and in the presence of Booysen. After a short while Booysen said he could not be seen there and left with me. Booysen later told me Mostert shot two of the suspects dead after one tried to hit him with a spade. Furthermore he told me that he arrived at the scene soon afterwards and that one suspect was still alive, waiting for the paramedics to arrive. He told me that he then leaned down to the dying suspect's ear and whispered: "I told you I'm going to kill you if you come back."

10.

On 9 April 2007 I was visited by Booysen and Adele Sonnekus at my residence when he received a call from one of his members to inform him of a shootout in Malvern area. Adele Sonnekus was an officer of Provincial Organised Unit and she was a secretary. During the day of the incident, she and Booysen visited my house. They had a romantic relationship. We proceeded to the crime scene where I saw various members of the Cato Manor unit (operation greed). I found two African males lying within a residential garage. One was shot dead inside a car and the other one was wounded and still alive but in great agony and bleeding heavily. Booysen told me that they will only call the paramedics and the ICD once the second suspect had also died, so everyone was waiting around for the second suspect to pass away due to his injuries. I managed to use a camera and recorded some video material of the crime scene in the presence of Booysen and the rest of the officers involved in the shooting. I was also instructed by Mostert and Olivier to pick up various large caliber spent police cartridges and after I placed them in my pocket I handed them over to Mostert and Olivier as per their request. He Malvin suspect dying.

The suspect died after a few minutes. I asked Booysen three times before the suspect died, to call an ambulance.

Later on I was told by Booysen that the driver of the police getaway car of the robbers was a police informer and had tipped off the Cato Manor office about the planned burglary, and that he had driven

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away after dropping the suspects at the house they intended to burgle. The suspects were then shot dead by the unit.

When we left the crime scene and returned to my residence with Booysen I played the video to him and he specifically instructed me to get rid of the video material or else I would get into serious trouble. I chose to keep it and placed it on YouTube in 2008.

11.

On 15 November 2007 robbers who were part of a gang that stole jewels and watches shot an off duty policeman at Pavilion shopping mall in Durban. I attended the scene with Booysen. Other members of the unit who I recall were present were Booysen, Mostert, Olivier, Van Tonder, Peter George, Rakesh Maharaj, Mukesh Panday and Shane Naidoo.

On 23 November 2007 a Greek national, Costas Svourakis, was arrested at OR Tambo airport aboard an Olympic Airways flight to Athens in possession of several watches later identified as the ones stolen at the Pavilion Mall. The suspect was brought to Cato Manor unit that night and interrogated for about two hours. I was called by Booysen to attend the scene to act as an interpreter. Other members of the unit who I recall were present were Booysen, Mostert, Eugene van Tonder and Vic Panday and Mukesh Panday.

I witnessed the suspect being stripped of his clothes and tied on a chair naked. Soon afterwards he was tortured and beaten by the members of the Cato Manor unit by placing a bag over his head and choked until he confessed to various crimes that he was accused of. During interrogation of Svourakis, I slapped him. An Occurrence Book entry was made at 22-23/11/2007. Director Kennedy should have a record of this OB entry. Dir Kennedy worked for an IT company but he was in charge of the reservist. (REGISTRATION OB 22 23, 11/2007)

12.

On the 24 May 2008 I received a call from Mostert to assist at a crime scene at 5th Avenue at Morning Side, Durban where a suspect was shot and also fell to his death while Mostert and members of the Cato manor unit tried to arrest him. When I arrived at the scene I was shown a dead body on the ground and I was refused entry to the crime scene by Olivier. I was told later by Mostert that he himself shot the suspect while he was falling to his death. (REF OB MAY 2008 24-25 1100 TO 0100)

13.

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The method utilized by the members of the unit was that they will strip the suspect naked and physically assault him if he does not cooperate. They will tie him to the chair naked and they will start to interrogate him. (Video reference.) They will place a piece of material over the head of the suspect, always from the back, to suffocate the suspect. The suspect can not see who is actually assaulting him. The standardized method was always used, namely shoot to kill, assault, torture, tampering with crime scenes. Genl Booyen would be called by his members to the crime scenes to cover them up. (Doctor the scene).

I KNOW AND UNDERSTAND THE CONTENTS OF THIS STATEMENT.

I HAVE NO OBJECTIONS TO TAKING THE PRESCRIBED OATH.

I CONSIDER THE OATH/AFFIRMATION BINDING TO MY CONSCIENCE.

_____DEPONENT SIGNATURE

I CERTIFTY THAT THE ABOVE MENTIONED STATEMENT WAS TAKEN BY ME AND THAT THE DEPONENT READ AND UNDERSTOOD THE CONTENTS OF HIS STATEMENT. THE DEPONENT PLACED HIS SIGNATURE THEREON IN MY PRESENCE ON _____ AT _____ AND DATED _____.

DATE: _____

TIME: _____

PLACE: _____

_____ COMMASIONER OF OATHS

FULL NAME: _____

BUSINESS ADRESS: _____

RANK: _____ FORCE NUMBER: _____

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MM27

STATEMENT OF LAURANCE MANFRED HODES

"MM27"

1. I am an adult male Advocate with senior counsel status practising as such at 3rd Floor, Maisels Chambers, 4 Protea Place, Sandown.

2. During June 2013, I was briefed by the State Attorney, Nelson Govender, with Naomi Manaka as my junior to represent the Acting National Director of Public Prosecutions, Nomgcobo Jiba, in a review application that had been brought against her by Major General Johan Wessel Booysen.

3. My junior drafted an answering affidavit based upon the instructions received in an internal memorandum dated 4 June 2013 as well as the docket pertaining to this matter.

4. The internal memorandum provided short responses to the various paragraphs of the founding affidavit. In particular, in relation to paragraph 50, the instruction received was *inter alia* that:

> *"The following evidence was placed before the First Respondent. In that:*
>
> - *The Applicant was the **de facto** commander of the Cato Manor Unit;*
> - *The monetary awards documents were before the First Respondent with regard to how the Applicant participated and benefited in the Taxi Violence cases;*

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- *The statements of the following witnesses were also before the First Respondent, which incriminated the Applicant; viz.*

  i. Ndlondlo;

  ii. Col. Aiyer;

  iii. Danikas.

- *The Answering Affidavit of the Applicant in the High Court Application by one Bongani Mkhize where the Applicant details his personal knowledge of the Taxi Violence killings."*

5. This was utilized and incorporated in paragraph 17 of the answering affidavit where the following appears:

> *"17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, Mr Aris and Danikas, and Mr Ndlondlo from which it is apparent that the Applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof YouTube. I annex copies of these statements as* ***"NJ2", "NJ3", "NJ4"*** *and* ***"NJ5"*** *respectively."*

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6. Once this affidavit had been drafted by my junior, I settled it and had it sent to Adv Jiba for her verification and signature.

7. When the matter was argued before the Honourable Mr Justice Gorven, I only made one concession and that was in relation to that court possibly having jurisdiction. I did not make the other concessions that were attributed to me in his judgment. A record of the proceedings may be obtained to substantiate my contentions in this regard.

8. Nevertheless, as alluded to above, the Honourable Mr Justice Gorven attributed various other concessions to me as appears from his reported judgment.

9. My junior and I consequently compiled an application for leave to appeal. A copy of this document is available and was discussed in a consultation with various members of the National Prosecuting Authority. It was then filed on behalf of the Acting National Director of Public Prosecutions.

10. However, on 25 March 2014, the newly appointed National Director of Public Prosecutions, Mr Mxolisi Nxasana, decided not to appeal against the judgment in the Booysens matter. This resulted in the notice of application for leave to appeal being withdrawn.

11. I have various emails relating to the exchange of communications pertaining to this matter available. Should they be required, please do not hesitate to contact me.

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12. My junior, Naomi Manaka, was not present when I made this statement, but I will approach her and request her to also provide a statement of her involvement in this matter.

L M HODES SC

Signed at JOHANNESBURG on this 3rd day of FEBRUARY 2015, the deponent having acknowledged that he has no objection to taking the prescribed oath, which oath he regards as binding upon his conscience.

COMMISSIONER OF OATHS
FULL NAMES: Marthinus Gysbert Bath
BUSINESS ADDRESS: 221 Frans du Toit Street
DESIGNATION: Colonel Pretoria
AREA/OFFICE: National Investigation Unit

MM28

AFFIDAVIT

I, the undersigned,

GLADSTONE SELLO MAEMA

do hereby make oath and state as follows:

1.

I am an adult male, employed by the National Prosecuting Authority (NPA) at the Director of Prosecutions Office in Mafikeng as a Deputy Director of Public Prosecutions, which offices are situated at the Mega City Complex, East Gallery 3139 Sekame Street, Mafikeng.

2.

The facts contained herein are both true and correct to the best of my knowledge and belief and fall within my personal knowledge unless it is expressly stated otherwise or the context indicates the contrary.

3.

In March 2012 I was informed by my DPP, Adv Johan Smit SC about a request by the then Acting National Director of Public Prosecutions (ANDPP), Adv Nomgcobo Jiba to form part of a team that would peruse a number of dockets which were originating from the KwaZulu-Natal Division, which later came to be known as the Cato Manor prosecution. The reason that was given at the time by the ANDPP was that the then Acting Director of Public Prosecutions, KwaZulu-Natal, Adv Simphiwe Mlotshwa had approached her with a request to appoint (a) prosecutor(s) from other divisions to look into the matter as prosecutors in his division had worked over a number of years closely with the members of the Cato Manor section of the Durban Organised Crime Unit. The request was that a team of prosecutors who were unknown to the suspects and who were unfamiliar with the facts of the matter be appointed to decide the dockets. I was asked to be the Lead Prosecutor assisted by a Deputy Director of Prosecutions, Adv

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Raymond Mathenjwa and four (4) Senior State Advocates, Advv Mlotshwa, Futshane, Moleko and Ntlakaza who were all based at the DPP office, South Gauteng Division under the leadership of Adv Andrew Chauke. A meeting was held at VGM building on 9 March 2012 with the team members, the Acting NDPP, the DPP, Adv Chauke and Adv Mosing. In furtherance of this meeting, a communique was sent to Adv Smit SC, the DPP of the North West by the Acting NDPP's PA, Jackie Lepinka a copy of which is marked "SM1".

4.

The cases, in which members of the Cato Manor section of the Durban Organised Crime Unit were implicated, were being investigated by the Independent Police Investigation Directorate (IPID) led by Mr Glen Angus who were being assisted by members of the Directorate of Priority Crime Investigations (DPCI) commonly known as the Hawks led by General Mabula. The investigation team also comprised of officials from provinces outside the KZN province.

5.

The prosecution team members perused a number of dockets, issued out queries in guiding outstanding investigations, had consultations with members of the investigation teams of both the Hawks and IPID, had consultations with some witnesses in some of the dockets and regularly had briefing sessions with both the DPP, South Gauteng Adv Chauke and the Acting National Director (ANDPP), Adv Jiba to report on the progress that was being made in the cases. The first batch of accused persons (Accused 2 – 18) were arrested on 20 June 2012 and appeared in the Regional court on 21 June 2012 where bail was fixed after an opposed bail application. The second batch, Accused 1, 19 -30 were arrested on 21 August 2012 and were added to the existing case on the next day and bail was fixed unopposed. The prosecution team members were convinced that there is a prima facie case against all the accused persons and a prosecution memo and the indictment was prepared and signed by myself on 16 August 2012.

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6.

The accused are being charged with one hundred and sixteen (116) counts which include two (2) racketeering charges; the predicate offences include twenty eight (28) murder counts; twenty two (22) counts of Defeating or Obstructing the course of Justice; twenty four (24) counts of Unlawful possession of Arms and ammunition; six (6) counts of Theft; three (3) counts of Assault with intent to cause grievous bodily harm; one (1) count of Attempted murder and one (1) count of Malicious damage to property.

7.

The prosecution team had several meetings in June and July 2012 during which the prosecution memo and the indictment were drafted. Adv. Mosing of the office of the ANDPP visited the prosecution team and in-depth discussions were held relating to the elements of the racketeering charges, such as the identity of the enterprise, the pattern of racketeering activity, management of the enterprise, as well as the predicate offences. Briefing sessions were held with the DPP South Gauteng, Adv Chauke and the ANDPP to keep them abreast of the prosecution team's work. On 10 July 2012, a prosecution memo requesting the ANDPP to authorise the racketeering charges in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998, was sent to the office of the ANDPP. The indictment also accompanied this application. A copy of the Prosecution Memo dated 10 July 2012 is enclosed herewith and marked "SM2". The indictment is a very lengthy document but it is also available for perusal should it become necessary. The racketeering authorisations were issued by the ANDPP on 17 August 2012 in accordance with section 2(4) of the Prevention of Organised Crime Act 121 of 1998 and copies thereof are marked "SM3" and "SM4".

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8.

On 7 May 2013 we received information of a motion application which was being brought by the then accused 1, Johan Booysen, which was served on the state attorney in Durban. The applicant, Johan Booysen was challenging the racketeering authorisation which were issued by the then Acting National Director, Adv Jiba on 17 August 2012 in terms of section 2(4) of the POCA Act 121 of 1998. The applicant, General Booysen was challenging the racketeering decisions on the basis of the principle of legality in terms of section 172 (1) (a) and (b) of the Constitution Act, Act 108 of 1996 in that the decision, in his view was irrational and not supported by the evidence available. The prosecution team and the DPP, Adv Chauke had a consultation with counsel, Adv Laurence Hodes SC and Adv Manaka at chambers in Sandton on 3 June 2013 to prepare a response to this court application by Johan Booysen. Counsel's advice was among others that:

- the decision to prosecute was not reviewable in terms of the Promotion of Access to Information Act (PAJA), Act 3 of 2000;
- that the Prosecution Memo should not be made available to the applicants as it is privileged communication between the DPP and ANDPP;
- that the decision to prosecute was taken in Pretoria and the applicants must bring the application in Gauteng as the KZN courts do not have jurisdiction.

9.

It was also decided during the consultation with counsel that a Memo will be prepared by the prosecution team to brief counsel more fully on the matter. The prosecution team decided to draft a proposed response to the applicant's founding affidavit. The proposed response is marked "SM5". The team also prepared an arch lever file for counsel the contents of which were the following:-

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- A statement of Colonel Aiyer dated 3 August 2012, stating the managerial responsibilities of the Cato Manor section; participation and interferences in activities of the Cato Manor section by General Booysen; direct resourcing of Cato Manor by General Booysen and the fact that he was overlooked as Branch Commander and the Cato Manor members reported directly to General Booysen and were acting under his command.

- A further statement dated 31 August 2012 was taken by the investigators after Colonel Aiyer was consulted by the team, the contents of the statement dated 31 August 2012 was conveyed by Colonel Aiyer in the consultation that he had with the prosecution team earlier in that month and the prosecution team did use the information in briefing sessions with the Acting NDPP as we expected the information just to be captured in writing and under oath by the investigators.

- The draft statement of Ari Danikas was in possession of the investigating team since 18 April 2012 and was handed to the prosecution team in June 2012. On 11 July 2012 the prosecution team asked General Mabula of the DPCI to obtain a more detailed statement so that we could decide whether we were going to use him as a witness, the prosecution team advised the police to leave the statement unsigned so that the process outlined in the Mutual Legal Assistance legislation (section 2 and 3 of the International Cooperation in Criminal matters Act 75 of 1996) could be followed to formalise the statement. The witness was in Greece at the time and had security concerns and was unwilling to come on his own to South Africa. There was constant communication with Mr Julian Knight an attorney in Pretoria who was representing the witness, whose role as I understood it, was to advise the witness on the implication of testifying in South African courts and the law applicable, section 204 of the Criminal Procedure Act 51 of 1977. We were confident that the statement would ultimately be

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signed through the outlined processes and that was the reason why it formed the basis of the briefings with the Acting NDPP and the briefing with counsel.

- A statement of Bhekinkosi Mthiyane Ndlondlo dated 31 July 2012; he was an executive member of Stanger Taxi Association that was in conflict with the KwaMaphumulo Taxi Association and provided information to Cato Manor police about the activities of KwaMaphumulo Taxi Association and was party to meetings where members of Cato Manor were paid for various killings of members of KwaMaphumulo Taxi Association. He states his own version of the killings of KwaMaphumulo Taxi Association members and the payments to Cato Manor police including General Booysen. This witness has been killed in the meantime and section 3 of Hearsay Evidence Act 45 of 1988 would be used to have it admitted as evidence in court.

- A statement of Bongani Mandla Mkhize, dated 1 August 2012; a bodyguard of Bongizwe Mhlongo who became privy to information relating to the killings of Kopolota Ntuli and Nkosinathi Mthembu and who accompanied Bongizwe Mhlongo to Tongaat toll plaza where a meeting was arranged with Mostert (Accused 4) to pay him for the killings of these members of KwaMaphumulo Taxi Association.

- A statement of Nkosinathi Hopewell Shozi dated 3 August 2012, an attorney who was instructed by the KwaMaphumulo Taxi Association to interact with the police for the possible handing over of suspects that the police wanted who are members of the KwaMaphumulo Taxi Association.

- A copy of the High Court interdict application brought by Bongane Mkhize, the Chairperson of the KwaMaphumulo Taxi Association (and the deceased in Count 20), preventing the police from unlawfully killing, threatening or harassing members of his taxi association including himself.

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Of note is the Respondent's answering affidavit filed in this case which was signed by General Booysen, in which he clarified that there was no warrant of arrest for Mkhize and if the police were to require questioning him, it would be done in compliance with the law.

- A copy of the Monetory Awards and National Commendations which had General Booysen as a beneficiary where he disclosed how he was intimately involved with the tracing and tracking of Magojela (deceased in Count 8) and other activities of the Cato Manor section, wherein members of KwaMaphumulo Taxi Association were killed and people suspected of involvement in the killing of Superitendent Choncho and other people suspected of involvement in various robberies at the Spar shops, were killed instead of arresting them and bringing them before the courts.

- A statement of Andrew Patrick Cochrane dated 16 May 2012 confirming that he was instructed to fetch General Booysen and Supt Olivier using the helicopter he was on duty with and transported them to the N3 High way scene near Howick on 16 September 2009, the date of the Magojela killing.

10.

Counsel who were appointed to represent the Acting NDPP, Adv Laurence Hodes SC, Adv Manaka and the state attorney, Mr Gorvender drafted the first Respondent's answering affidavit on their own without the involvement of the prosecution team (safe for the consultation on 3 June 2012 and the Prosecution Team's response to the founding affidavit, enclosed herewith as "Annexure SM5") and had the statement sworn to, signed and filed in court, the only time when the prosecution team saw the Respondent's answering affidavit for the first time was when the affidavit was already filed in court. The prosecution team thus had no role in the drafting of the

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affidavit and could not correct any mistakes that may have been contained in the affidavit.

11.

The applicant, General Booysen filed a Replying affidavit dated 2 August 2013. The prosecution team met about 10 August 2013 and made a proposal in writing to Adv Hodes contained in an Internal Memo dated 15 August 2012, (a copy of which is enclosed as "Annexure SM6") to respond to the allegations that General Booysen was making in his Replying affidavit, counsel did not revert back to the team nor file any response until the matter was heard. We conceded in the proposal to counsel, "Annexure SM6" that the statement of Aris Danikas was unsigned; we dealt with the statements on Ndlondlo, Aiyer, the monetary awards and High Court interdict and clarified the role of General Booysen in the management of the enterprise.

12.

After the court delivered its judgment on 26 February 2014, and we received a copy immediately thereafter, we realised that counsel made the following crucial concessions which affected our case detrimentally:-

- Paragraph 29 of the judgment that there were no statements in the dockets which implicated the applicant, General Booysen in any of the offences with which he has been charged. There was ample evidence linking General Booysen with the scene, in particular Howick CAS 106/09/2008 where General Booysen arrived at the scene in a helicopter and congratulated the members for the job well done, when this is read with his disclosures in the monetary awards that he was key and was the handler of the informant that supplied

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information that led to the tracing of Magojela (deceased in Count 8) along the N3 towards Howick.

- Paragraph 30 of the judgment that there are only four(4) statements on which the Acting NDPP relied on in authorising the racketeering charges; one of which is that of Danikas which is not signed; the second of Aiyer's statement was dated 31 August 2012, two(2) weeks after the impunged decision was made. Although the second of Aiyer's statement was dated 31 August 2012, the prosecution team had already consulted Aiyer and already knew what the contents of Aiyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy to the prosecutors from the consultation and was used on that basis.

- Paragraph 25 of the judgment related to the concession that counsel made relating to jurisdiction, that the impunged decisions were made in Pretoria and the KZN court lacked jurisdiction to deal with its challenge. Counsel advised us as such but in his argument conceded to jurisdiction without having discussed it with the prosecution team. Counsel was so strong about the jurisdiction issue that the State Attorney was asked to direct a letter to the applicants asking them to agree to separate the issues. The shift in position was not discussed with the team Prosecution members.

13.

Before the Prosecution team met with Counsel to discuss the case, we had formed an opinion that the decision should not be appealed against, rather we thought we should bring General Booysen to court, withdraw the

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charges and approach the newly appointed NDPP, Mr Nxasana with a request to consider re-issuing the racketeering authorisations afresh as we were confident that we had a strong case against General Booysen, only the presentation by counsel led us down. A memo dated 5 March 2014 which is attached hereto as Annexure "SM7" was drafted to this effect.

14.

The Prosecution Team met with counsel at his chambers on 13 March 2014 where counsel clarified that there were no concessions made during his argument in court and the judge had it totally wrong. Counsel was so strong that the evidence justifying a racketeering prosecution does not need to be under oath, the NDPP can rely on the memoranda of the DPP and statements by the Deputies which do not need to be under oath. His views were that the court judgment must be appealed against as it created a wrong precedent. The Prosecution team agreed with this approach and agreed with counsel and the DPP, Adv Chauke to file a Notice of Appeal to prevent the dies within which we should file a Notice of Appeal from expiring and to prevent the need to file a condonation application if the NDPP were to agree with the decision to appeal.

15.

The inaccuracies in the Answering Affidavit were thus created by counsel without the involvement of the Prosecution team. The Prosecution Team is still strongly of the view that there is a strong case against General Booysen that justifies the issuing of fresh authorisations by the new NDPP. It has always been the Prosecution team's advice to the Acting NDPP that

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there is a strong case against Booysen, it cannot be correct that the Acting NDPP could have lied under oath, she acted on the advice of the DPP and the Prosecution team, the inaccuracies about the dates in the statements were caused by counsel's failure to show us the statements prior to having them filed in court. We were of the view that it would be proper to consult witnesses from the Stanger Taxi Association side in order to clarify the role that General Booysen had in Cato Manor. All the witnesses which we plan to consult are being attacked and killed which caused the delay in the resubmission of the fresh memo.

16.

On 25 March 2014 the Prosecution team and the DPP South Gauteng, Adv Chauke and the DPP, KZN, Adv Noko, met with the NDPP, Mr Nxasana, the Deputy National Director, Dr Ramaite and the Special Advisor of the NDPP, Adv Duma for a briefing on the case and to deliberate on the reasons for appealing Judge Gorven's decision. The NDPP's decision was that we are not appealing as the judgment leaves open a possibility to resubmit a fresh prosecution memo to the NDPP for reconsideration of the decision to recharge Booysen on the racketeering charges. The NDPP also decided in that meeting that Adv Noko should supervise the prosecution team as the matter emanates from her division and she was not involved when the division sought for assistance in dealing with the matter initially.

17.

The Prosecution team is still of the view that there is a strong case against General Booysen and other members of Cato Manor section of the Durban Organised Crime Unit and that the decision to charge Booysen was that of the

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Prosecution team. The judge's comments were based on errors which counsel made in the answering affidavit which the prosecution team had very less role in its drafting and could not correct the errors until the answering affidavit was filed in court.

I know and understand the content of this affidavit.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience, SO HELP ME GOD.

.....

GLADSTONE SELLO MAEMA

I certify that the deponent has acknowledged that he knows and understand the contents of this affidavit. The deponent acknowledges that he has no objection in taking the prescribed oath and considers the oath binding on his conscience. This affidavit was sworn to before me and the deponent signature was placed thereon in my presence at JOHANNESBURG on this 16 day of January 2015.

.....

COLONEL BOTHA
COMMISSIONER OF OATHS
ORGANISED CRIME UNIT (OCU)
PRETORIA

MM28.1

[redacted]

MM28.1

RAJENDRAN SANJEEVI AIYER
STATES IN ENGLISH UNDER OATH

I AM COLONEL IN THE SAPS . ON THURSDAY 2012-08-30 I WAS APPROACHED BY INVESTIGATION TEAM. I WANT TO MAKE ADDITIONAL STATEMENT AS FOLLOWS:

IT WAS BROUGHT TO MY ATTENTION THAT CAPTAIN VAN TONDER WAS HAVING MEETING WITH ALL ROLE PLAYERS IN RESPECT OF CITI CRIMES ON A WEEKLY BASE. HE HELD THIS MEETING WITH STAKE HOLDERS . AT TIMES WHEN I CALLED ,THEN DIRECTOR JW BOOYSEN (PROVINCIAL COMMANDER OF OCU) AT THE PROVINCIAL OFFICE I WAS TOLD BY STAFF THAT HE IS ATTENDING A MEETING AT CATO MANOR OFFICES WHICH I HAD NO KNOWLEDGE OF, HIM BEING THERE .I WOULD CONTACT MEMBERS WHO CONFIRMED BOOYSEN PRESENCES CATO MANOR OFFICES. THAT WAS NOT PROTOCALL OF DIRECTOR BOOYSEN ,JUST TO GO DIRECTLY TO MY OFFICES WITHOUT INFORMING ME . I RECEIVED INFORMATION FROM RELIABLE SOURCES WITHIN THE UNIT MEMBERS I WAS TOLD THAT DIRECTOR BOOYSEN IS AT THE UNIT IN CATO MANOR. I WAS TOLD BY LATE WARRANT OFFICER NXUMALO. ON A CERTAIN DAY AFTER MY WEEKLY MEETING AT MY OFFICES "I SHOULD BE VERY CAREFUL OF BOOYSEN AND OLIVIER AND I SHOULD PROTECT MYSELF. THEY ARE UP TO SOMETHING. HE WAS DISTURBED WHEN HE NOTICED LT COL OLIVIER WALK TOWARDS MY OFFICE AND PROMISE TO DISCUSS THIS LATER. HE WAS SHOT AND KILLED SHORTLY THEREAFTER WHILST IN AN OPERATION IN THE INANDA AREA UNDER THE COMMAND OF CAPT LOCKHEM.

I THEN COMPLAINED TO COMMISSIONER PT BROWN THEN PROVINCIAL HEAD OF DETECTIVES (PT BROWN) . DIRECTOR BOOYSEN AND I WAS CALLED IN AT PROVINCIAL COMMISSIONER NGIDI'S OFFICE IN PRESENCES OF PT BROWN ,I TOLD THE PC OF KZN WHAT DIRECTOR BOOYSEN WAS DOING .HOW .BOOYSEN WAS VISITING THE CATO MANOR OFFICES WITHOUT MY KNOWLEDGE . A DECISION WAS TAKEN BY THE PC IN KZN I SHOULD REMAIN UNIT COMMANDER DURBAN ORGANISED CRIME AND DIRECTOR BOOYSEN SHOULD REMAIN AS PROVINCIAL COMMANDER NOT TO INTERFERE WITH EACH OTHER JOBS. I WAS IN AGREEMENT , YET BOOYSEN IGNORED THE INSTRUCTION AND CONTINUED TO GO TO CATO OFFICES WITHOUT TELLING ME AS THE UNIT COMMANDER. I WAS ALWAYS TOLD BY PT BROWN THAT BOOYSEN WAS MY COMMANDER AND I HAVE WORK ON HIS INSTRUCTION . I CONSTANTLY REMINDED A/ COMM. PT BROWN ,AS HE WAS TASKED BY THE PC TO OVERSEE THE INSTRUCTION OF PC IN KZN. I TOLD HIM I WILL COMPLY IF IT IS ONLY LAWFUL INSTRUCTION FROM BOOYSEN .I ALSO PICKED IT UP, THAT THE SENIOR MANAGER HAD A CERTAIN FEAR OF BOOYSEN .

CONTON PAGE 2.....

RSA

SEVERAL CASES OF SHOOTING LIKE RAJA KILLING ,PAVILLION SHOOTING , BALI ATM BOMBING, SHOOTING OF ATTORNEY SHAM KILLERS AND MANY OTHERS, I ESTABLISHED THAT DIRECTOR BOOYSEN WAS AT THE CRIME SCENES. WITHOUT ME INFORMING HIM . LATER WHEN I ARRIVED AT A FEW OF THE CRIME SCENE I NOTICED BOOYSEN PRESENCES .I SAID NOTHING EVEN THOU I WAS VERY UPSET . IT CLEAR LT COLONEL OLIVIER WAS WORKING HAND IN HAND WITH DIRECTOR BOOYSEN . HIS TELEPHONE RECORDS INCLUDING HIS CELLPHONE RECORDS WILL SHOW . I RECALL SHOOTING INCIDENT WHEN I REPORTED A SHOOTING INCIDENT TO DIRECTOR BOOYSEN IN THE N3 NEAR CATO RIDGE AREA BY CST SHANE NAIDOO AND OTHERS . I WAS UNWARE THAT BOOYSEN WAS ON LEAVE AT TIME YET HE CONFIRMED HE IS AT SCENE . I WAS SHOCKED I HAD NO COMMENTS.

CAPTAIN EVA WAS NOT APPOINTED TO DURBAN ORGANISED CRIME . COMMISSIONER PT BROWN AND DIRECTOR BOOYSEN WAS INVOLVED IN THE PROCESS ,THEY MUST EXPLAIN WHAT PROCESS THEY USED. I DID NOT APPROVE MOST OF MEMBERS AT CATO OFFICE MEMBERS TO ORGANISED CRIME DURBAN. ALL THEY DID WAS JUS CLOSED THE UNIT SERIOUS VIOLENT UNIT AND REOPENED AS THE CATO MANOR ORGANISED CRIME OFFICES. MANY OF THOSE MEMBERS HAVE LONG STANDING RELATIONSHIP WITH DIRECTOR JW BOOYSEN FROM DAYS OF MUDER AND ROBBERY UNIT, I DEMANDED THAT ALL THESE MEMBERS BE VETTED . NOTHING CAME OF THAT PROCESS. THEY CONTINUED TO OPERATE AS TWO SEPARATE UNITS.

I RECEIVED INFORMATION FROM RELIABLE SOURCES IN THE TAXI ASSOCIATION THAT WARRANT OFFICER MOSTERT IS WORKING WITH FOR A TAXI GUY IN THE STANGER TAXI ASSOCIATION . THERE GOING TO PUT A HIT ON ME AS I AM PROBLEM IN THERE OPERATIONS . ALLEGATIONS OF LARGE AMOUNTS OF MONEY WAS EXCHANGING HANDS. SHORTLY THEREAFTER I RECEIVED INFORMATION FROM A SOURCE THAT A DIRECTOR GOPAUL AND BOOYSEN WERE SEEN TOGETHER. DIRECTOR GOPAULS MEMBERS FROM THE DURBAN HARBOUR POLICE PROCEEDED TO UMHALI AREA AND GUN DOWN INNOCENT INDIAN BOY,PLUS THE DRIVER AFTER A CAR CHASE . THE STATION COMMANDER AT UMHALI AT TIME WAS UNAWARE OF HARBOUR POLICE WORKING IN THE AREA. THEY HAD NO MANDATE TO ENTER THAT POLICING AREA. CAPTAIN MANIVASHEN OF KWA DUKUZA SAPS ALSO REPORTED THE CONDUCT OF WARRANT OFFICER MOSTERT REGARDING A HIT ON A PRISONER NOTHING HAPPENED.

IN TERMS OF LOGISTIC AND RESOURCES MOST OF FINANCIAL APPROVALS BY PASSED ME AS UNIT COMMANDER RELATING TO CATO MANOR. I FINANCIAL CLERK INFORMED ME THAT MONIES HAVE BEEN TAKEN FROM OUR BUDGET AND PROVINCIAL OFFICE WAS TELLING US WHAT TO DO WITH OUR BUDGET, AT OCU DURBAN .

CONT PAGE 1.....

RSA

3 JUL 2013 12:54 SANTON ADVOCATES CHAMBERS 3 NO. 677 P. 19

I WAS LATER ALSO INFORMED BY SOURCES THAT LT COLONEL GARTH LE ROUX WAS INVOLVED IN MKIZE INCIDENT . IT IS ALLEGED THAT HE ESCORTED IN HIS RED CORSA(STATE CAR) MKIZE BEFORE THE KILLING. I DISCUSSED THIS MATTER TO WILLIAMS OF ICD . I TRUSTED WILLIAMS. I CONFIRM THAT ON THE DAY OF MKIZE KILLING I WAS IN THE COMPANY OF ANOTHER CONSTABLE TERRANCE MUNUSAMY FROM POINT POLICE WHEN I CALLED LT COLONEL OLIVIER TO FIND OUT IF HE KNEW OF THE SHOOTING OF MKIZE IN UMGENI ROAD . HE TOLD ME THAT ONLY NIU MEMBERS ARE INVOLVED ,NONE OF THE CATO MEMBERS ARE INVOLVED. I ONLY LATER DISCOVERED THAT LT COLONEL OLIVIER HAD TOLD ME LIES . I IMMEDIATELY TASKED MY SOURCE TO CONFIRM WHAT IS GOING ON IN UMGENI ROAD. MY FEEDBACK WAS THAT CATO MANOR MEMBERS ARE ON THE SCENE AND THEY ARE INVOLVED IN THE SHOOTING. I IMMEDIATELY MADE OB ENTRY . I CALLED ICD OFFICE TO FIND OUT WHAT'S GOING ON . INFORMATION WAS THAT DIRECTOR BOOYSEN AND BRIG MADONSELA HAD ALSO PROCEEDED TO THAT SCENE , YET THERE WAS A COURT ORDER. MY SOURCE ASKED WHO DRIVING A BEIGE MINI BUS ,IF WE HAVE ONE ,I TOLD HIM I DON'T KNOW. I LATER DISCOVERED THIS BEIGE MINI BUS WAS GIVEN TO CATO MANOR OFFICES WITHOUT MY KNOWLEDGE.
I DID MAKE CALL TO BOOYSEN AND TELL HIM OF SHOOTING INCIDENT AND REPORT I RECEIVED FROM LT COLONEL OLIVIER ABOUT SHOOTING INCIDENT THAT OUR MEMBERS ARE NOT INVOLVED IN THE INCIDENT. I WAS TOTALLY UNAWARE OF LIES GIVEN TO ME BY OLIVIER. I WILL REVEAL THE SOURCE TO INVESTIGATORS ,AS HE FEARS HIS LIFE. I ALSO CONFIRM THAT I HAD A WITNESS IN MY OFFICE WHEN I CALLED LT COLONEL OLIVIER. THE OB WAS STOLEN SHORTLY THEREAFTER FROM MY OFFICES. BOOYSEN CONCEDED IN A MEDIA REPORT HE ATTENDED TO MKIZE SHOOTING INCIDENT.

WARRANT OFFICER GANESH AND SGT PADAYCHEE WERE ONLY DEALING WITH DRUGS . THESE MEMBERS TAKEN TO CATO MANOR BY DIRECTOR BOOYSEN. I HAD NO SAY IN THE MATTER. MOST OF THE TRANSFERS AND SECONDMENT TO DURBAN ORGANISED CRIME WAS DONE BY DIRECTOR BOOYSEN. . I HAD VERY LITTLE SAY ,BY THAT TIME, I HAD NO COMMAND OVER LT COL OLIVIER AND THOSE MEMBERS AT CATO MANOR.

YES. WHEN THE NATIONAL OFFICE CLOSED CATO MANOR SVC OFFICES I HAD REQUEST FOR LOGISTICAL AUDIT . INVENTORY OF STATE PROPERTY WAS NOT IN ORDER INCLUDING UNACCOUNTED FIREARMS . I ISSUED A SINGLE 4X4 NISSAN HARDBODY TO LT COL OLIVIER. ALL OTHER RESOURCES WAS GIVEN FROM DIRECTOR BOOYSEN OFFICE INCLUDING COMPUTERS WHICH BROUGHT TO MY NOTICE LATER ON .
WHEN I CLOSED CATO MANOR OFFICES , BOOYSEN STEP IN AND WALKED INTO MY OFFICE AND TOLD ME THAT I HAVE NO DEALING WITH CATO MANOR OFFICES AND HE TAKE OVER THAT SECTION AND MAKE DECISION .
ALL MEDIA REPORTS OF SHOOTING BY CATO MANOR SECTION WAS MADE BY BOOYSEN .
ALSO OF UNLAWFUL ARREST OF WARRANT OFFICER SWART OF OCU

DURBAN COMPLAINED ABOUT BOOYSEN ARRESTING HIM UNLAWFULLY. I WITNESS WARRANT OFFICER KARL SANDERS OFFICE BEING RAIDED BY BOOYSEN WITH WARRANT PETER GEORGE AND WARRANT OFFICER MOSTERT. I CALLED BOOYSEN ASIDE AND INFORMED THAT THIS A UNLAWFUL SEARCH AND ARREST OF MEMBERS. I CAUTION BOOYSEN AGAINST ARREST OF MY MEMBERS. I ALSO AWARE THAT SPAR HAD DONATED A LAPTOP TO CATO MANOR OFFICES WITHOUT MY KNOWLEDGE. ONE CREAM OR BEIGE MINI BUS CUMBI WAS ISSUED WITHOUT ME BEING INFORMED DIRECTLY TO LT COL OLIVIER AND HIS TEAM , THIS CAN BE CONFIRMED BY CAPTAIN NI SHANGE FROM DURBAN ORGANISED CRIME UNIT. I WAS LATER TOLDED , IT WAS DISCOVERED TO BE USED IN MKIZE SHOOTING INCIDENT.
LT COL OLIVIER DID NOT OBTAIN HIS AFTER HOURS AUTHORITY FROM ME, AS I WAS HIS IMMEDIATE COMMANDER . I DO NOT KNOW WHO ISSUED HIM AFTER HOURS AUTHORITY TO USE A STATE VEHICLE AND RESOURCES. I WAS INFORMED SOME STATE VEHICLES REPAIRED AT PRIVATE PANEL SHOPS. I WILL DISCLOSE THIS TO INVESTIGATORS.

ALL THOU MY OFFICE KEPT THE ALL MEMBERS PERSONAL FILES. TIIESE MEMBERS WERE MAKING APPLICATION TO TRAVEL WITHOUT MY SIGNATURE OR I DID NOT HAVE ANY KNOWLEDGE OF THEIR OPERATIONS. SOMETIMES ,THEY TRAVEL WITHOUT ANY WRITTEN APPROVAL . I HAD FALL OUT WITH THE UNIT COMMANDER OF OCU RICHARD BAY , HE WANTED TO KNOW WHAT ARE MEMBERS OF CATO MANOR DOING IN HIS AREA .I COULD NOT GIVE HIM AN ANSWER, I MERELY REFERRED HIM TO BOOYSEN . I HAVE EVIDENCE THAT BOOYSEN WAS BUGGING MY CELLPHONES WITH A BRIG MOHAN AND CAPTAIN GOVENDER FROM WESTVILLE CORRECTIONAL SERVICES. THIS UNLAWFUL TO BUG MY CELLPHONES.

I THESE ALLEGATION AGAINST BOOYSEN ACTION AGAINST ME WILL RUN INTO PAGES WITH SUPPORTING DOCUMENTS. LT GEN MASEMOLA WAS AWARE OF THESE ISSUES. MOST OF SENIOR POLICE ON TOP KNEW WHAT WAS GOING ON . I REPORTED THIS LT GENERAL DRAMAT AS WELL. ALL I DID WAS BECOME A VICTIM , BOOYSEN MANAGED MOVE ME OUT OF MY POST AS UNIT COMMANDER. I BROUGHT THIS ISSUE TO GENERAL CELE ATTENTION VIA MY ADVOCATE ,I RECEIVED NO JOY. I WROTE TO MINISTER OF POLICE OFFICE THAT IS WHEN BRIG KADWA OF HAWKS INVESTIGATED ME ON THE INSTRUCTION OF LT GENERAL DRAMAT. I AM HONEST POLICE OFFICIAL DOING MY JOB YET I TARGETED FOR NO REASON. APPLICATIONS FOR STATES RESOURCES SUCH ACCOMMODATIONS AND TYRES FOR CATO MANOR ETC . MOST TRAVELING PLANS WENT DIRECTLY TO DIRECTOR BOOYSEN OFFICES.

I REPORTED THE SERIES OF SHOOTING INCIDENT DURBAN ICD OFFICES. I SPOKE TO MISS WILLIAMS WHO SHARED MY CONCERNS . IT WAS CLEAR VERY LITTLE COULD BE DONE AGAINST CATO MANOR .

R SA
R.

YES DID RECEIVE REPORTS AFTER SHOOTING INCIDENT . THIS DONE ONLY BECAUSE I FORCED THEM TO DO SO. I WAS AWARE OF DIRECT COMMUNICATION OF THESE MEMBERS TO DIRECTOR BOOYSEN . YES I DID QUESTION WHY SO MANY CASES KILLING TOOK PLACES. I TRIED TO REMOVE THE ATTORNEY SHAM MURDER DOCKET AND GIVE IT ANOTHER INVESTIGATOR BUT DIRECTOR BOOYSEN CALLED FOR MEETING . IN MY PRESENCES THE NEW INVESTIGATOR WARRANT OFFICER RENEYCKE HAD TO GIVE BACK THE DOCKET TO LUIT MOKESH PANDAY ON INSTRUCTION OF DIRECTOR BOOYSEN. I WAS UNDERMINED ALL THE TIME BY DIRECTOR BOOYSEN .HE ONLY VISITED MY OFFICE FEW TIMES.ONCE IN A FORMAL MEETING HELD AT DURBAN .
ALL THESE PRIVATE COMPANIES FREQUENTED CATO MANOR OFFICE YET I WAS COMMANDER. I WAS AWARE THAT SPAR DONATED COMPUTERS TO CATO MANOR OFFICE. CATO MANOR HOSTED HUGE YEAR FUNCTIONS AT DURBAN HARBOUR AFTER DURBAN OCU FINISHED HAVING YEAR END FUNCTION . AGAIN I COULD NOT QUESTION THEM AS DIRECTOR BOOYSEN WAS PRESENCES TO OPEN THAT FUNCTION . I DO NOT KNOW WHERE THE MONEY CAME ,AS LT COL OLIVIER MUST EXPLAIN .THIS PARTY WAS WELL IN ACCESS OF ONE HUNDRED THOUSAND RAND, LARGE NUMBER PEOPLE WERE INVITED . I WENT SEE AND WAS TREATED LIKE OUTSIDER TO THIS CATO MANOR OFFICE .

I WAS FORCEFUL REMOVED FROM MY OFFICE ON RECOMMENDATION OF DIRECTOR BOOYSEN THAT HE USED HIS POSITION AND THE DEPARTMENTAL PROCEDURE AGAINST ME . I WAS AWARE THAT BOOYSEN HAD INTENTION TO REMOVE ME FROM MY OFFICE A LONG TIME AGO . BRIG MADONSELA TOOK LOCKSMIT FORCED THE DOOR OPEN OF MY OFFICE. I FOUND A PLACARD READING EX UNIT COMMANDER ON MY DOOR . MOST OF KILLING WERE REPORTED TO ME LONG AFTER THE ICD HAD ATTENDED AND DIRECTOR BOOYSEN ,THEY ONLY SUBMITTED WRITTEN REPORTS TO ME LATE IN THE DAY.

I WANT MAKE IT VERY CLEAR THIS IS A VERY SERIOUS MATTER AND ACCORDING TO MY VIEW , THESE MEMBERS ARE VERY DANGEROUS. THEY HAVE BEEN GRANTED BAIL BY COURTS TO WORK FROM THE SAME OFFICES. IT CLEAR THAT NOBODY RESPECT THE WITNESS. I WILL ONLY MAKE A PROPER STATEMENT WHEN ALL SAFETY MEASURES ARE PUT INTO PLACE, MY RIGHTS ARE RESPECTED BY THE COURTS.

I FULLY UNDERSTAND THE RIGHTS OF SUSPECT BUT CASES SUCH AS THESE THE COURTS HAVE TO INTO CONSIDERATION SERIOUS NATURE OF CASE AND UNDERSTAND DANGERS OF DEALING WITH ORGANISED CRIMINAL NETWORKS. IT SEEMS THAT CERTAIN PUBLIC INVOLVEMENT IN THIS MATTER IS CREATED FALSE PERCEPTION OF FACTS. IN ORDER FOR TRUTH TO BE EXPOSED FAIR PRINCIPAL OF JUSTICE MUST APPLY.

R.

Silverton CAS 622/10/2014

mma8.2

AFFIDAVIT

I, the undersigned,

ANTHONY MOSING,

do hereby make oath and say that:

1.

I am an adult male South African citizen with identity number 6209105056080 residing at 655 Hairbell Street, Doornpoort, 0017 Pretoria.

2.

I am employed by the National Prosecuting Authority based at 128 Westlake Avenue, Weavind Park, Pretoria, 0001 as Senior Deputy Director of Public Prosecutions in the office of the National Director of Public Prosecutions (ONDPP). The facts contained in this affidavit are true and correct and are within my knowledge.

3.

I am the head of the Special Projects Division (SPD) in the ONDPP and my responsibilities include inter alia to advice the NDPP on all racketeering applications and dealing with high profile matters that the NDPP may assign to the SPD.

Silverton CAS 622/10/2014 2 A-3

In the course of the execution of my official duties as such I opened and maintained a file for the application for a racketeering authorisation submitted by the prosecution team assigned to the prosecution of the matter of State versus Booysen and others (the so- called Cato Manor case). The said file was kept within my office and submitted on or about 10 October 2014 to Mr Jan Daniel Schmidt, the Director: Administration: ONDPP, who required same for making of copies for the judge busy with a fact finding investigation in the NPA. The file has currently not been returned to me. On or about 20 October 2014 I handed another lever arch file to Theo Leeuwschut from the office of the CEO of the NPA, who requested same apparently in response to a section 205 subpoena served on the NPA. The file pertains to the review application brought by Major General Booysen against the NPA and SAPS in the Kwa- Zulu Natal High Court challenging the granting of the authorisation to prosecute him for racketeering, which authorisation was granted by the Acting NDPP, Adv Jiba. The said file was opened and maintained in the course of my duties as outlined herein and was kept in my custody until handed over to Leeuwschut as mentioned herein.

The deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to/~~declared~~ before me at Pretoria on this the 21st day of October 2014, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

21/10/2014.

EX OFFICIO **COMMISSIONER OF OATHS**
SYBRAND GERHARDUS NEL
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
123 WESTLAKE AVE.
WEAVIND PARK.
SILVERTON.

[illegible] A12 A.

MM23-3

AFFIDAVIT

I, the undersigned,

ANTHONY MOSING,

do hereby make oath and say that:

1. I am an adult male South African citizen with identity number 6209105056080 residing at 655 Hairbell Street, Doornpoort, 0017, Pretoria.

2. I am employed by the National Prosecuting Authority (NPA) based at 123 Westlake Avenue, Weavind Park, Pretoria, 0001 as Senior Deputy Director of Public Prosecutions in the office of the Head: National Prosecuting Service (NPS) at NPA Head Office. The facts contained in this affidavit are true and correct and are within my personal knowledge, unless otherwise stated or the context determine otherwise.

3. I am the head of the Special Projects Division (SPD), a unit that was at all relevant times pertinent to this affidavit based in the Office of the National Director of Public Prosecutions (NDPP) and reporting as such to the National Director. As from about November 2014 the unit was relocated by the NDPP to the NPS and I am now reporting to the Head: NPS. The duties and responsibilities of the SPD included coordinating Organised Crime prosecutions nationally and dealing with all matters assigned to it by the NDPP, including inter alia to advice the NDPP on all racketeering and other applications requiring the approval of the NDPP by law and dealing with high profile matters that the NDPP may assign to the SPD.

4. I am also a duly admitted Advocate of the High Court of South Africa, having thus been admitted on 30 November 1994 and as such am an Officer of the Court.

5. I am requested by the lead prosecutor, Adv. Jan Ferreira to submit a supplementary affidavit in the criminal prosecution of Adv. Jiba (Jiba) relating to the matter of State versus Booysen and Others (Cato Manor case) on certain documents pertaining to that case, as well as an e-mail exchange between Jiba and me on or about April 2014 (see annexures "A" and "B" attached hereto). I must pause to mention that the first affidavit I submitted was as I was informed to facilitate the acceptance into evidence in court of the documents that were made available from files in my possession pertaining to the Cato Manor case in compliance with an apparent section 205 subpoena that was served on the CEO of the NPA. It should be noted that I had at no stage refused to make any evidence or document available that was in my possession in the course of my employment. I was not requested at that stage to submit an affidavit pertaining to my knowledge about the events surrounding this matter. Though I am not entirely familiar with the precise allegations against Jiba and why she is being prosecuted, save what has been mentioned in the media that she is facing two counts of Fraud and Perjury relating to the prosecution of Major General Booysen (Booysen) in the Cato Manor case. As one who was closely associated with this case and as an Officer of the Court I regard it my duty to set out fully my knowledge of this matter in the hope that it might assist the court to come to a just conclusion.

6. As mentioned above my duties entailed inter alia to advice the NDPP on all applications for authorisation in terms of section 2(4) of the Prevention of Organised Crime Act 32 of 1998 (POCA) and to attend to matters assigned by the NDPP. I digress to mention that Jiba was the Acting NDPP at the relevant times of this matter.

7. In the course of the execution of my duties I attended a meeting on or about 8 March 2012 at our offices with three members of the Independent Police Investigative Directorate (IPID), who I gathered came to the NPA concerning an investigation that they were conducting into the crimes allegedly committed by the SAPS members from Cato Manor (Annexure "B" is my handwritten notes on the meeting). The reference to a meeting with the Minister of Police and the Acting National Commissioner of Police, Nhlanhla Vilakazi, is that I was informed by the said members that they (IPID) and the Hawks had a joint meeting with the Minister a week ago, whereby the Minister expressed his dissatisfaction with the slow progress made by the two investigating units, since it has been pending since December 2011. It was apparently decided during that meeting that the two units should conduct the matter jointly and that had been working throughout the previous weekend. The reason they came to see the Acting NDPP was that they needed to rope in prosecutors to handle the matter urgently and that the prosecutors seemingly promised by the Acting DPP of KZN, Adv. Mlotshwa, was not materialising. They mentioned that seized with 51 cases, but that in 12 of the cases they were convinced that they have a case. Of the 12 cases, 6 of them were now ready and they wanted me to decide on the six dockets by tomorrow. They also wanted a decision on whether the prosecutors to be made available by the NPA will be able to join with the investigating team by Monday next. I undertook to discuss the matter with the Acting NDPP, Jiba, which I did so and I think that she mentioned that there will be a meeting the next day with General Mabula from the Hawks on the same matter.

8. On or about 9 March 2012, the day following the first meeting, the meeting did indeed take place with Jiba. Certain members of the NPA, being Adv. A Chauke, the DPP of South Gauteng (Chauke), Adv. Maema (Maema), the DDPP from the North West office, Adv. Mathenjwa, DDPP from South Gauteng and two other Senior State

Advocates from the DPP South Gauteng, being Mlotshwa (not the former Acting DPP of KZN) and Ntlakaza were present. I was informed that these members are the appointed prosecuting team in the matter with Maema being the lead prosecutor for his experience in prosecuting organised crime cases, particularly on racketeering. It was also mentioned that there were fears of partiality should the matter be handled by prosecutors from KZN due to the close working relationship that the suspects in the matter, being police officials, had had with local prosecutors, especially with regard to the very incidents that were the subject of the investigation. Adv. Chauke' s role as I understood it was merely to manage the team as they were mainly from his office, but would not be vested with any decision making powers regarding prosecutorial decisions as he indeed did not have same, as the case fell outside of his area of jurisdiction. I make this point as I am aware that questions have been cast about Chauke's role in the matter and the composition of the prosecuting team being from outside KZN. Having regarded to the circumstances and the allegations in the matter this made perfect sense to me at the time. It was also decided that the team would utilise the budget of the Office of the NDPP for all expenses relating to the prosecution of the matter as it was envisaged that costs would be involved in the matter.

9. Major General Mabula (Mabula) Mabula who was also present at this meeting indicated to the meeting that they too (the Hawks) are seized with the investigating of the same allegations and were carrying certain other dockets, other than what the IPID had been investigating and that the meeting with the Minister dealt with the problems between the two investigating units. It was decided at that meeting that the Hawks should assist the IPID in its investigations. He said that they (Hawks) had three dockets which are ready to be handed over to the prosecutors for decision. It was decided that he would be the contact person regarding all dockets and Mathenjwa is the NPA contact person. I had made mention of the dockets received

from IPID the day before and it was decided that they be handed over to the prosecuting team, which I did the same day after the conclusion of the afore-said meeting and they acknowledged receipt thereof. The meeting was adjourned thereafter. It must be stressed that neither I, nor to my knowledge, Jiba attended such a meeting with the Minister of Police as it appears the impression is gained from reading my handwritten notes. We were merely informed that such a meeting took place by Mabula and the IPID investigators. I cannot recall whether Mabula had said that Adv. Mlotshwa, the former Acting DPP of KZN, attended the said meeting though it seems as if that is what I recorded in my notes.

10. As my unit would be involved in the matter as was the practice with such cases, it being an organised crime matter, I also decided to not involve any of the members of my unit in the matter, due to the fact that I was aware that some of them have had a similarly close working relationship with the suspects, especially Booysen, in the course of their duties regarding organised crime related matters and may find themselves in a difficult position. I also wanted the matter to be handled with due regard to the sensitive nature thereof. Hence I was the only person in my team and to my knowledge at NPA head office, apart from Jiba, that was familiar with the matter.

11. My role in the matter was to interact with the prosecuting team and guide them as far as racketeering issues were concerned and to act as liaison between the Acting NDPP and the team and to advice the Acting NDPP on developments as conveyed by the team or as gleaned from my interaction with them. As such I attended several meetings with the team when compiling the application for racketeering and indictment and made some contributions with advice as I would do with most such matters. I must mention that I was not an integral part of the prosecuting team and did not read and decide the dockets, but did deliberate with them on the merits of the

evidence, mostly from a critic point of view. The memorandum dated 23 May 2012 and marked as annexure "A" was as a result of my interaction with the team at some stage made available to me. I cannot recall the precise circumstances under which I received it. It is clearly a memorandum addressed to Chauke by the prosecution team and according to its heading was intended for the briefing of the Acting NDPP. It is furthermore clear from the contents that it was probably drafted in anticipation of the impending arrest of the suspects and consequent court appearance. I attended the first appearance of the accused in court in Durban, but did attend any subsequent hearings. Again this was done as observer in order to brief the Acting NDPP, which I duly did.

12. On or about 15 August 2012 I received the application for racketeering authorisation from the prosecuting team under cover of the letter from the DPP: KZN dated 15 August 2012. On or about the same time I also received an application for centralisation under cover of a letter from the DPP South Gauteng. I cannot recall the precise circumstances surrounding the receipt of these applications and must have not noticed that they were submitted under different letterheads from the two DPP offices. I drafted a memorandum for the Acting NDPP recommending the approval of the applications for authorisation of the racketeering prosecution and centralisation on the following day, being 16 August 2012. On 17 August 2012 Jiba approved the two applications and issued authorisations in terms of section 2(4) of POCA in respect of contraventions for section 2(1)(e) and (f) of POCA as well as in terms of Section 111 of Act 51 of 1977 read with sections 44 and 22(3) of Act 32 of 1998.

13. It appears that shortly after the matter was authorised and on or about 27 August 2012 an application for centralisation in respect of the offence allegedly committed in North West province was submitted by Maema under cover of a letter from the DPP KZN dated

20 August 2012. He pointed out to me that the first centralisation authorisation was erroneously submitted under cover of the letter from the DPP South Gauteng instead of KZN. He requested the issuing of a new centralisation directive on the new application. There was nothing new about the application and was merely a correction of the office under which the first directive was granted and I proceeded to request same. On 27 August 2012 I wrote a memo to Jiba explaining the matter and requesting a new centralisation directive to be issued. Jiba signed and issued a new centralisation directive on 27 August 2012. What may possibly explain the situation why the application emanated under cover of Chauke's office, is that it seems that Chauke and the DPP of KZN, Adv. Noko (Noko), had agreed to such an arrangement in order to expedite the matter and avoid any possible delay on account of Noko being based in KZN. It seems that it was later considered prudent that the Noko rather sign the documents instead, but that the application for centralisation signed by Chauke had already been submitted by him as indicated above. (See the attached e- mail from Maema dated 15 August 2012 at 12:02 marked "C1-3).

Ad Review application by Booysen

14. The accused, Mr Booysen, brought an application to review his prosecution on racketeering charges and other charges. As soon as the application was received on or about 7 May 2013, I drafted a memorandum seeking permission for the appointment of outside counsel to handle the matter on behalf of the NPA. Initially the State Attorney of Durban had recommended that counsel from KZN be appointed, but in view of the fact that the team was based in Gauteng, we recommended that counsel from Gauteng, particularly Johannesburg be appointed. The State Attorney, Durban indicated that he will consequently transfer the matter to his counterpart in Johannesburg and that he will act as correspondent only. Adv.

Laurens Hodes, SC, assisted by Adv. Manaka, was appointed to handle the matter. A first consultation with counsel attended by Chauke and the prosecuting team (excluding Mathenjwa, who was on leave of absence), including myself, took place at counsel's chambers on or about 4 June 2013 (Adv. Manaka was also present). I immediately drafted a memorandum for Jiba about the outcome of the consultations: Jiba had not been part of the consultations (see unsigned copy retrieved from my computer marked annexure "D"). It is to be noted that the team undertook to furnish counsel with all the facts and evidence in the docket surrounding the prosecution of Booysen and I later was informed that same was done as planned. It was also agreed that the NPA will oppose the application and that Jiba would file the answering affidavit on behalf of the NPA. I must add that it was thought that confirmatory affidavits would be filed by at least the lead prosecutor, Adv. Maema, who was cited as the second respondent. Counsel had also advised that the decision to issue a racketeering authorisation was not reviewable in terms of Rule 53 of the Uniform rules of court and it was decided that no "record of decision" need therefore be filed as these were not 'proceedings" as envisaged by Rule 53. I and I belief also the prosecuting team, had no further interaction with counsel, except perhaps Adv. Chauke until after the judgement was delivered by Gorven, J, when a consultation was again held with counsel at counsel's chambers. More about this later. When the answering affidavit by Jiba was filed, neither I, nor the prosecuting team members, had seen it before it was commissioned and filed nor had we seen a draft thereof (they all mentioned this afterwards) and I tend to belief that neither did Jiba see it except on the day she signed it, but I may be wrong on this. The contents of the answering affidavit only came to my attention sometime after it was filed when it transpired that there was a problem with two of the annexures not being attached during serving and filing, although referred to in the affidavit. I received an e- mail in this regard from Chauke on 11 July 2013 (see annexure "E") with trailing e- mail from the State Attorney, Mr Govender. I was surprised why Chauke

required me to attend to this, but I nevertheless contacted Govender and the missing annexures were later filed by him after receiving them from Adv. Manaka as he mentioned in the afore-said e- mail. In the same e- mail Govender had also mentioned that the applicant intended taking the point about the unsigned affidavit of Danikas. I noticed this as well as the other annexures filed and I expected the applicant to challenge this, which they duly did in the replying affidavit. The prosecuting team met with Adv. Chauke at his behest at his office on or about 14 August 2013 to discuss the response in the light of replying affidavit (see annexure "F"). I also attended this meeting and these issues regarding the annexures were pertinently raised. It was agreed that a memorandum would be compiled by the prosecution team wherein these issues would be raised with counsel with a view of addressing same. A copy of the said memo to counsel was circulated by Mathenjwa via e- mail on 16 August 2013 and I believe was handed to counsel (see annexure "G"). The expectation was that some attempt would be made by counsel, if possible, by way of filing a supplementary affidavit by Jiba explaining the issues relating to the annexures in her affidavit, even though it could be said that pleadings had closed. I must digress somewhat at this point to explain the reason for the apparent reluctance to have personal consultations with counsel in this regard. It seems that shortly after the first consultation with counsel as mentioned herein, the secretary to counsel wrote an e- mail to the State Attorney about a "Public Prosecutor" that contacted her enquiring about a copy of the letter that was written to applicant's attorney and that was not received by such "Public Prosecutor". The State Attorney had reported it to Chauke, who was apparently annoyed by this and issued a stern reminder to the prosecuting team that communication with counsel was to be strictly via the State Attorney, either by him or Maema or by one of the team members as mandated by Maema (see e- mail attached as annexure "H1-2"). This I believe explains the reluctance to engage with counsel by the prosecuting team and reliance placed on the DPP, Adv. Chauke, in maintaining communication with

counsel. This was fortified due to Adv. Chauke's experience with the practices of the Bar, having been a member of the Bar Council of Johannesburg previously. I directed a follow-up enquiry about our response to the replying affidavit to Chauke and the team (see e- mail dated 5 August 2013, annexure "J1-2"), but it seems that the message was misunderstood. On 19 August Jiba also directed an e-mail in response to my e- mail and was apparently not impressed by the response to my earlier e- mail. Chauke responded merely that counsel was busy with the State Attorney and that we had submitted our inputs for counsel to consider (see annexure "K1-2"). I was later informed that counsel advised that no further action is required to be taken, though I cannot recall from whom and at what stage this was mentioned. None of the prosecuting team members attended the hearing of the matter and only Adv. Chauke attended.

15. The Media, reporting on the hearing of the matter, alleged that Jiba lied in her affidavit. This it transpired was submissions made by applicant's counsel during argument. This raised a concern and Adv. Jiba requested the team to come and brief her on the matter in the light of the media reports. The meeting took place on or about 13 February 2014. Adv. Chauke explained what transpired in court and Jiba was assured that there is no cause for concern. It was portrayed as simply a matter of KZN media reporting negatively. As a result hereof it was decided that the team should prepare a media statement, which was eventually done and issued. This all transpired *before* judgment was delivered.

Events post Judgement of Gorven, J

16. After judgment was delivered on 26 February 2014 we all acquired a copy thereof and perused it. I requested a meeting with the prosecuting team and Adv. Chauke to discuss the judgment and it was agreed to meet on 3 March 2014 at the DPP's offices in

Johannesburg. During the meeting we discussed the judgment in detail and we came to the conclusion that the court arrived at its judgment mainly on the basis of the concession attributed to our counsel that there was no evidence that implicated Booysen with the predicate offences, coupled with the problems regarding the annexures to Jiba's answering affidavit and the corresponding silence to address the shortcomings thereof. Adv. Chauke, who was present during the hearing in court, explained to us what transpired when this concession was made and indicated that it was during counsel's address to court. It was apparent to us that there may have been some misunderstanding between counsel and the court. The entire team felt that it was in any event an incorrect concession, if it was indeed made consciously and we could not understand how counsel could have made it in the light of all the evidence presented to him by the prosecution team and also included as annexure NJ2 in the answering affidavit of Jiba. We concluded by agreeing as a team that, though not satisfied with the outcome of the matter, at least the door was still open to bring a new racketeering application as indicated in the judgment and it would therefore not be necessary to appeal the judgment. The team would prepare a memorandum for the NDPP informing him accordingly.

17. A few days after this meeting I received an e- mail from Chauke informing that a consultation with counsel had been secured to hear from counsel first-hand what his opinion on the judgment was and to get some explanation for the unfavourable outcome. I naturally attended this meeting on 13 March 2014 and so did the entire prosecuting team, including Adv. Chauke. Counsel raised a number of issues with us that he felt the court had erred, including interpretation of case law. He took us through the entire judgment, pointing out instances where he disagreed with the judgment. Also that court erred in setting aside the decision to prosecute on counts 8-12, as that was not taken by the Acting NDPP, but the DPP.

Counsel also indicated that he did not believe that he made the concession regarding the lack of evidence implicating Booysen as stated at para 29 of the judgment of Gorven, J. The result was that we were satisfied as a team that there were merits to appeal as advised by counsel. It was agreed that counsel should therefor in the meantime prepare the application for leave to appeal, while Chauke would brief the NDPP, Mr Nxasana, who in the meantime had been appointed NDPP, about the need to appeal the judgment and to obtain his consent. After the meeting with counsel, Chauke again reiterated to us that he will call Dr Ramaite, the Head of NPS and his direct supervisor, and also brief the NDPP accordingly. I was not made aware of further developments thereafter concerning the appeal process. On 7 March 2014 Adv. Chauke apparently forwarded to Noko a copy of the memorandum that he was going to present to the NDPP and Ramaite regarding the appeal. I was not copied on this mail and have not seen this memorandum, but merely received an e-mail in this regard from Maema on 11 March 2014 (see annexure "L1-2"). In the meantime the prosecution team and the investigating team met on 14 March 2014 in order to further discuss the implications of the judgment on the entire case. I also attended this meeting, but Chauke was not part thereof.

18. Early in the morning of 24 March 2014 I was called by the personal assistant of the NDPP, Mr Nxasana, to attend at his office with the entire files pertaining to the Booysen matter. I hastily gathered the files and went to his office. Present at the office was the former NPA spokesperson, Mr Nathi Ncube, Mr Nxasana, Adv. T Duma and Dr Ramaite. The NDPP enquired about the notice of appeal in the matter, saying he was not briefed about it. I immediately encountered the environment to be hostile towards me and decided to explain the whole sequence of events as I have done in this affidavit above, including the meeting with counsel and that Chauke undertook to brief the NDPP. The NDPP questioned the merits of an appeal and

suggested that counsel may be advising this to save his own reputation. He also suggested that the reason for appealing is to save the reputation of Jiba. I think Ncube raised the fact that a meeting took place in Jiba's office *after* the judgment which was attended by Chauke, Maema, Mathenjwa and other team members, including me and said that Jiba wanted us to appeal. I could not immediately place which meeting he was referring to, but I indicated that that was not the case. Later I realised that he was referring to the meeting referred to at para. 13 supra and which took place on or about 13 February 2014. Judgment was only delivered *after* this on the 26th of February 2014 and it was therefore impossible for Jiba to have already given us an instruction to appeal as judgment was not yet handed down.

19. Ramaite had to be excused to attend I think a doctor's appointment and the meeting continued in the same hostile vein, if not even more so. My role in attending to the meetings at the DPP office in Johannesburg in the Booysen matter was questioned, including who I reported to. On explaining that I and my team are based in the office of the NDPP and that I was informed by my former supervisor, Jiba, that she had briefed the NDPP about my team and me and what our mandate was, the NDPP, confirmed that indeed he was briefed, persistently so according to him, by Jiba, but that he never said that he was considering the location of my team and that's why he understands why the rumours are being spread by Jiba about him wanting to disband my unit. He also asked me why I attended the meeting of the National Operations Management Meeting (NOMM) of the NPS, saying it's a meeting attended by DPP's. I explained as best I could under the circumstances that the issue of the coordination of organised crime at head office was raised in the previous minutes of this meeting and it was decided by the meeting that I as head of the SPD should in future attend this meeting for better coordination of organised crime issues, much like SOCA was invited to attend NOMM. I realised that my attendance at this meeting was being

questioned because the NOMM meeting was chaired by Jiba then as the head of NPS. Mr Nxasana went as far as to suggest that it seems as if I am loyal to a person, Jiba. I realised that I found myself in a very precarious position, where it seemed that my immediate supervisor and head of NPA was at loggerheads with my former supervisor and I was smack bang in the middle. To cap it all off, I believe that this was the first verbal interaction of any kind with Mr. Nxasana since he took office in October 2013, some six months prior to this meeting. Needless to say that this situation has caused me endless distress to the point of affecting not just my professional life, but also my personal and family life. I had tried to keep it as quiet as possible and have not disclosed this to anyone, but am now forced to do so in order to properly explain the circumstances of the e- mail exchange between myself and Adv. Jiba dated 1-3 April 2014 that the prosecutor in the case, Adv. Ferreira, especially want me to address in "full" in my affidavit. I would have preferred it to be otherwise.

20. Dr Ramaite returned later to the meeting and the NDPP informed us all that the appeal is to be withdrawn, but only after he has informed the team of the decision. The next day, 25 March 2014 I was again called to the NDPP's office. This was before the meeting could commence that was arranged to take place later that day with the entire prosecution team and Chauke, wherein the decision of the NDPP he was going to conveyed. I am not sure whether there was anyone else present during this meeting with me. The NDPP informed me that after he had spoken to his spokesperson of reading about the appeal in the media, he has never been briefed. He said that he only came to hear about the application of Booysen when he read about the judgment thereof in the media. He discussed it at Exco and made it clear he was awaiting a memorandum on the matter. He read from the media that the court dismissed the applicant's interdict application and that his view was therefor that there is no need to appeal the judgment. To his surprise he did not

receive any memorandum, was not briefed and only received the media query about the appeal. He said only the NDPP can authorise the institution of an appeal. He does not know how it happened (i.e the filing of leave to appeal). Appeal is in the name of the NPA. I merely listened and was not sure why all this was being addressed to me as the meeting was going to take place shortly.

21. The team from Johannesburg, including Maema, arrived and the meeting proceeded. Present was the NDPP, Dr Ramaite, Duma, Chauke, members of the team and I. Apparently an e- mail from the Personal Assistant of the NDPP was sent to Chauke requesting the written instruction of why the matter was being dealt with by the DPP of South Gauteng being a matter arising in KZN. I was surprised at this as well as it was the first time that questions arose about this. Chauke explained that he attended a meeting in 2012 with the then Acting NDPP, Jiba and the former Acting DPP of KZN, Adv. Mlotshwa and that he was requested to assist with a team to prosecute the matter. On the issue of briefing the NDPP or lack thereof, Chauke made it clear that he had sent memo's to head office regularly about the matter and that he briefed Ramaite about the appeal in following protocol as he expected Ramaite in turn to brief the NDPP. He explained that the application for leave to appeal was filed due to time running out within which to file and that he felt that it could always be withdrawn should the NDPP not agree with the decision to appeal. The NDPP said he felt that he was being undermined. He said that he was angry yesterday on hearing about the notice to appeal and had already taken a decision to withdraw the notice. Ramaite did confess to having received the documents from Chauke, but said that it was detailed and he did not look at the documents, though he said he raised his view with the NDPP not to go ahead with the appeal. Chauke or someone, I am not sure who, mentioned that during a prior briefing with Jiba she had said that the team should submit a memorandum to the NDPP for his briefing. I think this was a

reference to the meeting the team had with Jiba during February 2014. The meeting was then adjourned with the understanding that the team would prepare a detailed briefing of the NDPP of the entire case that would take place on 7 April 2014. I could not attend this latter meeting as I was booked off sick, but am aware that it took place. The following day on 26 March 2014 Chauke issued an e- mail to the State Attorney conveying the decision of the NDPP (see annexure "M"). It is notable that Jiba was not present during all these discussions regarding the matter, although to my understanding she was present at work.

22. The afore- going is the context in which the e-mail exchange between myself and Jiba took place (see annexure "N" which is a copy I retrieved from my computer and annexure "P" is the copy supplied to me by Jan Ferreira, which indicates onward communication to a third party). I cannot recall precisely what transpired before I wrote the e-mail, but I think that Jiba called me about the matter and because I found myself in the difficult position already mentioned above in that I was in the middle to an apparent dispute between her and the NDPP, I wanted to cut short any discussion on the matter at hand, lest this lead further to the difficult situation I found myself in. I did not feel that I was allowed to discuss the matter with her in the light of what had transpired and the manner in which the matter was dealt with in her absence. More can be said about the context of the e- mail exchange, but I think that I have provided enough contexts so as to properly interpret the e- mail exchange between us. To my mind the enquiry directed to me by Jiba was not something sinister and her response to my e- mail is perfectly understandable in the light of my e- mail to her and in context. After carefully considering the contents of the e- mails in trying to understand the relevance thereof, I can now see how this exchange, viewed without a knowledge of the context, can be construed by someone to make it look sinister and therefor I have tried to give an accurate and honest account of the

events leading up to it as they unfolded.

23. I trust that I have dealt fully with all relevant aspects of the matter. Any omissions should not be construed as a deliberate attempt at deceit, but may have arisen from imperfect recollection of things that happened in the ordinary course of the execution of my duty after the elapse of some time, while not anticipating the sort of legal process such as is currently under way.

I know and understand the contents of this affidavit. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at Pretoria on this the 5th day of May 2015, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

MAJ. GEN.
N.C. TAIÒE
COMMISSIONER OF OATHS

L

"A"

Director of Public Prosecutions
South Gauteng

NATIONAL PROSECUTING AUTHORITY
South Africa

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INTERNAL MEMORANDUM

TO : MA CHAUKE
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

FROM: THE CATO MANOR TASK TEAM
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

DATE: 23 MAY 2012

KZN MANOR NATIONAL PROSECUTION TEAM BASED IN SOUTH GAUTENG HIGH COURT: BRIEFING TO THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

A. INTRODUCTION

The prosecution team has identified three (3) criminal offence categories committed by the Cator Manor Organised Crime Unit and Kwa-Zulu Natal National Intervention Unit, namely

- Conspiracy to kill members of the Kwa-Maphumulo Taxi Association
- Conspiracy to kill ATM Bombing syndicate gangs operating in KZN
- Conspiracy to kill criminal gangs suspected of business and private robberies.

There are substantial outstanding investigations on the Taxi and ATM bombing matters which could motivate charges relating to racketeering and inclusion of KZN and Cato Manor Organised Crime management.

The Task Team is confident on the available evidential material that there are prospects of a successful prosecution on ten (10) dockets involving the Conspiracy to kill criminal gangs suspected of involvement in business and private robberies.

There are fourteen (14) deceased persons in ten (10) dockets which will be coupled by complimentary offences as depicted in the following table:

B. PROSECUTABLE CASES AND IDENTIFIED SUSPECTS

Column 1	Column 2	Column 3	Column 4	Column 5
Serial No	**Case Docket**	**Deceased**	**Suspects**	**Possible charges**
1.	Kwa – Mashu 698/11/2009	Sakhile Prince Thabede	Padayachee Stoltz Mostert	Murder Unlawful possession of firearm Unlawful possession of ammunition
2	Esikhawini 03/04/10	Kwazi Ndlovu	Padayachee Nel Mostert Ghaness Olivier Makhanya George Shaun Mkhwanazi Thabethe Mdlalose	Murder Unlawful possession of firearm unlawful possession of ammunition
3.	Esikhawini 50/9/11	Qhilisani Gwala	Paul Mostert John Smith PhumeleleMakhanya Jeremia Morten MbkekiseniMkwanazi Thatayipi Mdlalose	Murder Unlawful possession of firearm unlawful possession of ammunition
4.	Melmoth 142/11/2008 146	Bongani Biyela Khanyisani Biyela	Eric Nel Innes Smith Nzama Ngodwana Padayechee David Mcinness S Naidoo Gannes Paul Mostert	Murder X2 Theft of firearm Theft of a firearm license Theft of cash Theft of cellphones Theft of

			Raymond Lee Makhanya	airtime Assault GBH x2 MITP Unlawful possession of firearm X2 Unlawful possession of ammunition X2
5.	Durban North 69/07/11	Dumisani Mgobhozi	Naidoo Morten Mostert Lockeem Ganneas Lee	Murder Attempted murder MITP Theft X4 Unlawful possession of firearm Unlawful possession of ammunition
6.	Durban North 71/07/2011	Boysie S Mbonambi	Lee Morten Mostert Lockeem Ganees Naidoo	Murder Possession of firearm Possession of ammunition
7.	Durban North 67/07/2011	Jabulani Bhengu	Mostert Lockeem Naidoo Ghaness Lee	Murder Unlawful possession of firearm Unlawful possession of ammunition
8.	Kwa Mashu 629/04/09	Thokozani Njapha	Nel Mostert Padayachee Eva	Murder Unlawful possession of firearm Unlawful possession of ammunition
9.	Phoenix 377/08/09	Lindokuhle Nzuza	Mostert Lockem Naidoo	Murder Unlawful possession of firearm Unlawful possession of ammunition
10.	Berea 288/05/08	Thabo Msimango	Mostert Naidoo Maharaj Makhanya	Murder Unlawful possession of firearm

			Mdlalose Eva	Unlawful possession of ammunition

C. LOGISTICAL ARRANGEMENTS

The date of first appearances would be determined by the Director of Public Prosecutions (DPP) having attended to all procedural issues regarding the arrest of the police officials in terms of Part 8 of the Prosecution Manual , compliance with Section 17 of the Inquest Act 58 of 1959 and in consultation with the prosecution and investigation team.

The office of the DPP will also manage communications in all relevant spheres of government.

D. RECOMMENDATIONS

It is recommended that the National Prosecuting Authority (NPA) Security and Risk Division provide security for the team as of the date of arrests.

Hawks and ICD have already provided security for their personnel.

CATO MANOR TASK TEAM

SOUTH GAUTENG HIGH COURT: JOHANNESBURG

SEQ 34/2020-361

"B"

8/3/12. Meeting with ICD.

I Gegamenyane 083 780 1154 } HO
Gen Angus 083 565 5320 } ICD
Mr Khuba 084 702 2761.

1st Meeting - meeting with Min of PSA
SAPS - Briefing Nat Com. NKC Ll Vilakazi,
merge two Teams. Mandate - Matters
pending since Dec. 2011 - High Speed
allegations - Visit area by the week.
worked throughout weekend.
Challenge to Hope in NPA pros. - PA submitted
to KZN DPP but to NDPP.
Gen Mbatha met with Matthews - Pros -
in that 2 Adv
Pros. join only by next week.

51 Cases - Thus TSG (19) Urgent dockets
12 Cases envisaged that
Now to cases that that are ready
Others for attendance -
Brought to cases. Which they want to leave
here and fetch from case. Wants decision by
Tomorrow.
Suspects — 12 in Unit - Booysen - PC - DC.

Evidence of Photos with General Mabuza - Team.
Need to get.....

Way forward: Whether in pros: will join by Monday.
next weekend. ICD officers DSN.
R - Ll - NDPP

9/3/2012 – Meeting on Cato Manor
Adv. Mbenya
Gen Mabula –
Accus for bail Granting } See attached list
Mthethwa
Investigation by ICD with Min.
Meeting on Monday – Adv. Mbenya attended.
Fears of KZN pros. to deal with cases. DPP SG
Mr Mnisatha.
Adv Moema –

Give brief on dockets. – Missing:

–

Gen: Mabula –
Terms of Ref. – Hawks – Cabinet request to inform
on Status report. Submitted report ↑ Support ICD,
not go into dockets. ICD rely on their findings
pending Offering their suspicion. Called their chief
and their chief. Min not happy with what
they've done.
Min: said – now Parliament. Help ICD. Now Lone access
to case dockets. . . . . .
Using independent ballistic Expert – Adv PE Nab
Screened this person?
Expert discredited in KZN.
Asked Forensic to give people.
3 dockets that case present to Pros.

. . . . . .

Gen Mabula – re Cato person – all dockets
to go through Min – Mthethwa in NPA Cato
SAPS team – 18 – 8/10 = 10

Way Forward

Pres. ~~to~~ go ~~to~~ KZN as per Addv J. BA
Pres will go ~~to~~ KZN for 1 week

Pres team ~~to~~ leave for KZN on Tuesday (13/3) provided SAPS can arrange for safehouse & accommodation. Can Monica ~~to~~ arrange this with Nat Com.

SEQ 34/2020-364

A. MOSING 054 7585076 amosing@npa.gov.za

C SMAEMA 018 381 9003 0842947934 csmaema@npa.gov.za

[illegible]	079 584 2204	[illegible]
Sol Mabula	082 856 1403	mbulani@saps.org.za
J. J. MWTSHWA	073 502 9602	jjmlotshwa@npa.gov.za
M. MTLAKAZA	084 817 7859	mtlakeze@npa.gov.za

L

Tongaat 190/3/2009.
O/North 67/7/2011
D/North 71/7/2011
D/North 69/7/2011
Kwa Mashu 698/11/2009.
Howick 106/9/2008
Pinetown 668/5/2009
Kwa Mashu 629/4/2009.

08/03/2012

Dockets handed to adv Mathenjwa on 9/3/2012

MM29

Lekker aand

<image001.png>

From: Helen. Van Jaarsveld <hevanjaarsveld@npa.gov.za>
Sent: Thursday, 28 May 2020 19:07
To: George D. Baloyi <gdbaloyi@npa.gov.za>; Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Cc: Jan Ferreira (JM) <janferreira@npa.gov.za>
Subject: FW: S v N Jiba

Dear George,
I expected the reply and it was my original view of the matter. There may be room for a different interpretation but that can be aired in court. I am happy for the prosecution to continue.

From: George D. Baloyi <gdbaloyi@npa.gov.za>
Date: 2020/05/28 16:18 Africa/Johannesburg
To: Helen. Van Jaarsveld <hevanjaarsveld@npa.gov.za>Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Cc: Jan Ferreira (JM) <janferreira@npa.gov.za>
Subject: FW: S v N Jiba

Dear Colleagues

Adv de Kock maintains that the process of transferring the matter to Johan Smit was not correct and his decision is therefore invalid, and there is thus nothing to review. The NDPP agreed that the process and subsequent decision were invalid, hence she referred the matter to us for a decision.
He says the original prosecuting team should continue to conduct the prosecution as testifying at Mokgoro Commission does not disqualify them, as the merits were not canvassed. He says a section 38 is a no-no as there are no funds.
He says if the prosecuting team feels that circumstances have changed impacting on the merits of the case, and the prospects of a successful prosecution, then they must bring it to the attention of this office in the normal way, for a reconsideration of the decision.

Kind regards
GBaloyi

-----Original Message-----
From: Trish Matzke
Sent: Thursday, 28 May 2020 16:02
To: George D. Baloyi <gdbaloyi@npa.gov.za>
Cc: Lizzie M. Maphutha <lmaphutha@npa.gov.za>; Rodney J. De Kock <rjdekock@npa.gov.za>
Subject: S v N Jiba

Dear George as briefed by adv de Kock pse find attached a response to you.

L

Johanna Nel

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Sunday, 27 September 2020 1:48 PM
To: jneljrts@law.co.za
Subject: FW: FW: S v N Jiba

Please find the trailing email.

From: Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Sent: Sunday, September 6, 2020 8:38 AM
To: jneljrts@law.co.za
Subject: FW: S v N Jiba

From: Jan Ferreira (JM)
Sent: Thursday, May 28, 2020 7:53 PM
To: George D. Baloyi <gdbaloyi@npa.gov.za>
Cc: Helen. Van Jaarsveld <hevanjaarsveld@npa.gov.za>; Marshall Mokgatlhe <mpmokgatlhe@npa.gov.za>
Subject: Re: S v N Jiba

Hallo George

The merits of the case was not the main issue, I haven't seen the docket since the decision by Shaun Abrahams and I don't know who the I/O is at the moment, the initial I/O passed away and Gen Taioe is on pension as far as I know. The decision by Marshall initially to withdraw the case as he believed there was no reasonable prospects of success and the decision by Johan Smit SC, on the same basis, was however the issue as well as how such decisions can be legally nullified. In light of such a serious dispute between senior members of the NPA on the reasonable prospects of success, it could have been prudent for the NPA to look at the merits and to have even taken representations from all relevant role-players so that an informed decision could be taken. But we are obviously passed that point.

Gerhard van Eeden and I will proceed as directed, once I am able to consult the "new" I/O, check on the availability of witnesses and the required documents and once we can see how my Johannesburg High Court matter (Porritt) proceeds, which is on trial, part-heard and takes a huge amount of my time.

I also believe we may end up with a review application prior to the actual trial being heard but that could be dealt with when and if it arises, I just trust that the NPA will not expect me to deal with that on my own.

Regards

Jan

> On 28 May 2020, at 19:18, George D. Baloyi <gdbaloyi@npa.gov.za> wrote:
>
> Hi Helen
>
> Ja, ons sal hoor wat se Jan- hulle,dit lyk vir my hulle is nie meer so oortuig van die meriete van die saak nie.
> Rodney se Jan- hulle was die heeltyd so verseker van hulle saak.

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Director of Public Prosecutions
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INTERNAL MEMORANDUM

TO: ADV. S BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV. R J DE KOCK
ADV. I THENGA
ADV. S RILEY
ADV. E. R MAMABOLO

SUBJECT: RECONSIDERATION OF AUTHORISATIONS IN TERMS OF SECTION 2(1) (e) and (f) OF THE PREVENTION OF ORGANISED ACT, 121 OF 1998

DATE: 27 JUNE 2019

BOOYSEN AND 4 OTHERS CHARGED WITH CONTRAVENING SECTION 2(1)(f) OF THE PREVENTION OF ORGANISED CRIME ACT
BOOYSEN AND 16 OTHERS CHARGED WITH CONTRAVENING SECTION 2(1) (e) OF THE PREVENTION OF ORGANISED CRIME ACT

PURPOSE

The purpose of this report is to provide the NDPP with an opinion as to the validity and the appropriateness of the decisions by the former National Director of Public Prosecutions, Advocate S. Abrahams, and the Acting National Director of Public Prosecutions, Advocate N. Jiba to authorize a prosecution in terms of Section 2(4) of POCA read with Section 2(1)(e) and 2(1)(f) in respect of the State versus Booysen and others.

A. BACKGROUND AND HISTORY OF THE INVESTIGATION AND PROSECUTION

1. This matter has a long history. The relevant period of the indictment involves incidents from 3 September 2008 to 4 September 2011. The case involves twenty-three (23) dockets. The State alleges in the indictment that the accused unlawfully killed 28 persons and that they were involved in a criminal enterprise that killed for reward and financial gain.

2. During September 2011, the Sunday Times published a front-page story about the Cato Manor 'hit squad'. The publication of this article resulted in an investigation by the Independent Complaints Directorate (ICD) (now IPID) and the Directorate for Priority crimes Investigations (DPCI).

3. By January 2012, General Anwar Dramat, the Head of the DPCI, appointed Major General Mabula from North West Province and two other generals to investigate the allegations made in the newspaper. [1]

8 March 2012: First NPA meeting with IPID and HAWKS

4. On 8 March 2012, a meeting took place between the NPA, IPID and HAWKS regarding the Cato Manor investigations. Advocate A Mosing in his affidavit dated 5 May 2015 ("*Mosing Affidavit*") states that the Hawks and IPID decided to meet with the Acting NDPP to 'rope in prosecutors' to handle the matter urgently and that the prosecutors seemingly promised by the Acting DPP of KZN, Advocate Mlotshwa, '*was not materialising*'. [2] This Affidavit dated 5 May 2015 is attached hereto as Annexure "A"

5. In this meeting, they reported that there was a meeting with the Minister of Police and the National Commissioner, N Vilakazi, and the decision was to merge the two teams. According to Mosing, the IPID members and the Hawks had a joint meeting with the Minister a week before the meeting of 8 March 2012, when the Minister expressed his dissatisfaction with the slow progress made by the two investigating units, since December 2011.

6. According to the police, of the twelve cases, six were ready and they wanted Mosing to decide the six cases by the next day.

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[1] State Capture Report- testimony of Johan Wessel Booysen.
[2] DPP SG JHB office file and Mosing Affidavit dated 5.5.15.

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7. Mosing briefed the Acting NDPP, Advocate N Jiba and she mentioned to him that there would be a meeting the next day with General Mabula from the Hawks on the same matter.

9 March 2012: Second NPA meeting with ICD and HAWKS

8. This meeting was attended by Major General Mabula of the DPCI, investigators of the Independent Police Investigative Directorate, the acting NDPP Advocate Jiba, the DPP of South Gauteng, Advocate Chauke, advocates A Mosing, advocate S Maema, advocate Mathenjwa, advocate JJ Mlotshwa and advocate M Ntlakaza. A decision was made that the DPCI would assist the ICD with the investigation. A decision was also made that the prosecutors who attended the meeting would be part of the prosecution team in the matter.

9. Advocate Jiba requested the prosecutors to go to KZN on 13 March 2011 for one week, to assist the investigators with the matter. Major General Mabula was requested to arrange accommodation for the Prosecutors at a safe house in KZN.

10. The following dockets were handed over to the prosecutors at the meeting:

TONGAAT 190/03/2009,
DURBAN NORTH 67/07/2011,
DURBAN NORTH 71/07/2011,
DURBAN NORTH 69/07/2011,
KWAMASHU 698/11/2009,
HOWICK 106/09/2008,

PINETOWN 668/05/2009, AND
KWAMASHU 629/04/2009.

The prosecution team and its management

11. At the 9 March 2012 meeting attended by the Hawks and IPID with Advocates Jiba, Mosing, Chauke, Maema, Mathenjwa, JJ Mlotswa and Ntlakaza, Mosing said that he was informed that the members present were appointed as the prosecuting team and that Maema was the "lead prosecutor" due to his experience in prosecuting in organised crime cases, particularly racketeering.

12. Subsequently, delegations and authorisations were issued to the prosecution team that was constituted as follows:

Advocate Sello Maema

Advocate Raymond Mathenjwa

Advocate Mahlubi Ntlakaza

Advocate Patience Moleko

Advocate Jabulani Mlotshwa

Advocate Pumeza Futshane

13. Mosing states that his understanding of Advocate Chauke's role was that he was "*merely to manage the team as they were mainly from his office but would not be vested with any decision making powers regarding prosecutorial decisions*

as he indeed did not have same, as the case fell outside of his area of jurisdiction."

14. The Acting DPP: Kwa Zulu Natal, Advocate C Mlotshwa, in an affidavit dated 12 May 2015, states that he received a call from the Acting NDPP, Advocate Jiba during period January-March 2012 requesting that a matter urgently be enrolled "*due to pressure*". He indicated that he did not have prosecutors to study the dockets. A few days later he was advised telephonically by Chauke informing him that he is instructed by Advocate Jiba to send a team of prosecutors to prosecute the accused in the Cato Manor case.

15. Advocate Mlotshwa states in his affidavit that while he attended a meeting of Directors of Public Prosecutions in Pretoria on the 29 May 2012, he was requested by Advocate Chauke to attend a meeting with Advocate Jiba. At this meeting, he was told by Advocate Jiba that she received an opinion from Advocate Gerhard Nel that he (Mlotshwa) can sign delegations for the prosecutors to prosecute in his jurisdiction and that he should, in terms of this legal opinion, sign the indictment.

16. Advocate Chauke said that he could not discuss '*everything relating to the matter since he had serious security concerns and there was a possibility of the investigation necessitating even the arrest of advocates in the office of the DPP, KZN.*'

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17. Advocate Mlotshwa responded by indicating that he would only sign an indictment if it was accompanied by a prosecutor's memorandum or report detailing the evidence implicating each accused as individuals and the evidence implicating all the accused as a collective.

18. By 12 June 2012, he received an email from the P.A. of Advocate Chauke attaching a copy of an indictment only. A number of emails were exchanged regarding this between him and Advocate Chauke. From this exchange of emails, it is noted that Advocates Mlotshwa and Chauke were in confrontation with each other about the signing of the indictment and the insistence by Advocate Mlotshwa for a prosecutor's report and the refusal of Advocate Chauke to agree to provide it.

19. The Acting NDPP, Advocate Jiba and the Acting head of the NPS, Advocate Thoko Majokweni were copied on these emails but there is no indication in any of the office files that they intervened to resolve the dispute. Advocate Mlotshwa states further that his acting appointment ended on 9 July 2012, and he never had anything to do with the matter thereafter. Advocate Noko was then appointed Acting DPP: KwaZulu-Natal.

20. It is remarkable to note that this arrangement, to constitute a national team of prosecutors to assist with an investigation and conduct a prosecution in KwaZulu-Natal Province, was never formalised in writing with a National

Directive or Memorandum by the NDPP. We did not find any written instruction in this regard, by Advocate Jiba in any of the office files provided to us.

The first racketeering application

21. On 29 August 2012, a report written by the 'Cato Manor Prosecution Team', which was signed by Advocate Maema, was sent to Advocate Chauke. It reported as follows in respect of the request for authorisation to institute a racketeering prosecution:

"*The final draft indictment was handed to Advocate Mosing at his house in Pretoria on night of Thursday 16th August 2012. We were working on correcting the description of the enterprise to include concerns that Advocate Mosing raised, relating to the SAPS as a legal entity that formed the enterprise. It is because of this close cooperation with Advocate Mosing, who kept the Acting NDPP informed of the progress at all times that we were able to get our racketeering authority on Friday, 17 August 2012.*"

22. A copy of this memorandum to Advocate Chauke is attached hereto as Annexure 'B'. It will be discussed during the evaluation of the evidence later in this memorandum. It is instructive to note, at this stage, that the memorandum was submitted to Advocate Jiba some five (5) months after the initial meeting that was held with the NPA officials and officials of the ICD and the DPCI.

23. It is also striking that the prosecution team did not do a presentation to the Acting NDPP in support of the application for the authorisation of the racketeering prosecution, as is customary in the NPA in applications of this nature.

24. Furthermore, the Acting NDPP signed the authorisation to institute the prosecution in terms of sections 2(1) (e) and (f) of the Prevention of Organised Crime Act, on the same day that the memorandum was presented to her by Advocate Mosing. Mosing in his affidavit, described his role as follows:

24.1 He was to interact with the prosecuting team and guide them as far as racketeering issues were concerned.

24.2 He acted as the liaison between the Acting NDPP and the team.

24.3 He had to advise the Acting NDPP on developments conveyed by the team or as gleamed from his interaction with the team.

24.4 He would attend meetings with the team when compiling the application for racketeering and he contributed with advice, as he would ordinarily do in matters of this nature.

24.5 He stressed the fact that he was NOT an integral part of the prosecuting team and he DID NOT read and decide the dockets.

24.6 He stated that he has not decided to involve any of the members of his unit because they had 'similarly close working relationships with the suspects, especially Booysen in the course of their duties regarding organised crime related matters...' (Our emphasis)

24.7 He also wanted the matter to be handled '*with due regard to the sensitive nature thereof.*'

24.8 He said that he would simply deliberate with the team on the merits of the evidence, '*mostly from a critic point of view*' (Our emphasis).

24.9 He attended the first hearing of the accused in the Durban Court merely as an observer in order to brief the Acting NDPP.

25. To the extent that Advocate Mosing says he only played an advisory and guiding role to the prosecutors and that he did not read the evidence, the absence of a proper presentation to the Acting NDPP by the prosecutors is a matter of concern. The Acting NDPP was not in a position to critically question and analyse the evidence as presented in the memorandum, since she did not engage directly with the prosecutors thereon. Mosing was not in a position to do so, since by his own admission; he had no direct knowledge of the evidence against the accused.

Setting aside of the POCA authorisations

26. On 7 May 2013, accused No 1, Johan Booysen launched an application in the High Court to review and set aside the decision by the Acting NDPP to issue the

authorisations for racketeering as well as the decision to prosecute him on the counts confronting him in the indictment.

27. He alleged in the application that the decision to prosecute him was irrational since there was no evidence in the dockets linking him to the offences in question.

28. On 7 February 2014, the matter was argued in the KwaZulu-Natal Local Division, Durban.

29. On 26 February 2014, the High Court handed down Judgment in the matter.[3] A copy of the judgment is attached hereto marked Annexure "C"

30. In paragraphs 29 to 32 of the said Judgment, the Court states as follows:

"[29] As regards the contents of the dockets, the respondents conceded in argument that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.

[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath. She says in addition, that they implicate Mr Booysen in one or more of the offences in question.

[3] Booysen v Acting National Director of Public Prosecutions and Others 2014 2 All SA 391 (KZN)

[31] The submission of Mr Booysen in his replying affidavit can be summarised as follows. Two of the annexures are sworn statements made under the name of one Colonel Alyer.

These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern 'office politics' and submits that they in no way implicate him in any of the offences with which he has been charged. The second of these, in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the impugned decision was taken. The document referred to as a statement by Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen. As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[33] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate" (our emphasis).

31. The Court found *"most significantly, the inference must be drawn that none of the information upon which she says she relied linked Mr Booysen to the offences in question. This means that the documents upon which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s2(1)(e) and (f) respectively."*

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32. The Court consequently found that it is just and equitable to review and set aside the decision to issue the racketeering authorisations and the decision to prosecute Booysen. The Court in conclusion declared the impugned decisions invalid.

Events following the high court judgment

33. On 5 March 2014, an unsigned memorandum was addressed to Advocate Chauke by the 'Cato manor Prosecution team' entitled "Judgement (sic)- Booysen versus The National Director of Public Prosecutions" (This memorandum is not signed by Advocate Maema as is customary in all prior memoranda).

34. It is noted in the memorandum that outside Counsel were briefed by the State Attorney, namely Hodes SC and Manaka to represent the then Acting NDPP in the matter.

35. It is stated that '*the prosecution team, however is of the view that there were crucial concessions which were incorrectly made by our counsel during his argument: see [29] of the judgment.*'

36. In this regard, the memorandum explains as follows: '*the concession in paragraph [29] was that there are no statements in the dockets which implicated*

the applicant in any of the offences with which he had been charged. This was an incorrect concession, as there are statements that implicate the applicant in the dockets, for instance in Howick CAS 106/09/2008, the applicant arrived at the scene in a helicopter and congratulated the members who fired shots for the job very well done. In this matter it appears that the applicant was informing the tracing unit of the whereabouts of the deceased which resulted in the deceased being located on the N3, this is made clear by the motivation for the monetary awards which was submitted by the applicant.' (Our emphasis).

37. This is the only example given by the prosecution team of evidence implicating the applicant in the offences in *Howick CAS 106/09/2008*. As will be seen later in this memorandum these statements, although they are contained in the docket, do not implicate Mr Booysen in any offence and the prosecutors statement above is misleading.

38. The High Court, in any event, made reference to the statements in the dockets where Mr Booysen is mentioned. In paragraph [25] of the judgment, the Court finds that "*of the 23 dockets, he is mentioned only in two. Of the 290 statements in all the dockets, only 3 statements even mention him.*"

39. The prosecution team in conclusion states that it does not intend to appeal the judgment since it intends to apply to the NDPP for the reissuing of the certificates.

Noting an appeal against the high court judgment

40. Despite the view expressed by the prosecution team that it did not intend to appeal the judgment, an appeal was noted in the matter.

41. It is not clear on whose instructions this was done since there are no copies of this document or any other correspondence about the appeal in the office files that indicate this.

The appointment of Mr. Nxasana and the decision to withdraw the appeal

42. Mr Nxasana was appointed NDPP during August 2013, effective from 1 October 2013. It appears that from the outset of his tenure it was a troubling one that was fraught with difficulties[4]. A copy of the State Capture transcript of Nxasana's evidence is attached hereto as Annexure "D".

43. Mr Nxasana indicated in his evidence at the State Capture Commission that he was not given the file in the Booysen matter despite his request to Advocate Jiba to provide him with a 'hand over' report in respect of her activities as Acting NDPP.

44. He testified that after he read about the Gorven Judgment in the Business day newspaper he requested that Advocate Jiba and the prosecution team discuss the Booysen matter with him.

[4] See evidence State Capture Commission 12 June 2019.

45. Prior to this, he was not aware of the matter and, despite a request to do so, there was no official handover from Jiba when he was appointed NDPP.

46. At this meeting, Nxasana asked them to indicate to him the relevant evidence that points to racketeering and the relevant evidence that implicates Booysen.

47. He was surprised that they produced a mere unsigned statement of a person named DANIKAS who was in Greece and two 'twice removed' hearsay statements.

48. He convinced them that they would not succeed in appealing the Gorven Judgment.

49. It is not clear when this meeting took place, but it was some time after his appointment as NDPP. In his affidavit, Advocate Mosing says that he was aware that a meeting took place between the prosecution team and the NDPP. He understood that the team was preparing a detailed briefing for the NDPP.

50. Mr. Nxasana also testified that he discussed the merits of the matter with Advocate Jiba and the prosecutors and made it clear that there was no evidence to justify racketeering.

51. According to Mr. Nxasana Advocate Jiba said that she relied on the racketeering experts who she referred to as the prosecutors in the room.

52. Mr. Nxasana testified that he understood from Jiba "*that she had not had direct access or required direct access to evidence but rather relied on the opinion of others.*"

53. In conclusion, after discussion of the matter, he instructed the prosecution team to withdraw the notice of appeal, which they subsequently did.

54. It is important to note that we were not placed in possession of an office file in respect of the discussions that Mr. Nxasana had with Advocate Jiba and the prosecution team and the decision to abandon the appeal in respect of the matter.

55. We have relied on the evidence, which Mr Nxasana gave at the State Capture Commission to determine what happened in respect of the Notice of Appeal. As indicated earlier, we could also not find any documentation in the office files handed to us regarding the appeal and its withdrawal.

The appointment of Advocate S. Abrahams as NDPP

56. Mr. Nxasana vacated the Office of the NDPP on 14 May 2015. Advocate Shaun Abrahams was appointed as NDPP on 18 June 2015. During the period of Mr. Nxasana's tenure as NDPP, he gave no new authorisation for the prosecution of

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Mr Booysen on racketeering charges. It is clear from his evidence at the State Capture Commission that he did not believe that there was sufficient evidence in the dockets to justify the issuing of a racketeering authorisation in the matter. During the intervening period the prosecution team did not institute a prosecution against Mr Booysen on any other charges. In the meantime, Naidoo launched an application in respect of himself and the rest of the accused charged with racketeering by Advocate Jiba to review and set aside these authorisations as well. This application was pending when Advocate Abrahams issues new authorisations against Mr Booysen and those accused who were already before the High Court for racketeering.

The second racketeering authorisation

57. On 19 August 2015, Advocate Noko, the DPP of KZN submitted a Memorandum to the NDPP, Advocate Abrahams for a 'fresh' authorisation in terms of section 2(4) of POCA against the Accused. This request attaches a Prosecution Memorandum signed by Advocate Maema on 17 August 2015, as well as other supporting documentation.

58. Advocate Abrahams indicated that he was not satisfied that there was sufficient evidence to institute a prosecution in respect of section 2(4) of POCA and requested that certain further investigation must be completed. A copy of the affidavit of advocate S Abrahams is attached as Annexure "E".

59. A period of almost four (4) years had now elapsed since the prosecution team first became involved in the matter during March 2011.

60. On 16 October 2015, an amended Prosecution Memorandum was submitted to the NDPP for the authorisations in terms of section 2(1) (e) and (f) of POCA.

61. Advocate Abrahams was still not satisfied with this memorandum and instructed Advocate Maema and Mr Dawood Adam to travel to Greece to interview Mr Danikus, the person who was referred to in the High Court application brought by Mr Booysen against the Acting NDPP, Advocate Jiba.

62. After their return from Greece and consultation with Advocate Abrahams he issued new authorisations against the accused in terms of section 2(1)(e) and (f), on 16 February 2016.

B. LEGAL POSITION IN RESPECT OF RACKETEERING PROSECUTION

The nature of the crime of racketeering

63. Classical criminal law targets the perpetrator. The crime of racketeering as defined in POCA focuses on the *enterprise* and *objects* rather than on the perpetrator. Racketeering is a complex crime, which bears some resemblance to the common-law crime of conspiracy. It usually involves group activity.[5]

[55] Organised Crime and the Proceeds of Crime Law in South Africa – Albert Kruger (Paragraph 63 – 67 is a summary of Kruger

64. In South Africa, for a person to be liable under section 2(1) (e) of POCA he or she must participate or be involved in at least two underlying offences listed in Schedule 1 of the Act.

65. The offence consists not in the commission of an act (such as stealing) but in the membership of an organisation (enterprise) which has been shown to have committed at least two particular offences. The focus is on the relationship between the accused, the enterprise and the pattern of racketeering activity.

Participating in the affairs of an enterprise (section 2(1) (e))

66. Participation in the affairs of the enterprise is the offence. The accused must conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. The conduct leading to conviction must be causally connected to the enterprise who participates directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity is guilty of racketeering. The accused is guilty by virtue of

(a) being involved in an enterprise (being part of the group of racketeers), and

(b) being involved in the commission of two or more offences.

67. In order to determine whether the pattern of racketeering existed there are a number of factors the Court could take into consideration for example:

- The number and variety of the predicate offences.
- The length of time over which the acts were committed.

- The number of victims the accused injured by similar acts.
- The similarity of the offences.
- The character of the unlawful activity.

68. The above factors were formulated by the American courts in cases such as *Morgan v Bank of Waukegan 804 F 2d 970 (1986) at 975 and Jones v Lampe 845 F 2d 755 (1988) at 756-59* to prevent the punishment of sporadic activity in terms of the RICO legislation. This is not a closed list of factors.

69. A 'pattern of racketeering activity' requires at least two acts of racketeering activity. It was held in several US cases that the mere existence of multiple acts of racketeering may not be enough. The criteria are that the acts must "amount to or pose a threat of continued criminal activity."(See the American case of *H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238-39 [1989]*).

70. Elements of a contravention of section 2(1)(e)

- An enterprise existed.
- The accused managed, was employed by or associated with the enterprise.
- The pattern of racketeering activity existed.

- The accused directly or indirectly conducted or participated in the affairs of the enterprise through a pattern of racketeering activity."[6]

Managing the enterprise (section 2(1)(f))

71. Managing the operation or activities of the enterprise is the offence. Here the target is the manager. It must be shown that the accused occupies some kind of management position in the enterprise.

72. Elements of a contravention of section 2(1)(f)

- An enterprise existed.
- The accused managed the operation or activities of the enterprise.
- The pattern of racketeering activity existed.
- The accused knew or ought reasonably to have known that a person (the accused or another).

(a) employed by or associated with that enterprise;

(b) conducted or participated in the conduct (directly or indirectly) of the affairs of the enterprise;

(c) through a pattern of racketeering activity.

73. When looking at the elements of the enterprise, certain characteristics become noticeable, for example, differentiation of roles or tasks; a system of command; common or shared goals or purpose; intention to profit ; continuity of personnel

[6] IBID Kruger paragraphs 70 - 72

(failing which misjoinder will arise). It is a separate entity and apart from the pattern of racketeering activity in which it engages and, as stated above, it is the organising principle behind the events (*our emphasis*).

74. In the ***United States v Turkette 452 U.S 576 (1981),*** the Court held that the enterprise and the existence of the pattern of racketeering are distinct elements of the charge. An enterprise should therefore be established by evidence separate from that establishing the existence of a pattern of racketeering activity.

75. In ***United States v. Bledsoe***, 674 F.2d 647, 664 (8th Cir) the Court stressed that an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. This does not mean that simply the members must exist, but rather the enterprise itself exists and maintains structure.

Open-ended continuity, however, does not require that the acts span for a certain period. Rather, the racketeering acts must *"include a specific threat of repetition extending indefinitely into the future [or] . . . are part of an ongoing entity's regular way of doing business.*

76. If these factors can be proven to exist then it satisfies the requirement that there must be a relationship between the predicate offences and the enterprise. These factors mentioned would prove the requirements of 'continuity' and 'relationship' between the predicate offences and the enterprise.

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C. THE EVALUATION OF EVIDENCE CONTAINED IN THE DOCKETS

77. The evaluation of the evidence in the docket will be done in accordance with the principles of the law discussed above.

78. In evaluating the evidence on which the NDPPs, Advocates Jiba (*Jiba*) and Abrahams (*Abrahams*) relied on in finding that there are *prima facie* proof that the accused were involved in racketeering activities, reference will be made during the analysis to the racketeering authorisations in Tables 1 and 2.

79. There are some differences in the two authorisations granted by Jiba on 17 August 2012 and Abrahams on 16 February 2016.

80. In respect of Felokwakhe Dlamuka, Advocate Jiba granted authorisation in respect of him for participation in racketeering activities. On 13 February 2016, Abrahams decided not to grant any authorisation against him in respect of both sections 2(1) (e) and (f). He is therefore still an applicant in the Naidoo application in which the accused is challenging her racketeering authorisations. In his Answering Affidavit, Advocate Abrahams said this was an error and the authorisation will have to be rectified. It is not clear if this was ever done.

81. In respect of Neville Eva who is deceased, whilst Jiba granted authorisation in respect of both sections 2(1) (e) and (f), Abrahams only did so in terms of sections 2(1) (f).

TABLE 1: *Section 2 (1) (f) racketeering authorisation*

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998	
SECTION 2(1) (f) – Managing an Enterprise	
17 August 2012	13 February 2016
BOOYSEN (ADV. JIBA) EVA OLIVIER LOCKEM VAN TONDER	BOOYSEN (ADV. ABRAHAMS) LOCKEM VAN TONDER EVA OLIVIER

TABLE 2: *Section 2 (1) (e) racketeering authorisation*

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998	
SECTION 2(1) (e) – Participation in the conduct of an Enterprise	
17 August 2012 ADVOCATE JIBA	13 February 2016 ADVOCATE ABRAHAMS
BOOYSEN (ADV. JIBA) PADAYACHEE STOLTZ MOSTERT NEL EVA (deceased) GHANESS MAKHANYA OLIVIER MKHWANAZI MDLALOSE NAIDOO LEE LOCKEM VAN TONDER SMITH CJ MCINNES MARTEM J FELOKWAKHE DLAMUKA	BOOYSEN (ADV. ABRAHAMS) PADAYACHEE STOLTZ MOSTERT NEL GHANESS MAKHANYA OLIVIER MKHWANAZI MDLALOSE NAIDOO LEE LOCKEM VAN TONDER SMITH CJ MCINNES MARTEM J

82. We also read and analysed the evidence in the twenty-three (23) dockets that the prosecution team, in their PowerPoint Presentation to Abrahams said implicated the accused in the racketeering activities. It appears based on an

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analysis of the two indictments that formed part of the documentation Jiba and Abrahams considered, that no further dockets were added or removed. Table 3 refers to those dockets. (Our emphasis)

83. We will discuss the content of the dockets and in particular some of the challenges in the investigations. In the discussion on the Racketeering Investigation, reference will be also be made to the incidents that traversed a period of four (4) years from 2008-2011. It should be noted that the bulk of the racketeering events occurred between 2008-2009 whilst in 2010 there were only three events and in 2011 two events. Durban North CAS 67/07/2011, CAS 69/07/2011 and CAS 71/07/2011 refer to one moving crime scene.

TABLE 3: *Case dockets*

DOCKETS			
2008	2009	2010	2011
1. Berea CAS 288/05/08 2. KwaMashu CAS 116/08/08 3. Escourt CAS 34/08/08 4. KwaDukuza CAS 39/9/08 5. Howick CAS 106/9/08 6. Mandeni CAS 76/9/08 7. Umkomaas CAS 235/10/08 8. Melmoth CAS 142/11/08 9. KwaMashu CAS 314/11/08	10.Durban Central CAS 185/02/09 11.Tongaat CAS 356/03/09 12.KwaMashu CAS 629/04/09 13.Pinetown CAS 1000/05/09 14.Phoenix CAS 377/08/09 15.Rustenburg CAS 1098/9/09 16.KwaMashu CAS 698/11/09	17. KwaDukuza CAS 115/3/10 18. Esikhawini CAS 3/4/2010 19. Bhekithemba CAS 44/5/10	20.Durban North CAS 67/7/11 21.Durban North CAS 69/7/11 22.Durban North CAS 71/7/11 23.Esikhawini CAS 50/09/11

RACKETEERING CHARGES

Gorven Judgment

84. In accordance with our mandate regarding the validity of the Abrahams authorisations we considered, after the *Gorven judgment* that said that the documents Jiba relied on did not provide a rational basis for the decisions to issue the authorisations to charge Major General Booysen (*Booysen*) for contraventions of s 2(1)(e) and (f) respectively, whether the Abrahams authorisations were based on the same documents, statements or were in any way supplemented with new evidence.

85. We have already made the point that the dockets considered remained unchanged.

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86. We therefore considered whether in addition to the statements of Colonel Rajendran Sanjeevi Aiyer (*Aiyer*), Aris Danikas (*Danikas),* and Bhekinkosi Mthiyane ("Dlondlo") that were submitted in the Booysen Application as *prima facie* proof that the Applicant was involved in racketeering activities, any further statements or evidence were placed before Abrahams.

87. In the *Gorven Judgement*, the document referred to as a statement by Danikas was found to be an undated and unsworn statement and the contents thereof did not cover the period dealt with in the indictment except for one event that does not relate to Booysen. The Court also found that Aiyer's statements did not implicate Booysen in any of the offences with which he has been charged. It is therefore important to consider whether subsequently the statement of Danikas was signed and commissioned and/or supplemented and if any reliance can be placed on the statements of Aiyer.

88. In line with our mandate to determine if, any further statements and other evidence was placed before Abrahams that did not serve before Jiba, we thought it prudent to study the affidavit of Abrahams since the dockets as well as the files of the NDPP, that of the DPP SG JHB and of Advocate Mosing was unable to shed light on whether there were any formal written requests for further investigation and obtaining of other witness statements and or documents. We managed to find two letters drafted by Advocate Mathenjwa requesting that the

investigating officer complete further investigation but it is dated 29 August 2012, and 3 September 2012, respectively.[7]

Advocate Abrahams answering affidavit

89. In respect of the above enquiry, Abrahams alleged that he had indeed called for additional information and investigations. [8]

90. He said on 27.08.2015 when the prosecution team made a presentation to him, he was not prepared to sign the POCA certificates and informed the prosecuting team that he wanted additional information and investigations. Later that day Maema and Mlotswa compiled a list of items he had requested.

91. It is important to determine what the additional information and investigation Abrahams requested and if indeed, there was compliance with his requests. Maema says in his affidavit that some of the documents on the list were later obtained and served before the NDPP.[9] A copy of the affidavit of advocate S. Maema is attached as Annexure "F"

92. Abrahams said that after he "*obtained these items, Maema amended his prosecution memorandum.*"[10] Both Abrahams and Maema in their affidavits in

[7] We found an Internal Memorandum from Maema to Abrahams dated 27.8.2015 as annexure 'SM5' to Maema's affidavit that lists the additional information and investigation he required and which he was going to advance to the National Commissioner of the police (See Annexure F).
[8] See page 72, paragraph 222 of his affidavit.
[9] See paragraph 14.3. of his affidavit.
[10] See paragraph 116-117 of his affidavit.

reference to the additional information and investigation refers to the October 2015 Memorandum.

93. It was important to study the two Prosecution Memoranda. The differences are minute and contain no new evidence.

94. Abrahams himself says in his affidavit that the "October Memo[11], *as included in the FSR, does not differ radically from the August Memo*".

95. He lists five differences between the two memoranda:

95.1 The memorandum now reflected that Cochrane was not the pilot but a crew member;

95.2 A schematic representation of the Durban Organised Crime Unit was included;

95.3 A more detailed description as to how the unit functioned was included;

95.4 The roles of the managers in the enterprise were highlighted; and

95.5 An analysis or summary of the modus operandi was included.

[11] The October Prosecution Memorandum is attached as annexure SM3 to the affidavit of Maema (Annexure F).

96. We are of the view that these changes to the October Memorandum were merely cosmetic changes made to the memorandum based on information and evidence already in possession of the prosecution. Witness statements were supplemented to explain further aspects and this did not amount to new evidence.

97. Abrahams was still not satisfied after the October 2015 Memorandum was presented to him and instructed Maema and Advocate Dawood Adam to travel to Greece to consult with Danikas. When Maema returned, he was verbally briefed and Abrahams said that he was "*now satisfied that the Danikas statement, as now elaborated, provided material that would assist in establishing the nature, scope and modus operandi of the alleged enterprise.*"[12] (Our emphasis).

98. He further states that his "*final remaining concern-the evidence of Danikas- had been resolved. I had no reason to revisit the material that was previously placed before me.*" [13]

99. We have already concluded that the dockets remained the same and that the additional information and investigation as reflected in the October 2015 memorandum were merely cosmetic changes. It appears from the affidavit that

[12] See paragraph 132 of his Affidavit
[13] See paragraph 136 of his Affidavit

Abrahams placed a lot of reliance on Danikas statement. It is important then to determine whether Danikas's statement contained new and additional evidence.

100. In respect of whether he had new evidence that was not before Jiba, Abrahams says the following at various stages of his affidavit:

100.1 "*I did rely upon new evidence.*" [14]

100.2 While it is true that the new authorisations he issued is very similar to the Jiba authorisations, his authorisations "*were based on a significant amount of material that did not serve before Jiba.*" [15]

100.3 "*In fact there was considerable material before me when I issued my authorisations that did not serve before Jiba.*" [16] (Our emphasis)

100.4 "*What I can confirm with absolute confidence is that there served before me evidence that had not served before Jiba.*" [17] (Our emphasis)

100.5 "*By this time there was new material that had not served before Jiba that strengthened the case against the Applicants.*" (Our emphasis)

[14] See paragraph 96, paragraph 338
[15] See pages 66-67, paragraph 190
[16] See page 91, paragraph 313
[17] See page 91, paragraph 315

101. It is therefore important to look exactly at what Abrahams described in his affidavit as new evidence and this is found at page 52 of Advocate Abrahams affidavit where he describes the basis for his decision to issue the authorisations as follows:

101.1 The input of Maema in his October Memo;

101.2 The SAPS correspondence which corroborated from the inside the basic narrative in the October Memo;

101.3 The intrinsic unlikelihood of 28 people being killed by a single relatively small unit, none being captured alive;

101.4 That in 26 out of 28 cases there were no arrest or search warrants;

101.5 The ballistic reports which cast doubt on the claim that the deceased were resisting arrest;

101.6 No officers were harmed or police vehicles damaged;

101.7 The similar fact evidence in the statement of Danikas;

101.8 Aiyer's affidavits;

101.9 Ex-Provincial Deputy commissioner, Brown's affidavit;

101.10 The statements of Bhekinkosi Dlondlo Mthiyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') Bongani Mandla Mkhize ('Bongani').

102. The factors Abrahams considered in 101.1-6 are not new evidence and are merely his assumptions, inferences and conclusions based on existing evidence in the dockets.

103. It is therefore important to discuss the statements in 100.7-10 that he considered as part of the spectrum of statements and factors he considered as the basis for his decision to authorise the racketeering prosecutions against the accused.

Aiyer's further statements

104. Colonel Aiyer made three statements on 3 August 2012, 31 August 2012, and 13 March 2013.

105. On 29 August 2012 and 3 September 2012, Adv. Mathenjwa drafted letters with instructions to the investigating officer requesting a supplementary statement from Col Aiyer.

106. The gist of the request for a supplementary statement focused on the operations of the Cato Manor Section and Booysen's involvement in it.

107. None of the statements implicates Booysen in any of the predicate offences except to overstate his perceived interference in his work and budget. His affidavits also contains uncorroborated hearsay. He speaks of reliable sources informing him of the fact that Booysen was on the payroll of Stanger Taxi association, but this was never investigated or the correctness of thereof ascertained. Aiyer subsequent statement smacks of fabrication of a recent nature.

108. His three affidavits failed to show at all material times that Booysen was in direct control of the Cato Manor Unit or that his managerial approach he adopted as a result of the volatile working relationship between Aiyer and his subordinates means that he was also involved in illegal activities.

109. Aiyer's credibility was questioned and he was discredited by Advocate Cassim S.C in the Booysen internal disciplinary hearing. Advocate Nazeer Cassim SC, the chairperson of the disciplinary hearing against Booysen described Col Aiyer who testified before him as a "*dismal witness in material respects...is obsessed by the notion of his own importance and his entire testimony was permeated by his political acceptability and self-importance.*"

110. In our view, a witness should be both credible and reliable. In our view no reliance should be placed on the statements of Colonel Aiyer.

Statement of Ex-Provincial Deputy commissioner, Brown

111. Brown's statement deals with the following:

111.1 He gives an organogram of the structure of the KZN Hawks and the changes within the police structures before and after 2007.

111.2 Brown elaborates on the challenges in the relationship between Booysen and Aiyer and said that because of the volatile relationship between Aiyer and the members of the SVC Durban Organised Crime Unit, Booysen was forced to step in as Aiyer's superior.

111.3 It shows that between 2008 – 2010, the period of the indictment, that Booysen reported to Major General Brown, Major General Masemola and Lt General Ngidi, as the Provincial Commissioner of the SAPS in KZN. It further shows that the commander of the SVC Durban Organised Crime (Cato Manor Unit) was Colonel Olivier who reported in turn to Col Aiyer.

111.4 Brown's statement in fact, shows that it is incorrect to single Booysen out as being responsible for the Cato Manor Unit when there were two Deputy Provincial Commissioners, namely, Masemola and Brown who were also in positions of authority.

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111.4.1Brown is unable to assist the prosecution in proving that Booysen managed a criminal enterprise and or participated in the affairs of the criminal enterprise.

Danikas Statement

112. In an internal memorandum addressed to the DPP SG JHB, advocate Chauke, the prosecution team alleged that this statement does not relate to a specific incident covered in the indictment but is intended to corroborate the evidence in possession of the state that the applicant was involved in the activities and "*that the applicant encouraged and with like minded in the Cato Manor component in killing of suspects.*"

113. This statement was already found in the *Gorven judgment* to be unsigned document lacking applicability and relevance.

114. On 25 January 2015, Maema says in an email to the attorney of Danikas that there was indeed consideration to use Danikas as a witness in the ensuing trial and that they have even "*drafted the MLA documents asking authorities in Greece to assist to have the documents signed in accordance with the prescripts.*"

115. He however indicated that there are some challenges in using him as a witness and listed them as follows:

115.1 *"The incidents that Mr Danikas refer to in his draft statements started in 2001 to 2007, a period which is not covered in the indictment.*

115.2 *Most of those incidents are not referred to in the indictment and do not have dockets which relate to them.*

115.3 *The concerns and fears that the witness has which prevents him from coming to the country even though they may be real, will make it very difficult for the state to secure his evidence, considering that evidence on commission is used rarely.*

115.4 *The real possibility of other offences unrelated to Cato Manor that the witness may be involved in, makes it a very risky consideration to expect him to come to the RSA for the purpose of testifying.*

115.5 *The tendency of material that should be used in court just being flashed in the media is a great concern. It draws unnecessary attention of the media to the case.*

115.6 *Section 204 requires a witness who expects indemnity from prosecution to testify openly and answer questions frankly and honestly, even those questions that may expose him or incriminate him. We are not sure that*

the witness is telling us everything; the chances of surprises in court are very real."

116. Maema also indicated that he did not include Danikas in the list of witnesses.

117. He ended the email and said they have not been to date "*able to convince our prosecution authorities that Danikas' evidence will assist the state case in any way.*" (Our emphasis)

118. Danikas's statement in Greek was only signed on 26 October 2016; months after the NDPP signed the authorisations on 13 February 2016. The English translation was made available to the prosecution on 12 October 2018.

119. According to Maema, he is still in possession of the original statements and none were filed in the docket. None of the statements was made available to the defence. He also stated in an email dated 24 April 2019, that the signature of Danikas on the Greek version of his statement was just superimposed on the English version. Danikas has never signed the English translation as he pointed out a number of mistakes.

120. The decision of the prosecution to call Danikas simply to testify about a similar modus operandi based on similar fact evidence is at most puzzling. Abrahams in his Answering Affidavit at paragraph 267.2 says that the practices described by

this "*eyewitness, who was an accepted part of Cato Manor SVC prior to the indictment period, bears a distinct similarity to what is described in the indictment.*" and that similar fact evidence is admissible under POCA.

120.1 This witness relates an incident in 2001 when the police killed a suspect and that he personally believed the person was not armed. Booysen came afterwards and also congratulated the members.

120.1.1 It would not have been necessary to make use of similar fact evidence because if there was an incident of this nature, the easiest would have been to expand the life and continuity of the criminal enterprise and charge Booysen and the police officers as it appears to be the same persons who are now being charged for participation in a racketeering enterprise.

120.1.2 Similarly, Danikas alleged that Booysen tampered with crime scenes. Danikas would have been able to testify not only about a murder but also about incidents when Booysen tampered with crime scenes that would have provided corroboration and additional charges.

121. It appears that the prosecution never intended to bring Danikas to South Africa to testify since Maema in his email already provides reasons why he cannot call him to testify.

122. It begs the question, did the investigators manage to trace these dockets mentioned in paragraphs 120.1.1 and 120.1.2. Does it exist or are the allegations false? Danikas said that he submitted details of all his records of case files from 2000-2008 to General Mabula. The following questions arise:

122.1 Where are the records and if the records pertain to the issues Danikas will testify about, why did it not form part of the docket as corroboration?

122.2 Why was the defence not placed in possession of the records if it forms part of the evidence?

122.3 Did Danikas make any other statements before he left South Africa?

122.4 Why is the signed English translation still outstanding after almost three (3) years? Who made the decision to superimpose the signature of Danikas on the English translation that Danikas says has mistakes?

122.5 Why did the prosecution not hand over the signed Greek statement and English translation to the defence yet?

123. In an Internal Memorandum from the prosecution team to the DPP SG JHB, advocate Chauke, dated 1 April 2014, it is noted that the team said they had a meeting with the DPP, advocate Noko and that they wanted to finalise the MLA application to seek the signing of the draft statement of Danikas and to secure the pictures he refers to in his draft statement. The DPP indicated that she required a full briefing in the matter to apply her mind properly, particularly in the light of the court challenges. Since a full briefing was planned for the NDPP on 7 April 2014, it was recommended that it would be prudent that the DPP also attend the briefing if she was available.

123.1 If the first meeting with the prosecution was on 8 March 2012 why did it take so long to deal with this application especially since Major General Mabula who was appointed by General Dramat in January 2012 to investigate this case had in his possession records obtained from Danikas.

123.2 In a letter it appears signed by Maema on behalf of advocate Chauke dated 8 May 2013, he states that a *"statement of Aris Danikas has been obtained but must still be routed through the chanelles ('sic') provided for in the International Co-operation in Criminal Matters Act, 75 of 1996."* A copy of the letter is attached as Annexure "G".

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123.3 It is unclear where the MLA file is.

124. There are various challenges with the Danikas testimony.

124.1 The credibility challenges as pointed out by Adv. Maema in the email to the Lawyer of Danikas:

124.2 He is a witness that will be called in terms of section 204 of the Criminal Procedure Act. If he is called, the defence will be allowed to cross – examine him about the incidents and corroboration for it. It does not appear that it was investigated otherwise it would have formed part of the docket and indictment.

124.3 It also appears that certain information has been withheld from the defence.

124.4 The NDPP was not in possession of a statement from Danikas when he made his decision to grant the authorisations, but he was briefed by Maema and Advocate Dawood Adam. The Greek Statement was signed on 24 October 2016.

125. We therefore conclude that the situation at the time of the second authorisation remained the same as when Jiba granted the first authorisation.

125.1 Danikas's statement was not a sworn statement.

125.2 It was not part of the docket.

125.3 The contents of the statement do not cover the period dealt with in the indictment except for one incident in which he arrived on the scene after the event (Berea CAS 288/5/08) in which Booysen is in any event not implicated (Berea CAS 288/5/08).

125.4 Danikas does not implicate Booysen and the other accused as far as the racketeering offences specifically are concerned and will not assist the prosecution to prove the racketeering charges.

125.5 Abrahams places a lot of reliance on Danikas statement and said that once he received the verbal briefing from Maema that he was now satisfied that the Danikas statement, as now elaborated, provided material that would assist in establishing the nature, scope and modus operandi of the alleged enterprise and he had no reason to revisit the material that was previously placed before him.

125.6 It is our view that his reliance on this unsigned statement was misplaced.

Statements of Bhekinkosi Dlondlo Mthiyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') Bongani Mandla Mkhize ('Bongani').

126. The prosecution declared that Col Aiyer's statements "w*ere not intended to implicate Booysen in any particular predicate offence.*" His evidence was intended to demonstrate Booysen's direct involvement by managing Cato Manor SVC, both at local and provincial levels. Aiyer was alleged that Booysen 'managed' the SVC section by engaging and instructing members directly, compromising the chain of command.

127. The prosecution will therefore rely primarily on three (3) witness statements to prove that the SVC section of the Durban Organised Crime "*was operating as a hit squad for eliminating the rivals of the Stanger Taxi Association while operating under the veil of South African Services.*"

128. We are of the opinion that the prosecution will not be successful in having the two (2) statements admitted in terms of the exception to the Hearsay Amendment Act and that the statement of the one (1) witness, Bongani Mandla Mkhize is insufficient to prove that Booysen and Mostert were involved in a hire to kill scheme. Mkhize can only identify Mostert who apparently received

money from Bongiswe. He alleged that he could see the money since it was in a clear plastic and he assumes it was handed to Mostert as he remained in the vehicle whilst Bongiswe went to Mostert's vehicle. There was never an ID Parade held to identify Mostert and the other white male that was with him.

129. Two of the witnesses, Bhekinkosi Dlondlo Mthiyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') are deceased. The testimony of the two deceased witnesses amounts to double hearsay (our emphasis). It is trite law that first-hand hearsay is preferable to multiple hearsay, because of the risk of manufacture and the errors that may be introduced by repetition. Hearsay often carries the risk of errors appearing as the statement is repeated by different people. The person who reports the words of another may have misheard them or misinterpreted them. The more remote the source, the greater the likelihood of errors in transmission.

130. Furthermore, with the presumption of innocence principle strictly applied in criminal law cases, courts have been hesitant in relying on hearsay evidence to convict an accused, more so in multiple hearsay.

131. Bongani and Mathonsi were bodyguards who accompanied Sanele Zondi and Bongiswe Zondi ('Mhlongo') when they had meetings with Booysen and Mostert to discuss the murder of Superintendent Chonco and the killings of the hitmen who murdered Chonco. Sanele Zondi and Bongiswe Zondi were

responsible for making the payments from the Stanger Taxi Association to Booysen and Mostert. Sandile and Bongiswe acted on behalf of the management of the taxi association. Both Sanele Zondi and Bongiswe Zondi ('Mhlongo') through their lawyers disputed the averments of the witnesses. They were not charged and it is unclear if they were ever approached to testify against Booysen.

132. On the other hand, Dlondlo, who was part of the executive of the Stanger Taxi Association, had meetings about the killings, arrange payment and received report backs from Sandile and Bongiswe.

133. Besides the fact that his evidence is double hearsay he is also a witness in terms of Section 204 of the Criminal Procedure Act 51 of 1977. It is not evident from the statement if he was ever warned in terms of the provisions of the Act. It is trite law that the evidence of an accomplice has to be treated with caution (see Hlapezula and others 1965 (4) SA 439 (A)).

134. We are of the opinion that it will amount to an unfair trial since this witness's double hearsay evidence is also that of an accomplice witness that is highly prejudicial to the accused who would not be able to test his credibility through cross-examination.

135. The court in Hewan v Kourie NO and another also examined the provisions of section 3(1)(c)(i) and nature of criminal and civil proceedings, and Du Plessis J stated that: 'in order to prove a central issue in a criminal case, *the Court would in turn probably require a high degree of reliability or a substantial probative value before exercising its discretion in favour of admitting evidence*.

136. The probative value of the evidence is highly relevant in this matter. There were no attempts made to obtain corroboration for the witnesses and the prosecution therefore seek to adduce evidence of a very low probative value. We are of the opinion that it would result in undue waste of time in the attempt to have it admitted because of the low probative value of the evidence.

137. In this matter, reliability of the evidence is also a major issue. It is important to determine when the witnesses made their statements to the police. Bongani Mkhize made his statement on 1 July 2012, Dlondlo on 31 July 2012 and Mathonsi on 15 March 2013. All of the witnesses made statements about incidents that occurred in 2007-2008. These statements were made years after the incidents in question and not when the events were fresh in their memories. There is value in the argument that many facts could be lost in the reporting of these statements years after the incidents.

138. Based on the aforesaid, we concluded that an application to have this hearsay evidence admitted will be unsuccessful.

139. An analysis of the statements that Abrahams relied on shows that it is totally misplaced and that no new evidence was placed before Abrahams.

Who were charged?

140. On their own narrative, the prosecution team should have charged certain persons and not have charged others. The prosecution also charged persons that were not involved in the individual incidents or at most had minimal involvement in the commission of the offences. The discussion below will look at who were charged for the racketeering offences, who were not charged with racketeering offences and the rationale behind it, whether persons were incorrectly charged and what were the charges preferred against persons or left out based on the statements in the dockets.

Charges against Booysen and the managers of the enterprise

141. Booysen was charged only in respect of Counts 8-12 in both the August 2012 and October 2015 indictments, i.e. for the murders of Magojela Timson Ndimande and Sibusiso Thokozani Tembe, for the possession of a firearm to wit an AK47 assault rifle with serial number 1975-849754, for possession of ammunition and defeating the ends of justice in that in Counts 8-9 he created an impression that the deceased were armed and/or would have used the firearm to shoot at them and/or endanger their lives (Howick CAS 106/09/2008).

142. In Watts vs State, 558 So. 2d 142, 144 (Fla. Dist. Ct. App. 1990) the defendant was involved in racketeering, kidnapping, and a burglary scheme. When reviewing the RICO conviction the court reversed it because all the predicate acts arose out of same incident or event. The proper target of RICO prosecution is of a career criminal. A series of acts, from several transactions will and should satisfy the requirements.

143. Booysen admits in his applications that he was on another crime scene, which is further corroborated by an entry in the Occurrence Register (No 185/2011, dated 4 July 2011 by Captain Msomi). In fact, both Captain Olivier and General Booysen who it is alleged managed the activities of the SVC section of the Durban Organised Crime were present afterwards at the crime scenes in Durban North CAS 67/07/2011, CAS 69/7/2011 and CAS 71/07/2011.

144. Interestingly enough, in respect of Counts 80-93, that deal with the incidents in the abovementioned dockets; both Olivier and Booysen were however not charged. (Our emphasis)

145. Counts 8-12 are but one event or incident and there is no meaningful lapse of time between the offences. The State has to prove two underlying predicate offences for a successful racketeering prosecution.

146. If both Olivier and Booysen were charged in respect of Counts 80-93 the State would have overcome one of the issues raised by Booysen namely that he is only charged with one predicate offence.

147. In both matters, there is however insufficient evidence to sustain a conviction on these potential two predicate offences. In both instances, the high-water mark is the arrival of Booysen on the crime scene after the incidents. Booysen was therefore incorrectly charged in both sections 2(1) (f) and (e) of POCA.

148. In respect of the requirement of continuity and relatedness to show the pattern of racketeering activity, the prosecution alleged that all of the accused conducted unlawful activities on a continuous basis through the enterprise.

149. A general statement is made that Booysen, Olivier, Eva, Lockem and van Tonder, managed the activities of the SVC section of the Durban Organised Crime without giving specific detail as to how and when and proof thereof. There is also no distinct role attributed to each accused and to their responsibilities as to how they managed the affairs of the enterprise.

150. In this matter, it is alleged that the managers were both involved in the commission of offences and that they also participated or involved themselves in the enterprise as they had knowledge of the pattern of racketeering activity.

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151. Therefore if the managers managed the operations or activities of the enterprise and knew or ought reasonably have known of the activities conducted through the enterprise as well as participating therein themselves, the prosecution should have charged the managers in respect of all the killings on the basis of conspiracy and/ or accessory after the fact. When the enterprise engages in a conspiracy, the predicate offences committed by one member of the enterprise in furtherance of the conspiracy may be attributed to another member of the enterprise. .

152. An enterprise is characterised by its members having a common or shared purpose, where there is some sort of hierarchical, decision-making structure and where the enterprise is ongoing, with some continuity of personnel. The Prevention of Organised Crime Act 121 of 1998 does not define who is a manager.

152.1 In respect of who the managers of the enterprise were the prosecution charged the accused according to the Organisational Structure of the South African Police and positions they held within their own units and/or sections. Booysen was charged as a manager since he was the Provincial Commander: Organised Crime, KZN, and later on the Provincial Head: DPCI, KZN, from 2010 onwards. Olivier was the section commander of the section whilst Lockem and Van Tonder were group commanders

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within this section. Whilst all the others under their command were charged in terms of section 2(1) (e).

152.2 The rationale for the above is not clear, since the requirement for a hierarchical management structure within an enterprise was intended to be more functional than formal.

152.3 An individual need not be part of an enterprise's upper management or hold a formal position within the organization in order to be guilty. The test only required that the individual, whatever his title or status, exert some degree of control over the operation of the enterprise.

152.4 In two of the three witness statements the prosecution relies on to show the complicity of Booysen in the taxi killings, the witnesses described how accused 4, Paul Jonathan Mostert, whom they referred to as a Senior Officer met the Stanger Taxi Association members with Booysen to discuss matters relating to the murders and handing over of money.

152.5 In the Internal Memorandum to the NDPP, Advocate Shaun Abrahams, dated 18 August 2015 it was stated that the docket contained a statement of Simphiwe Cyrian Mathonsi '*wherein he explains the collusion of Stanger Taxi Association with Messrs Booysen and Mostert to protect their association...and payment made to these two police officials.*'

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152.6 Based on this evidence, Mostert should have been charged as a manager in terms of section 2 (1) (f). Mostert was incorrectly charged.

152.7 Accept for their positions they held as commanders within the police, there is no evidence to prove that Lockem, Olivier and Van Tonder managed the affairs of the criminal enterprise and they were therefore incorrectly charged.

153. In the both August 2012 and October 2015 Prosecution memoranda[18], at paragraphs 25.5 and 32 respectively, it is stated that Accused 12,17,18,19,20,21,22,23,24,28,29 and 30 in the proposed indictment are not charged with racketeering activities. It is pertinently stated that they did not commit more than one offence in the predicate offences. Accused no 19 in both indictments is Felokwakhe Thomas Dlamuka.

153.1 Dlamuka is charged with in respect of two events; to wit in counts 20-24 and 39-52, he was charged with racketeering in both indictments, and on 17.08.2012, racketeering authorization was granted against him for participation in the criminal enterprise.

[18] See annexure SM3 of Maema's affidavit.

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153.2 In the October 2015 Prosecution Memorandum, Dlamuka is incorrectly referred to as accused 17. At all times in both indictments, accused 17 is Musawenkosi Ernest Nkabane. In the October 2015 Prosecution Memorandum, the prosecution also identified Dlamuka, as part of the criminal enterprise and charged him in the indictment drafted by Advocate Noko in terms of section 2(1) (e) of POCA.

153.3 Although the NDPP, Advocate Shaun Abrahams, did not grant the racketeering authorisation in terms of section 2(1) (e) in respect of Dlamuka on 16.2.2016, advocate Jiba granted it on 17.08.2012. Dlamuka is therefore Applicant 17 in the application against Jiba and the NPA.

153.4 The October 2015 indictment has not been amended to reflect the decision of advocate Abrahams not to grant the racketeering authorisation in respect of Dlamuka.

153.5 There is no evidence in the docket that proves that Dlamuka who was part of the National Intervention Unit (NIU) participated in the affairs of the SVC Durban Organised Crime criminal enterprise.

153.6 We therefore conclude that all the accused in Table 1 was incorrectly charged.

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Not charging persons mentioned in dockets and charging of persons not involved in incidents or minimal involvement in incidents

154. It became evident during the study of the twenty-three dockets that some persons charged were not mentioned in statements in the dockets setting out the involvement of the accused; others would be mentioned at least once as being involved and now are part of a racketeering indictment of 116 counts; yet others were on the crime scene but were not charged and in many instances those persons had fulfilled a specific role such as securing the crime scene but had not been involved in the actual shooting incidents.An example is Neville Eva who has been charged with both sections 2(1)(f) and (e) of POCA. The analysis below set out some of these examples.

154.1 In Kwadukuza CAS 39/9/2008, the duty officer on the scene, A5, said that Eugene van Tonder was also on the crime scene whilst Eva (deceased) attended to the crime scene after the shooting. Van Tonder was not charged whilst Eva was charged on all the counts which included murder, the assault on the deceased's girlfriend inside the house, and the possession of a firearm and ammunition. (Our emphasis)

154.2 Similarly, in Pinetown CAS 1000/05/2009 (counts 25-29), according to the statements of Adriaan Stoltz (A6) and Eugene van Tonder (A7), Eva took

over the crime scene after the shooting. Yet Eva was not charged. (Our emphasis)

154.3 In Rustenburg CAS 1098/09/2009 only Padayachee, Mostert and Eva were charged. Mkhanya (accused 8); Mkwanazi (accused 10) and Ghaness (accused 7) were allegedly also involved but were not charged. Eva attended to the crime scene after the shooting. (Our emphasis)

154.4 In Melmoth CAS 142/11/2008, four (4) police officers made statements in which they admitted to shooting the deceased. They were Nel; McInnis of Durban Organised Crime; and Ngodwana, and Nzama of the National Intervention Unit (NIU). They also made admissions to the first officer on the scene.

154.4.1 The latter two members of NIU who admitted they shot at the deceased were not charged whilst their commander, Inspector Dlamuka, who is not linked to the offences by any witness was charged solely on the basis of his duty officer reports, A44 and A46.

154.4.2 In an Internal Memorandum from the prosecution team to the DPP, advocate Chauke, dated 29 August 2012, it is stated that *"(w)e must still decide on the addition of both Ngodwana*

and Mthethwa to the Indictment. The report so far is that they both made statements to their lawyer and they are unwilling to consider becoming state witnesses. The team's prevalent view is that the members must be added to the charge sheet." [19]Despite this knowledge of their unwillingness to cooperate both Ngodwana and Nzama who admitted that they fired were never charged.

154.4.3 There were eleven members of NIU involved in this operation and in totality plus minus thirty members formed part of this operation.

154.4.4 Olivier identified Eva, A Pillay and Mkhwanazi on the photographs but they were not charged.

154.4.5 Of the two officers who were in charge of the operation, Olivier and Captain Smith, only Smith was charged.

154.4.6 It is not clear from the docket how Padayachee, Lee and Panday are linked to the offences.

155. Bongani Zondi was charged on counts 13-19 in Mandeni CAS 76/09/2008. He was only charged in respect of one incident and not charged in terms of section

[19] See the DPP SG JHB office file

2(1) (e) and (f). There are no independent witnesses and or other evidence such as video surveillance that place him at the crime scene.

156. The prosecution relies on the statements of the accused to place him at the crime scene.According to their statements, Capt Eva, Lockem, Mdlalose, Makhanya, Zondi and Mkhwanazi took guard outside while Mostert, Stolz and Naidoo entered the house. He had no role in what transpired inside the house.

157. In counts 58-61 that relates to the killing of the deceased, Lindokuhle Phillip Nzuza, Mostert, Lockem and Naidoo are charged but not for the consequential charges such as the possession of the firearm, ammunition and defeating the ends of justice. The exception is Mostert. Different accused are charged such as Nel, Padayachee and Eva who are not linked in the docket to any of the offences.

158. Asogram Pillay cited in both indictments as accused no 29 is not charged with any offence.

Lack of charges

159. In the August 2015 Prosecution Memorandum, it was also alleged that Mostert and Booysen "*were planning to kill Superintendent Zethembe Chonco.*" The prosecution places heavy reliance on the statement of Mathonsi, who is deceased and who made a statement based primarily on hearsay as evidence that will prove the complicity of Booysen in the murders. Yet they have not properly charged in terms of that statement.

159.1 The prosecution chose not to charge Mostert and Booysen with conspiracy to commit murder in respect of Superintendent Chonco.

159.2 They were also not charged with corruption in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

159.3 The prosecution did not charge the Stanger association as being part of the enterprise in that the association and its members colluded with the members of the Durban Organised Crime in particular Booysen and Mostert to protect their association.

159.4 Neither have Sandile Zondi and Bongiswe Zondi, who negotiated on behalf of the association with Mostert and Booysen and made payments on behalf of the association been charged.

160. In three matters, the police alleged they also found explosives in addition to the unlicensed firearms the deceased used to shoot at them to wit Khamashu CAS 629/04/2009, Khamashu CAS 116/07/2008 and Khamashu CAS 314/11/2008.

160.1 None of the charges against the accused for illegal possession of unlicensed firearm and defeating the ends of justice for planting the firearms next to the deceased's bodies mentions the explosives.

160.2 There are also no separate charges against the police in terms of the Explosives Act 15 of 2003.

160.3 It appears that the Asset Forfeiture Unit in KZN has done an asset analysis to determine if there were any proceeds of crime that the accused laundered and for the prosecution to consider whether they could add a money laundering charge in the indictment. It is not clear from the office files and dockets if this analysis was concluded and the outcome thereof. No money laundering charges were added.

Charging persons on a single event in a racketeering case

161. Since this case was a racketeering investigation with a focus on the management and participation of the members of the SVC Durban Organised Crime in the criminal enterprise, we looked at the role of the persons charged on the basis of a single event and whether it could be argued that their inclusion in the case amounts to misjoinder. Table 4 lists the persons charged, the charges and the events/incidents.

TABLE 4: *Accused not charged with racketeering*

ACCUSED NOT CHARGED IN TERMS OF SECTION 2(1)(e) and (f) of POCA				
ACCUSED	DETAILS	COUNTS	DOCKET	INCIDENTS
12	BONGANI ZONDI	13-19	MANDINI CAS 76/09/2008	1
17	MUSAWENKOSI NKABANE	19	UMKHOMAAS 235/10/2008	1

18	NICO CROUSE	19	UMKHOMAAS 235/10/2008	1
19	FELOKWAKHE DLAMUKA	20-24, 39-52	DURBAN CENTRAL CAS 185/2/2009; MELMOTH CAS 142/11/2008	2
20	SANDILE STANLEY MFENE	20-24	DURBAN CENTRAL CAS 185/2/2009	1
21	SIBONGILE SIKHUMULUME	20-24	DURBAN CENTRAL CAS 185/2/2009	1
22	VINCENT AUERBACH (deceased)	3-7	KWADUKUZA 39/9/2008	1
23	PETER WILLIAM GEORGE	66-69	ESIKHAWINI CAS 3/4/2010	1
24	WILBARD M THABETHE	66-69	ESIKHAWINI CAS 3/4/2010	1
29	ASOGRAM PILLAY	0	0	0
30	MUKESH PANDAY	39-52, 102-103	DURBAN CENTRAL CAS 185/2/2009; ESCOURT CAS 34/08/2008	2

162. Of the eleven accused who were not charged in terms of sections 2(1) (e) and (f) of POCA, eight are charged with only one event/incident and Asogram Pillay was not charge with any offence in the two indictments. After a diligent search of the evidence, we did not find any evidence linking Asogram Pillay to any incident let alone any offence. It is a mystery to us why he is an accused before court.

163. Accused 19, Felokwakhe Thomas Dlamuka and Accused 30, Mukesh Panday, were charged in respect of two incidents/events.

164. Accused 17, Musawenkosi Ernest Nkabane and Accused 18, Nico Crouse, were charged with only one count of murder.

165. In POCA indictments, the Accused cannot successfully, claim that there is a misjoinder of offences or defendants if they are alleged to have participated in the same underlying pattern of racketeering. In those instances, the accused would fail to demonstrate any prejudice that would outweigh the benefit afforded to efficient judicial administration by a single trial.

166. In the USA, courts have held that the fact that all the defendants are not charged with the RICO count is immaterial. In order to do so the Government would have to prove that each either committed two predicate offenses (§ 1962(c)) or conspired to do so (S1962(d)). As long as the indictment alleges that all the defendants were in some way involved in a common scheme or plan with respect to the enterprise, joinder is proper.

167. The prosecution does not at any stage explain how the accused that were not charged with racketeering knowingly performed activities helpful to the operation of the criminal enterprise. There is in any event no evidence in the dockets to substantiate an averment that the accused performed activities helpful to the operation of the enterprise as it can be argued that they acted within the course and scope of their work. Furthermore , there is no evidence that they acted with a common purpose in furtherance of the objectives of the enterprise.

167.1 Dlamuka, Mfene and Sikhumulume are members of the National Intervention Unit (NIU) which is mandated to assist the police with operations. There is no evidence that show that they in any manner

conspired with the members of the Durban Organised Crime to commit offences.

167.2 Similarly, both Crouse and Nkabane who are charged with a single count of murder are from the Port Shepstone Organised Crime and there is no evidence that show that they in any manner conspired with the members of the Durban Organised Crime to commit offences. In fact, none of the members of the Durban Organised Crime was part of this operation.

168. Another aspect to take into consideration is the potential prejudice to the accused who are charged as above. The remainder of the accused have been charged with multiple counts of murder and other charges. In United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), the First Circuit reversed the convictions of two defendants on a RICO conspiracy count and then found that it must also reverse the defendants' convictions on two independent substantive counts. The court reasoned that it was too prejudicial to the defendants, whose involvement in the enterprise was limited, to be tried on the two substantive counts when there was extensive, unrelated evidence introduced at the trial involving a massive race-fixing RICO conspiracy.

169. We therefore conclude that it would not be in the interest of justice to retain the remainder of the accused charged with single events in a big racketeering prosecution of this nature.

Charging of deceased persons

170. Abrahams charged Neville Eva with management of the enterprise in terms of section 2(1) (f) of POCA (see Table 1). Vincent Auerbach was charged with a single event (see Table 4). Both are deceased. We are of the opinion that exist no good reason for charging the deceased persons.

171. Warrant Officer RC Maharaj was killed in September 2011, Captain Neville Eva in November 2012 and Captain Vincent Auerbach in January 2013.

172. Maharaj was never charged and is not mentioned in any of the documents.

173. Although Eva died months after the first racketeering authorisation, he remained charged with forty-four counts that includes the racketeering charge in terms of section 2(1) (f) of POCA. Therefore, it is not only that Eva's name appears on the racketeering authorisation but he is also charged.

174. Auerbach who died in 2013 also remained charged in terms of one incident (counts 3-7).

175. Though it is possible that there could exist a compelling reason for naming an unindicted person in an indictment, it should be used sparingly since it can cause reputational injury. More importantly in terms of the accused's due process rights at trial this process will not provide that person with a forum in which to vindicate

his rights. If there exist compelling reasons for doing so, evidence can be led at trial of a person's participation by designating him anonymously as an "other person" or as "Person A" or with numbers.

176. Similarly, although it can be argued that deceased persons do not have constitutional rights, they leave behind families; possess a legacy and a memory that might deserve protection from being linked to criminal activity.

177. A decision at the trial that the accused were not guilty of the crimes will not vindicate the deceased since the court will not make a finding in respect of them.

178. If the prosecution made the choice not to charge or mention Maharaj who participated in operations in Kwadukuza CAS 115/3/10, Durban Central 185/2/09, Berea CAS 288/5/08 and Melmoth CAS 142/11/08, there exist no rationale from the responses to the applications or the dockets, for charging Eva and Auerbach who are deceased.

The purpose of the criminal enterprise

179. The prosecution in their memoranda, indictments and summary of substantial facts alleged that the criminal enterprise operated primarily for monetary gain and participated in pattern of racketeering activities of corruption, violence and murder.

180. As proof thereof, the prosecution team obtained a comprehensive list of the rewards awarded to police members including the accused which ranged from a mere R10 000.00 to R95 000.00. A copy of this list is attached as Annexure "H"

181. Booysen who is charged with seven counts, namely; contravention of section 2(1)(f); contravention of section 2(1)(e) of Act No. 121 of 1998, counts 8 – 12 (predicate offences) relating to two counts of murder, unlawful possession of firearm and ammunition and defeating the ends of justice, only received a once off sum of R10 000.00.

182. It is thus absurd to suggest that a manager of a criminal enterprise would involve himself in killings so that he can be rewarded for a mere sum of R10 000.

183. Since a National Committee decides the awarding of the rewards and or certificates over which nominated persons and their nominees have no control over their decision, makes it sound even more ludicrous.

184. Mostert who is not charged as a manager of the criminal enterprise but simply for participation in the affairs of the criminal enterprise received a substantial amount more than Booysen.

185. Padayachee who was charged with several predicate offences received none.

186. Some of the rewards were also received for cases investigated before 2008.

187. Many members from the SVC section of the Durban Organised Crime Unit also received awards and certificates but were not charged.

188. The lack of money laundering charges and the failure to conduct a proper financial investigation is apparent from the indictment and evidence. If there was an investigation of this nature the failure to reveal it, is prejudicial to the defense of the accused.

189. In our view, the prosecution will fail to prove that the purpose for the establishment of alleged criminal enterprise was for financial gain and the awarding of certificates.

Concluding remarks on the racketeering offences

190. It is clear from our discussion that the prosecution will not succeed in proving the racketeering offences for the following reasons:

190.1 There is no evidence to establish the existence of an unlawful enterprise separately from the existence of a pattern of racketeering activity.

190.2 The prosecution simply had several cases that they alleged established the pattern of racketeering activity and then attempted to show through the statements of Aiyer, Danikas, Mathonsi, Mkhize and Ndlondlo that an enterprise existed. The case law is clear that an enterprise cannot simply be the undertaking of the acts of the racketeering. A racketeering

indictment should focus on the entire enterprise, rather than individual participants in specific criminal acts.

190.3 The statements do no prove that an organised criminal group existed that acted in common purpose and conspired together on a continuous basis to commit murder.

190.4 The statements do not prove that each of the managers in the criminal enterprise played a defined role in its operations and pursued their common goal to commit murders for profit on an on-going basis as a cohesive unit.

190.5 By simply choosing the managers of the enterprise according to the Organisational Structure of the South African Police and positions they held within their own units and/or sections, the fallacy of this approach was exposed. Despite Mostert's alleged 'managerial role', the prosecution could not charge him since he was not a manager in the police.

190.6 If one has reference to the evidence as contained in the dockets, the alleged enterprise was on the verge of extinction. In 2011, the accused are only charged with two racketeering acts as compared with nine racketeering acts in 2008. To show a continuity the racketeering acts must include a specific threat of repetition extending indefinitely into the future.

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D. INCONSISTENCIES AND MATERIAL CONTRADICTIONS IN INDICTMENT, PROSECUTION MEMORANDA AND SUMMARY OF SUBSTANTIAL FACTS VIS-À-VIS THE EVIDENCE IN THE DOCKETS

Lack of evidence against the deceased

191. The prosecution team alleged in the October 2015 Prosecution Memorandum in their analysis of the modus operandi of the accused that the tracking or tracing of the suspects for questioning happened without shreds of evidence linking them to any offence. They also alleged that the accused also killed civilians and /or suspects without any tangible evidence against them and in the absence of warrants of arrests for the suspects.

192. This is misleading and contrary to the evidence in the dockets. The evidence in the dockets clearly shows that the deceased were sought on various serious violent crime cases.

192.1 In respect of the dockets, KwaDuzuka CAS 39/09/2008, Mandeni CAS 76/09/2008, Howick CAS 106/09/2008 and Umkhomaas 235/10/2008 (Counts 3-19), it is incorrect to aver that there was no evidence to link the deceased to any offence.

192.1.1 In the docket, Maphumulo CAS 99/9/2008 (the murder docket of Superintendent Chonco), there is a statement under oath of a witness. He that alleged that he was with two other persons at the taxi rank in

Stanger when Nathi Mthembu, the deceased in Mandeni CAS 76/09/2008 and from the Maphumulo Taxi Association came up with an idea to kill the police officer who was investigating taxi violence cases. One of the persons with him was Kopolota Ntuli, the deceased in Mandeni CAS 76/09/2008. Mthembu said that he was going to organise the hitmen to kill Chonco.

192.1.2 The cellular phone records provides corroboration for this witness and identify the following persons whose cellular phones picked up towers/base stations that provided reception to the crime scene, Nathi Mthembu, Kophalathu Ntuli and Lindelani Buthelezi who is now the deceased in KwaDukuza CAS 39/09/2008.

192.1.3 In addition to this evidence, there is the statement of the police officer who was with Chonco and who survived the attack on them. He identified three (3) of the four men who fired at them with AK47'S as Kopolathu Ntuli, Lindelani Buthelezi and Mdu Mkhize.

192.1.4 Seated in a taxi,was a member of the public who also saw Mdu Mkhize, now the deceased in Umkhomaas CAS 235/10/2008, with a firearm close to the crime scene.

192.1.5 The witness in 186.1.1 also identified the deceased who was killed on the scene by the police officer who accompanied Chonco. This deceased was found with an AK 47 between his legs.

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192.1.6 In addition to the evidence under oath, the police also had a warrant of arrest for the deceased Kopolato Nthuli in another murder case, Maphumulo CAS 2/02/2005.(Our emphasis)

192.2 In respect of the dockets, Durban Central CAS 185/02/2009, Pinetown CAS 1000/5/2009 and Rustenburg CAS 1098/09/2009 (Counts 20-34), it is also not correct to aver that there was no evidence linking the deceased to any offence.

192.2.1 These dockets relate to the murder of the ex-police officer Mbongeleni Wellington Zondi who was assassinated at Road 2403, Z Section in Umlazi. He was shot with an AK 47 as well as a 9mm calibre firearm, whilst driving in his Toyota RunX vehicle. His murder was investigated in the docket, Bhekithemba CAS 113/1/2009.

192.2.2 On the day of the assassination, information was received by an officer from Organised Crime as to the identity of the assassins as well as who the orchestrators of the assassination were. Information to hand indicated that Bongani Mkhize he was one of the orchestrators of the assassination.

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192.2.3This information was later confirmed by Mswayo Mkize as well as Spe Mhlongo after their respective arrests. Mswayo Mkize made a warning statement confession and pointing out (A8-A10 of the docket). The statements of Mkize implicated the deceased, Bongani Mkhlzi (Durban Central CAS 185/02/2009; counts 20-24) in the conspiracy to kill Zondi. They also identified Sibongile Badumile (Pinetown CAS 1000/05/2009, counts 25-30) and Sfiso Ndimande (Rustenburg CAS 1098/09/2009, counts 31-34) who were present when they planned to kill Zondi. The motive for the murder was that they believed that Zondi gave the police (Booysen) information on the whereabouts of Magojela Ndimande who was killed in Howick CAS 106/09/2008.

192.2.4In the murder docket of Zondi, Bhekithemba CAS 113/1/2009, there is a statement of a witness who saw persons in a Maroon Polo shooting at the vehicle of Zondi. Later information received confirmed that the suspects were indeed driving a Maroon Polo Playa motor vehicle with registration ND 601 862. A few minutes later, the said Polo was recovered outside a house (number U 424) and it was identified as a hijacked vehicle. LCRC Durban lifted fingerprints and later positively identified the prints in the vehicle as those of Sfiso Ndimande, the deceased in Rustenburg CAS 1098/09/2009.

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192.3 In both the 'Chonco' and 'Zondi' murders there were *prima facie* cases against the suspects and the averment by the prosecution in their memorandums and summary of substantial facts that there was no tangible evidence or not even a shred of against the deceased, is misleading.

192.4 In respect of Berea CAS 288/05/2008 (counts 35-38), the deceased Thabo Sunshine Msimango was arrested on Brighton Beach CAS 343/1/08 on a charge of armed robbery. He later escaped from members of the unit and a docket, Durban Central CAS 1641/01/2008, was registered.

192.5 In Melmoth CAS 142/11/2008 (counts 39-52), the deceased Bongani Velaphi Biyela was wanted on Maphumulo CAS 30/11/2008 on charges of murder, attempted murder and armed robbery. In respect of Brighton Beach CAS 243/01/2008 he was wanted on a charge of armed robbery. Khanyisani Biyela was also killed. According to the police, this person shot at them from one of the rondavels through the window. They then moved to the rondavel and fired one round in the direction of the suspect as more shooting erupted.

192.6 In Phoenix CAS 377/08/2009 (counts 58-61), the deceased Phillip Nzuza was wanted in cases forming part of the project, Operation Bulldozer, Durban North CAS 440/03/2009 (Armed Robbery), Phoenix CAS 872/06/2009 (Armed Robbery), Umbilo CAS 393/06/2009 (Armed Robbery),Umbilo CAS 394/06/2009(Armed Robbery and Attempted Murder),Umbilo CAS

494/06/2009(Armed Robbery), Sydenham CAS 75/07/2009(Armed Robbery) and Greenwood Park CAS 117/07/2009 (Armed Robbery).

192.7 In KwaMashu CAS 698/11/2009 (counts 62-65); the deceased Sakhile Prince Thabede was investigated in the docket Umhlali CAS 150/08/2008 (Armed Robbery). The deceased Sakhile Thabethe, alias "Mtako" was linked to the abovementioned matter through information from reliable sources and he was also implicated by Accused 1, Nqaba Mdluli in a statement dated 26.11.2009.

192.8 In Esikwanini CAS 3/04/2010 (counts 66-69), the deceased was Kwazi Wiseboy Ndlovu. The police were investigating the matter relating to Westville CAS 263/2/2010 in which nine prisoners escaped from Westville Prison, Medium A, 7™ Floor on 21.02.2010. They were following up on information of the suspect Tilili Mzimela who escaped from Westville. On their arrival at house No J63, they introduced themselves as the police and they entered the house. The deceased was killed. Mzimela later on made a statement in which he states that his family rented out this property to the Ndlovu family.

192.9 In Esikwanini CAS 50/09/2011 (counts 94-97), the deceased Qinisani Philangenkosi Gwala ('Gwala') was sought for the murder of a police officer in Inyoni CAS 158/08/2010. In the latter docket, a witness identifies the persons who came to his place with the items stolen from the police officer. The informant went with the police to the house of the deceased where he was pointed out.

192.10 The deceased also had a pending case for the illegal possession of firearm in Esikhawini CAS 263/8/2011. The offence was committed days before the police came to his house.

192.11 After the members of Cato Manor left the crime scene, the local police found a pump action firearm lying between the mattress and the base in addition to the firearm the police alleged he used to shoot at them. This firearm was booked into SAP 13 as per SAP 13/667/201.

192.12 On the police CRIM System, there are several matters against his name, in Esikhawini CAS 423/10/2002 on a charge attempted murder, Esikhawini CAS 196/12/2002 on a charge attempted murder, Esikhawini CAS 484/12/2002 on a charge of attempted murder, Esikhawini CAS 291/10/2002 on a charge of attempted murder. Esikhawini CAS 162/12/2002 on a charge of attempted murder and Esikhawini CAS 139/6/20012 on a charge of attempted murder.

192.13 In Escourt CAS 34/08/2008 (counts 102-103), the deceased Muzi Sanele Majola was wanted on a number of ATM bombings, Nyoni CAS 41/4/2008, Nyoni CAS 41/4/2008 and MAPHUMULO CAS 2/7/2008.

193 This analysis clearly shows that all of the deceased either had cases pending or were being sought in connection with cases in order to be questioned and or

charged and that the averment that the police traced or tracked the deceased without there being a shred of evidence against them is misleading.

Killing of Innocent civilians which the police alleged were suspects

194 In the Prosecution Memoranda, the prosecution also alleged that the police killed innocent civilians and would then allege that they were suspects.

195 The deceased, Khanyisani Biyela and Kwazi Wiseboy Ndlovu were not suspects sought by the police. According to the accused, Biyela fired at the police through a window of a rondavel when they went to arrest a family member at the reserve. The police entered the rondavel and he was fatally wounded. The cartridges found in the rondavel was positively linked to the firearm the accused alleged he fired at them. The firearm had a serial number but no investigation was done to determine ownership.

196 In respect of Ndlovu, the accused were following up on information of the suspect Tilili Mzimela who escaped from Westville under the docket, Westville CAS 263/02/2010. On their arrival at house No J63 they introduced themselves as the police and they entered the house. They alleged that when they went inside a boy fired a shot at them and Warrant officer G. Padayachee returned fire and shot the boy. He shot him four times with an R5 rifle. Padayachee left the crime scene.

197 In respect of the latter matter we are of the opinion that the investigation should be concluded and a decision be made whether Padayachee shoud be charged.

Lack of search and arrest warrants for the deceased

198 The prosecution also alleged in the Prosecution Memoranda that the Accused did not have any arrest and/ or search warrants for any of the suspects. This is also misleading as there was information in some of the dockets that details applications for warrants of arrests. The following dockets contain information about these warrants of arrest:

198.1 The police had a warrant of arrest for the deceased Kopolato Nthuli in another murder case, Maphumulo CAS 2/02/2005 (See 28.1.3 above).

198.2 It is logical that in Westville CAS 263/2/2010 in which nine (9) prisoners escaped from Westville Prison, Medium A, 7™ Floor on 21.02.2010, that there would have been warrants of arrests for the escapees.

198.3 In the partly heard High Court matter, the State versus Nhlanhla Lucky Mhlongo, Case number CC174/2009, a J50 warrant of arrest was applied for and issued.

198.4 After LCRC Durban lifted fingerprints and later positively identified the fingerprints in the vehicle as those of Sfiso Ndimande, the Umlazi magistrate issued a warrant for his arrest (See 28.3.4 above).

198.5 A warrant of arrest was obtained for Mdu Mkhize from the Stanger Court (count 19).

The accused would kill and shoot the victims and thereafter place a firearm next to the deceased

199 The prosecution team alleges that all of the firearms found were planted by the accused. In all but two of the dockets, firearms were found next to the deceased.

200 In all of the matters, there is no evidence to substantiate the averment that the police placed the firearm next to the deceased, except in the docket of Kwamashu CAS 698/11/2009 in which the girlfriend of the deceased, Denyse Hurley, alleged that she saw the police placed a firearm next to the deceased. There are however contradictions between her first and second statement she deposed to and between her statements and that of the two accused who were arrested before the deceased, A21 (Nqaba Mdluli) and A22 (Nkanyiso Ntenza).

201 They alleged that it was Mostert who came to look for the firearm in the Quantum vehicle in which they were seated. A21 saw Mostert take out a .38 from under the seat. A22 overheard Mostert asking the other police officers for his 'spook'. It appears highly unlikely that Mostert would do this in front of the co-accused of the deceased.

202 It also appears that Hurley changed her version of the events to fit in with theirs. Initially she said that the white male instructed the Indian male to shoot. She never said she saw him leaving and then returning. She also pertinently said Mostert came in afterwards and asked what happened. She never said he came in with the firearm and placed it in the room. In her 2012 statement, she refers to more than one white male who went into the bedroom and placed the firearm there.

203 In the majority of the matters, where there are witnesses who are family members and who did not witness the shooting, they would allege that the deceased did not have any firearm or explosives.

204 There is no other independent objective evidence that firearms were placed next to the deceased.

205 These allegations should be evaluated against the totality of the evidence in the docket. There is evidence in many dockets of primer residue found on the hands of the deceased.

206 There is also evidence of spent cartridges found in the vicinity of the deceased that were linked to the firearm the accused allegedly used to fire at the police at the time of the incident.

207 The prosecution team alleged that primer residue may be deposited within a two metre radius when a firearm is discharged. It is argued that primer residue may be deposited on the deceased's bodies. There are no reports in the dockets that show how this could have happened in each docket. The prosecutor is not an expert and cannot be a witness in his own matter.

208 In an attempt to counter the defence that the deceased fired at them and were in possession of firearms, statements were obtained from experts such as Steyl, Captain Mangena and Dr Reggie Perumal. Steyl was initially appointed as the defence's expert in some of the dockets.

209 In 2012, he was appointed by IPID to do reconstructions of some of the crime scenes and is now to be called as the prosecution's witness.

210 All of these experts relied on crime scene photographs, post mortem photographs and other statements in the docket. Their evidence should be evaluated against the evidence of the pathologists and ballistic experts that examined the bodies of the deceased and exhibits.

211 In Mandini CAS 76/09/2008 the high water mark of Steyl's statement is that he alleged that the police fired at the suspects when they were already in a lying position. He says that the deceased, Mzamani Johannes Ntuli, death register 347/2008 sustained multiple gunshot wounds. The police officer concerned is not denying that he shot at the accused while they were lying. According to Naidoo as they entered the room, "a black male alighted from the cupboard armed with a pistol." Stoltz fired a shot. Naidoo fired several shots towards the suspect. The suspect fell to the floor. The suspect still had the pistol in his hand and Naidoo continued to fire at the male.

E. LACK OF PROPER INVESTIGATIONS

Racketeering offences

212 It was evident after the analysis of the dockets that there were serious concerns regarding the quality of the investigation into the Racketeering offences and the underlying Predicate offences. Investigations of this nature ordinarily take more than five (5) months to be finalised. In cases of this nature, a racketeering docket will be registered that will document the investigation. This did not happen in this case. There is consequently no investigation done that shows how this case was investigated. There is thus no objective record of the investigation.

213 In the Danikas statement the allegation is that, the criminal enterprise has been in operation for a longer period than what is alleged in the indictment. If the

purpose of a racketeering investigation is to look at the life and continuity of the criminal enterprise and how it evolved over a period, the allegations in the Danikas statement and corroboration thereof should have been fully investigated which has not been done at all. This once again show that there was a haste to obtain the racketeering authorisations since an investigation focused on the life and continuity of the criminal enterprise should have been done over a long period.

214 Racketeering investigations focuses on the entire enterprise, rather than individual participants in specific criminal acts, which appears, was the focus in this matter. Consequently, there were no investigations to determine the nature, structure and scope of the enterprise as well as the relationship of the members to the enterprise. This explains the lack of cellular phone evidence and an analysis thereof to show a pattern of communication between the members. This could have shown not only how they communicated at strategic times, before, during and after the incidents, but also their communication with Booysen.

215 A racketeering investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its associates, its past acts, intended criminal goals, and its capacity for harm. There was no investigation into the size and composition of the group that constituted the criminal enterprise but simply a focus on individual participants engaging in specific criminal acts.

As a result, the investigation is unable to provide a proper analysis of exactly how many cases this group investigated over a period of four (4) years, its outcomes and why there was a focus on twenty-three (23) dockets; nine (9) in 2008, seven (7) in 2009, three (3) in 2010 and two (2) incidents in which four (4) dockets were registered in 2011. If the reason for the existence of the criminal enterprise was to obtain monetary gain or profits through racketeering activities, the decline in the racketeering activities is peculiar. A criminal enterprise does not necessarily end when one or more of the participants are prosecuted, since they are motivated by the monetary gain or profits. The failure to properly investigate the size and composition of the group involved and its associates explains the lack of charges against the Stanger Taxi Association that allegedly entered into a corrupt relationship with the members of the SVC Durban Organised Crime.

216 Investigations of this nature ordinarily employ informants and confidential sources, financial investigations, monitoring of electronic communications and section 252 A operations especially if the allegation is that the criminal enterprise can be hired to kill for monetary benefits. It appears that none of these investigative techniques was employed and would explain why there are no money laundering charges.

217 It appears that during the arrests of the accused searches and seizures of their homes were conducted. There is no indication that there were any searches and

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seizures at the offices of the accused in particular to search for documents, operational plans, meeting minutes and any other relevant information on their computers. It appears that the police seized several items when they arrested the accused at their homes such as computer disks, printers, cellular phones etc. It is not clear what if the items were investigated and if indeed so what are the outcomes.

Predicate offences

218 There is a lack of objective eyewitness accounts of incidents. The prosecution team places reliance on statements made by the persons charged. It appears that the police and or IPID/ICD made very little attempt to find witnesses that saw the incidents happen.

219 In all of these dockets, no identification parades were held. In counts 3-7, the girlfriend of the deceased alleged that she was assaulted by a white male. The absurdity now is that all of the accused Mostert, Naidoo, Makhanya, Auerbach and Eva are charged with the assault on her whilst Eva was not even in the house. In Melmoth CAS 142/11/2008, two witnesses alleged they were assaulted by the police. They were only taken to a doctor for a medical report in 2012, which means that the report would be of no value in a trial. No identification parades were held and all the accused were also charged for the assault on the

witnesses despite the fact there is evidence that more than thirty(30) officers were on the scene.

Ballistic evidence

220 In many dockets, the custodial chain statements are still outstanding. In Kwadukuza CAS 39/09/2008, counts 3-7, it is not clear what had happened to the exhibits that were collected by LCRC. Only one (1) spent cartridge found later by a duty officer was analysed. IPID/ICD also raised this issue in a letter and wrote a letter to the ballistic unit to enquire as to what happened to the exhibits: "...above report in our case docket only refers to a spent cartridge case that was examined. A letter with reference Durban LCRC 167/09/2008 refers to five cartridge casings, two bullet Heads and one firearm delivered to your office for analysis. "They enquired whether the ballistic unit received these exhibits. It is not clear from a reading of the docket if this issue of the lost exhibits were ever resolved.

221 In Howick CAS 106/09/2008, residue tests were done on the hands of the deceased and police officials (See A18; LAB 134428/08(1), HOWICK 106/9/2008). Primer residue was found on the test sample marked inter alia "B638RIGHT".There is a statement from ZONDI (A14), that simply stated he collected 11 spent cartridges, 86 live rounds, five rifles, three pistols and five magazines and he conducted primer residue tests on two deceased and on the

policeman involved. It is not clear on whose hands the primer residue was found and why if several police officers admitted they shot he took primer residue on the hands of one (1) police officer.

222 In Mandeni CAS 76/09/2008, it is not clear from the evidence in the docket on whose hands the primer residue were found. The test samples marked inter alia "D173RIGHT" and "C902RIGHT" tested positive for primer residue. There is no report from LCRC.

223 In many dockets, the firearms of the individual members were not tested to link it to the bullets that killed the deceased. In Kwadukuza CAS 39/09/2008, Mostert admitted that he fired yet it appears that his firearm was never tested. IPID/ICD also enquired "whether the following fire arm, ***a 9mm with serial number Q119840,*** was received by your office and if it was compared to the exhibits forwarded to your office for analysis."

224 In Mandeni CAS 76/09/2008, the ballistic investigation is also incomplete. Several of the cartridges, bullet heads and fragments found on the crime scene are not linked to any firearms. It appears that the firearms of the police were not seized at that time and sent for ballistic testing and comparison. The ballistic expert, Steyl, appointed by IPID, also confirms this. He says that the ballistic statement in this case is not complete '*as none of the shottists' firearms were connected with the cartridge cases and exhibits at the scene.*'

225 In some of the dockets, there are mistakes in some of the ballistic reports and some reports are not filed in the docket. In Mandini CAS 76/09/2008, it is stated in the report that the cartridge cases mentioned in 3.1 were fired in one firearm. This is a typographical mistake in the ballistic report and should be corrected, 3.1 refers to a firearm, one (1) 9mm parabellum calibre lew model z88 semi-automatic pistol with serial number obliterated and not cartridge. In Durban Central CAS 185/02/2009, the ballistic report with reference number LAB 18592/09 (5) was not found. In the same docket there appears to be mistakes in the reports. In the same docket a second set of bullets from the mortuary are missing.

226 In some of the dockets, either the firearms found in possession of the deceased had a serial number or in the case of obliterated serial numbers, some of the numbers were retrieved through the etching process. No investigation was done to determine ownership or how the firearm possibly came in possession of the deceased. Where an investigation of this nature was done in one incident, it proved that there was no evidence to connect the accused to the firearm the prosecution team alleged they planted. In Mandeni CAS 76/09/2008, the second firearm found, a CZ 75 9mm parabellum with serial number G2921 was stolen at a police station from the SAP 13 safe and appears to be one of several that went missing from that police station (ULUNDI CAS 185/7/2010). No suspects were

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identified. It therefore begs the question how the State is going to prove that the accused planted this firearm.

227 The whole SVC Durban Organised Crime Unit's firearms were however seized on 25/1/2012. It is unclear whether it were compared with the spent cartridges on all the other crime scenes and if indeed so, where is that report?

Inquests

228 In the October 2015 Prosecution Memorandum it is alleged that *'(s)ome of these cases ended up as informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, placing firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting and that the killings were justifiable." The acts of tampering ....were cover ups of their unlawful activities."*

229 Despite the averment, several inquests were finalised to wit;

229.1 KWADUKUZA CAS 39/09/2008, Inquest No 320/09, held on 16.4.2010, deceased Lindelani Buthelezi. Magistrate S Maharaj has made a 'no' finding; Counts 3-7 refer.

229.2 BEREA CAS 288/05/2008, Inquest No 556/10, held on 17.8.2010, deceased Thabo Sunshine Masimango. Magistrate has made a 'no' finding; Counts 35-38 refer.

229.3 ESIKHAWINI CAS 3/4/2010, deceased is Kwazi Ndlovu: According to the investigation diary, C1 25.3.2012, the history of the case was obtained from the ICD offices, Durban, and it was established that the case docket could not be traced. The parent, Ndlovu, was interviewed and the mentioned that the case was finalised as an inquest after a ruling was made by the court that no one could be responsible for the death of the victim; Counts 66-69 refer.

229.4 KWAMASHU CAS 116/7/2008, Inquest No 95/2008, held on 9.07.2010, deceased is Mfanafuthi Armstrong Zwane. Magistrate has made a 'no' finding; Counts 98-101 refer.

229.5 ESTCOURT CAS 34/08/2008, Inquest No 26/2010, held on 22.3.2010, deceased is Muzi Sanele Majola. The magistrate, Michelle Geldenhuys, Magistrate has made a 'yes' finding; on the part of Inspector Nel who shot the deceased (See A31 of the docket); Counts 102-103 refer.

229.6 KWADUKUZA 115/3/2010, the deceased is Ntlanhla Lucky Mhlongo. It is not clear if an inquest was finalised:

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There is a letter from branch commander to the SPP requesting that an inquest be held. In the investigation diary on 1.4.2010 at C5, the investigation officer said he referred the Inquest documents to court and he filed return of service at A12. At C5 dated 3.5.2012 it appears that when a person SMITH went to uplift the inquest documents he found that the docket /Inquest was returned with queries and never returned. Captain Eckard who is now on pension signed it. Last entry in docket is dated 2.8.2012; Counts 113-116 refer.

229.7 MELMOTH CAS 142/11/2008, Inquest No 67/2009, of the deceased, Bongani Biyela and Khanyisani Biyela. Magistrate F B Memela made the finding that the "Police returned fire in self-defence"; Counts 39-53 refer.

230 In addition, these dockets were also investigated by IPID/ICD who are responsible for investigating wrongdoing on the part of the police. If they suspected any wrongdoing on the part of the police there would have been a recommendation to the immediate commander for an enquiry to be held. It is important to pose the question if the ICD/IPID made any such recommendations and in particular, what did they do in respect of the matters referred for inquests.

231 Additionally, the NPA will prosecute police officers who conduct themselves unlawfully. It is important to pose the question if the ICD/IPID referred any of

these matters for a decision with their recommendations and what the outcomes were.

232 If the prosecution had any further evidence, in particular that the firearms were planted by the accused, requests should have been made to have the inquests reopened in terms of Section 17(2) of the Inquests Act 58 of 1959. It is unclear if there were any applications of this nature and if inquests were reopened.

F. CONCLUSION

233 After a careful evaluation of the evidence and the other relevant material placed at our disposal, it is clear that there are currently two sets of authorisations in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998, relevant to this matter.

234 The first, are the authorisation issued by Advocate Jiba, the acting NDPP on 17 August 2012.

235 These authorisations are applicable to all the accused persons originally charged with racketeering except accused number 1, Johan Booysen. It was only in respect of these authorisations to prosecute Mr Booysen that the High Court reviewed and set aside the authorisations of Advocate Jiba.

236 The second are the authorisations issued by Advocate Abrahams on 13 February 2016.

237 Table 1 of this memorandum, indicates all the accused in respect of the authorisations issued by Advocate Jiba on 17 August 2012 as well as all the accused in respect of the authorisations issued by Advocate Abrahams on 13 February 2016. Both sets of authorisations are currently the subject of litigation in the High Court in KwaZulu-Natal.

238 This memorandum is accordingly directed at the validity of the authorisations issued by the acting NDPP, Advocate Jiba and the NDPP, Advocate Abrahams.

239 After a careful evaluation of the evidence contained in the dockets, the pleadings in the various applications brought in this matter, we conclude that there was insufficient evidence placed before the Acting NDPP, Advocate N Jiba and NDPP, Advocate S Abrahams to justify the authorisations to institute a prosecution in terms of sections 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act 121 of 1998.

240 Despite the prosecution memoranda and the statements that were placed before the Acting NDPP, Advocate N Jiba and the NDPP, Advocate S Abrahams these were not sufficient to implicate the accused in the alleged racketeering offences.

The obvious credibility challenges that the prosecution would face in respect of the evidence of Col Aiyer in our view would be insurmountable during a criminal trial.

241 In respect of the potential witness Danikas at the time the NDPP, Advocate S Abrahams issued the authorisations the statements were still unsigned and no certified translation of the Greek statement has to date been filed in the docket. The prosecution, would furthermore, have challenges in presenting this evidence as similar fact evidence for the reasons as discussed in this memorandum. The hearsay statements of Ndlondlo, Mkhize and Mathontsi have its own challenges in respect of the low probative value and reliability of the statements. The prosecution would have difficulty in having these hearsay statements admitted as evidence. The application to have the hearsay evidence admitted will be unsuccessful.

242. There appeared to be undue haste on the part of the prosecutors to obtain the racketeering authorisations.

243. The investigation, both in respect of the racketeering and predicate offences, are incomplete.

244. Proper processes and procedures were not followed when the application for racketeering authorisations were made.

245. A proper presentation was not made by the prosecutors to the NDPP in respect of both sets of authorisations.

246. In respect of both sets of authorisations a proper case for racketeering was not made out on the papers presented.

F. RECOMMENDATIONS

The following recommendations are made:

1. The racketeering authorisations issued in terms of sections 2(4) of the Prevention of Organised Crime Act 121 of 1998, by the acting NDPP, advocate Jiba on the 17 August 2012, is invalid.
2. The racketeering authorisations issued in terms of sections 2(4) of the Prevention of Organised Crime Act 121 of 1998, by the NDPP, advocate S Abrahams on the 16 February 2016, is invalid.
3. The prosecution instituted against all the Accused on the racketeering charges based on the authorisations issued by the acting NDPP N Jiba and the NDPP S Abrahams as set out above, should be withdrawn.
4. The Director of Public Prosecutions, KwaZulu- Natal should, in compliance with the Prosecution Policy of the National Prosecuting Authority, review the evidence in respect of the remaining charges preferred against the Accused and decide whether or not to proceed with the prosecution against the individual Accused named in those charges.
5. A copy of this memorandum and its annexures should be provided to the DPP, KZN.

DATED AT CAPE TOWN ON THIS 28TH DAY OF JUNE 2019

Advocate RJ De Kock
Director of Public Prosecutions
Western Cape

On behalf of

Advocate I Thenga
Director of Public Prosecutions
Limpopo

Advocate S Riley
Deputy Director of Public Prosecutions
Western Cape

Advocate E R Mamabolo
Senior State Advocate

Specialised Commercial Crime Unit

Pretoria

MM31

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Director of Public Prosecutions: North West

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CONFIDENTIAL

MEMORANDUM

TO: **THE ACTING NDPP**

FROM: **ADV JJ SMIT SC**

DATE: **27 AUGUST 2018**

SUBJECT: **STATE VERSUS N JIBA: SILVERTON CAS 622/10/14**

My letter to you, dated 24 August 2018, in which I conveyed to you my decision in the abovementioned matter, has reference.

I deem it necessary to, in this separate memo, elaborate more on the reasons for my decision, to enable you to understand the decision better and also to explain it to the President, should you be requested to do so.

A. The Facts

1) At all relevant times to this case, Advocate Jiba was the Acting NDPP.

2) In March 2012 a prosecuting team was appointed by Adv Jiba to guide the investigation and handle any resulting prosecution in the case of J.W. Booysen and 17 others. This was done on request of General Mabula of the Hawks because it was a very complicated matter involving charges under the Prevention of Organised Crime Act, Racketeering, Murder and some other charges, a total of 128 charges in all.

3) Adv GS Maema, a DDPP in my office was appointed as the leader of the team and although it was a KZN case, Adv A Chauke, the DPP of Gauteng-North was to manage this team. This was done as a result of the close proximity the suspects

have had with the KZN DPP Office – they are all police officers. Nothing sinister is to be read into this.

4) In a memo dated 10 July 2012, Adv Chauke applied for a section 2(4) authorisation of the POCA Act 121 of 1998 from Adv Jiba.

5) This application included a draft indictment, as well as a summary of evidence, an analysis of the evidence, a statement of law, as well as an analysis of anticipated defences in the case. This document was compiled by Adv Maema, the leader of the prosecuting team.

6) The authorisation was granted by Adv Jiba, on 17 August 2012.

7) In July 2013, Booysen, accused one in the case, brought an application in the High Court of KZN, seeking an order setting aside the authorisation of Jiba, dated 17 August.

8) The investigating team, including Adv Chauke, then decided that the Answering Affidavit and all related documents, as well as the court appearances in the matter, opposing Booysens' application, should be drafted and handled by private counsel.

9) Consequently Adv Laurence Hodes, SC, Adv Manaka and state attorney Govender were briefed and all documents were handed to them in order to have the first steps, the notice to oppose and the filing of an answering affidavit, done.

10) From the documents handed to them, an answering affidavit was drafted on behalf of Adv Jiba. More specifically, it was drafted by Adv Manaka.

11) This answering affidavit consists of 28 pages and it was presented to Adv Jiba and signed by her on 3 July 2013. It is this affidavit that now forms the basis of this case against her, as it is alleged that she lied in the affidavit.

12) Before the matter went to court, the prosecuting team realised that there were certain errors in the affidavit of Jiba.

13) These errors were listed in a memo, compiled by the prosecuting team, dated 15 August 2013, and presented to Adv Lawrance Hodes S.C. It also contained additional information to explain in more detail the case against Booysen.

14) The statement that forms the core of Jiba's alleged lies, a statement by one Aiyer, referred to in the papers as "NJ 4," was specifically dealt with in the memo on page 3.

15) However, Adv Hodes S.C. apparently thought it fit not to attempt to file a supplementary affidavit by Adv Jiba, and as a result the errors in her answering affidavit prevailed. Had the supplementary affidavit been filed, almost all the criticisms levelled by the court in it's judgment of 26 February 2014 against Adv Jiba, would not have existed.

16) In the judgment of Gorven J he criticized Adv Jiba for

(i) - Not disclosing all the facts on which she relied in deciding whether to issue the authorisation and

(ii) - For stating that she considered the statement by Aiyer (NJ4) when taking her decision, whereas NJ4 was only taken after 17 August when she signed the authorisation, thereby showing that she could not have considered this statement, thereby implying that she lied about this in her affidavit. However, the judgment does not go so far as to say that she did lie.

(iii) That she did not correct any inaccuracies in the affidavit when she was afforded the opportunity to do so.

17) I wish to emphasise that had a supplementary statement been filed, as envisaged by the investigating team when they provided Adv Hodes with the memo referred to in paragraph 13 supra, these three criticisms would not have existed.

18) After the judgment was delivered, a meeting was held between Adv Hodes and the investigating team. Adv Hodes explained that there were a number of misdirections in the judgment and that reasonable prospects existed to succeed, on appeal against the outcome.

19) It was decided to appeal against the judgment and papers were prepared to facilitate this, but the then newly appointed NDPP, Mr Nxasana, ordered the process not to proceed and to be stopped immediately.

20) Consequently the judgment prevailed and as a result of this, one TC Leeuwshcut a director, Admin, in the office of the then CEO of the NPA, laid a charge of perjury against Adv Jiba, on 23 October 2014.

21) It must be mentioned that prior to laying a charge, a legal opinion was obtained from Adv P Ellis SC, by the then CEO, Adv CH van Rensburg.

22) Adv Ellis advised that a criminal investigation for perjury be opened against Adv Jiba but I am of the view that it is not of any value in this matter because:

i) He based his opinion entirely on the judgment and on the alleged conduct of Adv Jiba in previous (other cases) and

ii) He obviously had none of the relevant documents available to complete the whole picture, like the memo of 15 August 2013 (see par 13 supra)

B <u>Evaluation of the facts</u>

23) In my opinion there is nothing wrong in Adv Jiba stating that she had considered the "information under oath and the evidence as contained in the dockets" because surely, the only inference to be made from the document, setting out facts of the case by Adv Maema, is that it was compiled from the evidence and statements in the docket.

24) Nobody can expect Adv Jiba to have read each and every statement, and to have studied each and every document contained in the docket when she considered the application. It does not work that way and nobody, surely, could have thought so. Surely, as happens every day, she had to rely on the summary compiled by Adv Maema and this summary does represent the evidence and statements in the docket. Her statement surely cannot be construed to mean that she in fact studied, herself, all the statements and documents in the docket.

25) In regard to the statement "NJ4" referred to in paragraph 17 of her affidavit, it is clear that it was included in the bundle of documents submitted by the prosecuting team to Adv Hodes, in order for him to draft Jiba's affidavit.

26) It is also very likely that Adv Manaka, who actually drafted Jiba's affidavit, inadvertently included it in paragraph 17 of the affidavit, not realising that it was a **supplementary** statement from Aiyer and that it was obtained after 17 August 2012, when Jiba signed the authorisation. Aiyers "main statement" formed part of the documents as "NJ2" and was obtained on 3 August 2012.

27) Important is to note what Adv Maema explains in regard to "NJ4"
"A further statement dated 31 August 2012 was taken by the investigators after Colonel Aiyer was consulted by the team. The contents of the statement dated 31 August 2012 was conveyed by Col Aiyer in the consultation that he had with the prosecution team earlier in that month and the prosecution team did use the information in briefing sessions with the Acting NDPP (Jiba), as we expected the information just to be captured in writing and under oath by the investigators"
So, Adv Jiba did have knowledge of the contents of "NJ4" even, so it seems, before 17 August.

28) It may be argued, although I am not prepared to do so myself, that Adv Jiba was negligent in not realising that "NJ4" was included in par 17 of her affidavit before she signed it, but really, in a case of this magnitude is this a valid and reasonable argument? I submit not.

The Law

29) Perjury consists in the unlawful and intentional making, upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker knows to be or foresees may be false.
The essential elements are:

- unlawful
- statement
- false
- oath
- judicial proceedings
- intention

30) It is the last element that poses the main problem in this case. Intention in the context of perjury, means that the accused must have intended (actual or legal) to give false evidence. This means that he must at least actually foresee the possibility that what he says may be false.

31) In view of the facts as described above, I am of the opinion that there are no reasonable prospects of success in the state proving that Adv Jiba had the intention to give false evidence.

32) A factor that also militates an intention to lie, is the fact that "NJ4" was attached to her affidavit for all, including the court, to see. One does not decide to lie, and then, in or attached to your lie, you include proof that you are doing so! (lying)

33) The element that the statement must be false, could also pose a problem, considering the explanation given by Maema, referred to in paragraph 27 supra.

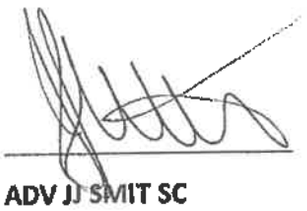
34) As regarding a charge of Fraud, the elements of misrepresentation and intention, just like in the case of Perjury, will not be proved by the state, for the same reasons as described above.

35) In addition, the prosecuting team still maintains that the court misdirected itself and that sufficient evidence exist to justify the authorisation of 17 August and the prosecution of Booysen.

36) I submit that it was therefore incorrect to state in the preamble of the charge sheet on which Adv Jiba appeared in the Regional Court, Pretoria, on 21 April 2015 that:

"The State alleges that there was no evidence whereupon the racketeering prosecuting against Major-General Booysen should have been instituted and that the accused in deposing to the affidavit of 3 July 2013 committed perjury"

37) These are my reasons for declining to prosecute in this matter.



ADV JJ SMIT SC

DPP NORTH-WEST

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: *89849/2015*

In the matter between:

FREEDOM UNDER LAW (RF) NPC	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	Second Respondent
NOMGCOBO JIBA	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
LAWRENCE SITHEMBISO MRWEBI	Sixth Respondent

ANSWERING AFFIDAVIT ON BEHALF OF SECOND RESPONDENT

I, the undersigned,

MARSHALL MOKGATLHE

do hereby declare under oath and state that: -

1. I am a Senior Deputy Director of Public Prosecutions (**"DDPP"**), duly appointed by the Fourth Respondent (**"the Minister"**) on 8 June 2015

in terms of section 15 (1) of the National Prosecuting Authority, Act 32 of 1998 **("the NPA Act")**.

2. I am the Regional Head of the Specialised Commercial Crimes Unit in Pretoria and the Second Respondent in these proceedings.

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

4. Where I make submissions of law, I do so on the strength of legal advice obtained by me from my legal representatives in this matter, which advice I verily believe to be correct.

5. Where I rely on information conveyed by others, I state the source, which information I verily believe to be true and correct. Allegations in the Applicant's affidavit not specifically denied should not be taken as being admitted.

6. In this affidavit, persons are generally identified by their surnames, with first names and titles omitted. The First, Second, Fourth and Fifth Respondents are referred to collectively as "*the Respondents.*"

INTRODUCTION

7. This application, as it relates to me, has to do with my decision to withdraw criminal charges of fraud and perjury against the Deputy National Director of Public Prosecutions ("**DNDPP**"), Advocate Nomgcobo Jiba, (the Third Respondent herein), on 17 August 2015. The charges arose out of her having signed authorisations (*per* section 2(4) of the Prevention of Organised Crime Act, Act 121 of 1998 (***"POCA"***)), for the prosecution of Major-General Johan Booysen for racketeering offences, in connection with alleged extra-judicial killings in Kwa-Zulu Natal by a SAPS unit, under his *de facto* control.

8. The Applicant seeks to have my decision to withdraw charges of fraud and perjury against Jiba reviewed and set aside. In opposing the application, I contend that my determination - that there was no prospect that the state would discharge its burden of proving Jiba's guilt beyond a reasonable doubt - was well founded.

9. My consideration of the matter, and ultimate decision to withdraw the charges was prompted by a written request from Advocate Shaun Abrahams, the National Director of Public Prosecutions (***"NDPP"),*** to provide him with my opinion and decision in respect of the criminal investigation. A copy of the request, which constitutes a lawful delegation by the NDPP, is annexed hereto marked **MM-1.**

10. Part A of the Notice of Motion urgently sought interim orders, effectively suspending Jiba, and the Advocate Lawrence Sithembiso Mrwebi, pending final relief sought under Part B. In this Court, the Honourable Prinsloo J struck the matter from the roll for want of urgency. He found that the Applicant had abused the process of the Court.

11. Part B of the Notice of Motion seeks to review and set aside two decisions:

    11.1. That of the NDPP, alternatively the NDPP and myself, further alternatively, my, withdrawal of the criminal charges against Jiba. (In fact, the decision was mine alone.)

    11.2. That of the President, *per* s. 12(6)(a) of the NPA Act, not to suspend the Third and Sixth Respondents, and institute enquiries into their alleged misconduct and fitness for office.

12. This affidavit addresses itself only to the first of these decisions. I personally took the decision in terms of section 6(a) of the Criminal Procedure Act 51 of 1977 (**"the CPA Act"**), and section 20(1)(c), read with section 20(4)(b), of the NPA Act. The NDPP had delegated the decision to me, anticipating that there might be an application to

review it, whichever way the decision went, under s. 22(2)(c) of the NPA Act and section 179(5)(d) of the Constitution. (Incidentally, no such review has been sought; as will be argued at the hearing, the Applicant has failed to exhaust its internal remedies; this part of the application falls to be dismissed on that basis alone.)

13. The essence of the charges against Jiba was that she intentionally mis-stated material facts in falsely representing that there were good grounds to pursue charges against Booysen. She is said also to have committed perjury in her answering affidavit in Booysen's application to review her POCA authorisation. (Booysen v Acting National Director of Public Prosecutions 2014 (2) All SA 391 (KZD); 2014 (2) SACR 556 (KZD) (26 February 2014).)

14. These two grounds for the charges against Jiba overlap to a considerable extent. Nevertheless, they are analysed separately herein, because the crimes have distinct elements.

15. I respectfully submit that this Court may grant this application, insofar as it relates to my decision to withdraw the charges against Jiba, *only* if it finds that:

    15.1. Jiba objectively acted in *bad faith* when she exercised her prosecutorial discretion to authorise the charges against Booysen; the other elements of fraud and perjury would also need to be proven; and that

    15.2. My own determination that Jiba did not act in bad faith was an *irrational* exercise of my own prosecutorial discretion.

16. The Applicant has failed to discharge this doubly onerous burden.

17. I need not contend that Booysen would have been convicted had the matter proceeded to trial. My more modest purpose is to argue that, all things considered, my determination that there was no reasonable prospect of securing the conviction of Jiba was not irrational.

18. The Applicant's arguments do not take into account the breadth of prosecutorial discretion; nor of the fact that Jiba's determination that there were reasonable prospects of success in charging Booysen fell to be assessed in light of the broad scope of liability under POCA. (The Applicant appears to be unaware that an accused can be liable under s. 2(1)(f) of POCA without having been personally implicated in any underlying offence).

19. Moreover, s. 2(1)(f), providing liability for "managing" a criminal enterprise, does not require *mens rea* in the form of *dolus*; all that is demanded is *culpa*, in the sense that the accused *ought reasonably* to have known that a person associated with the enterprise participated in the unlawful conduct (*directly or indirectly)* of the enterprise's affairs through a pattern of racketeering activity.

20. My considered assessment was that the documents before Jiba, read together, and in the context of the rest of the evidence in the docket, did provide at least a *prima facie* basis for criminal charges against Booysen. But, even if this Court were to conclude otherwise, that there were objectively no prospects of success at all, that would fall short of a basis for finding that Jiba committed fraud, or perjured herself.

BACKGROUND

A. The Relevant SAPS Structures and Booysen's role

21. The organisational structure of South African Police Services ("***SAPS***") changed several times between 2005 and 2011. So too did the rank, title and functions of Booysen within the hierarchy. The names of departments, sections and units also changed. What is important for present purposes is that there remained an operational and functional continuity with the relevant time span: 2008-2011. A core group of individual police officers were stationed at Cato Manor. This group was throughout the relevant period under the *de facto*

control of Booysen, even as he himself moved vertically and horizontally within the ranks.

22. During 2006 to 2007, what was then the Serious Violent Crime Unit (SVC) in KwaZulu Natal, was headed by Booysen, as Provincial Commander, KwaZulu-Natal, holding the rank of a Senior Superintendent. He was in a position at that point directly to control the "similar fact" unlawful activities alleged prior to the period covered by the indictment.

23. In 2007 the SVC became part of the Organised Crime Unit. Booysen was KwaZulu Natal Provincial Commander: Organised Crime of SAPS; in this capacity, he ran the Provincial Organised Crime Unit ("**POCU**.") At this point, he forfeited *formal* operational control of what is alleged to have been a SAPS "hit squad."

24. The basic structure from 2008 onwards is illustrated in the organogram attached as Annexure **MM-2**, in which POCU is labelled *OCI KwaZuluNatal.* It will be noted that POCU comprised the Durban Organised Crime unit; the Pietermaritzburg Organised Crime Unit; the Richards Bay Organised Crime Unit, and the Port Shepstone Organised Crime Unit.

25. As evident from the organogram, Colonel Aiyer ("**Aiyer**"), was at relevant times the unit commander of the Durban Unit of Organised Crime. ("**DOCU**"). Under him was Lieutenant Colonel Olivier ("*Olivier*"), the section Commander of the SVC section based at Cato Manor ("**the CMS**").

26. Booysen, from his higher position in the chain of command, by-passed Aiyer as a Unit Commander. Effectively, it is alleged, he co-managed the CMS together with its section commander, Olivier. Although Booysen had no operational responsibility for the CMS, he involved himself directly in its operations – reaching over the head of the marginalised Aiyer, to whom the CMS - through its senior officer, Olivier - should rightfully have reported. At times, Booysen allegedly

went beyond *co-managing* the CMS; he *participated* also in its unlawful activities.

27. In 2010 Organised Crime was incorporated under the Directorate for Priority Crime Investigations ("**DPCI**") (also know as the *Hawks*), and Booysen became the Provincial Head. The various Organised Crime units remained intact – but, as components of the DPCI, the respective commanders reported to Booysen. Despite this shift, Booysen allegedly remained involved in the activities of the CMS, both by way of *co-management* and *participation.*

B. **<u>The Criminal Conduct Alleged</u>**

28. It was alleged that, between May 2008 and September 2011, members of the CMS, falling under Booysen's *de facto* operational command and control (for at least part of the period), systematically assassinated members of the KwaMaphumulo Taxi Association ("***KTA***"), who were in conflict with the Stanger Taxi Association ("***STA***"). CMS members obtained financial rewards, both in the form of "blood money" from the STA, and SAPS cash incentives. (That allegation was to be proven, *inter alia*, by affidavits and documents linking such awards to the killings.)

29. One of the first victims of the "taxi wars" was Superintendent Zethembe Chonco, Head of the Kranskop Station. He was allegedly murdered at the instance of the KTA while he was investigating the organisation's criminal activity. Chonco died in an ambush on 27 August 2008, as he transported "taxi war" suspects to court.

30. It appears to have been undisputed that eight people suspected of killing Chonco were themselves killed in the wake of Chonco's death. One of them was Bongani Mkhize, a former head of the KTA. Members of the CMS claimed he had opened fire on them when they attempted to pull him over. (Mkhize had earlier obtained from the Durban High Court a futile interdict restraining the CMS from killing

him; remarkably, Booysen *himself* made an affidavit (a copy of which is attached below), opposing the application).

31. Seven other suspects wanted for Chonco's murder had by then already been killed by CMS officers in separate incidents, either while allegedly resisting arrest, or accompanying police on searches.

32. Five suspects died in a shootout on the N3 near Camperdown, after police received a tip-off about suspects headed to Pietermaritzburg. They were said to have opened fire on the police at a roadblock, who returned fire in self-defence, killing them all.

33. The extraordinarily high mortality rate among suspects where the CMS was involved became a source of suspicion that it may have evolved into a "hit squad". Ordinarily, for every fatality one might expect at least one wounded suspect. But that was not the case. In almost all instances, all of the suspects were shot dead. The explanation given by the CMS officers was that the suspects had returned fire. But that was inconsistent with the fact that in no instance was a member of the CMS shot; nor were there reports even of police vehicles being damaged by bullets.

34. It was on this basis that it was alleged that the CMS had becomes a hit-squad. The *modus operandi* was to track down suspects and that, instead of apprehending them, slay them. CMS officers would then, so it was alleged, plant firearms, to support the claim that the victims were killed when police returned fire.

35. This was explained in a detailed statement by one Ari Danikas, a police reservist who worked closely with Booysen (Annexure "**SFA1**" to applicant's supplementary affidavit). (To anticipate the more detailed discussion below, the Applicant makes much of the fact that that the statement of Danikas was unsigned. Yet, as expressly found by Gorven J, there is no requirement that a statement relied upon be sworn to or signed. My assessment was that Jiba could reasonably

have anticipated that Danikas' evidence, like the other evidence she reviewed, would be accorded weight.)

C. The POCA Authorisation

36. In terms of s 2(4) of POCA, a person shall be charged with committing an offence only if a prosecution is authorised in writing by the NDPP.

37. A first prosecution memorandum was drafted - but not signed - by Advocate Sello Maema ("**Maema**") in July 2012. He was one of the senior prosecutors who led the Booysen prosecution. It appears under cover of an unsigned memo addressed to Jiba by Advocate Andrew Chauke (the Director of Public Prosecutions **("DPP")**, South Gauteng) dated 10 July 2012. Accompanying the latter are two draft authorisations, one with respect to s 2(1)(e) of POCA, and one with respect to s. 2(1)(f). (These documents are collectively referred to as the "**July documents**", attached hereto as annexure **MM-3**).

38. A second prosecution memorandum was subsequently signed by Maema. It appears under cover of a signed memo addressed to Jiba by Advocate Noko-Mashilo, Acting Director of Public Prosecutions, KwaZulu-Natal dated 15 August 2012, who had provincial jurisdiction. Accompanying the latter are two authorisations signed by Jiba, one with respect to s 2(1)(e) of POCA, and one with respect to s. 2(1)(f). (For convenience, these documents are referred to together as the "**August documents**", attached hereto as annexure **MM-4**). I mention in passing that there can be no question of Booysen not having himself had the August documents to hand.)

39. It was the July documents that served before me. But the July and August documents are not in relevant respects at variance. The principal difference has to do with the definition of the POCA "enterprise". The July documents (in paragraphs 30 and 44), defines the Provincial Organised Crime Unit (POCU) as the *enterprise*. The

August documents, on the other hand, at paras 1 and 22, defines the *enterprise* as the CMS.

40. Other differences include:

40.1. A 19th accused, one Dlamuka, was added in the August documents (para 1).

40.2. A more detailed introductory section is included in the August documents, (paras 3-6), including a discussion of the *modus operandi,* and tables listing the names of the deceased, accompanied by the relevant dates and docket reference numbers.

41. More important, the prosecutor's summary in the August document (paras 33–34), is substantially similar to the equivalent summary in the July document (para 22.)

42. I can affirm unequivocally that I would have come to the same decision had I had the August Documents on my desk. Consideration in context of the July document, together with the balance of the papers in the record, made clear that the relevant *enterprise*, as understood by all concerned, was the CMS.

43. Moreover, in the July documents, 26 out of 27 accused (save Booysen himself), are listed (in Part D), as being stationed at the offices of the CMS, 446 Bellair Road, Cato Manor. The predicate acts described refer to activities of persons forming part of the CMS.

44. I noted that Jiba herself in her answering affidavit before the KZN High Court, refers to the "enterprise" as being the CMS, the section that was "conducted … as an enterprise as defined in [POCA]". (Para 16.2).

45. While it is the unsigned prosecution memorandum forming part of the July documents attached to the 16 January 2015 affidavit of Maema (attached *infra* as Annexure **MM-9**), the contents of Maema's affidavit

makes evident that the *de facto* enterprise was the "members of the *Cato Manor Section of the Durban Organised Crime Unit*." (Paragraphs 3; 4; 7; 17). Moreover, as discussed in detail below, Maema's affidavit independently set out more than enough to convince me that there was, at minimum, a *prima facie* POCA case. On the basis of all of the above, I stated in my 17 August 2015 opinion (**SFA11**) (para 24), that the Booysen prosecutors had "*correctly identified Cato Manor SVC Section of the Durban Organised Unit as the enterprise*."

46. Argument will be advanced at the hearing that, even if a determination should be made that my decision was irrational, it should not be set aside, because I would have made precisely the same decision had the August documents served before me.

D. Maema and Ferreira Inputs

47. As just mentioned, the meticulous analysis of Maema, in his memorandum, as fortified in his affidavit, suggested very strongly that Booysen indeed had at least a *prima facie* case to face.

48. Maema states in the July prosecution memo that:

> *"The criminal acts of the accused described in the summary of substantial facts were motivated by monetary reward and praises [sic] for exceptional performance from the State for solving crime ... [The] accused, instead of achieving this purpose by arresting and bringing the alleged criminals before the courts for justice to take its course, ... killed the alleged suspects and planted firearms next to the deceased persons to create an impression that their lives were in danger when they killed them."* [Para 34]

49. These allegations, in slightly modified form, appears also in the prosecutor memorandum that forms part of the August documents (at paras 3 and 10.)

50. I interpose that Maema has extensive experience in POCA prosecutions and presently works in the Priority Crimes Litigation Unit of the Office of the NDPP. Prior to joining the Priority Crimes Litigation Unit, he worked in the office of the DPP in the North-West as a coordinator of Organised Crime in the North West Province. He has been a prosecutor since 1993 and was appointed a DDPP in 1999. He prepared numerous racketeering authorisations for the consideration of the DPP and NDPP and has also prosecuted and assisted in the prosecution of numerous racketeering cases. There is no allegation that he had motive to improperly conduct himself in the Booysen matter. I am aware of no basis upon which Booysen would have been able to impugn the affidavit and testimony of Maema.

51. It is relevant here to note the evidentiary provisions in POCA:

> *"Section 2(2) of POCA allows the court to hear evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated against the accused ... the planting of the firearms on the crime scene is similar fact evidence."* [Para 51, 52].

52. My assessment was that Jiba reasonably relied upon the views of these officials, to the effect that there were reasonable prospects of a prosecution of Booysen succeeding. I had little hesitation in concluding that convicting Jiba of fraud and perjury would have been inordinately difficult, if not impossible.

53. On the other side of the coin, I considered also the joint legal opinion of Advocates Jan Ferreira and Gerhard Van Eeden dated 5 August 2015 (the "**Ferreira opinion**") (annexed to the applicant's supplementary affidavit marked "**SFA13**").

54. In contrast to the assessment of Mosing and Maema, the Ferreira opinion forcefully contends that the prosecution of Booysen was ill-founded, and advances the ostensible corollary - that the prosecution

of Jiba was warranted. (I say "ostensible", because the second proposition does not follow automatically from the first.)

55. The particulars of the Ferreira opinion are discussed in some detail below. For now, I wish to draw attention to a document that it is submitted places the Ferreira opinion into its necessary context. That is a confidential internal memorandum dated 16 February 2015, from Ferreira to Nxasana and Hofmeyr. It sheds light upon the genesis of, *inter alia*, the prosecution of Jiba (A copy of the memorandum is annexed hereto marked **MM5**).

56. The memorandum confirms that it was Hofmeyr who in November 2014 requested Ferreira to act as prosecutor [Para 1]. Ferreira notes that Hofmeyr stated that whomsoever was to assist Ferreira would need to be *"somebody that I trust unreservedly"* [Para 2].

57. The case against Jiba in particular is discussed in Part F of the memorandum, commencing at para 28. Ferreira acknowledged as follows:

> *"Although Mr Maema has deposed to an affidavit a decision will have to be made whether he should be called as a witness, should any prosecution follow. The same is true for the DPP Johannesburg Mr Chauke and Mr Mosing from the National Office as they all supported the failed racketeering prosecution of Booysen and in fact still support it." (Emphasis added)*

58. Significantly Ferreira states that *"we would need to go through the whole docket to gauge the precise evidence allegedly available at the time of making the decision to prosecute Booysen"* [Para 26.3].

59. Ferreira acknowledges that the Prosecution if proceeded with would be problematic within NPA structures:

> *"Due to the fact that both Gerhard van Eeden and I worked for Ms Breytenbach previously at the SCCU Pretoria, it should be pointed out that the suspects, should they be charged, would suggest ulterior motives, conspiracy or launch some sort of*

personal attack on us and our involvement in this matter." [Para 47]

60. Ferreira understood that the prosecution should be kept under wraps - to the extent even that it should be led from separate office facilities;

> *"It could perhaps be advisable to temporarily arrange that Gerhard van Eeden and I be accommodated in facilities similar to that of Mr Broughton and Mr Rossouw at (but not in) VGM for the duration of this matter and that we report to Mr Hofmeyr until finalisation of this matter."* [Para 49]

61. I submit that this manifests the irregularities that unfortunately characterised the prosecution. I was the immediate supervisor of Ferreira - yet knew nothing of the memorandum, or the fact that Ferreira was reporting to Hofmeyr. Although not in itself decisive, this contributed to my misgivings.

62. As to the merits, while I have respect for the authors of the Ferreira opinion, I found the inputs of Maema and Mosing more persuasive on balance, for reasons that appear below, and as are set forth in my own memorandum dated 17 August 2015. (A copy is attached as **MM6**.)

POCA

A. Basic Elements

63. It is useful to briefly consider the key definitions in POCA, before analysing the particular charges against Booysen.

64. Section 1 of POCA defines a criminal "enterprise" for purposes of POCA, as including:

> *"Any individual, partnership, corporate, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity."*

65. An "enterprise" is established by proving it has:

65.1. A common or shared purpose.

65.2. A formal or informal structure.

65.3. A system of authority.

65.4. Continuity.

66. A "pattern of racketeering activity" is defined in section 1 as:

> *"The planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred within 10 years after the commencement of this Act and the last offence occurred within 10 years [excluding any period of imprisonment] after the commission of such prior offences referred to in Schedule 1."*

67. Count 1, only Booysen and Olivier, respectively the commanding officer of POCU and of the CMS:

> *"Contravening section 2(1)(f) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act, Act 121 of 1998 – Managing an Enterprise (Accused 1 and 9)."*

68. Booysen and Olivier were thus alleged to be co-managers of POCU, which was designated in the prosecution memorandum as the *enterprise*. It was alleged to have provided the accused with a continuity of structure, whereunder they conducted unlawful activities, with the purpose of, *inter alia*, conducting unlawful assassinations of criminal suspects for reward.

69. The enterprise, thus defined, had both a formal structure, established under legislation and regulations, and an informal structure, consequent upon Booysen's usurpation of Aiyer, to whom Olivier should have been reporting. There was "continuity" in the unlawful activities over the period 2008 to 2011.

70. Some 116 underlying (or "predicate"), offences were alleged. However, the only predicate offences with which Booysen personally was charged were Counts 10 (murder), 11 (firearms offences), 12 (also firearms offences), and 13 (defeating or obstructing the course of justice). The latter counts, as lodged against Booysen, are of no relevance here, since Jiba's authorisation therefor was not necessary under POCA.

B. **The Reach of POCA in General, and s. 2(1)(f) in Particular**

71. Among the bases upon which I determined there were limited prospects of success in the prosecution of Jiba, was the low threshold for proving criminal liability under POCA

72. POCA ensures that it is not just lowly "foot soldiers" directly implicated in underlying predicate offences who are caught in the prosecutorial net. The objective is also to target the criminal bosses, who *manage* the criminal enterprise from behind the scenes, while maintaining a careful distance between themselves and common law criminal activity. Under the common law, these "big fish," who have kept their hands clean, may be off the hook, owing to the difficulty of finding evidence linking them with underlying offences.

73. The preamble to POCA is indicative of its purposes and broad reach:

> *"…. WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;*
>
> *… BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with*

enterprises which are involved in a pattern of racketeering activity;"

74. Amongst the features of POCA that render it more easy to secure a conviction under the common law are that:

74.1. Hearsay and similar fact evidence are admissible, to the extent that this would not give rise to an unfair trial. (Notably, Gorven J, acknowledged that:

> *"In the light of the provisions of POCA, it is … not necessary to have before her sworn statements from witnesses on which the state intends to rely."* [Para 38]

74.2. Guilt may, in terms of s 2(1)(f), attach to a person who manages the operation or activities of the *enterprise*:

> *"[A]nd who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity".*

75. Hence, Booysen, charged as "co-manager" of the enterprise, could be criminally liable *even if there were no evidence linking him to any individual offence*.

76. To put it another way: under s 2(1)(f), the nexus that needs to be demonstrated is not between those managing the enterprise and any particular predicate offence, or even between the "manager" and the enterprise itself, but between the "manager" and the activities of any employee or associate of the enterprise, who acts in the conduct of its affairs through a pattern of racketeering activity. Booysen could therefore in principle be liable under s. 2(1)(f) upon proof that he was several degrees removed from the underlying offences.

77. Regarding the intent element, Booysen could be convicted on no more than a showing that, as a senior police officer he *ought* to have known of the unlawful activities attributed to the employees of, and other participants in the enterprise.

C. **Booysen's Review Application**

78. Booysen applied for an order to review and set aside the authorisation. He argued that Jiba's decision to authorise the prosecution lacked a rational basis since. He contended that, at the time the POCA authorisations were issued, the material relied on by Jiba could not, viewed objectively, support a decision to prosecute.

79. On 26 February 2014, Gorven J granted Booysen's application. He held that Jiba's decision was arbitrary, offended the principle of legality, and therefore the rule of law, and was unconstitutional. However, he refused the application for an order interdicting the issuing of fresh POCA authorisation.

80. The details of the judgment are discussed below.

CHARGES AGAINST JIBA

81. The charges against Jiba are set out in Charge Sheet Case No. 111/83/2015, attached hereto as annexure **MM-7**. She allegedly committed fraud by misrepresenting the prospects of success in the prosecution of Booysen. She also allegedly perjured herself in her answering affidavit opposing his review application.

Fraud – Count 1

82. It was alleged that, in making the answering affidavit of 3 July 2013 Jiba did,

> *"Unlawfully, falsely and with intent to defraud represent to Johan Booysen and/or the South African Police Service, the National Prosecuting Authority, members of the public and/or the judiciary in KwaZulu-Natal that there was a reasonable prospect of success of obtaining a conviction against Booysen."*

83. Fraud is defined as the "*unlawful and intentional making of a misrepresentation which causes actual prejudice or which is intentionally prejudicial to another*". The elements of the crime are:

83.1. A misrepresentation.

83.2. Prejudice or potential prejudice.

83.3. Unlawfulness.

83.4. Intention.

84. I concluded that it was unlikely to be provable beyond reasonable doubt that there were no reasonable prospects of a successful conviction of Booysen, based upon the material before Jiba.

85. I took into account, *inter alia:*

85.1. The relatively low threshold for POCA prosecutions

85.2. The fact that the fraud and perjury charges against Jiba would both require intent to be proven beyond a reasonable doubt.

85.3. The multiple mutually corroborating items of evidence against Booysen.

85.4. The broad scope of prosecutorial discretion.

86. I concluded that, at worst for Jiba, it might be said that she misdirected herself, by unreasonably relying upon legal advice and factual input of her subordinates. Indeed, the language used by

Gorven J left the door open for the possibility that Jiba was animated not by bad faith, but by error of law:

> *"If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day."* [Para 38].

Perjury – Count 2

87. It was alleged that Jiba falsely stated in her answering affidavit that:

87.1. She gave due and careful consideration to information under oath that there was a *prima facie* case against Booysen.

87.2. The facts deposed to fell within her personal knowledge and were to the best of her knowledge true and correct.

87.3. Information under oath before her indicated that Booysen knew or ought to have known that his subordinates were killing suspects instead of arresting them.

87.4. The killings were motivated by the CMS's desire to enrich themselves.

87.5. Statements showed that Booysen was aware of the murders, and played an instrumental part in these crimes.

87.6. Booysen was in *de facto* command of the CMS.

87.7. That there was *prima facie* proof that Booysen was involved in racketeering activities.

88. Perjury consists of *"the unlawful and intentional making of a false statement in the course of a judicial proceeding, by a person who has taken the oath or made an admonition before, or who has been admonished by, someone competent to administer or accept the oath, affirmation or admonition"*. The elements of the crime are:

88.1. Making of a declaration;

88.2. Which is false;

88.3. Under oath;

88.4. In the course of a judicial proceeding;

88.5. Unlawfulness;

88.6. Intention.

89. I pause to note that perjury should not formally speaking have been charged by Ferreira at all, given his jurisdiction; that charge appears to have been "tacked on", as collateral to the fraud charge.

90. My assessment was that the representations in Jiba's affidavit upon which the prosecution of her relied were not objectively false. I refer to my analysis below of the meaning of the term *statement* and *sworn statement*, as used by Jiba.

91. Moreover, there is abundant authority to the effect that perjury cannot be committed "by mistake", so to speak. Even to the extent that any of what Jiba said was objectively untrue, a court could not convict Jiba of fraud or perjury simply on the basis that she was negligent or careless.

92. Moreover, I noted the contention of Jiba that her affidavit was drafted by counsel and that she was at all relevant times acting under legal advice. I had no reason to doubt Jiba's account in that regard.

93. As set forth in my opinion dated 17 August 2015, prosecutors are statutorily protected from liability arising out of their official functions, save to the extent they act in bad faith. (Section 42 of the NPA Act and section 78 of POCA are both of relevance in this regard.)

94. There is one instance in which Jiba's affidavit was plainly incorrect - her use of the present tense to refer to the 31 August statement of Aiyer. But that was in my assessment a *bona fide* error. It would be immediately obvious to anyone viewing the document that it was an oversight, rather than a bad faith attempt to fraudulently obtain a conviction. I venture to say that, if an error of this order formed the basis for serious criminal charges, a number of former NPA employees would be languishing in the cells.

Fraud – Count 3

95. Count 3 alleges that the evidence Jiba considered in authorising the racketeering prosecution did not justify her decision. (It is unclear how the second fraud count differs from the first; one can anticipate that she might have argued that there was a splitting of charges).

96. Be that as it may, it would in my view be impossible to show, especially in light of the broad scope of liability under POCA, that as an objective fact there was no reasonable prospect of a successful prosecution of Booysen.

MY DECISION TO WITHDRAW THE CHARGES

A. Some General Considerations

97. Having carefully considered all the documents before me, I stand by my conclusion, as set forth in my opinion dated 17 August 2015:

> *"The decision arrived at by both prosecutors to prosecute Ms Jiba for exercising her statutory obligations in terms of the law is not supported by objective facts. The predicate offences preferred against Johan Booysen stand to be adjudicated upon by the trial court. If this prosecutorial decision were to stand, prosecutors will not be able to carry out their duties without fear of being victimised ... there are no reasonable prospects of a successful prosecution in this matter and I accordingly recommend that the case against [Jiba] be withdrawn."* [Para 52].

98. I turn now to consider the standards applicable to the exercise of prosecutorial discretion. The applicable test has been variously stated, often formulated in terms of prospects for a successful prosecution, or whether there is a *prima facie* case. There is, however, no definitive formula. The NPA's Prosecution Policy (Revision Date: June 2013) (the **"Prosecution Policy"**), attached hereto as Annexure **MM-8**), in fact states that there is -

> *"[N]o rule in law stating that all provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor."* [Page 7].

99. As acknowledged by the Applicant, prosecutorial decisions are specifically excluded from the ambit of administrative action. That reflects an acknowledgment of the *sui generis* nature of the prosecutorial function; the need to defer to prosecutorial expertise, and the impracticality of a regime in which prosecutors go about their business with judges peering over their shoulders as they make day-to-day decisions, often under conditions of great pressure.

100. A further consideration that accounts for the fact that prosecutorial decisions are not subject to administrative review is that such decisions are informed, not only by the merits of the case, but by a host of exogenous considerations, including the need to prioritise matters in light of the scarcity of prosecutorial resources.

101. What also weighed with me in determining not to pursue the prosecution of Jiba was the need to avoid deterring prosecutors from vigorously pursuing suspects, by holding over their heads the threat that they themselves may be criminally charged if the prosecutions fail.

102. This is not to say that prosecutorial decisions are immune from judicial scrutiny. However, as is now well established, a decision to prosecute, or not to do so, will be set aside only in the exceptional circumstance that it can be shown to be irrational.

103. The breadth of prosecutorial discretion has application *both* to Jiba's initial determination to prosecute Booysen, and to my own subsequent determination not to pursue the prosecution against her. To set aside my decision, this Court would need to determine that the decision of Jiba to pursue charges against Booysen, *and that* my own subsequent decision not to pursue perjury and fraud charges fell outside of the discretion with which we are respectively vested. (In the case of Jiba, a court would need to find further that Jiba acted in bad faith.)

104. In terms of the Prosecution Policy, promulgated in terms of section 179(5)(a) of the Constitution of the Republic of South Africa 1996 read with section 21 of the NPA Act, prosecutors must assess "whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution ... otherwise the prosecution should not be commenced *or continued*". [Section 3A]. (Emphasis added). In evaluating the evidence, prosecutors must take into account factors, including: -

104.1. Whether the evidence is strong enough to prove all the elements of an offence. (Section 3B).

104.2. Whether there are matters which might properly be put by the defence to attack the credibility of the witness. (Section 3B).

104.3. Whether there are contradictions in the accounts of witnesses materially weakening the prosecution case. (Section 3B).

104.4. Whether the necessary witnesses are available, competent, willing and, if necessary, compellable to testify, including those who are out of the country. (Section 3B).

105. As further noted in the Prosecution Policy :

> *"The review of a case is a continuing process. Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made."* (Section 3A).
>
> ...
>
> *"This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded in spite of an initial decision to institute a prosecution."* (Section 3B).

B. <u>Particular Matters</u>

106. In the discussion that follows, I seek to demonstrate how the above-listed considerations weighed against continuing the Jiba prosecution.

107. I stand by the conclusion in my opinion of 17 August 2015, that:

> *"The decision arrived at to prosecute Adv Jiba for exercising her statutory obligations in terms of the law, was not supported by the objective facts."* [Para 62].

(i) <u>Alleged Mis-Statements in Jiba's Answering Affidavit</u>

108. Both the fraud and the perjury charges are premised upon an allegation that Jiba's answering affidavit contains bad faith mis-statements as to the nature of the evidence against Booysen.

109. Careful analysis of the relevant paragraphs of the answering affidavit led me to conclude that the purported mis-statements are in fact for a large part accurate (albeit in some instances ambiguous, and confusingly phrased), summaries of the material evidence. The specific language in the answering affidavit is discussed in detail below.

110. Admittedly, there are some mis-statements in the answering affidavit. But my assessment is that these were *bona fide* errors that could not support perjury or fraud convictions. Anyone familiar with the management of complex litigation will know that it is far from uncommon for an affidavit to contain material errors. It must be recalled that as the NDPP at the time, Jiba would have hundreds of case files serving before her at any one particular time.

(ii) **Reliance Upon Advice**

111. Jiba relied in particular upon the affidavits of two senior officers within the NPA, Maema and Mosing, in taking her decision to authorise the charges against Booysen. In my reading, these are credible statements, the contents of which exculpate Jiba.

The Maema Affidavit of 16 January 2015 (Attached hereto as Annexure MM-9)

112. Maema led a team consisting of Deputy Director of Prosecutions, Advocate Raymond Mathenjwa, and four senior state advocates (Advocate Mlotshwa, Advocate Outshine, Advocate Moleko and Advocate Ntlakaza) based at the DPP office, Gauteng, under the leadership of Chauke. Mosing of the office of the ANDPP (whose affidavit is discussed separately below), was brought in to assist with respect to the racketeering charges. Mosing acted as liaison between the Acting NDPP and the prosecuting team. [Para 11].)

113. Maema records that the prosecution team held several meetings in June and July 2012, at which time the prosecution memo and the indictment were drafted during:

> *"[I]n depth discussions … relating to the elements of the racketeering charges, such as the identity of the enterprise, the pattern of racketeering activity, management of the enterprise, as well as the predicate offences."* [Para 7]

114. Maema adds that:

> *"Briefing sessions were held with the DPP South Gauteng, Chauke, and the ANDPP to keep them abreast of the prosecution team's work on 10 July 2012. A prosecution memo requesting the ANDPP to authorize the racketeering charges … was sent to the office of the ANDPP."* [Para 7].

115. Maema reports that, even in the wake of the Gorven J decision:

> *"The prosecution team is still of the view that there is a strong case against General Booysen and other members of the Cato Manor Section of the Durban Organised Crime Unit and that the decision to charge Booysen was that of the prosecution team."* [Para 17].

116. Regarding the statements of Aiyer in particular, Maema records:

116.1. Two statements were submitted, one dated 3 August 2012, and another dated 31 August 2012.

116.2. The latter was signed only on 31 August 2014. <u>However, the prosecution team used the information reflected in the consultations with Aiyer when briefing Jiba.</u>

117. Regarding the statement of Danikas, Maema states:

> *"The draft statement of Ari Danikas was in possession of the investigation team since 18 April 2012 and was handed to the prosecution team in June 2012. On 11 July 2012 the*

prosecution team asked Gen Mabuli of the DPCI to obtain a more detailed statement so that we could decide whether we were going to use him as a witness. The prosecution team advised the police to leave the statement unsigned so that the process outlined in the mutual legal assistance legislation ... could be followed to formalise the statement. The witness was in Greece at the time and had security concerns and was unwilling to come to South Africa ... We were confident that the statement would ultimately be signed through the outlined processes, and that was the reason why it formed the basis of the briefings with the Acting NDPP and the briefing with counsel." [Para 9]

118. I have had experience in the use of mutual legal assistance protocols in obtaining affidavits from witnesses in foreign jurisdictions. It is not uncommon for draft statements initially to be compiled on the basis of telephonic or in-person interviews, with a view to subsequently being revised or elaborated, and later commissioned by South African diplomatic representatives in the country concerned.

119. I submit that both Jiba (at the time of her authorisation of the POCA prosecution), and myself (when I withdrew the charges against Jiba), were entitled to set store in Maema's affidavit.

120. In conclusion, Maema states in relation to Gorven's comments, that:

"The judge's comments were based on errors which counsel made in the answering affidavit which the prosecution team had very [little] role in drafting and could not correct the errors until the answering affidavit was filed in court."

<u>Mosing Affidavit of 5 May 2015</u> (Annexure MM-10)

121. Mosing relates how arrangements were made to file a supplementary affidavit of Jiba to address the issues regarding the annexures raised by Booysen in his answering affidavit. Mosing writes as follows:

"The expectation was that some attempt would be made by counsel ... by way of filing a supplementary affidavit by Jiba explaining the issues relating to the annexures in her affidavit, even though it could be said that pleadings had closed." [Para 14].

122. For reasons that are not clear to me, the supplementary affidavit envisaged by Mosing (p. 9), was not filed.

123. Mosing marks his disenchantment with the decision, apparently made unilaterally, and without briefing from the prosecution team, by the then-NDPP, Nxasana, to withdraw the appeal. [Para 18] He writes as follows regarding his uncomfortable meeting with Nxasana:

> *"Mr Nxasana went as far as to suggest that it seems as if I am loyal to a person, Jiba. I realised that I found myself in a very precarious position, where it seems that my immediate supervisor and head of NPA was [sic] at loggerheads with my former supervisor and I was smack bang in the middle." [Para 19].*

Statement of Hodes SC of 3 Feb 2015 (Annexure MM-11)

124. The legal strategy in the Booysen prosecution was guided by Advocate Laurence Hodes SC, a silk at the Johannesburg Bar, with wide experience in criminal law in general, and expertise in POCA in particular. He writes:

> *"My junior drafted [the answering affidavit] based upon the instructions received in an internal memorandum dated 4 June 2013 as well as the docket pertaining to this matter."* [Para 3].

125. Maema writes that Hodes had advised that evidence underlying a POCA authorisation need not to be under oath, and that there would be nothing irregular in the NDPP relying upon same. That this is a correct articulation of law was acknowledged by Gorven J, who wrote:

> *"In the light of the provisions of POCA, it [was] also not necessary [for Jiba] to have before her sworn statements from witnesses on which the state intends to rely."* [Para 38]

126. The application for leave to appeal was filed on the advice of Hodes SC. I refer to the affidavit of Mosing of 5 May 2015, attached hereto marked **MM-10,** in which he says (at para 18) that on 24 March 2014, Nxasana summoned him to his office, where he encountered a

"hostile environment". Nxasana questioned the merits of appealing Gorven J's judgment, and suggested that the reason for the appeal was to save the reputation of Jiba [*id*]. Subsequent to this meeting Nxasana directed that the appeal be abandoned.

127. Regarding the abortive application for leave to appeal, Hodes writes:

> *"My junior and I ... compiled an application for leave to appeal. A copy of this document is available and was discussed in a consultation with various members of the National Prosecuting Authority. It was then filed on behalf of the Acting National Director of Public Prosecution."* (Para 9).
>
> *"However, on 25 March 2014, the newly appointed National Director of Public Prosecutions, Mr Mxolisi Nxasana, decided not to appeal against the judgment in the Booysen matter. This resulted in the Notice of Application for Leave to Appeal being withdrawn."* (Para 10).

128. Gorven J found that concessions had been made by Hodes, counsel for Jiba. However, Hodes says:

> *"I only made one concession and that was in relation to that Court possibly having jurisdiction. I did not make the other concessions that were attributed to me in his judgment. A record of the proceedings may be obtained to substantiate my contention in that regard."* [Para 7].

129. I have no reason to doubt the statements of Hodes. Every effort has been made through the Registrar of the High Court to obtain the transcript of the hearing. These efforts have thus far been unsuccessful. If the transcript is obtained, leave will be sought to hand it up at the hearing.

130. My view is that, in the absence of Gorven J's apparently erroneous references to the concessions made by Hodes, the learned Judge may have dismissed Booysen's applications. There would then never have been any question of prosecuting Jiba.

(iii) **Opinion of Ferreira and Van Eeden, Dated 5 August 2015 (Attached to the applicant's supplementary affidavit as SFA13)**

131. On 22 July 2015, an opinion was requested by the NDPP (Abrahams) after a presentation by Ferreira and Van Eeden, who were in part responsible for the Jiba prosecution, at which I was present. (I refer to this document as the "Ferreira opinion".) The NDPP specifically directed that the Ferreira opinion be handed to me.

132. I understand that the NDPP did not consider the Ferreira opinion itself, but expected that I would do so in the course of making the decision as to whether to pursue the charges against Jiba. The NDPP, I understand, deliberately avoided taking the decision, because he anticipated that, whichever way it went, it would be subject to review under section 22(2)(c) of the NPA Act and section 179(5)(d) of the Constitution. No such review application has, however, been forthcoming. Applicant has thus failed to exhaust an internal remedy. This point will be advanced at the hearing of this matter.

133. I considered the Ferreira opinion, prior to compiling my own opinion. I was not persuaded by Ferreira's unequivocal conclusion that the prosecution of Jiba be continued. While I was obliged to carefully consider and give due weight to the Ferreira opinion, I was not bound by it.

134. To anticipate my overall conclusion regarding the Ferreira opinion, I considered it fundamentally flawed for four reasons:

134.1. First, it fails to acknowledge the broad scope of liability provided for under s. 2(1)(f) of POCA, and in particular the fact that no nexus need be shown between the accused and any predicate offence.

134.2. Second, it overlooks that Booysen could be criminally liable on a showing of no more than *culpa* with respect to his knowledge of unlawful activity.

134.3. Third, it fails to take account of the broad scope of prosecutorial discretion.

134.4. Fourth, both the NPA Act and POCA have provisions that protect an officer that acts in good faith.

135. I turn now to address pertinent parts of Ferreira's opinion on a paragraph-by-paragraph basis.

136. Before doing so, I should mention that it is disturbing that Ferreira, in the course of preparing his opinion, consulted with Booysen in Durban, on 24 July 2015 (a copy of the relevant travel claim is attached hereto as **MM-12)**. Significantly however, Ferreira opted not to approach Maema and Mathenjwa, the leaders of the Booysens prosecution, who were more familiar with the matter than anyone else.

137. I note in passing that Ellis SC, who advised the prosecution, similarly consulted with Booysen on 16 February 2016. A copy of the tax invoice reflecting same is attached hereto marked **MM-13**.

138. Needless to say, I took into account, in assessing both the Ferreira and the Ellis opinions, that both had been remarkably one-sided in their selection of sources.

Ad para 19 of Ferreira Opinion

139. I am aware that, with respect to certain of the underlying murder charges, inquests were held. As acknowledged by Ferreira, however, inquests were not held into all of the killings (28 charges of Murder are contained in the indictment). I point out further that the predicate offences in the indictment comprise numerous other charges,

including assault, defeating the ends of justice and firearms offences, as to which no inquests were held.

140. The Applicant has not annexed to its papers the inquest results upon which it relies; hence it is precluded from advancing arguments based thereupon.

Ad para 20 of the Ferreira Opinion

141. It seems evident that Ferreira did not take account of the fact that under s. 2(1)(f) of POCA, it is not necessary that any nexus be shown between Booysen and any predicate offence.

Ad para 21 of the Ferreira Opinion

142. I reiterate that some of the predicate offences listed in the indictment do not allege murder.

Ad para 24 of the Ferreira Opinion

143. As noted, inquests were held in relation to only a fraction of the POCA predicate offences. Furthermore, as set forth in this affidavit, there was in any event more than ample material before me to support my conclusion that the prospects of success in the case against Jiba – which is, after all, the subject matter of this review application - did not warrant continuation of the prosecution.

Ad para 28 of the Ferreira Opinion

144. I noted the opinion's comments about the limitations of Aiyer's knowledge. But the fact that there may have been other officers in as good a position to describe provincial structures is no reason to discount the evidence of Aiyer. He is peculiarly well-placed to describe the hierarchy within which he has long worked, the persons who have filled the posts above and beneath him, and their working relationships. At relevant times, he was unit Commander, Durban

Organised Crime, one of four unit commanders in the province who reported directly to Booysen. It was he who was allegedly marginalised when Booysen and Olivier co-managed the CMS as part of a racketeering enterprise.

Ad para 32 of the Ferreira Opinion

145. I have dealt elsewhere with the date of Aiyer's second statement.

Ad para 35 of the Ferreira Opinion

146. I reiterate that s. 2(1)(f) of POCA does not require that any nexus be shown between the accused and any predicate offence.

Ad para 36 of the Ferreira Opinion

147. I am aware of the decision of the Chairperson of the disciplinary hearing of Booysen, and his comments upon the evidence of Aiyer. While I was cognisant thereof, I did not deem that Jiba acted unlawfully or improperly by attaching weight to the evidence of Aiyer.

Ad para 40 of the Ferreira Opinion

148. I have dealt elsewhere in this affidavit with the statement of Danikas.

Ad para 42 of the Ferreira Opinion

149. It is not true that the statement of Danikas covered only the period 2001/2007. It extended also into the 2008 timeframe, which overlaps with the first year of the time span of the indictment, commencing in 2008. Danikas refers to an incident on 24 May 2008 in which, at a crime scene in Morningside, a suspect was shot and fell to his death as Mostert and members of the CMS attempted to arrest him. (Para 12).

150. It does not assist to point out that there is no mention of Booysen having been at the scene of this particular incident. No nexus need be shown between Booysen and any single predicate act. The point

of this evidence is to establish patterns and the *modus operandi* associated with fatal shooting of suspects when purportedly attempting arrest. It is not of course unusual for persons resisting arrest to be killed. What is extraordinary about the CMS is the extraordinarily high rate of such killings. There were seldom survivors amongst suspects confronted by the CMS. Notwithstanding claims that the police faced fire, in no instance was a member of the CMS wounded or killed. I have seen no report even of police vehicle damage attributed to gunfire. All of this must be understood not in isolation, but together with allegations from other sources that alleged a shoot-to-kill policy adopted by the CMS, in particular.

151. Irrespective of what one thinks of these allegations, they were not drawn out of thin air; my assessment was that Jiba had not acted in bad faith in determining that they should be ventilated at trial.

Ad para 44 of the Ferreira Opinion

152. POCA specifically allows for the admission of hearsay evidence, provided it does not render the trial unfair.

Ad para 45 of the Ferreira Opinion

153. I am not aware one way or another of what has been said by the persons referred to in the statement of Ndlondlo. Their credibility, and the credibility of Ndlondlo, remains to be tested. Booysen would be at liberty to call witnesses at trial to negate the testimony of Ndlondlo. The fact that it may be that an accused will negate a state witness's testimony at trial is not ordinarily deemed to be reason not to weigh that evidence in favour of instituting prosecution proceedings.

154. I obtained the Ndlondlo affidavit in the course of Ferreira's 22 July 2015 presentation On 13 July Mathenjwa advised me that it was Booysen himself who had deposed to the answering affidavit in the Mkhize case, a copy of which is attached as annexure **MM-13A**.

Ad para 48 of the Ferreira Opinion

155. I find it surprising that Ferreira was not aware that it is not necessary in establishing criminal liability under s. 2(1)(f) of POCA, to show any link between the accused and any predicate offence.

Ad para 49 of the Ferreira Opinion

156. I took account of Ferreira's criticism of the views of Maema and Mosing. Having carefully read these two memos, I found myself persuaded that Jiba could reasonably have relied upon them in issuing the authorisations.

Ad para 51 of the Ferreira Opinion

157. I reiterate further that s. 2(1)(f) of POCA does not require that any nexus be shown between the accused and any predicate offence.

Ad para 53 of the Ferreira Opinion

158. I do not comprehend Ferreira's suggestion that Jiba's opposing affidavit in the Bar Council application "*may have aggravated matters*".

159. Ferreira does not appear to deny that it was Nxasana that decided not to pursue the prosecution.

160. There is nothing inconsistent with not calling as a witness at trial a person who has earlier provided affidavit evidence. Also, there would be nothing to bar Jiba from relying upon initial notes of interviews with a person with relevant knowledge, in her determination of the prospects of success of the prosecution. In fact, she would be delinquent in not taking witness notes into account in her decision whether or not to prosecute.

161. Effectively, Ferreira appears to say that no authorisation of a POCA prosecution is permissible until and unless the decision-maker has before her all of the evidence, in admissible form, that would be

necessary to secure a conviction beyond a reasonable doubt. That is simply untenable.

Ad para 57 of the Ferreira Opinion

162. My own view was, having reviewed the substantially similar material as considered by Ferreira, that the prosecution of Booysen, whilst by no means assured of success, had sufficient prospects to warrant a prosecution. For reasons I do not fully understand, Ferreira determined for himself that the prosecution was unfair. I read little of substance in his opinion to support that conclusion. I took note of Ferreira's speculation about political *animus* that he suggests - but does not quite spell out - may have given rise to the Booysen prosecution. I was unable to accord significant weight to this.

163. My view was that the best forum to determine whether the prosecution was fair or not would be the court. I would add that, even were the prosecution to be found to be unfair at trial, that would not suffice to obtain a conviction of Jiba for fraud and perjury.

Ad para 58 of the Ferreira Opinion

164. Ferreira's speculation that there was "pressure on Jiba to prosecute Booysen" is entirely vague and speculative. Ferreira quotes Cassim SC as saying that there was an "agenda on the side of the SAPS to get rid of Booysen". Assuming for present purposes that was so, I am at a loss to see how that would bear one way or another on whether Jiba was guilty of fraud and perjury. As the Courts have stated, the worst motive does not render an otherwise lawful prosecution unlawful any more than the best motive can cure an otherwise unlawful prosecution.

Ad para 61 of the Ferreira Opinion

165. The observation that Jiba had "no evidence under oath before her on which she could lawfully authorise the racketeering prosecution

against Booysen" suggests that Ferreira is unaware that, as expressly found by Gorven J, there is no requirement that evidence be under oath to support a conviction under POCA. The fact that a written statement is not under oath may, of course, affect the weight to be given to evidence, or may call for corroborating material. But that is a matter for the trial court to determine.

Ad para 62 of the Ferreira Opinion

166. Ferreira adopts a hyper-technical approach that I felt very comfortable rejecting the arguments Jiba raised or did not raise in her answering affidavit in the Booysen application, or, for that matter in the GCB application, would not constrain her in defending the fraud and perjury charges.

Ad para 64 of the Ferreira Opinion

167. It escapes me what significance Ferreira attaches to the e-mail of Jiba addressed to Mosing on 1 April 2014. The fact that Jiba asked Mosing to assist her to "*get to the bottom*" of "*the whole issue about the evidence that we had when the authorisation was issued*", does not entail that she did not know what evidence was available against Booysen at the time of the authorisation.

Ad para 66 of the Ferreira Opinion

168. In my assessment, this is another *non sequitur*.

Ad para 81 of the Ferreira Opinion

169. I concur that there is always the possibility that a prosecutor will be affected by what Ferreira calls "tunnel vision". Another term for this phenomenon is "confirmation bias" - the tendency of persons to notice and attach unwarranted weight to data that fortifies pre-existing convictions, while failing to note data that tends to disconfirm those convictions. This is a well-known phenomenon that is widely commented upon in literature on human cognition.

170. The crucial point is that these phenomena represent systemic flaws in human thought patterns. No one has ever suggested that a person subject to *tunnel vision* or *confirmation bias* is acting in bad faith; these phenomenon are cognitive impairments that are beyond all conscious control.

(iv) **Other Documents**

171. I turn now to comment on items NJ1 – NJ6, the first six annexures to Jiba's answering affidavit. These featured prominently in the dispute about Jiba's answering affidavit in the Booysen application.

Recommendation of SAPS Incentive Payments (NJ1)

172. **NJ1** is a document (attached hereto as annexure **MM14**), naming the police officers who received monetary awards, dated 14 October 2008. I understand that it was considered by Jiba prior to deciding to authorise the prosecution.

173. The document shows that Booysen, along with several other CMS members, were recommended for awards for the killings of Kwa-Maphumulo Taxi Association members.

174. I pause here to note that much of Applicant's criticism of Jiba's authorisation of the Booysen prosecution is based upon attacks upon the provenance, contents, probative value and standing of statements, on an individual, item-by-item basis. But that is not the way to assess the prospects of success of a particular prosecution. We weigh the body of evidence as a whole, taking into account the manner in which various items of evidence confirms, mutually corroborates, impugns or undermines other inputs from independent sources.

175. In summary, the award recommendations record that:

175.1. On 3 September 2008, an investigating team consisting of members of the CMS, including Mostert (the 4th accused, a

Warrant Officer stationed at the section), entered a house. A gunfight is said to have ensued, leading to the shooting of one Buthelezi; found next to his body, according to the recommendation, was a 9 mm pistol. (There is no mention of any injury to any of the investigating officers.)

175.2. On 15 September 2008, Booysen informed Mostert that he had information regarding a suspect that had organised a "hit" on Chonco. The investigating team, including Mostert, pursued a vehicle in which the suspects were travelling. A shootout ensued. One Ndimande and his body guard were fatally shot.

175.3. On 18 September, Mostert received information about two suspects in the Mandini area. He and other members of the CMS proceeded to a house there. In an ensuing shootout two suspects, Mthembu and Ntuli, were fatally shot. Two pistols were found at the scene.

176. As already stated, the extraordinarily high, and one-sided, casualty rate is characteristic of police "hit squad" activity.

177. A further document, of 18 November 2011 (attached hereto as annexure **MM-15**), also concerns the aforementioned shooting, and sets out the events leading to the shooting of Mkhize by members of the team.

178. It was the aforementioned shootings that led to substantial financial awards being recommended.

179. I submit that it was not irrational for me to determine that this document, read in conjunction with other evidence before Jiba, could reasonably have been deemed by her to support the allegation that Booysen knew or reasonably ought to have known of the unlawful conduct of SAPS officers associated with the enterprise.

First Statement of Aiyer (NJ2)

180. This statement (attached to the applicant's supplementary affidavit as SFA17), was placed before Jiba for consideration before she decided to authorise the racketeering prosecution. It was signed on 4 August 2012.

181. The deponent, Aiyer, was the Commander, the Durban Organised Crime Unit. He was one of four Unit Commanders in the province who reported directly to Booysen, the Provisional Commander, who was in turn accountable to the Provincial Head of the Detective Service, Commissioner Brown. Reporting to Aiyer were three superintendents holding the rank of Lieutenant Colonel, each of whom was a "section" Commander. One of these, Olivier was the commander of the CMS. The crucial point for present purposes is that, under this chain of command, Olivier should have reported to Aiyer – not to Booysen.

182. Aiyer's evidence serves to rebut Booysen's contention that, given his senior position, he did not interact directly with the CMS. Evidence that Booysen in fact worked closely with the CMS, as set out in detail by Aiyer, supports the allegation that he was effectively *co-managing* the enterprise, with Olivier, within the meaning of s. 2(1)(f) of POCA.

183. Aiyer records in some detail how he came to be usurped by Booysen, abetted by Olivier:

> *"Olivier [Accused No 9, the commander of the CMS], reported all incidents directly to the then-Director JW Booysen. I was merely informed afterwards or long after any shooting incident had taken place his section. Almost every week the Cato Manor offices were visited by then Director JW Booysen without me being informed."* [Pg 2, "Para 3"].
>
> ...
>
> *"[Members of the CMS] ... became hostile towards me. [My] information was that all these members are only accountable to then Director JW Booysen."* [Pg 2, "Para 4"].

...

"[Booysen] walked into my office ... raised his voice and stated that ... decision[s] regarding Cato Manor [are] in his hands and I should not interfere anymore ... It was very clear that I was not in command of the Cato Manor offices." [Pg 2,Para 5].

State resource, emails and financial resources were sent directly to then Director JW Booysen. Although I was the Unit Commander, I was not in control of them. (Pg 3, "Para 1").

184. Aiyer wrote further:

"All media reports on all incidents came from Booysen and not me. All graphic picture[s] of shooting[s] on crime scene [were] put in by journalist called Mr Anil Singh (a friend of Booysen) of Daily Sun newspaper. I do not know how this journalist got to those crime scenes and authorisation[authorisation]ere he obtained those pictures." (Pg 3,"Para **5"**).

Second Statement of Aiyer (NJ4)

185. The second statement of Aiyer (attached to the applicant's supplementary affidavit marked "**SFA17"**), was signed on 31 August 2012. As already noted, Jiba's use of the present tense in her reference to this would appear to be the sole material mis-statement in her affidavit. My assessment was that demonstrating her bad faith on this basis would be inordinately difficult.

186. In this regard, I took account of the explanation of Maema (A4), on page 9 of his affidavit (attached hereto as annexure **MM-9**). He writes:

"Although the second of Aiyer's statement was dated 31 August 2012, the prosecution team had already consulted Aiyer and already knew what the contents of Aiyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy [sic] to the prosecutors from the consultation and was used on that basis."

187. A factor that makes it seem unlikely that Jiba deliberately misstated the dating of the 31 August statement (to procure an unjust conviction of Booysen), is just how patent the mis-description is. The most casual reader would immediately notice, from the plain fact that the document was signed on 31 August, that it *could* not have been before Jiba, at least not in that form, when she earlier signed her answering affidavit.

188. Regarding the content of this statement, it reaffirms what is set out in Aiyer's affidavit of 3 August, about how Booysen had interposed himself into the work of the CMS.. It fell under the co-management of Booysen and Olivier:

> *"Booysen walked into my office and told me that I have no dealing with Cato Manor offices and he [had] taken over that section and make decision. All media reports of shooting by Cato Manor section was made by Booysen. (Pg. Para 3).*
>
> *"It [was] clear Lt Colonel Olivier [accused No. 9], was working hand in hand with Director Booysen. ... I recall shooting incident in the N3 near Cato Ridge area by Cst Shane Naidoo and others. I was unaware that Booysen was on leave at time yet he confirmed he is at scene."* (Pg 2, Para 1).

189. Aiyer became fearful of Booysen and Olivier:

> *"I received information from reliable sources ... that Director Booysen [was] at the unit at Cato Manor. I was told by late Warrant Officer Nxumalo, on a certain day after my weekly meeting at my offices I should be very careful of Booysen and Olivier and I should protect myself."* (Pg1, Para 2).

190. Aiyer records that he received no support from his immediate superior officer:

> *"I was always told by PT Brown ..., that Booysen was my Commander and I have work on his instruction. I also picked it up, that the senior manager had a certain fear of Booysen."* (Para Pg1, Par 3).

191. In fact, Aiyer feared he might personally be targeted by the STA because of his defiance of Booysen:

> *"I received information from reliable sources in the Taxi Association that Warrant Officer Mostert [accused no 4, a Warrant Officer at the unit], is working with a taxi guy in the Stanger Taxi Association. There [sic] going to put a hit on me as I am a problem ... [There were] allegations of ... large amounts of money was exchanging hands. ... I received information from a source that a Director Gopauls and Booysen were seen together. Director Gopauls members from the Durban Harbour police proceeded to Umhali area and gun down innocent Indian boy, plus the driver after a car chase."* (Pg 2, Para 3).
>
> *"This is a very serious matter and according to my view, these members are very dangerous. They have been granted bail by courts to work from the same offices. ... I will only make a proper statement when all safety measures are put into place, my rights are respected by the courts."* (Pg 5, Para 3).

192. Both of Aiyer's affidavits, in my assessment, laid an adequate foundation for the allegation that Booysen did indeed come to exercise managerial power over the enterprise and that he exercised that power, at least in part, by intimidation of those who might challenge him. It may have been possible for Booysen to have refuted the foregoing at trial, by way of cross-examination of Aiyer, and countervailing evidence. That would be a matter for the court to assess. It struck me as inappropriate for the ultimate finding of a trial court to be pre-empted, by citing shortcomings in the admissibility and probative value of Aiyer's affidavit.

193. I must emphasise that I interpreted this second statement of Aiyer purely as fortifying that which appeared in his first statement, which I evaluated as sufficient on its own to support the allegation that Booysen managed the enterprise within the meaning of s. 2(1)(f).

Statement of Danikas (NJ3)

194. I have already referred to the reason that Danikas' statement (attached to the applicant's supplementary affidavit as SFA21) in April or May 2012, was not signed. There were difficulties in the use of the Mutual Foreign Assistance Protocols to obtain his signature in Athens - to which he had fled in the wake of threats to his life after he "blew

the whistle" on Booysen. (To the best of my knowledge, Danikas has no plans to return to South Africa.)

195. As for the substance of Danikas' statement, my assessment is that a court could have found that it establishes the *modus operandi* of the CMS in general, and Booysen in particular. One aspect was the alleged practice of "planting" firearms on bodies of suspects. Danikas wrote regarding the killing of a suspect on that:

> *"It is my personal belief that the suspect, up to his death, did not have a firearm. Booysen was the overall commander of the operation … [He] stood by the cars up the hill. He came to the scene and congratulated the members."* (Para 4).
>
> …
>
> *"The members claimed later that the suspect had produced a firearm hidden somewhere in the vicinity … [Which] I seriously doubt as he was surrounded by more or less 12 police officers armed with assault rifles."* (Para 4).

196. Further, Danikas wrote regarding the pattern of the use of torture and violence:

> *"On 27 October 2006 at around 9 am four suspects were arrested by Cato Manor members at Durban airport arrival lounge. Some of the members I remembered who were present during these arrests were: Booysen, Mostert, [accused no 4, a Warrant Officer at the unit], Van Tonder, Vick Panday, Peter George, Shane Naidoo, Mukest Panday, Anton Lokum, Sgt R Lee and Adele Sonnekus took part in this arrest too, at Booysen's invitation. They were taken to Cato Manor police station and interrogated one by one. I was present during this interrogation. I witnessed one being questioned and subsequently tortured in my presence and in the presence of Booysen." [Para 9]*

197. Danikas writes further:

> *"The method utilised by the members of the unit was they will strip the suspect naked and physically assault him if he does not cooperate. They will tie him to a chair naked and they will start to interrogate him. … They will place a piece of material over the head of the suspect, always from the back, to suffocate the suspect. The suspect cannot see who is actually assaulting him. The standard method was always*

> *used, namely shoot to kill, assault, torture, tampering with crime scenes. Genl Booysen would be called by his members to the crime scenes to cover them up."* [Para 13].

198. Danikas refers also to the violence meted out by the CMS, in the presence of Booysen:

> *"Booysen … told me Mostert [accused no 4, a Warrant Officer at the unit], shot two of the suspects dead after one tried to hit him with a spade. furthermore, he told me that he arrived at the scene soon afterwards and that one suspect was still alive, waiting for the paramedics to arrive. He told me that he then leaned down to the dying suspect's ear and whispered: 'I told you I'm going to kill you if you come back'."* [Para 9].

> *"I saw various members of the Cato Manor unit [at a crime scene]. I found two African males lying within a residential garage. One was shot dead inside a car and the other one was wounded but still alive but in great agony and bleeding heavily. Booysen told me they will only call the paramedics and the ICD once the second suspect had also died, so everyone was waiting around for the second suspect to pass away due to his injuries. I managed to use a camera and recorded some video material of the crime scene in the presence of Booysen and the rest of the officers involved in the shooting. I was also instructed by Mostert and Olivier [the commander of the Unit], to pick up various large calibre spent police cartridges and after I placed them to my pocket I handed them over to Mostert and Olivier as per their request."* [Para 10].

199. It is true that only one specific incident referred to by Danikas fell within 2008 time period, as already noted. However, it must be pointed out that the incident involved the fatal shooting of a suspect during a purported attempt to arrest him, the characteristic *modus operandi* of what was alleged to be a police "hit squad".

200. Read with the other documents referred to, this evidence may be fairly said to support the allegations regarding the scope and *modus operandi* of the criminal enterprise allegedly managed by Booysen. In my assessment it was hence not unreasonable for Jiba to take the view that the evidence of Danikas would be admitted to show the *modus operandi* of the enterprise and Booysen, including their alleged propensity for violence against criminal suspects, the use of torture,

and an ongoing pattern of violations of the standards of conduct appropriate to policing.

Statement of Ndlondlo (NJ5)

201. This is the affidavit of Ndlondlo (attached hereto as annexure **MM-16**), dated 3 July 2013, who was an executive member of the Stanger Taxi Association ("STA"), and an informant of Mostert (accused no 4, a Warrant Officer at the SMSVCS), who has since died, in murky circumstances.

202. The affidavit corroborates in several respects the *modus operandi* of the CMS, and the personal involvement of Booysen.

202.1. Superintendent Chonco a policeman who had been a friend of Bongizwe, was killed by members of the rival KwaMaphumulo Taxi Association ("KTA").

202.2. The STA held meetings to designate murder targets. The STA's Treasurer organised payments to the killers, who included members of the CMS.

202.3. Sanele Zondi and Nkosi Zondi (both registered informants of Booysen), made arrangements for the CMS and Booysen, to execute hits on KTA members. [Para 7 – Para 12]

202.4. In the wake of Chonco's murder, several members of the KTA were assassinated by members of the CMS, under the command of Booysen:

202.4.1. The first target was one Lindelani Buthelezi. Buthelezi was killed by Cato Manor Unit...I was there when the money was arranged to pay Cato Manor for a job well done. [Para 8].

202.4.2. Thereafter, Kolopota Ntuli and Nathi Mthembu were killed by CMS in the same house. Sanele and Bongizwe Mhlongo were tasked to transfer "blood"

money to Mostert [accused no 4, a Warrant Officer at the section], for the killing, at the Tongaat Toll Plaza. [Para 9].

202.4.3. The third target was Mdu Mkhize who was killed by the Police and money paid to the Police Officers. [Para 10]

202.4.4. The fourth target was one Ndimande, killed in the Howick area. The Stanger Association raised R750 000 to give to Zondi and Bongiziwe, who conveyed the money to CMS. The money was to be given to "the boss", referring specifically to Booysen. [Para 11].

202.4.5. The next person targeted and killed was Bongani Mkhize, the Chairperson of the KwaMaphumulo Taxi Association. He was killed by CMS. The section was paid R1 million. The deponent was told that the money would be paid to Booysen, described as "*big boss of the Cato Manor Unit*". [Para 12].

203. As acknowledged by Gorven J, POCA specifically envisions that hearsay evidence is admissible. Even if one concluded that Jiba unreasonably believed that a trial court could be persuaded to admit this particular hearsay, that would not in my assessment suffice to show perjury or fraud.

Affidavits filed of record in the Mkhize matter

204. I have already noted Mkhize was shot by the CMS, notwithstanding that he had successfully obtained a protection order to save him from precisely that fate. His founding affidavit in that matter was relied upon by Jiba, but, for reasons unknown, was not in the record that I

considered in making my decision to withdraw the charges against Jiba.

205. Booysen himself made the answering affidavit in the Mkhize application, a document referred to as annexure "NJ6". My understanding is that Maema and, in turn Jiba, relied in part upon inferences from this affidavit in assessing the prospects of success of prosecution of Booysen. I did not view such reliance to be irrational.

206. In his prosecution memo, Maema wrote:

> *"[Booysen's] management is abundantly clear in his Answering Affidavit to the Interdict Application obtained by the deceased Bongani Mkhize on 14 November 2008 as well as his visit to a crime scene where the participants in the enterprise had committed crime in his capacity as a Provincial Commander Organised Crime. He also wrote an information note to the Provincial Head: Detective Services for KwaZulu-Natal detailing the circumstances under which Bongani Mkhize was killed. He was controlling the affairs of the enterprise."* [Para 44].

207. It is evident that Maema found it significant in itself that Booysen had deposed to the answering affidavit in the Mkhize matter, and manifested detailed knowledge about the case. I found Maema's observation that this might negate Booysen's claim that he was distanced from the activities of the CMS persuasive. I understand that Jiba thought likewise. I did not think it was unreasonable of Jiba to do so.

208. I must add that these references in the affidavit of Maema to the affidavits of Mkhize and Booysen only reinforced my overall assessment that there were prospects of success in the prosecution of Booysen. Even if no account had been taken of this material, I would have remained of the view that the prosecution of Booysen was not unjustified.

ALLEGED MIS-STATEMENTS IN JIBA'S AFFIDAVIT

209. The perjury charges against Jiba arise directly from the contents of her answering affidavit in the Booysen review application. To deal with this charge, it is necessary to examine the crucial paragraphs of that part of the affidavit relied upon by Gorven J.

210. Although my analysis of the precise language in Jiba's answering affidavit is most germane to the perjury charge, it also weighed in my assessment that the two fraud charges against Jiba were likewise unlikely to succeed.

211. Anticipating the discussion below, I noted that Gorven J found that Jiba had said that the statements attached to her answering affidavit were under oath. However,

211.1. Jiba did *not* claim in her affidavit that the statements upon which she said she relied were made under oath. (But, in any event, there would be nothing irregular in her attributing weight to such statements, even if unsigned and not commissioned.)

211.2. To the extent that Jiba did err in her summation and interpretation of the various statements, there was no evidence to suggest to me that this was in bad faith.

212. It is beyond dispute that a prosecutor, like any other deponent to a sworn affidavit, has a duty to carefully read the affidavit in full and satisfy themselves of the veracity of the content before deposing thereto. However, it is far from uncommon for allegations in affidavits to be found by courts to be incorrect. While Judges are heard to comment adversely upon the conduct of deponents in such cases, it is rare for a perjury prosecution to ensue. The dearth of such proceedings reflects the need to show that the deponent intentionally advanced falsehoods. Especially in lengthy affidavits relating to complex fact pattern, material errors are virtually inevitable.

213. The likelihood of such errors is magnified where affidavits are drafted by legal representatives. In this instance, it is undisputed that the answering affidavit of Jiba was drafted by her legal representatives, based upon consultation in the first instance with her NPA subordinates.

214. As already noted, in terms of the prosecutorial guidelines, I am obliged to take into account weaknesses in the prosecution's case. In my assessment one such weakness *in casu* lay in what I refer to above – as well as other anomalies in Gorven J's analysis detailed below

215. It what follows, my comments are set out in bold type after relevant block quotations from Jiba's affidavit. Italicized and underscored text designates my added emphasis to particular text in the quoted extracts.

216. Jiba wrote as follows in paragraph 16 of her answering affidavit (as quoted by Gorven J at paragraph 26):

216.1. *"After due and careful consideration of the information under oath and the evidence as contained in the dockets … the respondents were, and still are satisfied that there is prima facie evidence that an offence has been committed and applicant is implicated in that …"*

The conjunctive form as used here, negates the contention that Jiba relied only upon "information under oath".

216.2. *"During May 2008 to September 2011, members of the South African Police Service (SAPS) under the applicant's command killed members of the KwaMaphumulo Taxi Association who were in conflict with the Stanger Taxi Association, as well as ordinary civilians and/or criminal gangs who were suspected of being involved in ATM bombings."* (Para 16(4) of Jiba Answering Affidavit).

It must be noted that this, the fundamental factual allegation in the case against Booysen, is stated by Jiba

as based *both* upon information under oath and evidence contained in the docket.

216.3. *"The information before me suggested that these members of the SAPS, would in most of the killings place a firearm next to the deceased person to create the impression that s/he was armed and had attacked the police by shooting at them or endangering their (police) lives."* (Para 16(5) of Jiba Answering Affidavit).

The broad, term "information", as used here by Jiba, suggests that the particular allegation in this paragraph was not solely reliant upon statements under oath in this respect. (If evidence under oath was indeed the exclusive basis for the allegation that firearms where "planted", why did Jiba not reiterate the term "information under oath"?) This reinforced my conclusion that Gorven J erred in attributing to Jiba the position that she relied upon only a narrow category of evidence in the annexures to her Answering Affidavit.

216.4. *"The information under oath which was placed before me also indicated that the applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them."* (Para 16(6) of Jiba Answering Affidavit).

This is the only allegation stated by Jiba to have been obtained "under oath". Even in this instance, however, there is nothing to suggest that particular allegation did not also derive from other sources.

216.5. *"The information further revealed that the unlawful activities of killing suspects and/or civilians were, in certain instances motivated by the applicant's and members of his Unit's desire to enrich themselves by means of state monetary awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim documented as "NJ1" in which inter alia the applicant is recommended for such an award resulting from the deaths of suspects."* (Para 16(7) of Jiba Answering Affidavit).

Again, the use of the broad term "information" suggests that this allegation may have drawn support at least in part from other independent evidence, not under oath. Significantly, NJ1, specifically referred to in this paragraph, is itself not under oath.

216.6. *"Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer (NJ2), Mr Aris Danikas [NJ3], and Mr Ndlondlo [NJ5], from which it is apparent that the applicant is well aware of the information that the respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the applicant) for the instrumental part that he played in these crimes."* (Para 17 of Jiba Answering Affidavit).

It will be noted that Jiba does not say that any of the statements mentioned are under oath - nor even that any of them are signed. It is puzzling that Gorven J found that Jiba alleged that all of the statements were under oath.

216.7. *"Additionally, Mr Danikas has revealed some of the information that he has provided to the respondents and to the press and even posted video footage thereof on YouTube."* (Para 17 of Jiba Answering Affidavit)

Jiba does not say that she did not rely upon this information. (If she did not rely on this material, why did she even mentioned it?)

216.8. *"These are only some of the instances that are referred to in the above-mentioned statements, which were considered together with the other information in the docket before the impugned decisions were made. In this affidavit, I do not intend to detail all of the information that was placed before me prior to me making the decisions in issue."* (Para 21 of Jiba Answering Affidavit).

This strongly suggests that Jiba did indeed rely upon "other information in the docket" - which is <u>not</u> stated here as being under oath.

217. I have attempted to show that careful analysis of the crucial portion of the answering affidavit thus reveals that Jiba nowhere alleges that the basis for her authorisation of the charges derived from sworn statements, or, indeed signed statements at all. Only a single allegation – that Booysen knew or ought to have known that his subordinates were killing suspects as aforesaid – is expressly alleged by Jiba to be based upon information under oath. And, even in that instance, Jiba does not say that allegations as to Booysen's knowledge derived <u>only</u> from such a sworn testimony.

218. In point of fact, there *is* testimony under oath that does support the contention that Booysen had culpable knowledge; I refer in that regard to the sworn affidavit of Ndlondlo (**NJ5**), a member of STA, who affirms, albeit on a hearsay basis, that payments were made to "the big boss" - meaning Booysen.

GORVEN J'S COMMENTS ON JIBA'S ANSWERING AFFIDAVIT

219. I turn now to consideration of portions of the judgment in which Gorven J analysed the relevant portions of Jiba's answering affidavit. With the utmost respect, Gorven J erred in his characterisation of what was stated by Jiba. These errors gave rise (at least in part) to adverse comments about her. They in turn formed the basis for the fraud and perjury charges. Having had the benefit of careful analyses both of Jiba's affidavit and these comments of Gorven J, I withdrew the charges, pursuant to the guidelines, which require that it may be necessary to reassess the prospects of a prosecution even after it has been instituted, on the basis, *inter alia*, of weaknesses in the prosecution's case.

220. Gorven J wrote:

220.1. *"In argument the respondents submitted that, because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. ... The insurmountable difficulty with this submission is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. She limits herself to the documents dealt with above. Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application."* [Para 27].

Although Jiba does not in so many words say that she relied on correspondence attached to the founding affidavit referring to informers, she also does not aver to the contrary. The question might be asked why, if Jiba did not rely on this category of matter, she mentioned it in her affidavit.

220.2. *"The provisions of POCA allow for hearsay and similar fact evidence to be led in certain circumstances."* (Para 27).

This is the recognition of section 2(1)(f) of POCA, to which I have already referred.

220.3. *"[Jiba] states that there were only two categories of information on which she based the first impugned decision. Firstly, the contents of the dockets. Secondly, statements under oath which she says are annexed as NJ2, NJ3, NJ4 and NJ5."* (Para 28).

With respect, Gorven J clearly erred here. As noted above, Jiba nowhere claims that annexures NJ2, NJ3, NJ4 and NJ5 are "under oath". Nor does she say even that they were signed. Only one aspect of the case against Booysen is stated by Jiba to be based upon information "under oath" – and, as it happens, she does not link this aspect to any particular statement.

220.4. *"The respondents conceded in argument that no statements contained in [the dockets] implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions."* (Para 29).

Counsel for the respondents has made an affidavit (attached to the applicant's supplementary affidavit as annexure SFA18), to the effect that he did not "concede" that no statements in the docket implicated Booysen in any of the offences.

220.5. *"This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath."* [Para 30].

With great respect, this is manifestly wrong. Jiba did not say that any one particular statement was under oath - although in point of fact two of them were.

220.6. *"She says, in addition, that they implicate Mr Booysen in one or more of the offences in question."* [Para 30].

This is indeed so. To take one example, the affidavits of Danikas, Aiyer and Ndlondlo all attest to Booysen's active involvement in the operational activities of the CMS. That would be of undoubted relevance to the allegation that he knew about its allegedly unlawful activities or, at minimum, that he ought to have known thereof within the meaning of s. 2(1)(f) of POCA. That having been said, it needs to be emphasised that, under s. 2 (1)(f) of POCA, it is not a requirement that a person accused of "managing" the enterprise be implicated in any of the predicate offences themselves. It would suffice to show that Booysen exercised a "managerial" responsibility with regard to the racketeering enterprise as a whole.

220.7. *"The submissions of Mr Booysen in his replying affidavit can be summarised as follows ... Two of the annexures are sworn statements made under the name of one Col Aiyer. These are annexures NJ2 and NJ4, respectively. Booysen describes these as statements which concern 'office politics' and submits that they in no way implicate him in any of the offences with which he has been charged."* [Para 19].

Examination of the two statements reveals that they go beyond what Booysen dismisses as mere "office politics". Aiyer alleges, with regard to a number of specific instances, that Booysen imposed himself as *de facto* commander of the CMS. That negates Booysen's defence that he exercised no command and control in respect to the CMS. This is of significance, bearing in mind the attenuated nexus required for "management" of an enterprise under 2(1)(f). Moreover, Aiyer refers to (see Pg 2, "Para 5" of 4 August Statement), intimidation on part of Booysen in response to his attempt to re-assert control over the CMS.

220.8. *"The second [Aiyer affidavit], in addition to not implicating [Booysen] in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken."* [Para 20].

It is not denied that Aiyer's statement was commissioned some two weeks after Jiba's decision to authorise the prosecution of Booysen. But, as noted above, Jiba did not allege that either of Aiyer's two statements had been commissioned - or even signed - as at the time that she considered them.

In my experience it is far from uncommon for a statement to be commissioned weeks, or even months, after initially being reduced to writing, even if only in the form of drafting notes. During the course of an investigation, officers may take statements from prospective witnesses, anticipating that, depending upon the further investigation, and what other evidence comes to light, follow-up interviews will be held, at which time the statement will if still necessary be revised or elaborated upon, prior to being signed and commissioned.

220.9. *"The document referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it could be attributed to the named person and even if it were a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment, except for one event which does not relate to Mr Booysen."* [Para 22-25].

With great respect, Gorven J errs in assuming that Jiba claimed that the Danikas statement was sworn to - or even signed. In any event, it is commonplace for unsigned statements to be taken into account in prosecutorial assessments. Doubtless, the fact that a statement is not commissioned or signed may cause less weight to be accorded. Alternatively, evidence *aliunde*

may be demanded. That is a matter of argument before the trial court.

Regarding the learned judge's comment that the content of Danikas' statement does not speak to the period covered in the indictment (2008-2011). I offer two answers.

Firstly, my reading of the allegations suggested that Booysen's alleged conduct before 2008 may be admissible, inasmuch as they are relevant to Booysen's *modus operandi*.

Secondly, there is a year's overlap between the period covered in the indictment and the events set forth in Danikas' affidavit. The incident on 24 May 2008 (para 12), in which Danikas says that a suspect was shot while Mostert and members of CMS attempted to arrest him, lies within the period covered by the indictment. While it is true that Booysen is not mentioned, Mostert and the CMS have a killing attributed to them. Booysen is linked in other evidence to the CMS and Mostert. As noted elsewhere, there is no requirement under POCA that a direct nexus be shown between the person alleged under s. 2(1)(f) to have "managed" the organisation, and any particular predicate acts.

Moreover, in the immediately following paragraphs, Danikas describes the *modus operandi* of the CMS, without relating it to any particular date. It would have been alleged that the particular *modus operandi* it followed during the period that Danikas was associated with the CMS "spilled over" into the balance of the time period covered by the indictment. Moreover, Booysen is specifically linked to the CMS's *modus operandi* by

Danikas when he states that "Booysen would be called by his members to the crime scenes to cover them up". (Pg 6).

220.10. *"As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question."* (Para 31).

It is difficult to understand how it could be suggested that the affidavit of Ndlondlo, in which he specifically describes members of the STA paying money to Booysen, is not material and probative. The evidence could support the charges against Booysen. The credibility of the various witnesses would of course be tested at trial. That issue should not be pre-judged either by Jiba or this Court.

220.11. *"Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence."* [Para 34]

I point out that Gorven J did not adopt the allegation that Jiba had in fact been "mendacious", the word emphasised by Booysen's counsel. Gorven J's emphasis was on the fact that Jiba had not applied to interpose a further affidavit to rebut the allegation. It is only in "exceptional circumstances" that a party will be allowed to interpose a further answering affidavit. No such application was made.

220.12. "In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case *need go no further* than that, on her version, the NDPP did not have before her annexure NJ4 at the time." [Para 34]

The Applicant overlooked that Gorven J specifically limited the scope of the inference against Jiba, finding only that the NDPP did not as a matter of fact have the benefit of NJ4 at the time she took the decision. The prosecution of Jiba was predicated upon a crucial further step of inference – that, when she signed her affidavit, Jiba knew that NJ4 had not been signed and commissioned. I doubt it would be possible to prove this second inference beyond reasonable doubt. This was a factor I took into account in withdrawing the charges against Jiba.

220.13. *"In addition it is clear that annexure NJ3 is not a sworn statement."* [Para 34]

As noted above, Jiba at no point alleged that NJ3 was a "sworn" statement. The fact that a statement is not signed does not render it *ipso facto* inadmissible - although it may, depending on surrounding evidence, limit its evidentiary weight, or call for corroboration.

220.14. "*Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question.*" [Para 34].

I respectfully differ from the implicit legal conclusion reflected in these words. Under POCA, it is simply not necessary to link an alleged *manager* of a criminal enterprise the accused to any predicate offence. (Booysen was charged under s. 2(1)(f) of POCA, which requires only that it be proved that Booysen managed the "operation or activities of an enterprise and ... knows or ought reasonably to have known that any person, whilst employed by, or associated with that enterprise,

conducts or participates in the conduct directly or indirectly, as such enterprise's affairs re a pattern of racketeering activity".)

220.15. "*This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Booysen for contraventions of s 2(1)(e) and (f), respectively.*" (Para 34)

I submit that there is no contradiction between a finding that Jiba had no rational basis for her decision to authorise the prosecution, and it being impossible to prove beyond a reasonable doubt that this lack of a rational basis amounted to untruthfulness and bad faith on her part.

221. I considered it to be of significance that Gorven J wrote:

> "*If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day.*"

222. Gorven J's conclusion, in effect, that it was Jiba's legal error that gave rise to Booysen's application, suggests strongly that Gorven J would not have viewed Jiba's conduct as warranting fraud and perjury charges against her.

AD THE FOUNDING AFFIDAVIT OF NICOLE LOUISE FRITZ

223. The bulk of the founding affidavit is most appropriately answered by ; I will answer directly only the allegations in the founding affidavit relating to my withdrawal of the fraud and perjury charges against Jiba.

Ad paras 1 – 73 and 79 - 99

224. I refer to the accompanying affidavit of Abrahams.

Ad paras 74 – 78

225. The contents of these paragraphs are denied insofar as they are inconsistent with what is stated above.

Ad para 100

226. The contents of this paragraph are denied. In argument in this matter, reference will be made to the full text of the decision of Gorven J. These demonstrate, it will be submitted, that the Applicant's allegations as to its content and implications are in crucial respects incorrect.

Ad para 101

227. Subject to the correction of the patent error in the final line of this paragraph, I do not contest the quotation from the judgment of Gorven J.

Ad para 102

228. The contents of this paragraph are admitted.

Ad paras 103 - 105

229. The contents of these paragraph are admitted to the extent they accurately reflect the news report cited.

Ad para 106

230. I do not deny that SABC news reported, to the extent it is accurately quoted.

Ad para 107

231. The contents of this paragraph are admitted

Ad para 108

232. I reiterate that which is stated above regarding the press conference, referred to in the GCB matter.

Ad para 109

233. To the extent that the news report is accurately quoted, I do not deny that this was said by the source.

234. Regarding the contents of the report, I refer to what is stated above, and note that it is confirms that it was myself, and not the NDPP, who made the operative decision.

235. Regarding my statements as to the rationality of the decision, I stand by my comments as quoted in the report.

Ad para 110

236. I do not deny this, to the extent it accurately quoted reflects the text.

Ad para 111

237. The contents of this paragraph are admitted, insofar as they accurately quote the text of letter of 18 August 2015.

Ad para 112

238. I must assume that the reference to the letter of 24 August 2015 is intended to refer to my letter of 21 August 2015.

239. I submit that the reasons given for the decision were as detailed as was appropriate in the circumstances. They are consistent with the well-established test for the institution and pursuing of a criminal prosecution.

240. As for the final sentence of this paragraph, it is unclear why I needed to deny earlier assertions regarding section 78 of POCA.

241. I refer also to the equivalent provision in s 42 of the NPA Act, which likewise protects NPA officials from liability with respect to actions taken in good faith.

Ad para 113

242. The contents of this paragraph are denied. There is no error of law.

243. The Applicant has not exhausted the available internal remedy of seeking review under section 22 of the NPA Act of the decision not to pursue the prosecution of Jiba.

Ad para 114

244. The contents of this paragraph are admitted

Ad paras 115 and 116

245. The contents of these paragraphs are admitted to the extent they accurately quote the relevant provisions.

Ad para 117

246. The implication of the word "should" will be subject to legal argument. For the moment, I submit that, as is well established, prosecutorial discretion is broad; only in rare instances will a court intervene.

247. I note that there is no allegation of bad faith in the founding affidavit. Nor could there be.

Ad para 118

248. The contents of this paragraph are admitted, save that additional reasons were furnished for the decision, as noted above.

Ad para 119

249. Applicant's concession is noted. I emphasise that, aside from not being reviewable under PAJA, a prosecutorial exercise of discretion will be reviewed and set aside only in exceptional circumstances.

Ad para 120.1

250. I have already noted that section 78 of POCA was not mentioned in the reasons given by way of my letter of 21 August 2015. But it remains the case that section 78 of POCA does indeed, offer partial grounds for my decision.

Ad paras 120.2 and 120.3

251. The contents of these paragraphs are denied.

Ad para 121

252. I refer to what has been stated above.

Ad para 122

253. I refer to my response to the equivalent allegation below. In addition, my decision was based also upon my determination that Jiba had not acted in bad faith.

Ad para 123

254. The contents of this paragraph are denied.

Ad para 124

255. The contents of this paragraph are admitted.

Ad para 125

256. The first sentence of this paragraph is admitted. The second sentence of this paragraph is denied. I refer to what has been stated above.

Ad para 126

257. The first two sentences of this paragraph are admitted, save that I deny the implication that I took the operative decision.

258. As noted, the determination to withdraw charges against Jiba was taken by myself.

259. There was no legal requirement that I consult with Booysen, in the circumstances. Such consultation would have been appropriate had Booysen been the complainant, and in the circumstance where the evidence was such that the prospects of success of the prosecution were uncertain. Here, by contrast, it was plain that there were no reasonable prospects of success.

260. I did not deem it necessary or appropriate to consult with Booysen, who was not the complainant. Indeed it would be unusual for a third party to be consulted in these circumstances. There is no basis for deeming my determination as to who should be consulted to be irrational.

261. As for "other stakeholders" the implication that all of those who may be interested in a particular prosecution must be consulted under section 179(5)(d) need only be stated to be rejected. Given the numbers of persons arguably interested in this matter, it would have been impracticable to consult all of them.

Ad para 127

262. I reiterate what is stated immediately above.

Ad para 128

263. The contents of this paragraph are denied.

AD THE SUPPLEMENTARY FOUNDING AFFIDAVIT OF NICOLE LOUISE FRITZ DATED 15 APRIL 2016

Ad paras 1 – 26

264. I refer to the accompanying affidavit of Abrahams.

Ad para 27

265. The contents of this paragraph are admitted, to the extent they accurately quote the press statement released on 18 August 2015.

Ad para 28

266. The contents of this paragraph are admitted.

Ad para 29

267. The contents of this paragraph are admitted, to the extent they accurately quote the text of the 24 August 2015 letter referred to.

Ad para 30

268. It is submitted that the reasons given in the letter of 24 August 2015 were adequate in the circumstances. It was open to the Applicant, or any other interested parties, to request reasons. Yet no such reasons were sought. The final sentence of this paragraph is denied.

269. I do not understand the term *conclusory* as employed in this paragraph. It is true that the NDPP stated that the decision to decline to prosecute Jiba was premised on an assessment that there were no prospects of a successful prosecution. That is so. I deny that any error of law was involved.

270. It was my decision that was operative; as it happened, the NDPP, having read my opinion, agreed.

Ad para 31

271. The contents of this paragraph are admitted. The decision was indeed taken by myself.

272. It is true that my email to Ferreira implied that it was Abrahams, rather than myself, that was to take the operative decision. That was not so.

Ad para 32

273. I did not disclose to Ferreira that I was responsible for the decision because I wished to avoid the risk that the decision would be leaked to the media prior to the announcement by the NDPP the following day, 18 August. My apprehension was not ill-founded, in light of a history of covert disclosures of confidential NPA matters to the media. I refer in that regard to the original impetus for the Yacoob Commission, as set forth in the minutes of the Exco meeting dated 31 July 2014 which was to deal precisely with a rash of leaks from within they NPA. The concerns relating to the media leaks were also highlighted by the NDPP when he made his inaugural speech to the public on 7 July 2015. A news article from the Citizen website dated 7 July 2015 is annexed hereto marked MM-17.[1]

274. On 6 August 2015 NDPP addressed a meeting attended by NPA senior management including Ferreira and myself where leaks of information in contravention of the section 41(6) of the NPA Act was discussed.

Ad para 33

275. The contents of this paragraph are denied for the reasons set forth above. I had in fact already, as of the afternoon of 17 August made the operative decision. I admit I did not disclose same to Ferreira, for the reasons set forth above.

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[1] *http://citizen.co.za/419109/abrahams-seeks-a-better-tomorrow-for-npa*

Ad para 34

276. The first sentence of this paragraph is admitted insofar as it accurately reflects what is contained in the letter of 23 February 2016.

277. The contents of this paragraph are further denied, insofar as the allegation is that the NDPP requested a further opinion after he had received my opinion. As I understand it, the opinion of Ivy Thenga was requested by the NDPP at the same time as mine.

278. Regarding the final sentence of this paragraph, I understand that Thenga's Opinion was obtained by the NDPP in regard to the decision to withdraw charges against Jiba.

279. However, the opinion did not serve before me when I made the decision sought to be reviewed, and therefore does not form part of the Record of Decision.

Ad para 35

280. The contents of this paragraph are denied.

281. I reiterate that I took the decision to discontinue the prosecution of Jiba. I deny the NDPP "passed the buck" with regard to the decision. I deny that the decision stands to be reviewed and set aside.

Ad para 36

282. The contents of this paragraph are denied.

Ad para 37

283. The contents of this paragraph are admitted.

Ad para 38

284. The contents of this paragraph are admitted to the extent they accurately quote s. 20(1) of the NPA Act.

Ad para 39

285. The contents of this paragraph are admitted.

Ad para 40

286. The contents of this paragraph are admitted.

Ad para 41

287. The contents of this paragraph are admitted.

Ad para 42

288. The contents of this paragraph are admitted.

Ad para 43

289. The contents of this paragraph are admitted, save that I do not fully understand the legal claim in the final sentence thereof.

Ad para 44

290. The contents of this paragraph are admitted.

Ad para 45

291. The contents of this paragraph are admitted to the extent they accurately summarise, paraphrase or quote the relevant provision.

Ad para 46

292. A copy of the relevant delegation of powers to myself from the NDPP is attached above as annexure **MM-1**. Regarding the final sentence of this paragraph, alleging that the delegation was made without guidelines, it is unnecessary for any such guidelines to be articulated in the written delegation. Such guidelines are set out in the NPA's Prosecution Policy as well as in the PPD, to which reference has been made above.

293. As explained in detail above, I applied precisely those guidelines in my decision to withdraw the charges against Jiba.

Ad para 47

294. The contents of this paragraph are admitted, to the extent that they accurately quote the language of the opinion. It is true that I was requested to provide an opinion to the NDPP on the withdrawal of charges against Jiba. I was also requested by the NDPP to make the operative decision, which I did.

Ad para 48

295. As noted, I was requested both to provide an opinion and a decision regarding the discontinuance of the prosecution of Jiba. As to the meaning of the word *veracity* in the context, while I admit that it is perhaps vague, in context it is clear that it refers to the defensibility, or otherwise, of the underlying decision of Ferreira and Van Eeden.

296. The quoted text clearly implies both that an opinion was required of myself, *and* that I would take the operative decision.

Ad para 49

297. It is denied that I was not tasked with taking the decision regarding Jiba.

Ad para 50

298. The contents of the first sentence of this paragraph are denied. The decision to prosecute Jiba was taken by Ferreira, to whom Hofmeyr had verbally delegated the prosecutorial decision. It is submitted that both the mandate from Nxasana to Hofmeyr and the purported delegation of Hofmeyr to Ferreira was both irregular and unlawful in terms of section 20(4) of the NPA Act.

299. As noted above, there was indeed clear and ambiguous delegation of the decision to discontinue the prosecution of Jiba.

300. The circumstances surrounding the emails of 17 August between me and Ferreira are set out above.

Ad para 51

301. The contents of this paragraph are denied.

Ad para 52

302. The contents of this paragraph are admitted insofar as they accurately reflect the quoted text.

Ad para 53

303. There is no basis for the speculation herein. I reiterate that the operative decision was taken by myself.

Ad para 54

304. The contents of this paragraph are denied.

Ad para 55

305. The contents of this paragraph are denied. As noted by the Applicant itself, I am answerable to the Sixth Respondent herein. The latter reports to Jiba. There is no reason that the decision to discontinue the prosecution pursuant to a valid delegation to myself should not have been taken by me.

Ad para 56

306. The first sentence of this paragraph is admitted.

307. The last sentence of this paragraph is denied. The core business units of the NPA are the National Prosecuting Services (including the SCCU), the Asset Forfeiture Unit, the Legal Affairs Division, and Administration.

Ad para 57

308. The content of this paragraph represents and over simplified summary of the relevant hierarchy. The final sentence, however, is admitted.

Ad para 58

309. It is denied that I was directly answerable to Jiba. I was however, answerable to Mrwebi, who then answered directly to Mokhatla, who in turn reported directly to Abrahams. Jiba does not fall into my line of reporting.

310. I deny that there is any bar or impediment to me being invested with delegated powers to take prosecutorial decisions in respect of these individuals. It is denied that there is no evidence of such delegation. It is further denied that there is any apprehension of personal or institutional bias on my part. There is no basis for the speculation that my decision was tainted by fear, favour or prejudice.

311. It seems ironic that the Applicant should have taken this point. After all, it was Ferreira who, in the first instance prosecuted Jiba and who is by several degrees junior to Jiba.

Ad para 59

312. The contents of this paragraph are denied for the reasons set forth above.

Ad para 60

313. I reiterate what is stated above in this regard.

Ad para 61

314. The contents of this paragraph are denied.

Ad Paragraph 62

315. It is denied that the contents of the record are "largely irrelevant" to these proceedings, although it is admitted that the record contains

duplications and incomplete documents. As set forth in my attorney's correspondence dated 23 February 2016, I was obliged to make available the RoD as it served before me. This I did. As for incomplete documents, they are available in the record in its complete form as set out in the aforesaid letter of 23 February 2016.

Ad para 63

316. I say the documents provided by way of the record of decision are highly relevant, insofar as they deal with the Gorven J judgment, from which the allegations of perjury and fraud against Jiba emerged. That subject is dealt with in detail above. I have dealt with the Ferreira opinion and the Ellis opinion above.

317. I deny that Booysen is the *complainant* in the matter. Mr Leeuwschut was the complainant. My assessment was that, in the circumstances, no consultation with any other person was called for. I stand by that decision, and deny I was irrational.

Ad para 64

318. The contents of this paragraph are admitted.

Ad para 65

319. The contents of this paragraph are denied.

320. The only judgment that is relevant to Jiba's fraud and perjury charges is that of Gorven J in the Booysen review. It is unclear which reports the Applicant is referring to.

Ad para 66

321. The dates set forth in this paragraph are admitted.

322. I say that there is nothing inordinate in the timing of the various documents.

323. It is denied in particular that there was nothing in the record to indicate that the charges against Jiba should be withdrawn. I have pointed above to the input of Maema and the prosecution team.

324. The team was particularly concerned about a prosecutor being charged criminally for pursuing charges against an individual, which are subsequently found to be flawed.

Ad para 67

325. The contents of this paragraph are noted.

Ad para 68

326. To the extent this paragraph accurately quotes the relevant text, it is admitted.

Ad para 69

327. I stand by with my views as quoted herein.

Ad para 70.1

328. It is admitted that the origin of a complaint does not in itself determine the veracity of the alleged facts. It is, however one factor to be taken into account.

Ad para 70.2

329. I deny that it is irrelevant that the name of individuals within the NPA management are not stated. Although of course not decisive, this is indeed a potentially relevant factor.

Ad para 70.3

330. I stand by my allegation that Leeuwschut, who is an administrative functionary in the office of the former CEO, Ms Van Rensburg, who in turn is allied to the Hofmeyr camp, may have acted under undue influence.

Ad para 71

331. The contents of this paragraph are admitted

Ad para 72

332. The contents of this paragraph are denied, save that it is admitted that the documents do not constitute "evidence" in support of the charges against Jiba. It is nonetheless important that any documents upon which I rely be shown to be authentic and reliable; proper certification, together with supporting affidavits, is of assistance in that regard. I reiterate, however, that the absence of certification and supporting affidavits was by no means decisive in my decision-making.

Ad para 73

333. Indeed, I could have attempted to procure the missing affidavits. This would, however, protract the matter further. I deemed it important, in light of the fact that the trial was due to begin the following week, that finality be reached in this long-running saga, the dragging-out of which was prejudicing the functioning of the institution as a whole. My assessment was that, in the nature of things, procuring the missing affidavits might consume a considerable period of time. I should emphasise, however, that the absence of the affidavits was a relatively insignificant factor in my decision.

Ad para 74

334. The contents of this paragraph are denied. I stand by my decision. I did not take my decision on the basis that the Gorven J decision "was not to be trusted". I took my decision on the basis that, all things considered, and in light of the material errors on the face of the judgment, the prosecution should be discontinued.

335. As for any effect of s. 235 of the Criminal Procedures Act, that was the least of my concerns. However, it remains standard operating procedure that s. 235 be complied with in such circumstances.

336. As for the Gorven J judgment not having been appealed, that is correct. My understanding is that, owing to the unilateral decision of Nxasana, the appeal, for which papers had been prepared by Senior Counsel, was not proceeded with. I took into account that the prosecution team was most unhappy with that decision. I submit that it would be manifestly unfair to penalise Jiba by virtue of the withdrawal of an appeal at the instance of persons over whom she had no control.

337. I should mention that I shared the NDPP's view that Nxasana was engaged in a long-standing vendetta against Jiba.

338. My assessment was that if an appeal had been pursued, it stood good chances of success.

339. As for the allegation that I have acted in contempt, I deny that unequivocally. I do not, however, deny the final clause of this paragraph.

Ad para 75

340. I stand by what is stated in the opinion in this regard.

Ad para 76

341. I stand by the assessment reflected in my opinion.

342. Regarding the second sentence of this paragraph, it is not clear to me what is meant by the allegation that I made "absolutely no attempt to interrogate the authenticity of the potentially devastating allegations". It is not sufficient that the docket contain "*potentially* devastating" allegations. I concluded that the allegations, read with Jiba's rebuttals and explanations thereof, would not overcome the presumption of

innocence of which Jiba would have the benefit at trial. I refer to my analysis above of the Gorven J judgment.

343. The Applicant's suggestion that I was bound by Gorven J to find that there was a sufficient basis for the fraud and perjury allegations, which would need to be proven beyond reasonable doubt, is baseless. I would in fact have been abusing my discretion had I allowed my discretion to be fettered in that manner.

Ad para 77

344. I stand by my decision. I refer again to my analysis above of the decision of Gorven J, and in particular to the language that is underscored in this paragraph. Regarding the evidence tendered by Jiba, I did indeed take into account her answering affidavit in the GCB application. I reiterate what is said above in this regard.

Ad para 78

345. I reiterate what is stated above regarding the allegations in NJ2 and in NJ4 and the statements of Aiyer. Regarding the final sentence of this paragraph, it is not clear why the Applicant contends that Jiba was entitled only to consider statements that had been formally commissioned. It is elementary that, while the attestation of a statement may lend more weight to it, and support its credibility, it is open to a prosecutor to attach weight to unsigned statements, depending upon the circumstances. I myself considered those circumstances in making my decision, and in my discretion determined that the fact that Jiba had relied in part upon unattested statements would not, in light of the countervailing evidence, support the charges of fraud and perjury.

346. As noted above, in my assessment of this language in the decision of Gorven J, I arrived at the conclusion that he erred in several respects as to what had been attested to by Jiba.

Ad para 79

347. The contents of this paragraph are denied.

348. It is true, however, that Jiba relied upon NJ2. I have stated above why NJ2 lent support to POCA charges against Booysen. I reiterate that the fact that a statement is not attested does not render it fraudulent or perjurious to rely thereupon.

Ad para 79

349. I studied the Yacoob Report in respect, *inter alia*, of Jiba. I found nothing therein that would justify the continuation of the prosecution of Jiba; in my assessment there was no reasonable prospect of success.

Ad para 80

350. My assessment was indeed that Jiba had seen the document designated as NJ4 prior to its being commissioned. I was aware that Ferreira came to a different conclusion. It goes without saying that I was not bound by the assessment of Ferreira. My assessment was that the quoted text did not satisfy the high threshold necessary to obtain a conviction of fraud or perjury.

Ad para 81

351. I stand by my opinion.

Ad para 82-83

352. It is denied that the quoted statement is either improper or speculative. Argument will be advanced in this regard at the hearing. It is denied further that the fact that Gorven J made findings on the same subject matter would render my opinion "entirely irrelevant".

353. Although the decision of Gorven J, like that of any other court judgment must be respected, it was not binding for the purpose of the

exercise of my discretion. I of course was required to bear in mind that the test applicable to determining prospects of success entails absence of reasonable doubt, a consideration that would not have featured in Gorven J's determination of Booysen's application to review the POCA authorisation.

Ad para 84

354. I agree that there exists a dispute of fact as to whether various statements were before Jiba at the time that she granted authorisation. Gorven J decided this dispute against Jiba. For the reasons given in my detailed analysis of Gorven J's judgment, I took the view that Gorven J erred in this regard. There is nothing "unfathomable" in my having come to the conclusion that, despite Gorven J's decision, there was no evidence sufficient to support a finding of Jiba's guilt beyond a reasonable doubt.

355. It is true that the dispute might be determined at trial. However, there is no reason that a decision should not have been made in advance of trial that, on a conspectus of all the facts and circumstances, there was no reasonable prospect of success in the prosecution. In fact, it is the responsibility of prosecutors to carefully consider whether scarce prosecutorial resources should be expended in pursuing cases where prospects of success are limited.

356. Regarding paragraph 3 of Part 6 of the PPD's, the need to refer the matter to trial rather than making a credibility finding based on written statements is qualified by there being "reasonable prospects of a successful conviction. The point here was that I concluded that such prospects did not exists.

Ad para 85

357. The first three sentences of this paragraph are admitted.

358. It is true that I drew inferences from all of the circumstances, including the Hodes affidavit. The deponent gives no basis for her contention that the bases for the inference were not factually correct.

359. Regarding the quoted text from the judgment of Gorven J, that has been dealt with above. Upon a careful reading of the judgment, together with the portions of Jiba's answering affidavit upon which the learned Judge relied, it became clear that he erred by attributing to Jiba allegations that she did not in fact advance.

360. It is also the case that, as noted by Hodes, the concessions attributed to him by Gorven J were not in fact made.

361. I am aware of the contents of the Ferreira presentation, and contest their veracity, for the reasons set forth above.

Ad para 86

362. The contents of this paragraph are admitted to the extent they accurately quote my opinion.

Ad para 87

363. The contents of this paragraph are admitted to the extent they faithfully quote the Hofmeyr affidavit. However, I do not agree with Hofmeyr's sentiments in this regard.

Ad para 88

364. The contents of this paragraph are admitted to the extent they accurately summarise and/or paraphrase the affidavit of Nxasana.

365. The ill-will manifested by Nxasana towards Jiba was one factor that legitimately played a part in my determination to withdraw the prosecution. I submit that it was not irrational to take that fact into account, amongst others.

Ad para 89

366. As stated above, the only judgment which is relevant to Jiba's charges of fraud and perjury is the Booysen judgment.

Ad para 90

367. The first sentence of this paragraph is admitted. The second sentence is denied; I refer to the paragraph answering paragraphs 121 – 127 of the founding affidavit.

Ad para 91

368. The first sentence of this paragraph is admitted. As to the second sentence, already set forth above are the reasons I found the Ferreira and Van Eeden opinions unpersuasive on balance.

Ad para 92

369. The contents of this paragraph are admitted to the extent they accurately summarise and/or paraphrase the Ferreira and Van Eeden opinion referred to.

Ad para 93.1

370. It is denied that Jiba misled the Court by stating that Booysen was directly implicated by statements under oath. I refer to what I have stated above in this regard.

Ad para 93.2

371. The inference derived by the Applicant is denied. The deponent misconstrues Jiba's e-mail to Mosing of 1 April 2014, in saying that it indicated that Jiba did not apply her mind when she made the decision to authorise the prosecution under POCA. In context it is clear that Jiba was requesting Mosing to assist in refreshing her memory for purposes of the answering affidavit. It is mischievous to interpret this language as an admission that, at the time that she made the decision to authorise the prosecution, she lacked sufficient material before her to apply her mind.

Ad para 93.3

372. The link between this sub-paragraph and the introductory paragraph is not clear; suffice to say for the moment that Danikas affidavit was a valuable source of similar fact evidence that would in my view have been admissible under POCA.

Ad paras 94 – 97

373. It is denied that an adverse inference can be drawn from the fact that Jiba did not correct the incorrect statements made in her answering affidavit in the Booysen's application. The errors came to light only *post facto*.

374. Moreover, something more than negligence either in making an affirmation in the first instance, or not correcting, it in the second instance, is necessary to satisfy the *mens rea* element of fraud and perjury. My careful assessment was that it was unlikely that it would be possible to prove *mens rea* in any form beyond a reasonable doubt.

375. I was aware of the Ferreira opinion, and studied it carefully before taking my decision to withdraw the charges against Jiba.

376. I have dealt above with the allegation that Jiba committed perjury by stating under oath that the document attached to her affidavit implicated Booysen. Jiba did not say, contrary to what was found by Gorven J, that *all* of the statements were under oath.

377. Regarding whether there was intent in the form of *dolus eventualis* to commit fraud, I reiterate that, for the reasons set forth above, proving that Jiba committed fraud beyond a reasonable doubt would be exceedingly difficult, irrespective of whether the element of intent in the form of *dolus eventualis* was available.

Ad para 98

378. The contents of this paragraph are admitted.

Ad para 99

379. I carefully assessed the Ellis opinion in making my decision about whether to drop the charges against Jiba. As effectively conceded here, the Ellis opinion relied almost exclusively upon adverse judicial pronouncements. I have explained why I determined that these pronouncements, read together with Jiba's explanations therefore, did not entail that there were good prospects for a conviction of Jiba for fraud and perjury.

Ad para 100

380. I was alive to the quoted passage in the Ellis opinion, and took it into account when I took my decision to discontinue the prosecution of Jiba.

381. The contents of this paragraph are denied in their entirety. The meaning of the word *apathetic* in the third sentence of this paragraph is not clear.

Ad para 101

382. I was alive to the recommendations in paragraphs 27 and 28 of the Ellis opinion at the time I took the decision to withdraw the charges against Jiba.

383. Having carefully studied the decision of Gorven J, the affidavit of Jiba in the Booysen matter, and other relevant material, I respectfully disagreed with the assessment of Gorven J as quoted herein.

Ad para 102

384. I deny that either s. 179(5)(d) of the Constitution or s. 22(2)(c) of the NPA Act compel the taking of representations from the complainant in the course of reviewing a decision to prosecute or not to prosecute. Booysen was not the *complainant* in any sense of that term; as I

have indicated, Leeuwschut was the pro-forma complainant. In my assessment, Booysen was not *relevant* for purposes of the decision. Having succeeded before Gorven J, Booysen lacked any abiding interest in the matter.

385. As the Applicant has pointed out, there served before me a number of documents urging that the prosecution be continued, including the opinions of Ellis and Ferreira. My assessment was that it was unlikely that Booysen's representations would add anything to the latter.

386. Practical considerations come into play when determining the scope of consultations in the course of reviewing a decision to prosecute or not to prosecute. It is not possible for all potentially relevant views to be elicited. I submit that my determination as to the scope of consultations called for should be deferred to.

Ad para 103

387. It is true that I considered, as reflected in para 9 of my opinion, the NPA to be the complainant in the matter against Jiba. I have never considered Booysen to be a "complainant". That would have been entirely inconsistent with NPA practice.

Ad para 104

388. I do not deny that Booysen's own view as to whether or not the matter should proceed was not taken into account in my decision. Nor do I deny I did not expressly seek his input. I have already set out the reasons why I thought it unnecessary to do so.

Ad para 105

389. The contents of this paragraph are denied.

Ad para 106

390. The contents of this paragraph are denied.

Ad para 107

391. The contents of this paragraph are admitted, insofar as they accurately reflect my opinion.

Ad para 108

392. The contents of this paragraph are admitted.

Ad para 109

393. The contents of this paragraph are admitted.

Ad para 110

394. I was well-aware that the statements marked NJ1 and NJ2 were not deposed to by Jiba. The point is that the factual statements in both documents would be relevant when the POCA charges were considered at trial, even to the extent they were not commissioned.

395. Both the recommendation of Major Brown (NJ1) and the affidavit of Aiyer (NJ2) reflect upon, *inter alia*, the alleged relationship between Booysen and the POCA "enterprise". If these documents are to be believed, they show that, even though Booysen was not formally responsible for the CMS, he was nonetheless extremely hands-on in managing the conduct of the enterprise. That being so, it was entirely appropriate that I take the allegation in the document into account in determining whether or not to withdraw the charges against Jiba.

396. I was aware that Booysen had alleged that much of what Aiyer said in his statement was false. But I had no reason to prefer his version over that of Aiyer. If Aiyer's version was correct, that would increase the chances of a conviction of Booysen, and correspondingly reduce the prospects of convicting Jiba for fraud and perjury in pursuing the prosecution of Jiba.

Ad para 111

397. The contents of this paragraph are admitted.

Ad paras 112

398. The contents hereof are denied.

Ad para 113

399. The contents of this paragraph are denied. The decision and the reasons given flowed from my assessment of the evidence, based upon the applicable law, read with the prosecutorial guidelines, on an overall conspectus of the documents that served before me.

400. I did indeed consider the allegation that Jiba lied in stating that she considered statements under oath from Danikas and Ndlondlo. I came to the conclusion that she did indeed consider both items, although it was true that as at the time that she took the decision, the statement of Danikas had yet to be commissioned. I had no reason to dispute her explanation that this was a *bona fide* error, arising from impediments in obtaining a commissioned statement from Danikas, who was at that time in Greece.

Ad para 114

401. The contents of this paragraph are admitted.

Ad para 115

402. The contents of this paragraph are admitted insofar as they faithfully reflect paragraph 3 of part 6 of the Prosecution Policy Directives ("**PPD**").

Ad para 116

403. I do not understand the suggestion that I "found against" Booysen in para 21 of my opinion. The commonplace observation that the evidence of the accused should be approached with caution hardly constitutes a "finding" against him. It is absurd to suggest that I was

absolutely required, before making that observation, to consult with Booysen himself.

404. As for the statement in the last sentence of paragraph 116, to the extent that there is no written statement from Jiba, the very answering affidavit at issue constitutes such a written statement.

Ad para 117

405. The contents of this paragraph are admitted. I conducted myself in accordance with the PPD. The latter articulates the obligation of prosecutors not to continue a prosecution in the absence of prospects of success. As noted above, it is precisely because of deficiencies in the case against Jiba that I made a determination that the charges should be dropped. The contention of the Applicant that I acted irrationally in withdrawing charges that in my view had little chance of leading to a successful conviction is, with respect, absurd.

406. I do not deny the contents of paragraph 1 of Part 5 of the PPD (R: 392, R: 396), relied upon by the Applicant. I have set forth why I believe that there were indeed compelling grounds for withdrawing the prosecution of Jiba. I would add that this part of the PPD must be read with:

406.1. Part 3. 3 of the PPD - the onus of the state to prove its case beyond reasonable doubt.

406.2. Part 3A of the *Prosecution Policy* – resources must not be wasted pursuing inappropriate cases.

406.3. "There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced *or continued. (Id.) (emphasis added.)*

406.4. "The review of a Case is a continuing process. Prosecutors must take into account changing circumstances and fresh

facts, which may come to light after an initial decision to prosecute or not to prosecute has been made." (Id.)

Ad para 118

407. I deny that the prosecution of Jiba was on the instruction of the former NDPP. The decision to prosecute Jiba was made by Ferreira and Van Eeden, the latter having been designated by Hofmeyr in terms of a delegation from Nxasana. As stated above, both were irregular and unlawful.

Ad para 119

408. It is not my contention that my opinion purports to render the various judgments and reports adverse to Jiba "irrelevant". My opinion represents my assessment, in the wake of my own investigations, in light of the various affidavits and reports, and taking into account also the views of Jiba as reflected in the GCB matter, as well as input from members of the Booysen prosecution team.

409. The balance of this paragraph is denied.

Ad para 120

410. The contents of this paragraph are denied. I deny in particular that I conflate the question of the guilt or innocence of Booysen with the question of whether Jiba was guilty of fraud and perjury. These independent questions are, however, connected - in the sense that, if there was little in the relevant material that could support a guilty finding of Booysen, that would of course weigh in favour of withdrawing the prosecution of Jiba. If, on the other hand, a consideration of the evidence suggested that there was a *prima facie* case against Booysen - as in my opinion there was - it would make it difficult to justify continuing with the prosecution of Jiba.

Ad para 121

411. This paragraph, like many of those which precede it, consists largely of repetitious bluster. Nonetheless, I feel constrained to formally deny the allegations. I have set forth in some detail the bases upon which I determined to withdraw the fraud and perjury charges against Jiba, after a careful consideration of all of the material relied upon by the Applicant herein, and more besides.

412. The decision was mine alone.

Ad para 122

413. The contents of this paragraph are denied. This paragraph misrepresents the basis for my decision to withdraw the charges against Jiba. The "technical grounds" mentioned here constituted but one of several factors that I weighed. I have set forth above the substantive basis for my decision, which included a careful consideration of the elements of perjury and fraud, in light of the evidence against Jiba, and applicable POCA standards.

414. I point out also that even if my decision is deemed to be wrong, it should not be disturbed unless I can be said to have acted irrationally or unlawfully. Argument in that regard will be advanced at the hearing.

Ad para 123

415. The contents of this paragraph are denied. My determination was not drawn from thin air. It was supported by the views of senior prosecutors with extensive POCA experience, who were intimately familiar with the facts of the case against Booysen. Regarding the allegation that the opinion was prepared "in a rush", I point out that having been asked to draft the opinion on 13 August, I completed it on 17 August. That is hardly an inordinately short amount of time in which to prepare my relatively brief opinion.

416. I know not what "other objective evidence" the Applicant has in mind. Nor do I know from whence its "clear and convincing explanation" test is derived.

Ad para 124

417. It is submitted that the application to review and set aside my decision should be dismissed with costs, including the costs attendant upon the employment of three counsel.

CONFIRMATORY AFFIDAVITS

418. Attached hereto as are confirmatory affidavits of **SHAUN KEVIN ABRAHAMS (MM-18)** and **GLADSTONE SELLO MAEMA (MM-19).**

CONCLUSION

419. I respectfully submit in the premises that the application should be dismissed insofar it seeks to review and set aside my decision to withdraw charges against Jiba.

MARSHALL MOKGATHLHE

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **SILVERTON** on this **1st** day of **JULY 2016** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS
ALBERTUS MARTHINUS MATTHYS FLYNN
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
218 VISAGIE STREET
PRETORIA
COLONEL: SILVERTON

MM-1

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INTERNAL MEMORANDUM

TO : ADV. M MOKGATLHE
REGIONAL HEAD: SCCU

CC : ADV. N MOKHATLA
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: NSPS

FROM : ADV. SHAUN ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE : 13 AUGUST 2015

RE : CRIMINAL INVESTIGATION: SILVERTON CAS 622/10/2014
STATE v N JIBA

Dear Adv. Mokgatlhe

My email dated 5 August 2015 refers. (A copy of which is annexed hereto)

As you are aware the prosecutors in this matter were appointed by my predecessor Mr MSO Nxasana and Mr Willie Hofmeyr. During the briefing of the prosecuting team on 22 July 2015 I relieved Mr Hofmeyr of the responsibility of the prosecuting team reporting to him hereon and directed that the prosecuting team should report to you instead as the Regional Head of SCCU.

As such I only deem it proper that you as the Regional Head provide me with your opinion and decision in respect of the criminal investigation into Silverton CAS 622/10/2014 on or before 17 August 2015.

Yours sincerely,

Adv. Shaun Abrahams
National Director of Public Prosecutions **Date:** 13/8/2015

Kim Benjamin

Subject: FW: S v Jiba

From: Shaun SK. Abrahams
Sent: 05 August 2015 08:36 AM
To: Nomvula NF. Mokhatla
Cc: Dawood I. Adam; Marshall Mokgatlhe; Kim Benjamin
Subject: S v Jiba

Good morning Adv Mokhatla

The briefing by the Prosecuting Team on 22 July 2015 has reference.

At the conclusion of the meeting I requested to be provided with a legal opinion from the Prosecuting team through their Regional Head, Adv Mokgatlhe, along with the docket once the outstanding witness statements had been obtained. The trial is scheduled to commence on 19 & 20 August 2015.

As such, I would appreciate if same can be provided to me by 14h00, Friday, 7 August 2015 at the latest.

I trust you find same in order.

Kind regards,

Adv. Shaun K Abrahams
National Director of Public Prosecutions
Republic of South Africa
Email: skabrahams@npa.gov.za
Tel: +27 12 845 6454 Fax: +27 12 843 1066

Executive Assistant: Ms. Kim Benjamin
Email: kbenjamin@npa.gov.za • Tel: +27 12 845 6768 • Cell: +27 82 490 5237

SEQ 34/2020-565

MM-12

PROVINCIAL ORGANISED CRIME ORGANIGRAM

PROVINCIAL COMMANDER
ORGANISED CRIME KZN

DIRECTOR: LW BOOYSEN

SECRETARY
Vacant

ADMIN

CAC P Moodley
SAC Jayaram
SAC Lachanah
SAC Maran
Data Typist Shozi
Data Typist Mkize

NM-

"3"

TO: ADV. N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTONS
NATIONAL PROSECUTING AUTHORITY

FROM: ADV. KMA CHAUKE
DIRECTOR OF PUBLIC PROSECUTIONS
JOHANNESBURG

DATE: 10 JULY 2012

SUBJECT: APPLICATION FOR AUTHORISATION IN TERMS OF SECTION 2 (4) OF POCA ACT 121 OF 1998
THE STATE VERSUS BOOYSEN, JOHAN WESSEL AND OTHERS

---

1. Herewith the following:

   1.1 Application for authority in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998 for your recommendation.

   1.2 The draft Indictment,

   1.3 The draft authorizations for section (2)(1)(e) and 2(1)(f) respectively

2. I have perused the documents and recommend the Application.

3. The Accused have appeared in the Regional Court, Durban and the matter has been postponed to 24 August 2012 for the Racketeering Authorisation. Eighteen (18) of the accused persons are on bail, other accused persons still need to be added to the charge sheet and/or indictment

ADV. K.M.A. CHAUKE
DPP: JOHANNESBURG

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

1. BOOYSEN, JOHAN WESSEL
2. PADAYACHEE, GONASAGREN
3. STOLZ, ADRIAAN JAKOBUS FICK
4. MOSTERT, PAUL JONATHAN
5. NEL, ERIC ALFRED
6. EVA, NEVILLE
7. GHANESS, ADJITHSINGH
8. MAKHANYA, PHUMELELA
9. OLIVIER, WILLEM CORNELIUS
10. MKHWANAZI, THEMBIKNOSI MBHEKISENI
11. MDLALOSE, THATHAYIPHI ENOCK
12. NAIDOO, RUBENDREN
13. LEE, RAYMOND CHRISTOPHER
14. LOCKEM, ANTON
15. VAN TONDER, JAN JOHANNES EUGENE
16. SMITH, CHARLES JOHN
17. MARTEN, JEREMY
18. MC INNES, BRUCE DAVID

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of the contravention of section 2(1)(e) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011, against the above named accused.

GIVEN UNDER MY HAND AT PRETORIA on this day of JULY 2012

NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

BOOYSEN, JOHAN WESSEL
OLIVIER, WILLEM CORNELIUS

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of the contravention of section 2(1)(f) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011, against the above named accused.

GIVEN UNDER MY HAND AT PRETORIA on this day of JULY 2012

NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

PROSECUTION MEMORANDUM

A. INTRODUCTION

1. The accused in these matters are the members of the South African Police Services assigned to the Durban Organised Crime Unit based in Cato Manor and National Intervention Unit. Accused 1 is the Provincial Commander of Organised Crime Unit for KwaZulu-Natal.

2. The Durban Organised Crime Unit based in Cato Minor worked under the direct control of accused 1 and 9.

3. Their Area of Jurisdiction is Durban and surrounding areas.

4. The Unit operates from their offices and attend some cases in their Jurisdiction that are assigned to their Unit.

B. BACKGROUND

5. Some of these cases were informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, planting firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting arrest.

6. These acts of tampering with the crime scenes were cover-ups of their unlawful activities.

C. MODUS OPERANDI

7. The accused persons would approach their victims mostly at night with allegations that they have committed certain offences. Instead of arresting them and bring them properly before a court of law for their guilt to be established beyond reasonable doubt, the accused shot and killed all the suspects.

8. There are instances where the accused persons killed people who were not even their suspects.

9. The accused would kill their suspects, plant a firearm next to them and alleged that they were being attacked by the suspects.

D. IDENTIFICATION OF THE ACCUSED

10. Accused 1: **BOOYSEN, JOHAN WESSEL**

A 55 year old male person. His residence is yet to be confirmed. At the relevant period he was the Provincial Commander: Organised Crime for the Province of KwaZulu-Natal. He held the rank of a Director.

11. Accused 2: **PADAYACHEE, GONASAGREN**

a 44 year old male person of 61 Statesman Drive, Havenside, Chatsworth. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor

12. Accused 3: **STOLTZ, ADRIAAN JAKOBUS FICK**

a 45 year old male person of 10 Stonehill Complex, 28 Serissa Avenue, Roodekrans, Roodepoort. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

13. Accused 4: **MOSTERT, PAUL JONATHAN**

a 51 year old male person of 06 Keeling Place, Queensburgh He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

14. Accused 5: **NEL, ERIC ALFRED**

a 41 year old male person of 37 Illovo Glen, Berrio Avenue, Amanzimtoti. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

15. Accused 6: **EVA, NEVILLE**

a 45 year old male person of 25 High Street. New Germany, Pinetown. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

16. Accused 7: **GHANESS, ADJITHSINGH**

a 41 year old male person of 44 Old Castle Place, Newlands West, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

17. Accused 8: **MAKHANYA, PHUMELELA**

a 45 year old male person of 90 Morewood Road, Sydenham, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

18. Accused 9: **OLIVIER, WILLEM CORNELIUS**

a 59 year old male person of 16 Walnut Grove Complex, 03 Entombeni Road, Amanzimtoti. He is a Colonel stationed at the Organised Crime Unit, 446 Belliar Road

19. Accused 10: **MKHWANAZI, THEMBIKNOSI MBHEKISENI**

a 47 year old male person of Room D 008, Umlazi Police Barracks, Umlazi. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

20. Accused 11: **MDLALOSE, THATHAYIPHI ENOCK**

a 48 year old male person of 21 Bennie Geldenhuis, Austerville, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

21. Accused 13: **NAIDOO, RUBENDREN**

a 33 year old male person of 57 Evergreen Circle, Phoenix, Durban. He is a Constable Officer stationed at the Organised Crime Unit, 446 Belliar Road

22. Accused 14: **LEE, RAYMOND CHRISTOPHER**

a 31 year old male person of 4F Queens Terrace, 100 Dipdale Road, Queensburgh, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

23. Accused 15: **LOCKEM, ANTON**

a 44 year old male person of 201 Moss Road, Bluff, Durban. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

24. Accused 16: **VAN TONDER, JAN JOHANNES EUGENE**

an adult male person. His residential address is yet to be confirmed. He is a retired member of the South African Police Services who was stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Captain.

25. Accused 25: **SMITH, CHARLES JOHN**

A 40 year old male person. His residential address is 34 Frederrick Avenue Bluff, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

26. Accused 26: **MARTEM, JEREMY**

A 39 year old male person. His residential address is 12 Goodricke Road Morningside, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

27. Accused 27: **MC INNES, BRUCE DAVID**

A 43 year old male person. His residential address is 87 St Winniefreds Whitefield Drive, Warner Beach, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

28. Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29, 30, 31 and 32 in the proposed indictment are not charged with racketeering. They did not commit more than one offence in the predicate offences.

E. ANALYSIS OF EVIDENCE

THE ENTERPRISE – PROVINCIAL ORGANISED CRIME FOR KWAZULU-NATAL TO WHICH ACCUSED 1 WAS THE COMMANDER

29. The enterprise is defined to include "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*".

30. The Provincial Organised Crime Unit of the South African Police Services is an enterprise within the meaning of section (1) of the Prevention of Organised Crime Act, Act 121 of 1998 ("POCA), being a legal entity associated in fact.

31. This legal entity provided the accused with the continuity of structure under which to conduct their unlawful activities.

32. Accused 1 was the Commander of the Provincial Organised Crime. Accused 9 was the Commander of the Durban Organised Crime Unit based in Cato Manor. Accused 1 and 9 co-managed the enterprise. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 were participants in the racketeering activities..

33. Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29, 30, 31 and 32 in the proposed indictment are not charged with racketeering activities. They did not commit more than one offence in the predicate offences.

F. LIST OF PROPOSED CHARGES

COUNT 1

CONTRAVENING SECTION 2(1)(f) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE;

(Accused 1 and 9)

COUNT 2

CONTRAVENING SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY;

(Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27)

PART A PREDICATE OFFENCES

COUNT 3

HOUSEBREAKING WITH INTENT TO COMMIT MURDER;

(Accused 4,6,8, 13 and 22)

COUNT 4

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4,6,8, 13 and 22)

COUNT 5 ASSAULT

(Accused 4,6,8, 13 and 22)

COUNT 6 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4,6,8, 13 and 22)

COUNT 7 CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM

(Accused 4,6,8, 13 and 22)

COUNT8 CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 4,6,8, 13 and 22)

COUNT 9 MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1, 4,5,6,8,9,15 and 16)

COUNT 10

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 11

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 12

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 13

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 14

HOUSEBREAKING WITH INTENT TO COMMIT MURDER

(Accused 3,4,6,8,10,11,12,13 and15)

COUNT 15

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 16

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3,4,6,8,10,11,12,13 and 15

COUNT 17

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARMS

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 18

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL

PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 3,4,6,8,10,11,12,13 and15)

COUNT 19

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 20

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 17 and 18)

COUNT 21

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 2,3,14,19,20 and 21)

COUNT 22

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 2,3,14,19,20 and 21)

COUNT 23

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2,3,14,19,20 and 21)

COUNT 24

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2,3,14,19,20 and 21)

COUNT 25

THEFT

(Accused 3 Only)

COUNT 26

HOUSEBREAKING WITH INTENT TO COMMIT MURDER

(Accused 2,3,9,13 and 16)

COUNT 27

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2,3,9,13 and 16)

COUNT 28	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM; **(Accused 2,3,9,13 and 16)**
COUNT 29	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM **(Accused 2,3,9,13 and 16)**
COUNT 30	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION **(Accused 2,3,9,13 and 16)**
COUNT 31	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2,3,9,13 and 16)**
COUNT 32	THEFT **(Accused 2,3,9,13 and 16)**
COUNT 33	HOUSEBREAKING WITH INTENT TO COMMIT MURDER **(Accused 2,4 and 6)**

COUNT 34

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2,4 and 6)

COUNT 35

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 2,4 and 6)

COUNT 36

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2,4 and 6)

COUNT 37

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2,4 and 6)

PART B PREDICATE OFFENCES

COUNT 38

HOUSEBREAKING WITH INTENT TO COMMIT MURDER;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 39

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 40

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120, (1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 41

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESION OF AMMUNITION;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 42

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 43

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 44

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 45

ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 46

CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 47

ASSAULT WITH INTENT TO DO GRIVOUS BODILY HARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 48

CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 49

MALICIOUS DAMAGE TO PROPERTY;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 50

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 51

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 52

CONTRAVENTION OF SECTION 3, READ WITH SECTION 1, 103, 117,120(1)(A), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 53

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 54

THEFT
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 55

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 56

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 57

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5 and 6)

COUNT 58

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND

SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 2, 4, 5 and 6)

COUNT 59

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION
(Accused 2, 4, 5 and 6)

COUNT 60

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5 and 6)

COUNT 61

THEFT
(Accused 2, 4, 5 and 6)

COUNT 62

MURDER, READ WITH SECTION 51 OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 4, 13 and 15)

COUNT 63

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFULLY POSSESSION OF A FIREARM;
(Accused 4, 13 and 15)

COUNT 64

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 13 and 15)

COUNT 65

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 4, 13 and 15)

COUNT 66

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER
(Accused 2,3 and 4)

COUNT 67

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 2,3 and 4)

COUNT 68

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 2,3 and 4)

COUNT 69

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; AND

(Accused 2,3 and 4)

COUNT 70

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2,3 and 4)

COUNT 71

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 72

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 73

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 74

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 75

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 76

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER

(Accused 6, 7 and 13)

COUNT 77

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 78

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 79

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 80

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 81

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 82

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 83

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 84

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 85

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 86

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 87

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 88

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 89

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 90

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 91

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 92

ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

COUNT 93

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 94

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 95

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 96

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 97

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 98

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 99

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 100

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 101

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 102

THEFT

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 103

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 104

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 105

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 106

DEFEATING OR OBSTRUCTINGTHE COURSE OF JUSTICE

(Accused 4, 8, 11, 16, 25 and 26)

PART C PREDICATE OFFENCES

COUNT 107

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused 4, 8, 10,11 and 15)

COUNT 108

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 8, 10,11 and 15)

COUNT 109

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 8, 10,11 and 15)

COUNT 110

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 8, 10,11 and 15)

COUNT 111

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused 4, 5, 13 and 32)

COUNT 112

DEFEATING OR OBSTRUCTRING THE COURSE OF JUSTICE

(Accused 4, 5, 13 and 32)

COUNT 113

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF 1977

(Accused 5, 6 and 27)

COUNT 114

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 5, 6 and 27)

COUNT 115

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 5, 6 and 27)

COUNT 116

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 5, 6 and 27)

COUNT 117

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 5, 15 and 25)

COUNT 118

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 5, 15 and 25)

COUNT 119

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 5, 15 and 25)

COUNT 120

DEFEATING OR OBSTRUCTING THE OF JUSTICE

(Accused 5, 15 and 25)

COUNT 121

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused ???)

COUNT 122

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused ???)

COUNT 123

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused ???)

COUNT 124

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused ???)

COUNT 125

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 13 and 15)

COUNT 126

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 13 and 15)

COUNT 127

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 13 and 15)

COUNT 128

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 13 and 15)

G. SUMMARY OF THE CASE

34. The criminal acts of the accused described in the summary of substantial facts were motivated by monetary reward and praises for exceptional performance from the State for solving violent crime, the accused, instead of achieving this purpose by arresting and bringing the alleged criminals before the courts for justice to take its course, they killed the alleged suspects and planted firearms next to the deceased persons to create an impression that their lives were in danger when they killed them. The circumstances under which the alleged suspects were killed, show that the accused acted on the cases described above, at times:

- without the knowledge of the investigating officers assigned to investigate the cases concerned,
- without warrants of arrests,
- without evidence to support the reason for arrest,
- without any need to pursue the deceased persons
- kill the deceased whereas there was ample opportunity to apprehend;
- tamper with the crimes scenes in order to hide the true nature of their criminal acts;
- arrest and release the deceased, after release, pursue the deceased again and kill them;
- kill the deceased despite the High Court Interdict preventing such killing;

- informing the security company providing body guards for the deceased to remove the said body guards as those body guards will also be in line of fire;

- kill the deceased together with the body, and thereafter inform the security company the result of their failure to heed to the warning of withdrawing the body guard,

- would break into the properties, assault, point firearms and commit theft to whomever is present on scene where they kill the deceased.

- operate in any area which is not under their area of operation and would enter these areas without alerting local police command.

- arrogated powers of 'a tracing unit' without allocated investigating officers.

35. None of these incidents demonstrate that the accused were shot at by the deceased persons or police vehicles were damaged as a result of an attack from the deceased persons. In fact, the facts show that the deceased persons were not in possession of the firearms appearing next to their bodies.

36. No evidence that could prove beyond a reasonable doubt that the deceased persons would have been guilty of the killing of either Superintendent Chonco and/or iNkosi Zondi. The killing of the deceased persons can best be described as 'summary execution' as there was no due process. They were committing crimes instead of solving violent crime.

H. STATEMENT OF THE LAW

37. Chapter 2 of POCA sets out offences regarding Racketeering. Sub-sections 2(1)(a) – 2(1)(f) require proof of the existence of an **"enterprise"**, **"a pattern of racketeering"**, and **"the accused"**.

38. Section 2(1)(e) of POCA provides that:

Any person who – *"whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

39. Section 2(1)(f) provides that:

Any person who – *"manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

40. Section 1 of POCA defines the enterprise as including:

"any individual, partnership, corporate, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity".

41. An enterprise is established by proving that it has:

(a) A common or shared purpose

(b) A formal or informal structure

(c) A system of authority

(d) Continuity

42. A pattern of racketeering activity is defined in Section 1 of POCA as:

"the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at

least two offences referred to in Schedule 1, of which one of the offences occurred within 10 years after the commencement of this Act and the last offence occurred within 10 years [excluding any period of imprisonment] after the commission of such prior offences referred to in Schedule 1"

43. In this matter the relevant sections are Sections 2(1)(e) and 2(1)(f). Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 are charged with a contravention of section 2(1)(e). Accused No 1 will be charged with contravening Section 2(1)(f).

44. Accused number 1 and 9 were co-managing the enterprise. As for accused 1 his management is abundantly clear in his Answering Affidavit to the Interdict Application obtained by the deceased **Bongani Mkhize** on 14 November 2008 as well as his visit to a crime scene where the participants in the enterprise had committed crime in his capacity as a Provincial Commander Organised Crime. He also wrote an information note to the Provincial Head: Detective Services for KwaZulu-Natal detailing the circumstances under which **Bongani Mkhize** was killed. He was controlling the affairs of the enterprise. The Provincial Organised Crime of the SAPS constitutes an enterprise within the meaning of Section 1 (1) of POCA. As for accused 9, he was present in the incident at esiKhawini and at Pinetown in his capacity as a commander of the Durban Organised Crime Unit based at Cato Manor.

45. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 were employed by the enterprise. They participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. The enterprise has continued in **PART A, B** and **C** as described in the proposed indictment. The accused shared together the benefits of the enterprise in the form of monetary rewards and/or certificates of excellence.

46. All the accused committed more than two offences as set out above. The pattern of racketeering activity contains offences of MURDER, DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE, POSSESSION OF UNLICENSED FIREAMS AND AMMUNITION. The offences are committed in a planned, ongoing, continuous and repeated occurrence. The offences occurred from 2008 to 2011 thus meeting the requirement that at least one offence must have occurred after 1998 and the other within 10 years of the last offence.

47. Therefore, the accused were acting contrary to the provisions of section 205 of the Constitution of South Africa, Act 108 of 1996.

48. They also acted contrary to the Police Standing Orders issued in terms of section 25 of the South African Police Service Act 68 of 1995.

49. The accused cannot justify their acts in terms of common law private defence nor section 49(2) of the Criminal Procedure Act 51 of 1977.

I. POCA RACKETEERING POLICY

50. It will be impossible to charge the accused individually with all the offences they have committed. Charging the accused together outside the ambit of POCA will result in misjoinders. A POCA prosecution will allow the joining of different participating accused which is otherwise not permissible.

51. A POCA prosecution will enable the State to charge the accused with all offences committed through a pattern of racketeering activity, distinctly and separately.

52. Section 2(2) of POCA allows the court to hear evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated against the accused.

53. The planting of the firearms on the crime scene is similar fact evidence.

J. ANTICIPATED DEFENCES

54. The accused will say that they were defending themselves from attack by the deceased persons, essentially relying on section 49(2) of the Criminal Procedure Act and the Police Standing Order regarding the use of arms.

55. They were not participants in some of the crimes scenes, essentially relying on 'disassociation'.

56. Accused 1 will say he was not on the crime scenes described on the indictment and on the scene of **Magojela Ndlmande** and **Sibusiso Tembe** he arrived after the murders were committed.

57. The State will counter these defences with:

- Eyewitnesses
- Ballistics evidence
- Post-Mortem Reports
- Crime Scene Photos
- *modus operandi* demonstrating similar fact
- some of the deceased were not even suspects and were asleep
- They clearly exceeded bounds of self defence
- They received monetary rewards and/or certificates for arrest of violent criminals, whereas in truth, none of the suspects were arrested

K. ASSET FORFEITURE UNIT

58. The matter has not yet been referred to the Asset Forfeiture Unit. There is anticipated financial investigations which will determine the extent of the benefit outside the known SAPS rewards.

L. CONCLUSION

59. Based on the evidence outlined above, it is recommended that :

(a) Authority be granted for the prosecution of the accused as proposed in the draft indictment; and

(b) Certificates in terms of Section 2(4) of the PREVENTION OF ORGANISED CRIME ACT 121 OF 1998 be issued.

60. *** The proposed indictment is attached.

ADV GS MAEMA
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTION SERVICE

WM

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Director of Public Prosecutions
KwaZulu-Natal

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TO: ADV. N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTONS

FROM: ADV. M NOKO - MASHILO
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

DATE: 15 AUGUST 2012

SUBJECT: **APPLICATION FOR AUTHORISATION IN TERMS OF SECTION 2 (4) OF POCA ACT 121 OF 1998**

THE STATE VERSUS BOOYSEN, JOHAN WESSEL AND OTHERS

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1. Herewith the following:

   1.1 Application for authority in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998 for your consideration and approval.

   1.2 The proposed Indictment,

   1.3 The draft authorisations for Section (2)(1)(e) and 2(1)(f) respectively .

2. I have perused the documents and recommend the Application.

3. The Accused have appeared in the Regional Court, Durban and the matter has been postponed to 24 August 2012 for the Racketeering Authorisation. Eighteen (18) of the accused persons are on bail and twelve (12) other accused persons will be added to the charge sheet.

ADV. M NOKO-MASHILO
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU NATAL

W MNN

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

1. BOOYSEN, JOHAN WESSEL
2. PADAYACHEE, GONASAGREN
3. STOLTZ, ADRIAAN JAKOBUS FICK
4. MOSTERT, PAUL JONATHAN
5. NEL, ERIC ALFRED
6. EVA, NEVILLE
7. GHANESS, ADJITHSINGH
8. MAKHANYA, PHUMELELA
9. OLIVIER, WILLEM CORNELIUS
10. MKHWANAZI, THEMBINKOSI MBHEKISENI
11. MDLALOSE, THATHAYIPHI ENOCK
12. NAIDOO, RUBENDREN
13. LEE, RAYMOND CHRISTOPHER
14. LOCKEM, ANTON
15. VAN TONDER, JAN JOHANNES EUGENE
16. SMITH, CHARLES JOHN
17. MARTEN, JEREMY
18. MC INNES, BRUCE DAVID
19. DLAMUKA, FELOKWAKHE THOMAS

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorise the institution of prosecution against the abovementioned accused for contravention of section 2(1)(e) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011

GIVEN UNDER MY HAND AT PRETORIA on this 17th day of AUGUST 2012

ADV NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

WJ MDN

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998
THE STATE VERSUS:

BOOYSEN, JOHAN WESSEL
EVA, NEVILLE
OLIVIER, WILLEM CORNELIUS
LOCKEM, ANTON
VAN TONDER, JAN JOHANNES EUGENE

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorise the institution of prosecution against the abovementioned accused for contravention of section 2(1)(f) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011.

GIVEN UNDER MY HAND AT PRETORIA on this 17th day of AUGUST 2012

ADV NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

PROSECUTION MEMORANDUM

A. INTRODUCTION

1. The South African Police Service (SAPS) is a legal entity established by legislation in terms of the South African Police Service Act No 68 of 1995. It is composed of a national office and provincial structures for each province. The Serious Violent Crime (SVC) section based at Cato Manor was a section within the Durban Organised Crime Unit, which formed part of the KZN Provincial Organised Crime structure and was therefore an enterprise as defined in the Act. During 2006 this Serious Violent Crime (SVC) section which was a separate unit dealing with SVC, became incorporated into the Durban Organised Crime Unit after the decision to abolish all SVC units and make them part of organised crime structures. During 2010, in a further development the organised crime structures became part of the newly established Directorate for Priority Crimes Investigations (DPCI) and continue to be as such to date. At all relevant times to the indictment accused no 1 was the Provincial Commander: Organised Crime: KZN and later was appointed as the Provincial Head: DPCI: KZN during 2010. Accused no. 9 was the section commander of the SVC section based in Cato Manor, whilst accused nos. 6, 15, and 16 were group commanders within this section. The majority of the remainder of the accused were members of this SVC section, whilst other accused were co-opted from other units. Accused 1, 6, 9, 15, and 16 were all managers of the enterprise within the meaning of the Act. The accused conducted unlawful activities on a continuous basis through the enterprise.

2. The unlawful activities of the enterprise began to manifest themselves from May 2008 to September 2011, through a pattern of racketeering activities. They killed members of KwaMaphumulo Taxi Association which was in conflict with Stanger Taxi Association, ordinary civilians and/or suspects and criminal gang suspected of ATM bombings.

3. In some of their killings, the unlawful activities were motivated by the desire to enrich themselves through State monetary awards and/or certificates for excellent

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performance and financial benefits from associations and/or businesses and/or individuals in conflict with the deceased in the preferred charges.

4. The State has grouped the preferred predicate offences by association and/or method of operation as killings relating to Taxi Violence, Ordinary Civilians or Suspects and ATM bombing suspects as described below.

5. The Taxi Violence killings are directly related to the killing of Superintendent Zethembe Mawakile Chonco and Inkosi Wellington Zondi. Superintendent Chonco was a co-ordinator dealing with Taxi Violence killings between KwaMaphumulo Taxi Association and Stanger Taxi Association. He was killed whilst transporting prisoners to court on 27 August 2008. Certain members of KwaMaphumulo Taxi Association were suspected of his murder and were subsequently killed from 03 September 2008 to 18 October 2008 as mentioned in the schedule below:

Date	**Docket Reference Number**	**Names of Deceased**
03 September 2008	KwaDukuza CAS 39/09/2008	1 Lindelani Buthelezi
16 September 2008	Howick CAS 106/09/2008	1 Magojela Timson Ndlmande 2. Sibusiso Thokozani Tembe
18 September 2008	Mandini CAS 76/09/2008	1.Mzameni Johannes Ntuli 2.Nkosinathi Wilson Mthembu
18 October 2008	Umkomaas CAS 235/10/2008	Mduduzi Mkhize

6. Nkosi Wellington Zondi was suspected of having leaked information to the Accused about the whereabouts of **Magojela Timson Ndimande** who was subsequently killed by the accused on 16 September 2008.

7. Nkosi Wellington Zondi was subsequently killed 22 January 2009 and Bongani Mkhize, the Chairperson of KwaMaphumulo Taxi Association and Magojela Timson Ndimande's brothers were suspected by the Accused without evidence for having orchestrated the killing of Nkosi Zondi. Bongani Mkhize

and Ndimande brothers were subsequently killed as mentioned in the schedule below:

Date	Docket Reference Number	Names of Deceased
03 February 2009	Durban Central CAS 185/02/2009	Bongani Mkhize
23 May 2009	Pinetown CAS 1000/05/2009	Sibongiseni Badumile Ndimade
20 September 2009	Rustenburg CAS 1098/09/2009	Sifiso Ndimande

8. The Accused also killed a number of civilians and/or suspects. They did not have tangible evidence and warrants of arrests against the suspects. The Accused killed the civilians and/or suspects mentioned in the schedule below, when there was ample opportunities to effect an arrest.

Date	Docket Reference Number	Names of Deceased
24 May 2008	Berea CAS 288/05/2008	Thabo Sunshine Msimango
23 November 2008	Melmoth CAS 142/11/2008	1.Bongani Velaphi Biyela 2.Khayisani Biyela
27 April 2009	KwaMashu CAS 629/04/2009	GladwellThokozani Njapha
10 August 2009	Phoenix CAS 377/08/2009	Phillip Lindokuhle Nzuza
26 November 2009	KwaMashu CAS 698/11/2009	Prince Thabethe
01 April 2010	Esikhawini CAS 03/04/2010	Kwazi Wiseboy Ndlovu
10 May 2010	Bhekithemba CAS 44/05/2010	1.Musawenkosi Aubrey Ngcobo 2. Xolisani Allen Ngcobo 3.Simphiwe Sydney Shozi
04 July 2011	Durban North CAS 67/07/2011	Jabulani Camson Bhengu
04 July 2011	Durban North CAS 69/07/2011	Dumisani Blessing Mgobhozi
04 July 2011	Durban North CAS 71/07/2011	Boysie Sibusiso Mbonambi

04September 2011	Esikhawini CAS 50/09/2011	Qinisani Philangenkosi Gwala

9. The Accused further killed individuals who were suspected of being part of a syndicate involved in ATM bombings as mentioned in the schedule below, without warrants of arrest and sufficient evidence:

Date	**Docket Reference Number**	**Names of Deceased**
31 July 2008	KwaMashu CAS 116/08/2008	Mfanafuthi Amstrong Zwane
06 August 2008	Escourt CAS 34/08/2008	Muzi Sanele Majola
12 November 2008	KwaMashu CAS 314/11/2008	Nhlanhla NkuthuMasondo
18 March 2009	Tongaat CAS 356/03/2009	Dan Chester Phiri
06 March 2010	KwaDukuza CAS 115/03/2010	Nhlanhla Lucky Mhlongo

9 The Accused killed a total of 28 (twenty eight) persons and committed other crimes in the process.

10 The Accused would in most of the killings place a firearm next to the deceased person to create an impression that the deceased was armed and/or attacked them and/or posed danger to their lives thus tempering with the scenes of crime. The tempering with the crime scenes precipitated the opening of inquest dockets in some of the matters.

11 The Accused would break and enter the premises of the deceased, steal possessions of the deceased and family members, damage their property and assault family members who were on the premises.

B. BACKGROUND

12 Some of these cases were informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, placing firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting arrest.

13 These acts of tampering with the crime scenes were cover-ups of their unlawful activities.

C. MODUS OPERANDI

14 The accused persons would approach their victims mostly at night with allegations that they have committed certain offences. Instead of arresting them and bring them properly before a court of law for their guilt to be established beyond reasonable doubt, the accused shot and killed all the suspects.

15 There are instances where the accused persons killed people who were not even their suspects.

16 The accused would kill their suspects, place a firearm next to their bodies and allege that they were being attacked by the suspects.

IDENTIFICATION OF THE ACCUSED

Accused 1: **BOOYSEN, JOHAN WESSEL**

A 55 year old male person of 14 Thompson Road, Amanzimtoti. At all the relevant times he was the Provincial Commander: Organised Crime and Directorate for Priority Crime Investigations (DPCI) for the Province of KwaZulu-Natal. He held the rank of a Director and General respectively.

Accused 2: **PADAYACHEE, GONASAGREN**

a 44 year old male person of 61 Statesman Drive, Havenside, Chatsworth. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor.

Accused 3: **STOLTZ, ADRIAAN JAKOBUS FICK**

a 45 year old male person of 10 Stonehill Complex, 28 Serissa Avenue, Roodekrans, Roodepoort. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 4: **MOSTERT, PAUL JONATHAN**

a 51 year old male person of 06 Keeling Place, Queensburgh He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 5: **NEL, ERIC ALFRED**

a 41 year old male person of 37 Illovo Glen, Berrio Avenue, Amanzimtoti. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 6: **EVA, NEVILLE**

a45 year old male person of 25 High Street. New Germany, Pinetown. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

Accused 7: **GHANESS, ADJITHSINGH**

a 41 year old male person of 44 Old Castle Place, Newlands West, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 8: **MAKHANYA, PHUMELELA**
a 45 year old male person of 90 Morewood Road, Sydenham, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 9: **OLIVIER, WILLEM CORNELIUS**
a 59 year old male person of 16 Walnut Grove Complex, 03 Entombeni Road, Amanzimtoti. He is a Colonel stationed at the Organised Crime Unit, 446 Belliar Road

Accused 10: **MKHWANAZI, THEMBINKOSI MBHEKISENI**
a 47 year old male person of Room D 008, Umlazi Police Barracks, Umlazi. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 11: **MDLALOSE, THATHAYIPHI ENOCK**
a 48 year old male person of 21 Bennie Geldenhuis, Austerville, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 13: **NAIDOO, RUBENDREN**
a 33 year old male person of 57 Evergreen Circle, Phoenix, Durban. He is a Constable Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 14: **LEE, RAYMOND CHRISTOPHER**
a 31 year old male person of 4F Queens Terrace, 100 Dipdale Road, Queensburgh, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 15: **LOCKEM, ANTON**
a 44 year old male person of 201 Moss Road, Bluff, Durban. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

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Accused 16: **VAN TONDER, JAN JOHANNES EUGENE**

a 56 year old male person. He resides at 244 Grosvener Road, Carrington Heights, Durban. He is a retired member of the South African Police Services who was stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Captain.

Accused 19: **DLAMUKA, FELOKWAKHE THOMAS**

a 46 year old male person of 29 Linum Road, Northdale. He is a Warrant Officer, stationed at SAPS National Intervention Unit at Durban

Accused 25: **SMITH, CHARLES JOHN**

A 40 year old male person. His residential address is 34 Frederrick Avenue Bluff, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

Accused 26: **MARTEM, JEREMY**

A 39 year old male person. His residential address is 12 Goodricke Road Morningside, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

Accused 27: **MC INNES, BRUCE DAVID**

A 43 year old male person. His residential address is 87 St Winniefreds Whitefield Drive, Warner Beach, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

Accused 12,17,18, 20, 21, 22, 23, 24, 28, 29 and 30 in the proposed indictment are not charged with racketeering. They did not commit more than one offence in the predicate offences.

E. ANALYSIS OF EVIDENCE

17 The enterprise is defined to include "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*".

18 The KwaZulu-Natal Provincial Organised Crime Unit and Directorate for Priority Crime Investigations (DPCI) of the South African Police Services is an enterprise within the meaning of section (1) of the Prevention of Organised Crime Act, Act 121 of 1998 ("POCA), being a legal entity associated in fact.

19 This legal entity provided the accused with the continuity of structure under which to conduct their unlawful activities.

20 At all relevant times to the indictment accused no 1 was the Provincial Commander: Organised Crime: KZN and later was appointed as the Provincial Head: DPCI: KZN during 2010. Accused no. 9 was the section commander of the SVC section based in Cato Manor, whilst accused nos. 6, 15, and 16 were group commanders within this section. The majority of the remainder of the accused were members of this SVC section, whilst other accused were co-opted from other units. Accused 1, 6, 9, 15, and 16 were all managers of the enterprise within the meaning of the Act. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 19, 25, 26 and 27 were participants in the racketeering activities.

21 Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29 and 30 in the proposed indictment are not charged with racketeering activities. They did not commit more than one offence in the predicate offences.

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F. **LIST OF PROPOSED CHARGES**

ACCUSED	CHARGES	COUNTS
1. BOOYSEN JOHAN WESSEL	CONTRAVENTION OF SECTION 2 (1)(f) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	1
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	1

	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	1
2. PADAYACHEE, GONASAGREN	CONTRAVENTION OF SECTION 2 (1) (e) READ WITH SECTIONS 1, 2 (2), 2 (3), 2 (4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	7
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	7
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	8
	THEFT	4
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	5

	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(A),121 AND SCHEDULE 4 – POINTING OF A FIREARM	3
	MALICIOUS DAMAGE TO PROPERTY	1
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
3. STOLTZ, ADRIAAN JAKOBUS FICK	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	5
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF	4

	THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	4
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	1
	THEFT	2
4.MOSTERT, PAUL JONATHAN	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	11
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	7
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	15
	CONTRAVENTION OF SECTION 90, READ WITH	15

	SECTION 1,1 03, 117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	
	ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977	1
	MALICIOUS DAMAGE TO PROPERTY	1
	THEFT	3
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	2
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	16
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	3
5. NEL, ERIC ALFRED	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	7

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	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	7
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	7
	MALICIOUS DAMAGE TO PROPERTY	1
	THEFT	3
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	8
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
6. EVA, NEVILLE	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1

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	CONTRAVENTION OF SECTION 2(1)(f) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	7
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	5
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	10
	CONTRAVENTION OF SECTION 90 READ WITH SECTION 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	10
	THEFT	2
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	8
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	1

7.GHANESS, ADJTHSINGH	CONTRAVENTION OF SECTION 2 (1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	6
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	4
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	9
	CONTRAVENTION OF SECTION 90 READ WITH SECTION 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	10
	ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997 READ WITH SECTION 155(1) OF ACT 51 OF 1977	1
	THEFT	2

	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	8
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(A), 121 AND SCHEDULE 4 – POINTING OF A FIREARM	2
	MALICIOUS DAMAGE TO PROPERTY	1
8. MAKHANYA, PHUMELELA	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	6
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1, 103, 117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60	5

	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	8
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(A),121 AND SCHEDULE 4 – POINTING OF A FIREARM	2
	MALICIOUS DAMAGE TO PROPERTY	1
8. MAKHANYA, PHUMELELA	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROGEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	6
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1, 103, 117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60	5

	OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	5
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	1
9.OLIVIER, WILLEM CORNELIUS	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	CONTRAVENTION OF SECTION 2 (1)(e) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF	3

	2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	
	CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	3
	THEFT	1
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	3
10 MKHWANAZI, BHEKINKOSI MBHEKISENI	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	1
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	1
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 –	3

	UNLAWFUL POSSESSION OF A FIREARM CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	1 1
11. MDLALOSE, HATHAYIPHI ENOCK	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY MURDER READ WITH SECTION 51(1) OF ACT 105 OF 997 AND SECTION 155(1) OF ACT 51 OF 1977 HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977 CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	1 2 3 5

	CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	5
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	4
12. NAIDOO, RUBENDREN	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISEDCRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	10
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	6
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	15
	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60	14

	OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	
	ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997 READ WITH SECTION 155(1) OF ACT 51 OF 1977	1
	MALICIOUS DAMAGE TO PROPERTY	1
	THEFT	3
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103,120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	3
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	13
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	3
LEE, YMOND HRISTOPHER	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	5

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	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	6
	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	6
	THEFT	2
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103,120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	2
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	6
4. LOCKEM, ANTON	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	9

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	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	1
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(A) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	9
	CONTRAVENTION OF SECTION 90 READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	8
	ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997 READ WITH SECTION 155(1) OF ACT 51 OF 1977	1
	THEFT	1
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	9
15. VAN TONDER, JAN JOHANNES EUGENE	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1

	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OFACT 51 OF 1977	3
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	2
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	4
	CONTRAVENTION OF SECTION 90 READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	4
	THEFT	1
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103,120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	1
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	4
16. SMITH, CHARLES JOHN	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1

	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	1
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	5
	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1,103,117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	3
	MALICIOUS DAMAGE TO PROPERTY	1
	THEFT	1
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(a),121 AND SCHEDULE 4 – POINTING OF A FIREARM	2
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	4

	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
17. MARTEM, JEREMY	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	4
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	4
	CONTRAVENTION OF SECTION 90 READ WITH SECTION1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	4
	ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997 READ WITH SECTION 155(1) OF ACT 51 OF 1977	1
	THEFT	1

	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	1
18. MC INNES, BRUCE DAVID	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	2
	CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	2
	THEFT	3
	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 READ WITH SECTION 1, 103, 120(1)(a),121 AND	3

	SCHEDULE 4 - POINTING OF A FIREARM	
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	1
	ASSAULT WITH INTENT TO DO GRIEVIOUS BODILY HARM	2
19.DLAMUKA, FELOKWAKHE THOMAS	CONTRAVENTION OF SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY	1
	MURDER READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977	3
	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM	3
	CONTRAVENTION OF SECTION 90 READ WITH SECTION1;103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION	3
	THEFT	2
	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE	3

SUMMARY OF THE CASE

22 The South African Police Service (SAPS) is a legal entity established by legislation in terms of the South African Police Service Act No 68 of 1995. It is composed of a national office and provincial structures for each province. The Serious Violent Crime (SVC) section based at Cato Manor was a section within the Durban Organised Crime Unit, which formed part of the KZN Provincial Organised Crime structure and was therefore an enterprise as defined in the Act. During 2006 this Serious Violent Crime (SVC) section, which was a separate unit dealing with SVC, and became incorporated into the Durban Organised Crime Unit after the decision to abolish all SVC units and make them part of organised crime structures. During 2010, in a further development the organised crime structures became part of the newly established Directorate for Priority Crimes Investigations (DPCI) and continue to be as such to date. At all relevant times to the indictment accused no 1 was the Provincial Commander: Organised Crime: KZN and later was appointed as the Provincial Head: DPCI: KZN during 2010. Accused no. 9 was the section commander of the SVC section based in Cato Manor, whilst accused nos. 6, 15, and 16 were group commanders within this section. The majority of the remainder of the accused were members of this SVC section, whilst other accused were co-opted from other units. Accused 1, 6, 9, 15, and 16 were all managers of the enterprise within the meaning of the Act. The accused conducted unlawful activities on a continuous basis through the enterprise.

23 The Accused committed the predicate offences mentioned from **Count 3 – 116** in the furtherance of the unlawful activities of the enterprise.

24 The Accused killed a total of 28 (twenty eight) persons and committed other crimes in the process.

25 The Accused would in most of the killings place (a) firearm(s) next to the deceased person to create an impression that the deceased was armed and/or attacked them and/or posed danger to their lives thus interfering with the scenes of crime. The interferences led to the opening of inquest dockets in some matters.

26 The Accused would break and enter the premises of the deceased, steal possessions of the deceased and family members, damage their property and assault family members who were on the premises.

G. STATEMENT OF THE LAW

27 The Prevention of Organised Crime Act, Act No 121 of 1998(hereinafter referred to as The Act) defines in section 2 thereof various criminal offences in respect of racketeering.

28 Section 1(1) of The Act states that an "Enterprise" includes *"any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity"*

29 Section 1(1) of The Act states further that *"a pattern of racketeering activity" means the "planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1"*

30 Section 2(1)(f) provides that:

Any person who – *"manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

31 Section 2(1)(e) of POCA provides that:

Any person who – *"whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

32 An enterprise is established by proving that it has:

(a) A common or shared purpose

(b) A formal or informal structure

(c) A system of authority

(d) Continuity

H. POCA RACKETEERING POLICY

33 It will be impossible to charge the accused individually with all the offences they have committed. Charging the accused together outside the ambit of POCA will result in misjoinders. A POCA prosecution will allow the joining of different participating accused which is otherwise not permissible.

34 A POCA prosecution will enable the State to charge the accused with all offences committed through a pattern of racketeering activity, distinctly and separately.

35 Section 2(2) of POCA allows the court to hear evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated against the accused.

36 The placing of the firearms on the crime scene is similar fact evidence.

I. ANTICIPATED DEFENCES

37 The accused will argue self defence and rely on section 49(2) of the Criminal Procedure Act.

38 They were not participants in some of the crimes scenes, essentially relying on 'disassociation'.

39 The accused would raise a defence of bare denial on charges of theft, assault, possession of unlicenced firearms and ammunitions and malicious damage to property.

40 The State will counter these defences with:

- direct evidence
- circumstantial evidence
- expert evidence
- real evidence
- documentary evidence.
- some of the deceased were not their suspects.
- some of the deceased were shot in a supine position.
- They acted maliciously in a quest for personal benefits.
- The list is not exhaustive.

J. ASSET FORFEITURE UNIT

41 The investigation team has referred the matter to KZN Asset Forfeiture Unit. Their financial investigations are in progress. The prosecution team would study the financial investigation report and consider a possibility of money laundering charges.

K. CONCLUSION

I. Based on the evidence outlined above, it is recommended that :

(a) Authority be granted for the prosecution of the accused as proposed in the indictment; and

(b) Certificates in terms of Section 2(4) of the PREVENTION OF ORGANISED CRIME ACT 121 OF 1998 be issued.

II. *** The proposed indictment is attached.

ADV GS MAEMA
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTION SERVICE

MM-5

CONFIDENTIAL INTERNAL MEMORANDUM

16 February 2015

TO: MR. MSO NXASANA
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: MR. WILLIE HOFMEYR
DEPUTY NASIONAL DIRECTOR OF PUBLIC PROSECUTION

FROM: JM FERREIRA
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS (SCCU)

G VAN EEDEN
STATE ADVOCATE (SCCU)

RE: **REPORT ON THE COMPLAINTS AGAINST THREE SENIOR NPA PERSONNEL, NAMELY MS JIBA, MR MWREBI and MR MZINYATHI.**

SILVERTON CAS 817/07/2013

(I/O- Colonel Magobosha)

ACTT ENQ 1/12/2014

(I/O - Captain De Klerk)

PTA CENTRAL CAS 55/08/2014

(I/O - Captain De Klerk)

SILVERTON CAS 688/10/2014

(I/O- Col Botha)

A. INTRODUCTION

1. I received a verbal request from Mr Hofmeyr in November 2014 regarding this case and I agreed to be the prosecutor in the matter.
2. Due to the individuals involved and my current workload at the SCCU I requested Mr Hofmeyr whether I could get somebody to assist me. He agreed but added that it must be somebody that I trust unreservedly.
3. Adv. Gerhard van Eeden a person whom I know for more than 22 years is assisting me. He is a very experienced litigant; who also spent approximately 14 years in private practice, and because we have more than one matter that we are dealing with find it convenient to work together; also on this matter since we have ample time to discuss this matter and strategize, specifically when dealing with other matters away from Pretoria.
4. I had a meeting with Brigadier Moodley at his offices on **12 February 2015** at 13:00 regarding unresolved problems in the investigation and a lack of communication from their side.
5. Brigadier Moodley informed me that he had instruction from Gen.

Ntlemeza that they will investigate the case until *finalisation*, where after they will submit the dockets (the ones Captain de Klerk is dealing with) to the NDPP for decision. They will apparently also request the NDPP to remove me from this prosecution. I was not provided with any reason and believe that no cogent reasons could exist for this as the General do not know me at all and have had no interaction with me regarding this case at all.

6. Knowing the history of the Mdluli matter and General Ntlemeza' s links to General Mdluli and his links to Ms Jiba and Mr Mwrebi, one could perhaps venture a guess as to who possibly could in fact want me removed as prosecutor.

7. Another aspect to be raised in this introduction is the fact that one must perhaps point out that there are three investigating officers from different units, with Col Botha the only one not reporting to Gen. Ntlemeza.

8. If the SAPS follow through with this approach it will definitely cause a delay in the matter.

9. Ms Jiba has also had a meeting with Lt. Gen. Moonoo the head to whom Col Botha report; this meeting was apparently sparked by Col Botha attempting to obtain a warning statement from Ms Jiba.

10. No decision to prosecute has been made as yet as there are various outstanding aspects at this point in time.

B. **BACK GROUND**

5. The original complaint follows the disciplinary hearing of Ms Breytenbach and is also intertwined with the application launched by Freedom under Law (FUL), first in the North Gauteng High Court and thereafter in the Supreme Court of Appeal.

6. The charges related to negative findings made by the Supreme Court of Appeal in the FUL matter against Ms Jiba, Mr Mwrebi and Mr Mzinyathi.

7. There were also negative comments made by the KZN High Court against Ms Jiba in the unsuccessful attempt to prosecute Lt-Gen. Booysen for racketeering.

C. **SILVERTON CAS 817/07/2013.**

8. The investigating officer is Colonel Magobosha and the charges are Defeating the ends of justice and contravening section 32 (1) (b) of the NPA Act.

9. Col. Roelofse, the investigating officer in the Mdluli case, is the complainant.

10. The case entails the instruction by Mr Mwrebi (SDPP) to the SCCU Pretoria to withdraw the Mdluli prosecution at a time (December 2011) when the SCCU reported to the DPP Pretoria and ***not*** to the Special Director Mr Mwrebi. The prosecution against Gen. Mdluli was also instituted by the DPP and not the SDPP and at a time prior to the appointment of Mr Mwrebi as

SDPP.

11. Section 24 (3) of the NPA Act on which the SDPP relied both in the Breytenbach disciplinary hearing as well as in the FUL matter was simply not applicable to the Mdluli case for the reasons stated above. Mr Mwrebi' s instruction improperly interfered with, hindered or obstructed the DPP, North Gauteng and/or Mr Chris Smith and/or Ms Glynnis Breytenbach in the exercise, carrying out or performance of their powers and duties in relation to the Mdluli prosecution.

12. The proclamation whereby he was appointed cannot save Mr Mwrebi in this regard as the NPA Act is quite clear on the fact that the DPP in a specific province is the primary seat of power insofar as prosecutions in that province are concerned.

13. Although the SDPP (Mr Mwrebi) was initially the only suspect, we believe that a case could perhaps be made out that Ms Jiba may also be involved either as a co-perpetrator or an accomplice.

14. Initially these charges would have been dealt with by Mr Pieter Luyt of the DPP office in Pretoria. However he has requested us to deal with it as part of our case also involves the FUL matter. It would therefore make much more sense to deal with it along with the FUL perjury complaints.

15. Mr Luyt would therefore only proceed in his case against Mr Mwrebi (which is already on the roll) with the complaints where Mr Nathi Mncube (former spokesperson of the NPA) is the complainant.

16. The outstanding issues are:

16.1. Finding evidence whether the memo by Ms Breytenbach calling on Ms Jiba to review the Mdluli decision came to the knowledge of Ms Jiba before the FUL litigation. Here we need assistance of NPA Exco to inform us if the Breytenbach memo was ever discussed ***at*** a NPA Exco meeting or with any NPA Exco member in the presence of Ms Jiba. Ms Jiba' s failure to act when she became aware of the memo and its contents could make her an accessory after the fact to Mr Mwrebi' s alleged illegal and unlawful interference in the Mdluli prosecution.

16.2. We are struggling to get I-Africa to certify the record in the disciplinary proceedings.

16.3. If the SAPS push through with their intention to finalise the investigation ***"on their own"*** before providing the docket to the NDPP, a lot of time will be wasted and further aspects to investigate will only be identified after the docket is provided to the NPA.

D. ACTT ENQ 1/12/2014

17. The investigating officer is Captain De Klerk.

18. On 9 September 2010, while working at the SCCU, Pretoria Ms Jiba undertook a flight to Durban during the day. (SAA 563 departing Johannesburg at 15:00) She returned on SAA 563 at

19:40). This flight was paid for from the account of Crime Intelligence (CI) and Gen. Mdluli was on both these flights, even though they did not sit in adjacent seats.

19. The ticket was originally requested and approved on the basis that it was another person (a known agent - SA71 – *not Ms Jiba*) that would fly. There was thus clearly fraud committed by somebody in the Crime Intelligence environment. The cost amounted to R3 784.00.

20. If Ms Jiba went to Durban on official business then the NPA should have paid for her flight, if she went on private business then she should have paid for her flight.

21. The value of the airfare could therefore be seen as an unauthorised gratification and she could well be guilty of corruption. Alternatively, the ticket was obtained by fraudulent means and because she was the beneficiary of the fraud she could be held accountable for the fraud depending on her knowledge of the facts.

22. One problem is that there was a lot of alleged fraud, where family members of Mdluli and other people were allowed to fly on tickets bought by UTE, the front company of CI. As such the identities of passengers were deliberately withheld in the purchasing process.

23. What is outstanding:

    23.1. Because of the secrecy in CI there is no ID number to link to Ms Jiba so if she dispute that it was her that flew

to Durban on that day the State will have to counter it.

23.2. There is a small spelling mistake in her name.

23.3. South African Airways alleges that it was only somewhere after 2011 that they can certify that every passenger's ID or drivers licence was used to verify the identity of the passenger.

23.4. There are severe resistance in the SAPS to investigate this as apparently numerous people had free flights on the budget of CI and it is felt that it would be unfair to prosecute only this one beneficiary. However, if dockets against other beneficiaries are opened we can look at all cases on their merit.

23.5. Further/other evidence that Ms Jiba was indeed in Durban on that day.

E. PTA CENTRAL CAS 55/08/2014

24. The investigating officer is Captain De Klerk and it relates to the alleged perjury committed by Ms Jiba, Mr Mwrebi and Mr Mzinyathi when the last two mentioned individuals contradicted in the FUL affidavits their oral evidence in the Breytenbach disciplinary hearing.

25. We have had many problems with the investigating officer who doesn't seem to be up to the task and lately the SAPS having also

taken unilateral decisions referred to in the introduction above.

26. It has also come to light that during evidence Mr Mwrebi gave at the trial of Mr Ledwaba (A former DPP in the scorpions) Mr Mwrebi made certain admissions to the effect that he committed perjury while testifying in the Selebi trial. Both records are available and need to be filed in the docket. Showing the court more than one instance of perjury on the part of Mr Mwrebi would be of assistance to the State in any possible prosecution.

27. What is outstanding:

27.1. The whole issue of Mr Mwrebi's evidence in the Selebi case and the Ledwaba case.

27.2. Transcription certificates of the record of the disciplinary hearing regarding the evidence of Mr Mwrebi and Mr Mzinyathi.

27.3. Statements from Mr Motau SC (and Mr Halgryn SC) on of the counsels of the NPA in the FUL matter as well as that of his junior Ms Manaka. They have requested the Bar Council to give them permission to depose to affidavits.

27.4. Statements form the state-attorney who instructed the various sets of counsel. This has been outstanding for quite some time and we get the impression the members of the State Attorney is hesitant to become involved.

F. **SILVERTON CAS 688/10/2014**

28. The investigating officer is Col Botha ("Botha") and this case is about the General. Booysen ("Booysen") racketeering prosecution in which Ms Jiba, the then ANDPP were severely criticised about her affidavit and the fact that she instituted a prosecution against the Booysen in the first place.

29. The court found that there was NO evidence linking Booysen to the commission of the alleged racketeering offences.

30. A statement was obtained from Mr Maema a DDPP from Mmabatho who was one of the designated prosecutors on the Booysen team. In this statement Mr Maema tries to justify that there is indeed a case for Booysen to answer, however the highlight of the so-called evidence is that on one occasion Booysen came to the scene of a shooting afterwards in a helicopter and congratulated the SAPS members and in some instances some SAPS members got monetary rewards.

31. The monetary rewards was not applied for by Booysen and only approved by him at the request of another SAPS official. The fact that on one occasion Booysen arrived after the event could not seriously be regarded as "evidence" for purposes of a racketeering prosecution.

32. A more sinister motive for the prosecution of Booysen could have been to discredit him as he was a prime witness against a well-known businessman (Thoshan Panday) arrested for corruption.

That case was withdrawn and so far the businessman (and a member of SAPS) has escaped justice.

33. Although Mr Maema has deposed to an affidavit a decision will have to be made whether he should be called as a witness, should any prosecution follow. The same is true for the DPP Johannesburg Mr Chauke and Mr Mosing from the National Office as they all supported the failed racketeering prosecution of Booysen and in fact still support it.

34. Ms Jiba will without any doubt place *some*; if not all, the blame for her perjury on the Booysen prosecution team.

35. However, supporting the failed prosecution does not ***per se*** make them guilty of any criminal offence, unless one can prove that they knew the contents of the affidavit in which Ms Jiba perjured herself, before it was signed and that they let her sign it; well knowing the false facts contained therein. We simply have no evidence of that at this stage.

36. What is outstanding:

    36.1. Statement from Ms Manaka one of the counsels who acted for the NPA in this matter as well as from Mr Laurence Hodes SC, her senior.

    36.2. A copy of the racketeering docket, specifically the investigating diary to draft a timeline and to see exactly when which affidavits were filed.

36.3. It is suggested that we would need to go through the whole docket to gauge the precise evidence allegedly available at the time of making the decision to prosecute Booysen.

36.4. Statements from possibly:

- Mr Chauke the DPP of Johannesburg, and
- Mr Mosing a DDPP at this office, who were both intimately involved in the failed racketeering prosecution.
- To consult the investigating officer in the racketeering prosecution of Booysen

G. OTHER ASPECTS OF IMPORTANCE.

Challenges experienced

37. As explained above we are experiencing a number of challenges with the SAPS including, but not limited to, the fact that we have three different investigating officers from three different SAPS units investigating various aspects of the same case.

38. We believed that a small task team would have been much more focussed and effective in this regard and would appreciate any assistance the NDPP can/may give by engaging the Commissioner of SAPS in this regard.

39. Originally the case of General Booysen was also investigated by

Captain De Klerk. However, on the same day he obtained a statement from the General in Durban the Commissioner of SAPS intervened and directed that, that investigation should move to the unit of General Moonoo. It may of course simple be because General Booysen is also a member of the Hawks and that it could be frowned upon that they investigate "one of their own".

Workload of prosecutors

40. Even though Gerhard van Eeden and I are completely swamped with other work as well, this has not caused any delay as the delays are caused by the slow pace of the SAPS investigation, specifically that of Captain De Klerk. Complaints to Brigadier Moodley have unfortunately not speeded up the pace of the investigation.

41. Gerhard van Eeden is involved; along with me, in:

41.1. The ***Tannenbaum matter*** in which one suspect is in Australia and one in Switzerland. The Tannenbaum scheme is probably one of the biggest investments fraud matters in the South African legal history.

41.2. A part heard matter in Limpopo (***Mankele Bridge matter***) regarding a bridge built over the Olifant's river between Penge and Mankele. In this matter a section 174 discharge was refused by the trial court recently and the accused will have to testify later in the year.

41.3. The ***Bongavelli-project*** where farms were purchased in Mpumalanga and then sold to the government at hugely inflated prices. In some instances the transfer to the "middle man" and from them to the government took place on the same day at the deeds office, mere minutes apart.

41.4. Apart from this, Gerhard Van Eeden also has 53 other cases under investigation and 8 cases on the court roll.

42. As for myself I am involved in the ***Porritt prosecution*** in Johannesburg where the Supreme Court of Appeal have recently overturned the ruling of Mallula, J to remove Etienne Coetzee SC (Private Counsel and section 38 (3) appointee) and me as prosecutors in this matter with a very long, protracted and colourful legal history. The Judge President has very recently appointed judge Vally to do case management of this matter which will hopefully start in the third or fourth quarter of 2016. This is a massive matter in which the indictment is 1400 pages long and it has been to the Supreme Court of Appeal three times and on the High Court roll in Johannesburg since January 2006.

43. I furthermore have 16 cases under investigation and 9 cases on the court roll.

Outside Counsel

44. Consideration could perhaps be given to appoint an outside silk to

give an opinion as to the fact whether there is a prima facie case or not on the anticipated charges ***and or*** to lead the prosecution in light of the fact that this is a case involving very senior NPA personnel; *all of whom*, are more senior than Gerhard van Eeden and I.

45. The suspects will most probably allege that their possible prosecution is a purge by the NDPP, in light hereof, the opinion of an independent senior counsel of good standing can go a long way in showing that the NPA and its personnel is acting completely transparently and taking every precaution that the decision is based only on the relevant facts and law and on nothing else.

46. One possible problem with this is that the Minister of Justice will have to agree with the appointment of outside counsel in terms of section 38 (1) and 38 (2) of the NPA Act, however, very cogent reasons could be put forward which would make it very difficult to deny such request.

47. Due to the fact that both Gerhard van Eeden and I have worked for Ms Breytenbach previously at the SCCU Pretoria, it should be pointed out that the suspects; should they be charged, would suggest ulterior motives, conspiracy or launch some sort of personal attack on us and our involvement in this matter.

48. However, we are **willing and able** to deal with the matter on our own; should it be unachievable or impractical or undesirable to

have an outside senior counsel appointed.

49. It could perhaps be advisable to temporarily arrange that Gerhard van Eeden and I be accommodated in facilities similar to that of Mr Broughton and Mr Rossouw at (*but not in*) VGM for the duration of this matter and that we report to Mr Hofmeyr until finalisation of this matter.

H. CONCLUSION

50. Gerhard van Eeden and I have not been reporting to our acting regional head ***on this matter***. Mr Mokgatlhe reports to, and has regular interactions with Mr Mwrebi, who is still the SDPP and as such responsible for the whole of the SCCU.

51. We require guidance in this regard as to whom we report to on this matter. At this stage we are reporting to Mr Hofmeyr and we have no problem proceeding to do so.

52. Insofar as the clear impression is that there are certain segments in the SAPS not willing to do the best they can in this investigation, possible escalation of this to the Commissioner of SAPS by the NDPP should seriously be considered. Col. Botha is more than able to investigate these matters and he and Col. Magobosha could potentially form a small task team to deal with all of the dockets referred to in this report.

KMM-6

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

TO: ADV SHAUN K ABRAHAMS
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND TO: ADV NOMVULA MOKHATLA
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV M.P MOKGATLHE
SPECIALISED COMMERCIAL CRIME UNIT

DATE: 17 AUGUST 2015

RE: LEGAL OPINION ON DECISION TO PROSECUTE N JIBA

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Introduction

1. On 13 August 2015 I was requested by the National Director of Public Prosecutions, Advocate Shaun Kevin Abrahams to furnish him with a legal opinion and a decision on the veracity of the prosecutorial decision of Advocates Ferreira and Van Eeden, who are prosecutors reporting under writer hereof.

2. I consulted the following sources:

2.1 The evidence as contained in case docket, Silverton CAS 622/10/2014 investigated by Major General Taloe,
2.2 The charge sheet of State versus Nomgcobo Jiba, Case No. 111/83/2015,
2.3 The NPA Policy Directives,
2.4 The provisions of the Prevention of Organised Crime Act, 121 of 1998,

2.5 Judgment of Gorven J in Booysen v NDPP and Others [2014] 2 All SA 391 (KZD),

2.6 The affidavit of Johan Booysen,

2.7 The affidavit of Nomgcobo Jiba,

2.8 The legal opinion of Ferreira and Van Eeden, and

2.9 Consultations with prosecutors in the Cato Manor case against Booysen and Others.

Evaluation of the Evidence contained in Silverton CAS 622/10/2014

3. **A1- Theodore Leeuwschut**, who is a director of administration in the office of the CEO. He will testify that he was advised by NPA management to lay a criminal complaint against Jiba. He does not mention the names of the persons alleged to be NPA management. He refers to the remarks made by Gorven J and the legal opinion of Patrick Ellis SC. He concludes his affidavit by alleging that the NPA management is of the view that the matter should be reported to the SAPS with a view to investigate a criminal charge of perjury.

4. It is evident from A1 that he did not act out of his own volition in laying a complaint with the SAPS but was influenced into doing that. His evidence is therefore not sufficient to particularise the offence alleged to have been committed by Jiba.

5. Patrick Ellis SC mentions the names of NPA officials he consulted with as Ms Karen Van Rensburg and Mr Gordon Hollanby. He further states that these NPA officials wanted his advice on the disciplinary measures available against senior NPA officials.

6. On 16 February 2015 Jan Ferreira submitted a memorandum to Mr Nxasana wherein he alleged that Mr Willie Hofmeyr requested him to be the prosecutor in the case against Jiba.

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7. Sworn affidavits of Ellis SC, Van Rensburg, Hollomby and Hofmeyr are conspicuous by their absence.

8. The Gorven J judgment attached in the docket as evidence is not preceded by a section 235 certificate as required by the Criminal Procedure Act 51 of 1977.

9. Apart from the purported complaint of A1, there is no sworn affidavit by the NPA as complainant in the criminal case against Jiba and any averment in the charge sheet that the NPA suffered prejudice as a result of Jiba's alleged misrepresentation cannot be supported by objective facts.

10. **A2- Johan Booysen**, who is a Deputy Provincial Commissioner with the rank of Major General in the SAPS. He was an Applicant in the case of Booysen v NDPP and Others [2014] 2 All SA 391 (KZD) where he challenged the validity of the decision taken by Jiba to authorise his prosecution for Racketeering on 17 August 2015.

11. Johan Booysen is accusing Jiba of misleading the court and lying under oath. He further alleges that Jiba misrepresented the truth which caused him actual prejudice. He says that in his view, Jiba committed fraud by lying under oath and in the process defeated or obstructed the course of justice. All this allegations are not corroborated by objective facts.

12. Johan Booysen alleges in paragraph 29 of his Replying Affidavit as follows:

"I submit that the only reasonable inference to be drawn from the aforegoing is that none of the statements were in the possession of the First and Second Respondents when the impugned decisions were made. The statements of Alyer certainly could not have been in their possession by 17 August 2012.....(NJ4 is in any event, dated 31 August 2015). The same applies in respect of Denikas and Ndiondlo."

13. The aforementioned submission cannot be true because NJ2 which is a statement of Alyer dated 4 August 2012 was placed before Jiba for

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consideration before she decided to authorise the racketeering prosecution against Johan Booysen.

14. Furthermore, the statement of Ndlondlo is dated 31 July 2012 and was also considered by Jiba prior to authorising the racketeering prosecution of Johan Booysen.

15. NJ1 is a document indicating the police officers who received monetary awards, and is dated 14 October 2008. It was considered by Jiba prior to deciding to authorise the racketeering prosecution of Booysen.

16. Can it then be said that the false affidavit filed by Johan Booysen in the court papers, where he says that NJ1, NJ2 and Ndlondlo's statement were not before Jiba when she made the decision to authorise the racketeering prosecution, was made with the intention to mislead the court?

17. According to the Monetary Awards (NJ1) dated 14 October 2008, Booysen received an award together with the Cato Manor SVC Section of the Durban Organised Crime Unit for the killing of the Kwa-Maphumulo Taxi Association members.

18. The only mistake that Jiba made was to allege in her Answering Affidavit that she also referred to NJ3 which is the unsigned statement of Dantkas, before deciding to authorise the racketeering prosecution of Booysen. The mistake referred to can be mitigated by the fact that Jiba's affidavit was drafted by junior counsel, Adv. Manaka and settled by A8- Laurence Hodes SC before she signed it. Jiba's conduct can therefore not be alleged to be fraudulent.

19. With regard to NJ4 statement of Aiyer signed on 31 August 2012, there is a valid explanation by A4- Advocate Maema, on page 9 of his affidavit wherein he mentions that,

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"Although the second of Alyer's statement was dated 31 August 2012, the prosecution team had already consulted Alyer and already knew what the contents of Alyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy to the prosecutors from the consultation and was used on that basis."

20. The prosecutors in Jiba's criminal matter appear to have disregarded the abovementioned explanation by Sello Maema but chose instead to believe the unsubstantiated allegations made by Johan Booysen.

21. Johan Booysen's evidence has to be approached with caution, since he has a motive. His motive is to ensure that the criminal case instituted against him does not proceed without delay. His evidence is not corroborated by any independent witness.

22. The prosecutors' reliance on the fact that Booysen was not at the scene of the crimes and that there was no direct evidence linking him to the individual offences is irrational and indicates a lack of understanding of the requirements necessary for managing an enterprise. The provisions of POCA allows the State to charge any individual with managing the activities of an enterprise, even if the said person is not at the scene of the crime or his conduct is not directly linked to the offences.

23. According to section 2(1)(f) of POCA,

(1) *Any person who.....(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity.....*

within the Republic or elsewhere, shall be guilty of an offence.

The elements required for a contravention of section 2(1)(f) are: *An enterprise must have existed; * The accused managed the operation or activities of the enterprise; * A pattern of racketeering activity must have existed; and * The accused knew or ought reasonably to have known that any person, employed by or associated

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with that enterprise, must have directly or indirectly conducted or participated in the affairs of the enterprise, through a pattern of racketeering activity.

The reasons for charging Johan Booysen with Racketeering

24. The prosecutors in the Johan Booysen case had correctly identified Cato Manor SVC Section of the Durban Organised Unit as the enterprise.

25. According to Alyer, Johan Booysen was the Provincial Commander of Organised Crime in KZN during 2008, bypassed Alyer and managed the operations of Cato Manor SVC Section.

26. Immediately after Supt Choncho was killed on 27 August 2008, 7 people who were suspected to have been involved in his murder were all killed by Cato Manor SVC Section of the Durban Organised Crime Unit. These people who were killed belonged to the Kwa-Maphumulo Taxi Association. Johan Booysen and the Cato Manor SVC Section of the Durban Organised Crime Unit received monetary awards and certificates for this particular operation.

27. Johan Booysen knew or ought reasonably to have known that these 7 people were killed because they were suspected of having killed a police officer. The killing of the 7 people happened in close proximity to the date of the killing of Supt Choncho. The 7 people were killed on the following dates:

- 3 September 2008
- 16 September 2008
- 18 September 2008
- 18 September 2008
- 3 February 2008

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28. In this regard, the conclusion that Cato Manor SVC Section of the Durban Organised Crime Unit under the management of Johan Booysen embarked on an ongoing and continuous killing pattern. It is surprising that all the 7 deceased are said to have been shot when Cato Manor SVC Section members were attempting to arrest them. The 7 deceased are also alleged to have fired at the Cato Manor SVC Section members, at different scenes but no member of the police was ever shot and no State property was damaged.

29. Booysen also assisted Mostert, one of the Cato Manor SVC Section members in tracing the suspects that were later shot dead.

30. In a High Court application case no. 13789/2008 brought about by one deceased, Bongani Elpheas Mkhize, interdicting all the Respondents including Booysen, not to kill him citing the murder of his fellow members of Kwa-Maphumulo Taxi Association who were allegedly suspected of involvement in the killing of Superintedent Choncho.

31. Booysen filed an answering affidavit where he defended the actions of Cato Manor SVC Section policemen. This conduct clearly indicates that Booysen had knowledge of the activities of the said policemen. In spite of the Court order in favour of Mkhize, the latter was killed by the same Cato Manor SVC Section of the Durban Organised Crime Unit.

32. Accordingly, the authorisation of the Racketeering prosecution against Johan Booysen and Cato Manor SVC Section members cannot be faulted.

33. The statement of Booysen when properly assessed constitutes evidence of a single witness, however, there are statements of several witnesses who will corroborate the version of Jiba. The State will not be able to prove that Jiba had the necessary intention to commit the offences of fraud and perjury.

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34. **A3 and A12- Anthony Mosing** who is head of the Special Projects Unit in the office of the NDPP. He will testify that he advises the NDPP on all the racketeering applications. He met with the prosecution team in the case against Booysen, where the team made a presentation to him. He had to satisfy himself that a prima facie case of racketeering existed including the enterprise and managers and participants. He was satisfied that the application brought by prosecutors, Advocates Maema and Mathenjwa was sound and proceeded to draft a certificate and advised Jiba to authorise the racketeering prosecution of Booysen.

35. Mosing will further state that Nxasana summoned him to his office and accused him of being loyal to Jiba. Nxasana told him that he felt undermined by the decision to appeal the Gorven J decision as it was meant to protect the reputation of Jiba. Nxasana then ordered the withdrawal of the notice of appeal that had already been filed. Nxasana's conduct mentioned above clearly indicates that the relationship between him and Jiba was far from being cordial.

36. It is important to note that Jiba authorised the racketeering prosecution of Booysen at the time when she was the acting NDPP and long before Nxasana was appointed as National Director. Nxasana therefore, cannot claim to have been undermined since the decision was not taken under his watch.

37. It is surprising that Ferreira and Van Eeden decided not to charge Maema, Mathenjwa, Mosing and Chauke who all made briefings to Jiba and provided argument in support of the authorisation of the racketeering prosecution of Booysen and the Cato Manor policemen.

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Charge Sheet Case No. 111/83/2015

38. According to count 1 of the charge sheet, Jiba is accused of fraud in that she made misrepresentations to Johan Booysen and/ or SAPS and/ or NPA and/ or members of the public and/ or the judiciary in KZN.
39. There are no affidavits from any of the mentioned persons in par 38 above, wherein they allege under oath how Jiba defrauded them.
40. The evidence of both A1 and A2 is insufficient to sustain the alleged charge of fraud against Jiba.
41. It will be impossible to prove the existence of a fraudulent intent on the part of Jiba since she acted on advice of Mosing, Chauke, Masina and Mathenjwa.

42. According to count 2 of the charge sheet, Jiba is accused of having committed perjury by unlawfully and intentionally making false statements under oath.
43. It is true that the statements of Ndlovu, NJ1 and NJ2 were made under oath and Jiba considered them before deciding to authorise the racketeering prosecution. The alleged falsity of the said statements is only known to Booysen. The veracity thereof can best be adjudicated upon by a trial court.

44. Count 3 of the charge sheet alleges that the evidence Jiba considered for authorising the racketeering prosecution did not justify her decision hence Gorven J set aside her authorisation. The setting aside of a decision cannot result in a criminal offence by the decision maker, but it is a legal remedy available to the aggrieved party. Furthermore Gorven J did not recommend that criminal charges be instituted against Jiba.

45. There is no evidence to prove that Jiba had a fraudulent intent when she made her decision to authorise the racketeering prosecution of Booysen and members of the Cato Manor SVC Section.

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The legal position

47. The powers of the NDPP are outlined by the provisions of **section 22** of the NPA Act, Act 32 of 1998. The NDPP is empowered by legislation to carry certain functions and duties only relevant to an appointee in his/her position. **Section 78** of POCA clearly insulates Ms Jiba from any personal liability for carrying out her functions under the Act. As an officer of the court, the NDPP can make mistakes in carrying out her functions and aggrieved parties can approach the courts for appropriate relief.

48. In this particular case, Booysen approached the court to review the decision of Ms Jiba to authorize a racketeering prosecution against him in terms of the POCA legislation. This fact does not nullify the decision taken to prefer the predicate offences. It is submitted that any mistake or misdirection by the NDPP in exercising his functions cannot be criminalized. The setting aside of the authorization is a legal remedy that Booysen successfully exercised. The NDPP can reissue the authorization upon receipt of a properly motivated application by the prosecution team that complies with the standard set by the court.

49. In **S v Brown** (681/2013) [2014] ZASCA 217 (1 December 2014), the SCA severely criticized Veldhuizen J's conduct as tending to bring the administration of justice into disrepute. The SCA did not criminalize his conduct because the appeal process was the remedy available to the NPA.

50. Ms Jiba has been charged with the offences of Fraud and Perjury. Upon assessing the evidence against the alleged charges, one is left wondering as to how the prosecution intends proving the element of intention in both counts. With regard to Fraud, the prosecution must prove that Ms Jiba had a fraudulent intent when she authorized the racketeering prosecution of Booysen. The prosecutors seem to be relying on *dolus eventualis* in both instances. Both A4 and A12 will

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testify that they are the ones who advised Ms Jiba through verbal briefings and a prosecutorial memorandum to issue the authorization. A8 will disprove the Perjury charge by testifying that he settled Ms Jiba's affidavit after it was drafted and compiled by Adv Manaka.

51. The doctrine of *dolus eventualis* cannot find application in this particular instance since Ms Jiba could not have foreseen the possibility that her decision-making will lead to an unlawful outcome. She acted on the legal advice of counsel as a litigant in review proceedings. She could not have reconciled herself to the ensuing result since her conduct was not reckless. She might have erred or misdirected herself in believing that the motivation as contained in the prosecutorial memorandum was sufficient to justify her decision to issue the racketeering authorization.

Conclusion

52. The decision arrived at by both prosecutors to prosecute Ms Jiba for exercising her statutory obligations in terms of the law is not supported by objective facts. The predicate offences preferred against Johan Booysen stand to be adjudicated upon by the trial court. If this prosecutorial decision were to stand, prosecutors will not be able to carry out their duties without fear of being victimized.

There are no reasonable prospects of a successful prosecution in this matter and I accordingly recommend that the case against Ms Nomgcobo Jiba be withdrawn.

MP MOKGATLHE
REGIONAL HEAD: SCCU PRETORIA

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Summons No./Dagvaarding No. 14/2015
Case NO./ Saak No. 111/83/2015

SUMMONS IN CRIMINAL CASE
Magistrate's Court

DAGVAARDING IN STRAFSAAK
Landdroshof

District/Distrik		Regional division/Streekafdeling
PRETORIA		GAUTENG
Held at/Gehou te	Court/Hof	Date of trial/Verhoordatum
PRETORIA	19	21 APRIL 2015

To the MESSENGER OF THE COURT: You are hereby commanded in the name of the State to serve the copy of this summons on the person(s) (hereinafter reffered to as accused) of whom particulars appear hereunder as to summons him/her/them to appear in court and to remain in attendance in connection with the charge(s) of which the particulars is/are mentioned hereunder. Report to this Court what you have done thereon.

Aan die GEREGSBODE: U word hierby in die naam van die Staat gelas om die afskrif van hierdie dagvaarding aan die persoon/e (hieronder die beskuldige(s) genoem) van wie besonderhede hieronder verskyn, te beteken ten einde hom/haar/hulle aan te sê om die Hofverrigtinge by te woon en aanwesig te bly insake die aangelg(te) waarvan die besonderhede hieronder verksyn. U moet aan hierdie Hof verslag doen van wat U hieromtrent gedoen het.

Name/Naam NOMBCOBO JIBA			
Address/Adres:			
Business/Besigheid Victoria & Griffiths Mxenge Building. 123 Westlake Ave SILVERTON			
Sex/Geslag	Race/Ras	Age/Ouderdom	Identity No./Identiteitsnommer
FEMALE		47	6704120531083

Particulars of charge(s):
Besonderhede van aanklag(te): 1 PER ANNEXURE / PER BYLAE

Accused is/are guilty of the offence of
Beskuldigde(s) is skuldig aan die misdryf van .....

In that upon or about the
deurdat op of omtrent die ..... day of 20
a MANLIK nd al or near
en te of naby
the accused did w
die beskuldigde(s) ...

CONTROL DOCUMENT / BEHEERSTUK

TO THE ACCUSED

1. You are hereby summoned to appear in perspn before the above-mentioned court at 08:00 on the above-mentioned date and time in connection with the charge(s) of which the particulars is/are mentioned above and to remain in attendance
2. An admisaion of guilt fine of ---- per count
3. You are entitle to obtain the services of a legal practitioner of your choice to Assist you. If you cannot afford a legal practitioner you may apply for legal aid at the local Legal Aid Officer.

AAN DIE BESKULDIGDE(S)

1 U word hierby gedagvaar om persoonlik om 08:00 op die bovermelde datum en plek voor die bovermelde Hof te verskyn en aanwesig te bly insake die aanklag(te) waarvan die besonderhede hierbo verskyn.
2. 'n Skulderkenningsboete te bedrae van ---- per klag
3. U is geregtig om op u eie koste deur 'n regsadviseur van u keuse bygestaan te word. Indien u nie self 'n regspraktisyn kan bekostig nie, kan u aansoek doen om regshulp By die plaaslike Regshulp beampte.

*In terms of subsection (1) of section 57 of the Criminal Procedure Act, 1977 the accused is/are deemed to be convicted of the offence(s) set out above
Kragtens subartikel (7) van artikel 57 van die Strafproseswet 51 van 1977, word die beskuldigde(s) geag veroordeel te word weens die oortreding(s)
And is sentenced to a fine of
Hierbo uiteengesit en word hy/ay/hulle gevonnis tot 'n boete van R .....
*Other
Ander

ALERTS VAN DIE HOF
2015 -03- 23
PRETORIA
Date stamp CRIMINAL
Datumstempel OF THE COURT

Magistrate/Landdros

* Delete which is not applicable. If passing of sentence is declined and it is directed that the accused be prosecuted in the ordinary course, a note to this effect should be endorsed accordingly under "()". Skrap wat nie van toepassing is nie. Indien die oplegging van vonnis geweier word en gelas word dat die beskuldigde(s) op die gewone wyse vervolg word, moet die feit dienooreenkomstig onder "A" gendosseer word.

(1)

TRIAL / VERHOOR

Held in the aforementioned Court on the ~~18th~~ 21st day of APRIL 2015 COURT 19. Gehou in die voormelde Hof op die	
Presiding officer/Voorsittende beampte Mr. VAN WYK.	For the State/Vir die Staat **Adv. J. Ferreira** **Adv. G.van Eeden**
For Defence/Vir Verdediging MR Z MAJAVU	Interpreter/Tolk Mr Khumalo
PLEA/PLEIT:	
JUDGMENT/UITSPRAAK	
SENTENCE/VONNIS: Bail as withdrawn by State	
Date Datum 19/4/15	Magistrate/Landdros

The following evidence was adduced in the presence and hearing of the accused then in his/her sound and sober senses:

Die volgende getuienis is aangevoer in die teenwoordigheid en ten aanhore van die beskuldigde toe by sy/haar volle verstand:

S/P Engel 1016 ... Prosecutor ... Sotshongaye ...
... Mr ... Accused ... Advocate. P/P also ...
... R 1016/15 Prosecutor ... Sotshongaye ...
... Case ... (19)
20/4/15
... S/P ... Accused ... Advocate ... Case ... Magistrate ... Bail ... Accused ... Case ... Accused ... Case ... Accused ... Case

(1)

TRIAL - VERHOOR

Held in the aforementioned Court on the 21st day of APRIL 2015 COURT 19. Gehou in die voormelde Hof op die	
Presiding officer/Voorsittende beampte: Mr. van Wyk.	For the State/Vir die Staat: Adv. J. Ferreira; Adv. G.van Eeden
For Defence/Vir Verdediging: MR Z MAJAVU	Interpreter/Tolk: Mr Khumalo
PLEA/PLEIT:	
JUDGMENT/UITSPRAAK:	
SENTENCE/VONNIS: Cases withdrawn by State	
Date / Datum: 19/8/15	Magistrate/Landdros: .....

The following evidence was adduced in the presence and hearing of the accused then in his/her sound and sober senses:

Die volgende getuienis is aangevoer in die teenwoordigheid en ten aanhore van die beskuldigde toe by sy/haar volle verstand:

S/P August 1016 ... Docquay + Robbertse ...

... R 1016/15 Docquay + Robbertse ... Case struck off ... (19)

20/4/15

... S/P ... Docquay + Robbertse ...

111/83/15

S/O as a general.

I hope S/O (as my fm Dept) will be able to confirm what PIP has told me about this enquiry. When Parnell was about he said he had told me that he was still in possession of the docket and enquiries not completed. Anyway I hope we will have this placed as regards.

PIP: S/O to Cabal Botha signed by General. PIP check who else is [illegible] 21/4/15

IN THE REGIONAL DIVISION OF GAUTENG

HELD IN THE REGIONAL COURT AT PRETORIA

Case Number... 111/83/2015

The State

versus

JIBA: NOMGCOBO

(Hereinafter referred to as "the accused")

PROVISIONAL CHARGE SHEET

PREAMBLE TO THE CHARGE SHEET

WHEREAS THE ACCUSED (at all times relevant to the charges):

1. Was the Acting National Director of Public Prosecutions of the National Prosecuting Authority of South Africa,
2. Authorised a racketeering prosecution against ***inter alia***, Major-General Johan Booysen, the head of the Hawks in Kwazulu-Natal, since March 2010;

2.1. Authorised it on 17 August 2012, and

2.2. On counts of the contravention of section 2 (1) (e) and 2 (1) (f) of Act 121 of 1998,

2.3. Did so in terms of the provision of section 2 (4) of Act 121 of 1998.

3. Major-General Booysen brought an application in the Kwazulu-Natal High Court wherein he ***inter alia***, asked the High Court to declare invalid the decisions of the accused, and to set aside the decision made by the accused to authorise the racketeering prosecution against him.

4. During the course of this litigation the accused deposed to an affidavit commissioned on 3 July 2013 wherein she made various allegations and statements under oath.

5. Judge Gorven of the Kwazulu-Natal High Court ruled in favour of Major-General Booysen on 26 February 2014 and inter alia found:

"I can conceive no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore the rule of law and were unconstitutional."[1]

and

"As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate."

and

"In response to Mr Booysen' s assertion of mendacity on her part, there is a deafening silence."

6. The State alleges that there was no evidence whereupon the racketeering prosecution against Major-General Booysen should have been instituted and that the accused in deposing to the affidavit of 3 July 2013 committed perjury.

---

[1] Booysen v Acting National Director of Public Prosecutions and others (4665/2010) [2014] ZAKZDHC1; [2014] 2 All SA 391 (KZD) (26 February 2014) paragraph [36] of the Judgment.

NOW THEREFORE THE ACCUSED IS GUILTY OF

COUNT 1 – FRAUD

IN THAT on or about **3 July 2013** at or near ***Silverton***, **PRETORIA** in the Regional Division of Gauteng, the accused did unlawfully, falsely and with intent to defraud represent to Johan Booysen and/or the South African Police Service (SAPS), the National Prosecuting Authority (NPA) members of the public and/or the judiciary in Kwazulu- Natal that:

- She gave due and careful consideration to information under oath and that there is a prima facie case against Johan Booysen on racketeering charges.
- The facts she deposed to in her affidavit of 3 July 2012 fall within her personal knowledge and are to the best of her belief true and correct.
- There were information under oath *which was before her* which indicate that Johan Booysen knew or ought to have known that his subordinates ***were killing*** suspects instead of arresting them, and/or
- This killing was motivated by the Unit's desire to enrich themselves by means of State monetary awards and or certificates of excellent performance, and/or
- The statements of Alyer, Danikas and Ndlondo
    - Is relevant, and/or
    - Was available, and/or
    - Was under oath, and/or
    - Was considered by her, and/or
    - Shows that Johan Booysen was well aware of the murder of at least 28 people, and/or
    - Shows that Booysen played an instrumental part in these crimes.
- Johan Booysen was in overall control of the members of the "Unit", and/or

- Johan Booysen was actively involved in the commission of offences ***and*** their cover up, and/or
- The same firearms (damaged and incapable of firing) were repeatedly re-utilised to create the impression that the deceased persons had fired at the police, and/or
- There is prima facie proof or sufficient information under oath that Johan Booysen was involved in racketeering activities.

and did by means of the said misrepresentation induce the South African Police Service, the NPA, members of the public and/or the judiciary in Kwazulu-Natal to believe the said misrepresentations and to act thereupon to their prejudice or potential prejudice or to the prejudice or potential prejudice of the NPA or the courts or the legal system of South Africa,

Whereas the accused at the time they made the aforesaid misrepresentation well knew that:

- She did not give due and careful consideration to information under oath and there is no prima facie case against Johan Booysen on racketeering charges. In fact some of the affidavits she referred to did not exist on 17 August 2012 and some of them were not under oath.
- The facts she deposed to in her affidavit of 3 July 2012 do not fall within her personal knowledge and are certainly not true and correct.
- There were no information under oath *before her* which indicate that Johan Booysen knew or ought to have known that his subordinates ***were killing*** suspects instead of arresting them,
- The killings was neither unlawful nor intentional but were conducted in the execution of their duties as SAPS officials and the monetary rewards and certificates of excellence were granted in terms of accepted policy in the SAPS.

- The statements of Alyer, Danikas and Ndlondo
  - Is irrelevant, or
  - not available, and/or
  - was not under oath, and/or
  - Could not be considered by the accused, and/or
  - Does not shows that Johan Booysen was aware of the murder of at least 28 people, and/or
  - Clearly doesn't show that Booysen played any part in these alleged crimes.
- Johan Booysen was not in overall control of the members of the "Unit", as he was only appointed the head of the Hawks in March 2010,
- Johan Booysen was never involved in the commission of any of these so-called offences ***or*** their cover up,
- The same firearms were never repeatedly re-utilised and certainly never to create the impression that the deceased persons had fired at the police,
- There is no evidence; certainly not ***prima facie*** or even *sufficient* to conclude that Johan Booysen was involved in racketeering activities.

and thus the accused did commit the crime of fraud.

COUNT 2 – PERJURY (Read with section 101 of the Criminal Procedure Act, Act 51 of 1977)

IN THAT on or about **3 July 2013** at or near ***Silverton***, **PRETORIA** in the Regional Division of Gauteng, the accused did unlawfully and intentionally ***make the following false statements under oath*** in the matter between Johan Wessel Booysen and the Acting

National Director of Public Prosecutions and others Case number 4665/13 in the KwaZulu-Natal High Court sitting at Durban:

- She gave due and careful consideration to information under oath and that there is a prima facie case against Johan Booysen on racketeering charges.
- The facts she deposed to in her affidavit of 3 July 2012 fall within her personal knowledge and are to the best of her belief true and correct.
- There were information under oath *which was before her* which indicate that Johan Booysen knew or ought to have known that his subordinates ***were killing*** suspects instead of arresting them, and/or
- This killing was motivated by the Unit's desire to enrich themselves by means of State monetary awards and or certificates of excellent performance, and/or
- The statements of Alyer, Danikas and Ndlondo
    - Is relevant, and or
    - Was available, and/or
    - Was considered by her, and/or
    - Shows that Johan Booysen was well aware of the murder of at least 28 people, and/or
    - Shows that Booysen played an instrumental part in these crimes.
- Johan Booysen was in overall control of the members of the "Unit", and/or
- Johan Booysen was actively involved in the commission of offences ***and*** their cover up, and/or
- The same firearms (damaged and incapable of firing) were repeatedly re-utilised to create the impression that the deceased persons had fired at the police, and/or
- There is prima facie proof that Johan Booysen was involved in racketeering activities.

Alternative Count to COUNT 2 – (Contravening section 9 of the Justices of the Peace and Commissioners of oaths Act, Act 16 of 1963) (Read with section 101 of the Criminal Procedure Act, Act 51 of 1977)

IN THAT on or about **3 July 2013** at or near ***Silverton***, **PRETORIA** in the Regional Division of Gauteng, the accused unlawfully and intentionally made a false statement under oath before Ntesang Maletswa, a person competent to administer the oath.

COUNT 3 – FRAUD

IN THAT on or about **17 August 2012** at or near ***Silverton***, **PRETORIA** in the Regional Division of Gauteng, the accused did unlawfully, falsely and with intent to defraud represent to Johan Booysen, the National Prosecuting Authority (NPA) and/or the South African Police Service or members of the public and/or the judiciary in Kwazulu-Natal that:

- The evidence the accused considered and that was placed before her justified her authorising, in terms of section 2 (4) of the Prevention of Organised Crime Act, Act 121 of 1998, a prosecution in terms of section 2 (1) (e) and 2 (1) (f) of the same Act against Johan Wessel Booysen,

and did by means of the said misrepresentation induce the South African Police Service, , the NPA, members of the public and/or the judiciary in Kwazulu-Natal that to believe the said misrepresentations and to act thereupon to their prejudice or potential prejudice or to the prejudice or potential prejudice the courts, the NPA or the legal system of South Africa,

Whereas the accused at the time they made the aforesaid misrepresentation well knew that:

- The evidence she considered and that was placed before her did not justify her authorising, in terms of section 2 (4) of the Prevention of Organised Crime Act, Act

121 of 1998, a prosecution in terms of section 2 (1) (e) and 2 (1) (f) of the same Act against Johan Wessel Booysen ***and in fact*** in 2013 the High Court in KwaZulu-Natal set aside her authorisation inter alia indicating:

> ***"I can conceive no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore the rule of law and were unconstitutional."***

and thus the accused did commit the crime of fraud.

Case number: 111/53/20

SPECIALISED COMMERCIAL CRIME COURT: PRETORIA
GESPESIALISEERDE HANDELSMISDAADHOF: PRETORIA

Court: 19
On:
Presiding Officer: Mr Van Wyk
Prosecutor: JAN Ferreira/Gerhard v. Geder
Interpreter: Mr Khumalo
Defence: Barrie Majavu & Lit

Plc: Enjoin 19+20/8 + 21/9 & Lit
Rescission application 3 x CDS
Mr Majavu absent.

R 19/8/15 Enrolled (19)
Court 8230

20/8 + 21/9 also
postponed

10/6/15.

Matter also on 19/8 - 3 days.

SPECIALISED COMMERCIAL CRIME COURT: PRETORIA
GESPESIALISEERDE HANDELSMISDAADHOF: PRETORIA

111/83/2015

COURT/HOF : **19**

ON/OP : **19/08/2015.**

PO/VB : **MAGISTRATE H. VAN WYK**

PP/SA : **ADV J. FERRERA/Adv G van Eeden**

TOLK/INTER : **MR. KHUMALO.**

DEF/VERD. : **Mr Majavu i/l**

E-mail: .....
Fax. No.: .....
TEL: .....
E-mail: .....
Fax. No.: .....

p/p: Adv v Wyk

Adv v Wyk

19/8/15

Annexures/vdm

MIM-8

PROSECUTION POLICY

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PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. Therefore, at the highest level, the objectives of the National Prosecuting Authority are to contribute to a better life for all by ensuring justice in our society so that people can live in freedom and security.

In order to contribute to the freedom and security of the community, the National Prosecuting Authority needs to contribute to the reduction in crime and to a culture of civic morality and thereby enhancing public confidence in the criminal justice system.

Furthermore, the National Prosecuting Authority must treat its customers, which include victims, witnesses and complainants, in accordance with the Bill of Rights and ensure access to the prosecuting service.

The National Prosecuting Authority is part of the bigger criminal justice system and therefore needs to enhance cooperation within such broader system.

This Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It was also circulated to a number of criminal justice organisations, government departments, academic institutions and community organisations. The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

This Prosecution Policy was revised in 2006 after a country-wide consultation process. It was reviewed again in 2010 and amended in June 2013.

1. INTRODUCTION

Section 179 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution"), read with sections 2 and 4 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (hereinafter referred to as "the NPA Act"), provides for a single National Prosecuting Authority ("the NPA"), consisting of—

- the National Director of Public Prosecutions ("the National Director"), who is the head of the NPA;
- Deputy National Directors of Public Prosecutions;
- Directors of Public Prosecutions;
- Deputy Directors of Public Prosecutions; and
- Prosecutors.

As an organ of state the NPA must give effect to the laws of the country; as an instrument of

justice it must, in accordance with its constitutional obligation, exercise its prosecutorial functions independently without fear, favour or prejudice.

The NPA has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director to determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*". The Policy is binding on the NPA.

The NPA Act also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The NPA Act required that the first Prosecution Policy be tabled in Parliament. Amendments to the Policy must be included in the National Director's annual report to the Minister, which report must be tabled in Parliament.

The NPA is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the NPA.

The law gives a discretion to the NPA and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the NPA and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local

conditions.

3. ROLE OF PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example—

- the decision whether or not to institute criminal proceedings against an accused person;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest;
- the decision about which crimes to charge an accused person with and in which court the prosecution should be instituted;
- the decision whether or not to enter into a plea or sentence agreement;
- the decision whether or not the case should be diverted;
- the decision whether or not to accept a plea of guilty tendered by an accused person;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

A member of the NPA must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth of the victim, witnesses or the offender.

Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

A. General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor must consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- enter into a plea or sentence agreement;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution.** There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors must consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused person must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.

This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded in spite of an initial decision to institute a prosecution.

B. Factors to be considered when evaluating evidence

When evaluating the evidence, prosecutors must take into account all relevant factors, including—

How strong is the case for the State?

- Is the evidence strong enough to prove all the elements of an offence?
- Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

- Will the evidence be excluded, because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

- Is the probable defence of the accused person likely to lead to his or her acquittal in the light of the facts of the case?

C. Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused person and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome, in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care must be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of whether or not a complainant wishes to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused person, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether or not the accused person has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the accused person and the extent to which reliable evidence from the said accused person is considered necessary to secure a conviction against others will be crucial).*
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in

the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

D. Prosecution of corruption of foreign public officials

The prosecution of offences in respect of corrupt activities relating to foreign public officials shall be subject to the abovementioned principles and considerations: Provided that the decision-making process shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

4. CASE REVIEW

A. Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen making the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused person will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions concerned, or his or her delegate, has consented thereto. Such decisions should therefore be made with circumspection.

B. Restarting a prosecution

People should be able to rely on and accept decisions made by members of the NPA. Normally, when a suspect or an accused person is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include—

- an indication that the initial decision was clearly wrong and should not be allowed to stand;
- an instance where a case has not been proceeded with in order to allow the police to gather and collate further evidence, in which case the prosecutor should normally have

informed the accused person that the prosecution might well start again; and
- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

C. Consent to prosecution

A number of statutes require that a prosecution for an offence under a particular law may not be commenced or proceeded with unless the consent of a Director of Public Prosecutions or the National Director has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions or the National Director before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

5. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

A. Forum of trial

The law directs and policy considerations suggest that certain types or categories of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, must be taken into account:
- The nature and complexity of the case and its seriousness in the circumstances.
- The adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect.
- Any specific legal provision providing for or any implied legislative preference for a

particular forum of trial.

- Any delay, cost or adverse effect that witnesses may have to incur if the case is heard in a particular Court.
- The desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused person is determined by the complexity and seriousness of an offence, and the need for the NPA to guard against making decisions that will bring the criminal justice system into disrepute.

Where the probable sentence may be one of life imprisonment, the matter should be referred to the Director of Public Prosecutions concerned for a decision whether or not to institute the prosecution in the High Court.

B. Determination of charges

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors must decide upon, and draw up charges based on, available evidence, which evidence—

- adequately reflects the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provides the court with an appropriate basis for sentence; and
- enables the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the available evidence and where such charges will significantly enhance the likelihood of a conviction of an accused person or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided, because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused person to plead guilty to some of the charges. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

C. Acceptance of pleas

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that—

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused person;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police, as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

6. TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases must therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors must present the facts of a case to a court fairly. They must disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an unrepresented accused person before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, prosecutors should not oppose the release from custody of an accused person if the interests of justice permit.

Prosecutors must show sensitivity and understanding to victims and witnesses and assist in providing them with protection where necessary. In suitable cases the prosecutor must advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors must consult with victims and witnesses before the trial begins. They must assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases pending before the court, because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors must assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

Prosecutors must also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation

of offenders.

The NPA must give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The NPA should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

7. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it is less likely to lead to a successful prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The NPA is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Prosecutors have the responsibility under the NPA Act to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors must consult with the police and other interest groups where required.

It is therefore desirable, wherever practicable, that the police refer matters to prosecutors before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close cooperation, with mutual

respect for the distinct functions and operational independence of each profession.

Prosecutors should cooperate with other departments and agencies such as Correctional Services, Welfare, lawyers' organisations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

8. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

9. CONCLUSION

The NPA is a public, representative service, which should be effective and respected. Prosecutors must adhere to the highest ethical and professional standards in prosecuting crime and must conduct themselves in a manner, which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

This Prosecution Policy is not an end in itself.

The challenge, which faces the NPA, is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

MM-9

AFFIDAVIT

I, the undersigned,

GLADSTONE SELLO MAEMA

do hereby make oath and state as follows:

1.

I am an adult male, employed by the National Prosecuting Authority (NPA) at the Director of Prosecutions Office in Mafikeng as a Deputy Director of Public Prosecutions, which offices are situated at the Mega City Complex, East Gallery 3139 Sekame Street, Mafikeng.

2.

The facts contained herein are both true and correct to the best of my knowledge and belief and fall within my personal knowledge unless it is expressly stated otherwise or the context indicates the contrary.

3.

In March 2012 I was informed by my DPP, Adv Johan Smit SC about a request by the then Acting National Director of Public Prosecutions (ANDPP), Adv Nomgcobo Jiba to form part of a team that would peruse a number of dockets which were originating from the KwaZulu-Natal Division, which later came to be known as the Cato Manor prosecution. The reason that was given at the time by the ANDPP was that the then Acting Director of Public Prosecutions, KwaZulu-Natal, Adv Simphiwe Mlotshwa had approached her with a request to appoint (a) prosecutor(s) from other divisions to look into the matter as prosecutors in his division had worked over a number of years closely with the members of the Cato Manor section of the Durban Organised Crime Unit. The request was that a team of prosecutors who were unknown to the suspects and who were unfamiliar with the facts of the matter be appointed to decide the dockets. I was asked to be the Lead Prosecutor assisted by a Deputy Director of Prosecutions, Adv

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Raymond Mathenjwa and four (4) Senior State Advocates, Advv Mlotshwa, Futshane, Moleko and Ntlakaza who were all based at the DPP office, South Gauteng Division under the leadership of Adv Andrew Chauke. A meeting was held at VGM building on 9 March 2012 with the team members, the Acting NDPP, the DPP, Adv Chauke and Adv Mosing. In furtherance of this meeting, a communique was sent to Adv Smit SC, the DPP of the North West by the Acting NDPP's PA, Jackie Lepinka a copy of which is marked "SM1".

4.

The cases, in which members of the Cato Manor section of the Durban Organised Crime Unit were implicated, were being investigated by the Independent Police Investigation Directorate (IPID) led by Mr Glen Angus who were being assisted by members of the Directorate of Priority Crime Investigations (DPCI) commonly known as the Hawks led by General Mabula. The investigation team also comprised of officials from provinces outside the KZN province.

5.

The prosecution team members perused a number of dockets, issued out queries in guiding outstanding investigations, had consultations with members of the investigation teams of both the Hawks and IPID, had consultations with some witnesses in some of the dockets and regularly had briefing sessions with both the DPP, South Gauteng Adv Chauke and the Acting National Director (ANDPP), Adv Jiba to report on the progress that was being made in the cases. The first batch of accused persons (Accused 2 – 18) were arrested on 20 June 2012 and appeared in the Regional court on 21 June 2012 where bail was fixed after an opposed bail application. The second batch, Accused 1, 19 -30 were arrested on 21 August 2012 and were added to the existing case on the next day and bail was fixed unopposed. The prosecution team members were convinced that there is a prima facie case against all the accused persons and a prosecution memo and the indictment was prepared and signed by myself on 16 August 2012.

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6.

The accused are being charged with one hundred and sixteen (116) counts which include two (2) racketeering charges; the predicate offences include twenty eight (28) murder counts; twenty two (22) counts of Defeating or Obstructing the course of Justice; twenty four (24) counts of Unlawful possession of Arms and ammunition; six (6) counts of Theft; three (3) counts of Assault with intent to cause grievous bodily harm; one (1) count of Attempted murder and one (1) count of Malicious damage to property.

7.

The prosecution team had several meetings in June and July 2012 during which the prosecution memo and the indictment were drafted. Adv. Mosing of the office of the ANDPP visited the prosecution team and in-depth discussions were held relating to the elements of the racketeering charges, such as the identity of the enterprise, the pattern of racketeering activity, management of the enterprise, as well as the predicate offences. Briefing sessions were held with the DPP South Gauteng, Adv Chauke and the ANDPP to keep them abreast of the prosecution team's work. On 10 July 2012, a prosecution memo requesting the ANDPP to authorise the racketeering charges in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998, was sent to the office of the ANDPP. The indictment also accompanied this application. A copy of the Prosecution Memo dated 10 July 2012 is enclosed herewith and marked "SM2". The indictment is a very lengthy document but it is also available for perusal should it become necessary. The racketeering authorisations were issued by the ANDPP on 17 August 2012 in accordance with section 2(4) of the Prevention of Organised Crime Act 121 of 1998 and copies thereof are marked "SM3" and "SM4".

8.

On 7 May 2013 we received information of a motion application which was being brought by the then accused 1, Johan Booysen, which was served on the state attorney in Durban. The applicant, Johan Booysen was challenging the racketeering authorisation which were issued by the then Acting National Director, Adv Jiba on 17 August 2012 in terms of section 2(4) of the POCA Act 121 of 1998. The applicant, General Booysen was challenging the racketeering decisions on the basis of the principle of legality in terms of section 172 (1) (a) and (b) of the Constitution Act, Act 108 of 1996 in that the decision, in his view was irrational and not supported by the evidence available. The prosecution team and the DPP, Adv Chauke had a consultation with counsel, Adv Laurence Hodes SC and Adv Manaka at chambers in Sandton on 3 June 2013 to prepare a response to this court application by Johan Booysen. Counsel's advice was among others that:

- the decision to prosecute was not reviewable in terms of the Promotion of Access to Information Act (PAJA), Act 3 of 2000;
- that the Prosecution Memo should not be made available to the applicants as it is privileged communication between the DPP and ANDPP;
- that the decision to prosecute was taken in Pretoria and the applicants must bring the application in Gauteng as the KZN courts do not have jurisdiction.

9.

It was also decided during the consultation with counsel that a Memo will be prepared by the prosecution team to brief counsel more fully on the matter. The prosecution team decided to draft a proposed response to the applicant's founding affidavit. The proposed response is marked "SM5". The team also prepared an arch lever file for counsel the contents of which were the following:-

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- A statement of Colonel Aiyer dated 3 August 2012, stating the managerial responsibilities of the Cato Manor section; participation and interferences in activities of the Cato Manor section by General Booysen; direct resourcing of Cato Manor by General Booysen and the fact that he was overlooked as Branch Commander and the Cato Manor members reported directly to General Booysen and were acting under his command.

- A further statement dated 31 August 2012 was taken by the investigators after Colonel Aiyer was consulted by the team, the contents of the statement dated 31 August 2012 was conveyed by Colonel Aiyer in the consultation that he had with the prosecution team earlier in that month and the prosecution team did use the information in briefing sessions with the Acting NDPP as we expected the information just to be captured in writing and under oath by the investigators.

- The draft statement of Ari Danikas was in possession of the investigating team since 18 April 2012 and was handed to the prosecution team in June 2012. On 11 July 2012 the prosecution team asked General Mabula of the DPCI to obtain a more detailed statement so that we could decide whether we were going to use him as a witness, the prosecution team advised the police to leave the statement unsigned so that the process outlined in the Mutual Legal Assistance legislation (section 2 and 3 of the International Cooperation in Criminal matters Act 75 of 1996) could be followed to formalise the statement. The witness was in Greece at the time and had security concerns and was unwilling to come on his own to South Africa. There was constant communication with Mr Julian Knight an attorney in Pretoria who was representing the witness, whose role as I understood it, was to advise the witness on the implication of testifying in South African courts and the law applicable, section 204 of the Criminal Procedure Act 51 of 1977. We were confident that the statement would ultimately be

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signed through the outlined processes and that was the reason why it formed the basis of the briefings with the Acting NDPP and the briefing with counsel.

- A statement of Bhekinkosi Mthiyane Ndlondlo dated 31 July 2012; he was an executive member of Stanger Taxi Association that was in conflict with the KwaMaphumulo Taxi Association and provided information to Cato Manor police about the activities of KwaMaphumulo Taxi Association and was party to meetings where members of Cato Manor were paid for various killings of members of KwaMaphumulo Taxi Association. He states his own version of the killings of KwaMaphumulo Taxi Association members and the payments to Cato Manor police including General Booysen. This witness has been killed in the meantime and section 3 of Hearsay Evidence Act 45 of 1988 would be used to have it admitted as evidence in court.

- A statement of Bongani Mandla Mkhize, dated 1 August 2012; a bodyguard of Bongizwe Mhlongo who became privy to information relating to the killings of Kopolota Ntuli and Nkosinathi Mthembu and who accompanied Bongizwe Mhlongo to Tongaat toll plaza where a meeting was arranged with Mostert (Accused 4) to pay him for the killings of these members of KwaMaphumulo Taxi Association.

- A statement of Nkosinathi Hopewell Shozi dated 3 August 2012, an attorney who was instructed by the KwaMaphumulo Taxi Association to interact with the police for the possible handing over of suspects that the police wanted who are members of the KwaMaphumulo Taxi Association.

- A copy of the High Court interdict application brought by Bongane Mkhize, the Chairperson of the KwaMaphumulo Taxi Association (and the deceased in Count 20), preventing the police from unlawfully killing, threatening or harassing members of his taxi association including himself.

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Of note is the Respondent's answering affidavit filed in this case which was signed by General Booysen, in which he clarified that there was no warrant of arrest for Mkhize and if the police were to require questioning him, it would be done in compliance with the law.

- A copy of the Monetory Awards and National Commendations which had General Booysen as a beneficiary where he disclosed how he was intimately involved with the tracing and tracking of Magojela (deceased in Count 8) and other activities of the Cato Manor section, wherein members of KwaMaphumulo Taxi Association were killed and people suspected of involvement in the killing of Superitendent Choncho and other people suspected of involvement in various robberies at the Spar shops, were killed instead of arresting them and bringing them before the courts.

- A statement of Andrew Patrick Cochrane dated 16 May 2012 confirming that he was instructed to fetch General Booysen and Supt Olivier using the helicopter he was on duty with and transported them to the N3 High way scene near Howick on 16 September 2009, the date of the Magojela killing.

10.

Counsel who were appointed to represent the Acting NDPP, Adv Laurence Hodes SC, Adv Manaka and the state attorney, Mr Gorvender drafted the first Respondent's answering affidavit on their own without the involvement of the prosecution team (safe for the consultation on 3 June 2012 and the Prosecution Team's response to the founding affidavit, enclosed herewith as "Annexure SM5") and had the statement sworn to, signed and filed in court, the only time when the prosecution team saw the Respondent's answering affidavit for the first time was when the affidavit was already filed in court. The prosecution team thus had no role in the drafting of the

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affidavit and could not correct any mistakes that may have been contained in the affidavit.

11.

The applicant, General Booysen filed a Replying affidavit dated 2 August 2013. The prosecution team met about 10 August 2013 and made a proposal in writing to Adv Hodes contained in an Internal Memo dated 15 August 2012, (a copy of which is enclosed as "Annexure SM6") to respond to the allegations that General Booysen was making in his Replying affidavit, counsel did not revert back to the team nor file any response until the matter was heard. We conceded in the proposal to counsel, "Annexure SM6" that the statement of Aris Danikas was unsigned; we dealt with the statements on Ndlondlo, Aiyer, the monetary awards and High Court interdict and clarified the role of General Booysen in the management of the enterprise.

12.

After the court delivered its judgment on 26 February 2014, and we received a copy immediately thereafter, we realised that counsel made the following crucial concessions which affected our case detrimentally:-

- Paragraph 29 of the judgment that there were no statements in the dockets which implicated the applicant, General Booysen in any of the offences with which he has been charged. There was ample evidence linking General Booysen with the scene, in particular Howick CAS 106/09/2008 where General Booysen arrived at the scene in a helicopter and congratulated the members for the job well done, when this is read with his disclosures in the monetary awards that he was key and was the handler of the informant that supplied

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information that led to the tracing of Magojela (deceased in Count 8) along the N3 towards Howick.

- Paragraph 30 of the judgment that there are only four(4) statements on which the Acting NDPP relied on in authorising the racketeering charges; one of which is that of Danikas which is not signed; the second of Aiyer's statement was dated 31 August 2012, two(2) weeks after the impunged decision was made. Although the second of Aiyer's statement was dated 31 August 2012, the prosecution team had already consulted Aiyer and already knew what the contents of Aiyer's statement was going to be from that consultation, the police only had to reduce it to writing and have it signed. The content of the statement was privy to the prosecutors from the consultation and was used on that basis.

- Paragraph 25 of the judgment related to the concession that counsel made relating to jurisdiction, that the impunged decisions were made in Pretoria and the KZN court lacked jurisdiction to deal with its challenge. Counsel advised us as such but in his argument conceded to jurisdiction without having discussed it with the prosecution team. Counsel was so strong about the jurisdiction issue that the State Attorney was asked to direct a letter to the applicants asking them to agree to separate the issues. The shift in position was not discussed with the team Prosecution members.

13.

Before the Prosecution team met with Counsel to discuss the case, we had formed an opinion that the decision should not be appealed against, rather we thought we should bring General Booysen to court, withdraw the

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charges and approach the newly appointed NDPP, Mr Nxasana with a request to consider re-issuing the racketeering authorisations afresh as we were confident that we had a strong case against General Booysen, only the presentation by counsel led us down. A memo dated 5 March 2014 which is attached hereto as Annexure "SM7" was drafted to this effect.

14.

The Prosecution Team met with counsel at his chambers on 13 March 2014 where counsel clarified that there were no concessions made during his argument in court and the judge had it totally wrong. Counsel was so strong that the evidence justifying a racketeering prosecution does not need to be under oath, the NDPP can rely on the memoranda of the DPP and statements by the Deputies which do not need to be under oath. His views were that the court judgment must be appealed against as it created a wrong precedent. The Prosecution team agreed with this approach and agreed with counsel and the DPP, Adv Chauke to file a Notice of Appeal to prevent the dies within which we should file a Notice of Appeal from expiring and to prevent the need to file a condonation application if the NDPP were to agree with the decision to appeal.

15.

The inaccuracies in the Answering Affidavit were thus created by counsel without the involvement of the Prosecution team. The Prosecution Team is still strongly of the view that there is a strong case against General Booysen that justifies the issuing of fresh authorisations by the new NDPP. It has always been the Prosecution team's advice to the Acting NDPP that

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there is a strong case against Booysen, it cannot be correct that the Acting NDPP could have lied under oath, she acted on the advice of the DPP and the Prosecution team, the inaccuracies about the dates in the statements were caused by counsel's failure to show us the statements prior to having them filed in court. We were of the view that it would be proper to consult witnesses from the Stanger Taxi Association side in order to clarify the role that General Booysen had in Cato Manor. All the witnesses which we plan to consult are being attacked and killed which caused the delay in the resubmission of the fresh memo.

16.

On 25 March 2014 the Prosecution team and the DPP South Gauteng, Adv Chauke and the DPP, KZN, Adv Noko, met with the NDPP, Mr Nxasana, the Deputy National Director, Dr Ramaite and the Special Advisor of the NDPP, Adv Duma for a briefing on the case and to deliberate on the reasons for appealing Judge Gorven's decision. The NDPP's decision was that we are not appealing as the judgment leaves open a possibility to resubmit a fresh prosecution memo to the NDPP for reconsideration of the decision to recharge Booysen on the racketeering charges. The NDPP also decided in that meeting that Adv Noko should supervise the prosecution team as the matter emanates from her division and she was not involved when the division sought for assistance in dealing with the matter initially.

17.

The Prosecution team is still of the view that there is a strong case against General Booysen and other members of Cato Manor section of the Durban Organised Crime Unit and that the decision to charge Booysen was that of the

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Prosecution team. The judge's comments were based on errors which counsel made in the answering affidavit which the prosecution team had very less role in its drafting and could not correct the errors until the answering affidavit was filed in court.

I know and understand the content of this affidavit.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience, SO HELP ME GOD.

.....
GLADSTONE SELLO MAEMA

I certify that the deponent has acknowledged that he knows and understand the contents of this affidavit. The deponent acknowledges that he has no objection In taking the prescribed oath and considers the oath binding on his conscience. This affidavit was sworn to before me and the deponent signature was placed thereon in my presence at JOHANNESBURG on this 16 day of January 2015.

.....
COLONEL BOTHA
COMMISSIONER OF OATHS
ORGANISED CRIME UNIT (OCU)
PRETORIA

ANNEXURE "SM 1"

Office of the National Director of Public Prosecutions

NATIONAL PROSECUTING AUTHORITY South Africa

INTERNAL MEMORANDUM

TO: ADV SMITH
DPP: NORTH WEST

FROM: MS. JACKIE LEPINKA
MANAGER EXECUTIVE SUPPORT TO THE NDPP

REF: NDPP/JL/03/2012

DATE: 19 MARCH 2012

SUBJECT: CATO MANOR KZN

Dear Adv Smith

Your e-mail communiqué addressed to the ANDPP on 13 March 2012 refers.

Please be advised that the ANDPP has noted contents of the said communiqué. Adv. Maema's role will be determined by events as the matter progresses. Further, please note that this matter is a National Project and therefore cooperation from all relevant and identified officials is important and should not be hampered as it will have an impact on the said matter.

Travel and accommodation will be borne by your office.

I trust that this clarifies your concerns raised in your e-mail.

Kind regards

MS JACKIE LEPINKA
MANAGER EXECUTIVE SUPPORT TO THE NDPP

Annexure SM 2

TO: ADV. N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTONS
NATIONAL PROSECUTING AUTHORITY

FROM: ADV. KMA CHAUKE
DIRECTOR OF PUBLIC PROSECUTIONS
JOHANNESBURG

DATE: 10 JULY 2012

SUBJECT: APPLICATION FOR AUTHORISATION IN TERMS OF SECTION 2 (4) OF POCA ACT 121 OF 1998
THE STATE VERSUS BOOYSEN, JOHAN WESSEL AND OTHERS

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1. Herewith the following:

1.1 Application for authority in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998 for your recommendation.

1.2 The draft Indictment,

1.3 The draft authorizations for section (2)(1)(e) and 2(1)(f) respectively

2. I have perused the documents and recommend the Application.

3. The Accused have appeared in the Regional Court, Durban and the matter has been postponed to 24 August 2012 for the Racketeering Authorisation. Eighteen (18) of the accused persons are on bail, other accused persons still need to be added to the charge sheet and/or indictment

ADV. K.M.A. CHAUKE
DPP: JOHANNESBURG

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

1. BOOYSEN, JOHAN WESSEL
2. PADAYACHEE, GONASAGREN
3. STOLZ, ADRIAAN JAKOBUS FICK
4. MOSTERT, PAUL JONATHAN
5. NEL, ERIC ALFRED
6. EVA, NEVILLE
7. GHANESS, ADJITHSINGH
8. MAKHANYA, PHUMELELA
9. OLIVIER, WILLEM CORNELIUS
10. MKHWANAZI, THEMBIKNOSI MBHEKISENI
11. MDLALOSE, THATHAYIPHI ENOCK
12. NAIDOO, RUBENDREN
13. LEE, RAYMOND CHRISTOPHER
14. LOCKEM, ANTON
15. VAN TONDER, JAN JOHANNES EUGENE
16. SMITH, CHARLES JOHN
17. MARTEN, JEREMY
18. MC INNES, BRUCE DAVID

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of the contravention of section 2(1)(e) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011, against the above named accused.

GIVEN UNDER MY HAND AT PRETORIA on this day of JULY 2012

NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

BOOYSEN, JOHAN WESSEL
OLIVIER, WILLEM CORNELIUS

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of the contravention of section 2(1)(f) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011, against the above named accused.

GIVEN UNDER MY HAND AT PRETORIA on this day of JULY 2012

NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

PROSECUTION MEMORANDUM

A. INTRODUCTION

1. The accused in these matters are the members of the South African Police Services assigned to the Durban Organised Crime Unit based in Cato Manor and National Intervention Unit. Accused 1 is the Provincial Commander of Organised Crime Unit for KwaZulu-Natal.

2. The Durban Organised Crime Unit based in Cato Minor worked under the direct control of accused 1 and 9.

3. Their Area of Jurisdiction is Durban and surrounding areas.

4. The Unit operates from their offices and attend some cases in their Jurisdiction that are assigned to their Unit.

B. BACKGROUND

5. Some of these cases were informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, planting firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting arrest.

6. These acts of tampering with the crime scenes were cover-ups of their unlawful activities.

C. MODUS OPERANDI

7. The accused persons would approach their victims mostly at night with allegations that they have committed certain offences. Instead of arresting them and bring them properly before a court of law for their guilt to be established beyond reasonable doubt, the accused shot and killed all the suspects.

8. There are instances where the accused persons killed people who were not even their suspects.

9. The accused would kill their suspects, plant a firearm next to them and alleged that they were being attacked by the suspects.

D. IDENTIFICATION OF THE ACCUSED

10. Accused 1: **BOOYSEN, JOHAN WESSEL**

A 55 year old male person. His residence is yet to be confirmed. At the relevant period he was the Provincial Commander: Organised Crime for the Province of KwaZulu-Natal. He held the rank of a Director.

11. Accused 2: **PADAYACHEE, GONASAGREN**

a 44 year old male person of 61 Statesman Drive, Havenside, Chatsworth. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor

12. Accused 3: **STOLTZ, ADRIAAN JAKOBUS FICK**

a 45 year old male person of 10 Stonehill Complex, 28 Serissa Avenue, Roodekrans, Roodepoort. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

13. Accused 4: **MOSTERT, PAUL JONATHAN**

a 51 year old male person of 06 Keeling Place, Queensburgh He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

14. Accused 5: **NEL, ERIC ALFRED**

a 41 year old male person of 37 Illovo Glen, Berrio Avenue, Amanzimtoti. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

15. Accused 6: **EVA, NEVILLE**

a 45 year old male person of 25 High Street. New Germany, Pinetown. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

16. Accused 7: **GHANESS, ADJITHSINGH**

a 41 year old male person of 44 Old Castle Place, Newlands West, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

17. Accused 8: **MAKHANYA, PHUMELELA**

a 45 year old male person of 90 Morewood Road, Sydenham, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

18. Accused 9: **OLIVIER, WILLEM CORNELIUS**

a 59 year old male person of 16 Walnut Grove Complex, 03 Entombeni Road, Amanzimtoti. He is a Colonel stationed at the Organised Crime Unit, 446 Belliar Road

19. Accused 10: **MKHWANAZI, THEMBIKNOSI MBHEKISENI**

a 47 year old male person of Room D 008, Umlazi Police Barracks, Umlazi. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

20. Accused 11: **MDLALOSE, THATHAYIPHI ENOCK**

a 48 year old male person of 21 Bennie Geldenhuis, Austerville, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

21. Accused 13: **NAIDOO, RUBENDREN**

a 33 year old male person of 57 Evergreen Circle, Phoenix, Durban. He is a Constable Officer stationed at the Organised Crime Unit, 446 Belliar Road

22. Accused 14: **LEE, RAYMOND CHRISTOPHER**

a 31 year old male person of 4F Queens Terrace, 100 Dipdale Road, Queensburgh, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

23. Accused 15: **LOCKEM, ANTON**

a 44 year old male person of 201 Moss Road, Bluff, Durban. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

24. Accused 16: **VAN TONDER, JAN JOHANNES EUGENE**

an adult male person. His residential address is yet to be confirmed. He is a retired member of the South African Police Services who was stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Captain.

25. Accused 25: **SMITH, CHARLES JOHN**

A 40 year old male person. His residential address is 34 Frederrick Avenue Bluff, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

26. Accused 26: **MARTEM, JEREMY**

A 39 year old male person. His residential address is 12 Goodricke Road Morningside, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

27. Accused 27: **MC INNES, BRUCE DAVID**

A 43 year old male person. His residential address is 87 St Winniefreds Whitefield Drive, Warner Beach, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

28. Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29, 30, 31 and 32 in the proposed indictment are not charged with racketeering. They did not commit more than one offence in the predicate offences.

E. ANALYSIS OF EVIDENCE

THE ENTERPRISE – PROVINCIAL ORGANISED CRIME FOR KWAZULU-NATAL TO WHICH ACCUSED 1 WAS THE COMMANDER

29. The enterprise is defined to include "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*".

30. The Provincial Organised Crime Unit of the South African Police Services is an enterprise within the meaning of section (1) of the Prevention of Organised Crime Act, Act 121 of 1998 ("POCA), being a legal entity associated in fact.

31. This legal entity provided the accused with the continuity of structure under which to conduct their unlawful activities.

32. Accused 1 was the Commander of the Provincial Organised Crime. Accused 9 was the Commander of the Durban Organised Crime Unit based in Cato Manor. Accused 1 and 9 co-managed the enterprise. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 were participants in the racketeering activities..

33. Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29, 30, 31 and 32 in the proposed indictment are not charged with racketeering activities. They did not commit more than one offence in the predicate offences.

F. LIST OF PROPOSED CHARGES

COUNT 1

CONTRAVENING SECTION 2(1)(f) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE;

(Accused 1 and 9)

COUNT 2

CONTRAVENING SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY;

(Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27)

PART A PREDICATE OFFENCES

COUNT 3

HOUSEBREAKING WITH INTENT TO COMMIT MURDER;

(Accused 4,6,8, 13 and 22)

COUNT 4

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4,6,8, 13 and 22)

COUNT 5 ASSAULT

(Accused 4,6,8, 13 and 22)

COUNT 6 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4,6,8, 13 and 22)

COUNT 7 CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM

(Accused 4,6,8, 13 and 22)

COUNT8 CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 4,6,8, 13 and 22)

COUNT 9 MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1, 4,5,6,8,9,15 and 16)

COUNT 10

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 11

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 12

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 13

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 1,4,5,6,8,9,15 and 16)

COUNT 14

HOUSEBREAKING WITH INTENT TO COMMIT MURDER

(Accused 3,4,6,8,10,11,12,13 and15)

COUNT 15

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 16

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3,4,6,8,10,11,12,13 and 15

COUNT 17

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARMS

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 18

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL

PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 3,4,6,8,10,11,12,13 and15)

COUNT 19

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 3,4,6,8,10,11,12,13 and 15)

COUNT 20

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 17 and 18)

COUNT 21

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 2,3,14,19,20 and 21)

COUNT 22

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 2,3,14,19,20 and 21)

COUNT 23

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2,3,14,19,20 and 21)

COUNT 24

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2,3,14,19,20 and 21)

COUNT 25

THEFT

(Accused 3 Only)

COUNT 26

HOUSEBREAKING WITH INTENT TO COMMIT MURDER

(Accused 2,3,9,13 and 16)

COUNT 27

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2,3,9,13 and 16)

COUNT 28	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM; **(Accused 2,3,9,13 and 16)**
COUNT 29	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM **(Accused 2,3,9,13 and 16)**
COUNT 30	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION **(Accused 2,3,9,13 and 16)**
COUNT 31	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2,3,9,13 and 16)**
COUNT 32	THEFT **(Accused 2,3,9,13 and 16)**
COUNT 33	HOUSEBREAKING WITH INTENT TO COMMIT MURDER **(Accused 2,4 and 6)**

COUNT 34

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2,4 and 6)

COUNT 35

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 2,4 and 6)

COUNT 36

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2,4 and 6)

COUNT 37

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2,4 and 6)

PART B PREDICATE OFFENCES

COUNT 38

HOUSEBREAKING WITH INTENT TO COMMIT MURDER;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 39

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 40

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120, (1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 41

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESION OF AMMUNITION;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 42

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 43	MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**
COUNT 44	MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**
COUNT 45	ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM; **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**
COUNT 46	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**
COUNT 47	ASSAULT WITH INTENT TO DO GRIVOUS BODILY HARM; **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**
COUNT 48	CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM; **(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)**

COUNT 49

MALICIOUS DAMAGE TO PROPERTY;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 50

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 51

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 52

CONTRAVENTION OF SECTION 3, READ WITH SECTION 1, 103, 117,120(1)(A), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 53

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 54

THEFT
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 55

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 56

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5, 7, 13, 14, 25, 27, 28, 29,30 and 31)

COUNT 57

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5 and 6)

COUNT 58

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND

SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 2, 4, 5 and 6)

COUNT 59

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION
(Accused 2, 4, 5 and 6)

COUNT 60

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2, 4, 5 and 6)

COUNT 61

THEFT
(Accused 2, 4, 5 and 6)

COUNT 62

MURDER, READ WITH SECTION 51 OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 4, 13 and 15)

COUNT 63

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFULLY POSSESSION OF A FIREARM;
(Accused 4, 13 and 15)

COUNT 64

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 13 and 15)

COUNT 65

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 4, 13 and 15)

COUNT 66

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER
(Accused 2,3 and 4)

COUNT 67

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 2,3 and 4)

COUNT 68

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 2,3 and 4)

COUNT 69

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; AND
(Accused 2,3 and 4)

COUNT 70

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 2,3 and 4)

COUNT 71

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER
(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 72

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 73

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 74

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 75

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 76

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER

(Accused 6, 7 and 13)

COUNT 77

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 78

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 79

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 80

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 81

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 82

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 83

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 84

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 85

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 86

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 87

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 88

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 89

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 90

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 91

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 92

ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

COUNT 93

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 94

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 95

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 96

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13, 14, 15 and 26)

COUNT 97

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 98

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 99

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 100

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 101

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 102

THEFT

(Accused 4, 7, 13, 14, 15 and 26)

COUNT 103

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 104

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 105

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 8, 11, 16, 25 and 26)

COUNT 106

DEFEATING OR OBSTRUCTINGTHE COURSE OF JUSTICE

(Accused 4, 8, 11, 16, 25 and 26)

PART C PREDICATE OFFENCES

COUNT 107

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused 4, 8, 10,11 and 15)

COUNT 108

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 4, 8, 10,11 and 15)

COUNT 109

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 4, 8, 10,11 and 15)

COUNT 110

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 8, 10,11 and 15)

COUNT 111

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused 4, 5, 13 and 32)

COUNT 112

DEFEATING OR OBSTRUCTRING THE COURSE OF JUSTICE

(Accused 4, 5, 13 and 32)

COUNT 113

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF 1977

(Accused 5, 6 and 27)

COUNT 114

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 5, 6 and 27)

COUNT 115

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE

FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 5, 6 and 27)

COUNT 116

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 5, 6 and 27)

COUNT 117

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 5, 15 and 25)

COUNT 118

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 5, 15 and 25)

COUNT 119

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 5, 15 and 25)

COUNT 120

DEFEATING OR OBSTRUCTING THE OF JUSTICE

(Accused 5, 15 and 25)

COUNT 121

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977

(Accused ???)

COUNT 122

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused ???)

COUNT 123

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused ???)

COUNT 124

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused ???)

COUNT 125

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 13 and 15)

COUNT 126

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 13 and 15)

COUNT 127

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 13 and 15)

COUNT 128

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 13 and 15)

G. SUMMARY OF THE CASE

34. The criminal acts of the accused described in the summary of substantial facts were motivated by monetary reward and praises for exceptional performance from the State for solving violent crime, the accused, instead of achieving this purpose by arresting and bringing the alleged criminals before the courts for justice to take its course, they killed the alleged suspects and planted firearms next to the deceased persons to create an impression that their lives were in danger when they killed them. The circumstances under which the alleged suspects were killed, show that the accused acted on the cases described above, at times:

- without the knowledge of the investigating officers assigned to investigate the cases concerned,
- without warrants of arrests,
- without evidence to support the reason for arrest,
- without any need to pursue the deceased persons
- kill the deceased whereas there was ample opportunity to apprehend;
- tamper with the crimes scenes in order to hide the true nature of their criminal acts;
- arrest and release the deceased, after release, pursue the deceased again and kill them;
- kill the deceased despite the High Court Interdict preventing such killing;

- informing the security company providing body guards for the deceased to remove the said body guards as those body guards will also be in line of fire;

- kill the deceased together with the body, and thereafter inform the security company the result of their failure to heed to the warning of withdrawing the body guard,

- would break into the properties, assault, point firearms and commit theft to whomever is present on scene where they kill the deceased.

- operate in any area which is not under their area of operation and would enter these areas without alerting local police command.

- arrogated powers of 'a tracing unit' without allocated investigating officers.

35. None of these incidents demonstrate that the accused were shot at by the deceased persons or police vehicles were damaged as a result of an attack from the deceased persons. In fact, the facts show that the deceased persons were not in possession of the firearms appearing next to their bodies.

36. No evidence that could prove beyond a reasonable doubt that the deceased persons would have been guilty of the killing of either Superintendent Chonco and/or iNkosi Zondi. The killing of the deceased persons can best be described as 'summary execution' as there was no due process. They were committing crimes instead of solving violent crime.

H. STATEMENT OF THE LAW

37. Chapter 2 of POCA sets out offences regarding Racketeering. Sub-sections 2(1)(a) – 2(1)(f) require proof of the existence of an **"enterprise"**, **"a pattern of racketeering"**, and **"the accused"**.

38. Section 2(1)(e) of POCA provides that:

Any person who – *"whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

39. Section 2(1)(f) provides that:

Any person who – "*manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

40. Section 1 of POCA defines the enterprise as including:

"any individual, partnership, corporate, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity".

41. An enterprise is established by proving that it has:

(a) A common or shared purpose

(b) A formal or informal structure

(c) A system of authority

(d) Continuity

42. A pattern of racketeering activity is defined in Section 1 of POCA as:

"the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at

least two offences referred to in Schedule 1, of which one of the offences occurred within 10 years after the commencement of this Act and the last offence occurred within 10 years [excluding any period of imprisonment] after the commission of such prior offences referred to in Schedule 1"

43. In this matter the relevant sections are Sections 2(1)(e) and 2(1)(f). Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 are charged with a contravention of section 2(1)(e). Accused No 1 will be charged with contravening Section 2(1)(f).

44. Accused number 1 and 9 were co-managing the enterprise. As for accused 1 his management is abundantly clear in his Answering Affidavit to the Interdict Application obtained by the deceased **Bongani Mkhize** on 14 November 2008 as well as his visit to a crime scene where the participants in the enterprise had committed crime in his capacity as a Provincial Commander Organised Crime. He also wrote an information note to the Provincial Head: Detective Services for KwaZulu-Natal detailing the circumstances under which **Bongani Mkhize** was killed. He was controlling the affairs of the enterprise. The Provincial Organised Crime of the SAPS constitutes an enterprise within the meaning of Section 1 (1) of POCA. As for accused 9, he was present in the incident at esiKhawini and at Pinetown in his capacity as a commander of the Durban Organised Crime Unit based at Cato Manor.

45. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 were employed by the enterprise. They participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. The enterprise has continued in **PART A, B** and **C** as described in the proposed indictment. The accused shared together the benefits of the enterprise in the form of monetary rewards and/or certificates of excellence.

46. All the accused committed more than two offences as set out above. The pattern of racketeering activity contains offences of MURDER, DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE, POSSESSION OF UNLICENSED FIREAMS AND AMMUNITION. The offences are committed in a planned, ongoing, continuous and repeated occurrence. The offences occurred from 2008 to 2011 thus meeting the requirement that at least one offence must have occurred after 1998 and the other within 10 years of the last offence.

47. Therefore, the accused were acting contrary to the provisions of section 205 of the Constitution of South Africa, Act 108 of 1996.

48. They also acted contrary to the Police Standing Orders issued in terms of section 25 of the South African Police Service Act 68 of 1995.

49. The accused cannot justify their acts in terms of common law private defence nor section 49(2) of the Criminal Procedure Act 51 of 1977.

I. POCA RACKETEERING POLICY

50. It will be impossible to charge the accused individually with all the offences they have committed. Charging the accused together outside the ambit of POCA will result in misjoinders. A POCA prosecution will allow the joining of different participating accused which is otherwise not permissible.

51. A POCA prosecution will enable the State to charge the accused with all offences committed through a pattern of racketeering activity, distinctly and separately.

52. Section 2(2) of POCA allows the court to hear evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated against the accused.

53. The planting of the firearms on the crime scene is similar fact evidence.

J. ANTICIPATED DEFENCES

54. The accused will say that they were defending themselves from attack by the deceased persons, essentially relying on section 49(2) of the Criminal Procedure Act and the Police Standing Order regarding the use of arms.

55. They were not participants in some of the crimes scenes, essentially relying on 'disassociation'.

56. Accused 1 will say he was not on the crime scenes described on the indictment and on the scene of **Magojela Ndimande** and **Sibusiso Tembe** he arrived after the murders were committed.

57. The State will counter these defences with:

- Eyewitnesses
- Ballistics evidence
- Post-Mortem Reports
- Crime Scene Photos
- *modus operandi* demonstrating similar fact
- some of the deceased were not even suspects and were asleep
- They clearly exceeded bounds of self defence
- They received monetary rewards and/or certificates for arrest of violent criminals, whereas in truth, none of the suspects were arrested

K. ASSET FORFEITURE UNIT

58. The matter has not yet been referred to the Asset Forfeiture Unit. There is anticipated financial investigations which will determine the extent of the benefit outside the known SAPS rewards.

L. CONCLUSION

59. Based on the evidence outlined above, it is recommended that :

(a) Authority be granted for the prosecution of the accused as proposed in the draft indictment; and

(b) Certificates in terms of Section 2(4) of the PREVENTION OF ORGANISED CRIME ACT 121 OF 1998 be issued.

60. *** The proposed indictment is attached.

ADV GS MAEMA
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTION SERVICE

ANNEXURE "SM 3"

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998
THE STATE VERSUS:

BOOYSEN, JOHAN WESSEL
EVA, NEVILLE
OLIVIER, WILLEM CORNELIUS
LOCKEM, ANTON
VAN TONDER, JAN JOHANNES EUGENE

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorise the institution of prosecution against the abovementioned accused for contravention of section 2(1)(f) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011.

GIVEN UNDER MY HAND AT PRETORIA on this 17th day of AUGUST 2012

ADV NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

ANNEXURE "SM4"

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT, ACT NO 121 OF 1998

THE STATE VERSUS:

1. BOOYSEN, JOHAN WESSEL
2. PADAYACHEE, GONASAGREN
3. STOLTZ, ADRIAAN JAKOBUS FICK
4. MOSTERT, PAUL JONATHAN
5. NEL, ERIC ALFRED
6. EVA, NEVILLE
7. GHANESS, ADJITHSINGH
8. MAKHANYA, PHUMELELA
9. OLIVIER, WILLEM CORNELIUS
10. MKHWANAZI, THEMBINKOSI MBHEKISENI
11. MDLALOSE, THATHAYIPHI ENOCK
12. NAIDOO, RUBENDREN
13. LEE, RAYMOND CHRISTOPHER
14. LOCKEM, ANTON
15. VAN TONDER, JAN JOHANNES EUGENE
16. SMITH, CHARLES JOHN
17. MARTEN, JEREMY
18. MC INNES, BRUCE DAVID
19. DLAMUKA, FELOKWAKHE THOMAS

I, **NOMGCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorise the institution of prosecution against the abovementioned accused for contravention of section 2(1)(e) of the Prevention of Organised Crime Act, No. 121 of 1998, committed during the period 2008 to 2011

GIVEN UNDER MY HAND AT PRETORIA on this 17th day of AUGUST 2012

ADV NOMGCOBO JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA

ANNEXURE "S M 5"

Director of Public Prosecutions
South Gauteng

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INTERNAL MEMORANDUM

TO : LAURENCE HODES SC
MAISELES CHAMBERS, SANDTON

FROM: THE CATO MANOR PROSECUTION TEAM
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

DATE: 04 JUNE 2013

REFERENCE NUMBER: JPK2012/0112

BOOYSEN versus ANDPP

AD PARAGRAPHS 1-9

Admitted

AD PARAGRAPHS 10-26

Noted

AD PARAGRAPHS 27-42

Noted

AD PARAGRAPHS 43-45

Admitted

AD PARAGRAPH 46

Denied

The Second Respondent advised the Court and the Attorney for the Applicant that all relevant documents that the Second Respondent had in their possession at the time are given to them **and** at a later stage other documents will be forwarded to them as and when they become available.

AD PARAGRAPHS 47- 49

Admitted

AD PARAGRAPHS 50

Denied

The following evidence was placed before the First Respondent. In that:

- The Applicant was the **de facto** commander of the Cato Manor Unit;

- The monetary awards documents were before the First Respondent with regard to how the Applicant participated and benefitted in the Taxi Violence cases;

- The statements of the following witnesses were also before the First Respondent, which incriminated the Applicant; viz.

    i. **Ndlondlo**

    ii. **Col. Alyer**

    iii. **Danikas**

- The Answering Affidavit of the Applicant in the High Court Application by one Bongani Mkhize where the Applicant details his personal knowledge of the Taxi Violence killings.

AD PARAGRAPH 51

Noted and refer to para [50] above

AD PARAGRAPHS 52, 53, 54 AND 55

Noted

AD PARAGRAPH 56

Noted and refer to para [50] above

AD PARAGRAPH 57

Noted

AD PARAGRAPH 58 AND 59

Noted and refer to para [50] above

AD PARAGRAPH 60

Denied

There were further incriminating statements which have now been disclosed for the purposes of trial. And in any event, further particulars have not yet been requested by the Applicant.

AD PARAGRAPH 61

Denied

AD PARAGRAPH 62

Noted and refer to para [50]

AD PARAGRAPH 63

Denied

AD PARAGRAPH 64

Denied

AD PARAGRAPH 65 AND 66

Noted

AD PARAGRAPH 67 AND 68

Denied

AD PARAGRAPH 69

Denied

AD PARAGRAPH 70

Denied and refer to para [50] above

AD PARAGRAPH 71

Noted

AD PARAGRAPH 72

Denied and refer to para [50]

AD PARAGRAPHS 73, 74, 75, 76, 77 AND 78

Noted

AD PARAGRAPH 79

Admit that the Second Respondent refused to provide the memorandum to the Applicant.

We, however, deny that there was no evidence which warranted prosecution.

AD PARAGRAPH 80, 81 AND 82

Admitted

AD PARAGRAPH 83

Admitted

AD PARAGRAPH 84

Noted

AD PARAGRAPH 85

Denied

AD PARAGRAPH 86

Denied

AD PARAGRAPH 87

Denied

AD PARAGRAPH 88

Denied

AD PARAGRAPH 89

Noted

AD PARAGRAPH 90

Noted

AD PARAGRAPH 91

Noted

AD PARAGRAPH 92

Denied

AD PARAGRAPH 93

We have no knowledge of the contents of this paragraph

AD PARAGRAPH 94

Denied. How do you apply **audi alteram partem** rule to someone you are charging?

AD PARAGRAPH 95

Noted

AD PARAGRAPH 96

Noted

AD PARAGRAPH 97

Denied

AD PARAGRAPH 98

Noted

AD PARAGRAPH 99

Denied. We have a right to decide to prosecute any matter

AD PARAGRAPH 100

Denied and section 179(5) of the constitution is irrelevant *in casu.*

AD PARAGRAPH 101

Denied

AD PARAGRAPH 102

Denied

AD PARAGRAPH 103

Denied

AD PARAGRAPH 104

Denied

AD PARAGRAPH 105

It is not clear what the Applicant is conveying in this paragraph

AD PARAGRAPH 106

Denied

AD PARAGRAPH 107

Noted

AD PARAGRAPH 108

Denied. This will be for the trial court.

AD PARAGRAPH 109

Noted. And irrelevant to the application at hand

AD PARAGRAPH 110

Ad Paragraph 110.1

Noted

Ad Paragrapgh 110.2

Denied

Ad Paragraph 110.3

Noted

Ad Paragraph 110.4

Denied

Ad Paragraph 110.5

Noted

Ad Paragraph 110.6

Noted

AD PARAGRAPH 111

Denied. It is premature.

AD PARAGRAPH 112

Ad Paragraph 112.1

Noted

Ad Paragraph 112.2

Noted

Ad Paragraph 112.3

Denied

Ad Paragraph 112.4

Noted

Ad Paragraph 112.5

No knowledge of the contents of this paragraph

Ad Paragraph 112.6

Denied

AD PARAGRAPH 113

Noted

AD PARAGRAPH 114

Noted

AD PARAGRAPH 115

Noted

AD PARAGRAPH 116

Denied

AD PARAGRAPH 117

Denied

AD PARAGRAPH 118

Noted

AD PARAGRAPH 119

Denied

Kind Regards

CATO MANOR PROSECUTION TEAM
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

ANNEXURE "S 20 6"

INTERNAL MEMORANDUM

TO: LAURANCE HODES SC

MAISELES CHAMBERS, SANDTON

FROM: THE CATO MANOR PROSECUTION TEAM

DIRECTOR OF PUBLIC PROSECUTIONS

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DATE: 15 AUGUST 2013

REFERENCE NUMBER: JPK 2012/0112

BOOYSEN versus ANDPP

(RE: REPLYING AFFIDAVIT OF BOOYSEN)

AD PARAGRAPHS 1-4

Noted

AD PARAGRAPH 5-8

Noted, the First Respondent still maintains the averments in the answering affidavit

AD PARAGRAPHS 9 -11

Noted

AD PARAGRAPH 12

The evidence under oath is the evidence in the dockets.

AD PARAGRAPH 13

Correct, save with the statement of DANIKAS which is unsigned statement.

AD PARAGRAPH 14

We refer to the Brenton Frank and others versus NDPP unreported decision of KZN HIGH COURT, under case NO.: CC 58/11 delivered by the Honorable K Pillay J, wherein it was held that " ... considering the content of the Prosecutor's Memorandum as aforesaid and its possible negative impact on the proper prosecution of this case if disclosed, my view is that the State was entitled to refuse to furnish it in its entirety" see **ANNEXURE A**

Therefore it is correct to state that the NDPP did not intend to detail all of the information that was placed before her.

AD PARAGRAPH 15-18

Noted, For the purposes of the prosecution, the disclosures have been done in the ordinary course.

THE STATEMENT OF AIYER

AD PARAGRAPH 19-21

"NJ2" is a statement of AIYER taken on the 03 of August 2012 stating the managerial responsibilities, participation and interferences in activities of a section of Durban Organized

Crime based in CATO MANOR. This section under the management and supervision of the Applicant committed horrendous pattern of criminal acts.

This statement was obtained before the 17th of August 2012, being the date on which the certificate was authorized.

"NJ4" is a statement of AIYER taken on 31 August 2012 following a consultation with the prosecution team. Whatever is contained in this statement was already information related to the prosecution team by the deponent during the consultation with the prosecution team.

Therefore the Applicant's averments are unfortunate, unfounded and misleading.

THE STATEMENT OF DANIKAS

AD PARAGRAPH 22-25

These paragraphs refer to NJ3 which is DANIKAS's draft statement. The Applicant's averments in these paragraphs are deliberately misleading or misleading due to lack of information. DANIKAS was reservist in Durban Organised Crime Unit based in CATO MANOR, he was recruited into the reservist component of SAPS by the Applicant, he was the CONFIDANT of the Applicant and a family associate of the Applicant. The draft statement deals with the activities of the Applicant as a Director of KwaZulu-Natal Organised Crime Unit actively involved in operational activities of CATO MANOR based section of the Organised Crime.

The draft statement details the method of operation by the CATO MANOR section with the Applicant involved in killing suspects and the Applicant condoning and or covering the same.

The draft statement was in possession of the prosecution team in June 2012 and thus formed part of information considered in authorizing the prosecution of the Applicant as a manager and a participant.

The averments by the Applicant that on 09 May 2013, the Second Respondent was in the process of getting a statement from DANIKAS through MLA process was meant to formalize the

draft statement through International Treaties, so that International Avenues of testifying and securing a witness should be followed on a common understanding of two countries involved

The draft statement does not relate to a specific incident covered in the indictment, but is intended to corroborate the evidence in possession of the State that the Applicant was involved in CATO MANOR activities and that the Applicant encouraged, and was like-minded in the CATO MANOR component in killing suspects.

THE STATEMENT OF NDLONDLO

AD PARAGRAPH 26

"NJ5" which is NDLONDLO's statement gave a breakthrough in the killing of members of KWA-MAPHUMULO TAXI ASSOCIATION by CATO MANOR UNIT under the management of the Applicant in that CATO MANOR section was used by STANGER TAXI ASSOCIATION to kill its rivals being KWA-MAPHUMULO TAXI ASSOCIATION. Further CATO MANOR SECTION received gratification for this discourse.

The statement is hearsay as to the direct link of the Applicant, but that the First Respondent had information which corroborated this hearsay against the Applicant, and that information has subsequently been converted into evidential material directly linking the Applicant.

Hearsay evidence is admissible in law and it is the RESPONSIBILTY of the trial court to determine the admissibility of any hearsay material.

AD PARAGRAPHS 27-30

Ad Paragraph 27.1

The averment by the Applicant is misleading. The First Respondent was in possession of AIYER's statement on 04 AUGUST 2012, NDLONDLO's statement of 31ST JULY 2012, DANIKAS's draft statement in JUNE 2012 and that was before the authorization to prosecute the Applicant which was taken on 17th August 2012.

Ad Paragraph 27.2

The averments by the Applicant is misleading due to lack of information that the date (11 April 2013) referred relate to a further statement by AIYER after consultation based on previous statement submitted by AIYER.

THE LETTER DATED 25 SEPTEMBER 2012

Ad Paragraph 28

The decision by the First Respondent was not based on subsequent consultations with AIYER, but the purpose of the consultation was to unravel inter-provincial and inter-city operational protocol in the RSA Organised Crime Unit which subsequently became DPCI.

The First and the Second Respondent are not responsible for BLACKENED OUT of the letter (marked AA), but are in possession of an original letter which is NOT BLACKED. The BLACKNED PART OF THE letter refer to SIKHUMBUZO NDLOVU a-was-to-be a prospective witness, which was subsequently found to be irrelevant to the matter at hand.

The letter was not addressed to the Applicant, the First and the Second Respondent wonder how the Applicant scavenged the said letter. The original letter is **ANNEXURE B.**

Ad Paragraph 29

The First and the Second Respondent were in possession of the statements of the witnesses herein referred to before the 17th of August 2012.

"NJ4" is a further statement of AIYER obtained after "NJ2" which was obtained on the 04 of August 2013.

Paragraph 30

Ad Paragraph 30.1

The dockets placed before the First Respondent on or before the 17TH of August 2012 relate to 29 deceased persons killed by the CATO MANOR UNIT under the pretext of solving crime in KwaZulu-Natal. The dockets relate to deceased in the TAXI INDUSTRY and alleged suspects in Criminal Activities without substance, which the Applicant was fully aware of and in certain incidents, participated and got rewarded.

Ad Paragraph 30.2

The Applicant seems to concentrate only on the statements of NDLONDLO, AIYER and DANIKAS as the only information that was considered in taking the decision to prosecute him. The First and the Second respondent had further material in their possession to consider before 17 August 2012, which is:

i) The Monetary Award for the CATO MANOR UNIT including the Applicant, motivation of which was drafted by the Applicant; and

ii) Court Papers relating to the Interdict (Case number 13759/2008) against the KZN MEC for Safety and Security and Others, filed by BONGANI ELPHUS MKHIZE who is the deceased in count 20 on the INDICTMENT, where the deceased was seeking Court recourse to prevent the Police from killing him which they subsequently did in breach of the COURT ORDER. The Applicant filed an answering affidavit on behalf of the SAPS marked "NJ6". In this replying affidavit, the Applicant demonstrated his intimate knowledge and participation in the investigation and subsequent killing of members of KWA-MAPHUMULO TAXI ASSICIATION the rival of STANGER TAXI ASSOCIATION.

AD PARAGRAPHS 31-36

The Applicant bases these averments on misleading allegation that we did not have information, viz. "NJ2", "NJ3", "NJ4" and" NJ5" which we have demonstrated by dates and months that we had these sworn affidavits and information before the 17th of August 2012. And further that we had the Monetary Award documentation as well as the Applicant's answering affidavit.

The Applicant further bases these averments that the information has no evidential weight, which we respectfully differ with and is a matter for the trial court to determine.

Ad Paragraph 35.4

NDLONDLO (NJ5) was a member of STANGER TAXI ASSOCIATION together with SANELE ZONDI and BANGIZWE MHLONGO. "NJ5" clarifies the connivance of STANGER TAXI ASSOCIATION with CATO MANOR UNIT to kill their rival (KWA-MAPHUMULO TAXI ASSOCIATION MEMBERS), using CATO MANOR UNIT under disguise of Police Operations and their official title.

On 09 May 2013, the Second Respondent discovered" NJ5" to the Applicant and a few days later SANELE ZONDI and BANGIZWE MHLONGO responded via their Attorney SD MOLOI marked "CC" refuting NDLONDLO's statement. Mathematically, the Applicant presented SANELE ZONDI and BANGIZWE MHLONGO with NDLONDLO's statement which is an obstructive and counter investigation act by the Applicant. Further, it shows the Applicant's accessibility to SANELE ZONDI and BANGIZWE MHLONGO.

The First and Second Respondent considered "NJ5" and available information corroborating "NJ5" which has been subsequently converted into evidential material, clearly stating the horrendous relationship between STANGER TAXI ASSOCIATION and CATO MANOR UNIT managed by the Applicant and the Applicant's participation in those activities.

Now therefore, we argue that the First and the Second Respondent complied with the provisions of the PROSECUTION POLICY MANUAL.

AD PARAGRAPHS 37-47

Counsel's submission

AD PARAGRAPH 46

It is a matter to be argued in the trial court.

AD PARAGRAPH 47

The Applicant held the ranks of Senior Superintendent SVC KZN, Provincial Director Organised Crime KZN and subsequently Major General DPCI KZN province. The offences as detailed in the indictment were committed by CATO MANOR UNIT in his tenure as DIRECTOR ORGANISED CRIME KZN and subsequently MAJOR GENERAL ORGANISED CRIME KZN.

Ad Paragraph 47.2

The Applicant was the line manager of Organised Crime KZN whereas Major General Masemola was overall HEAD OF DETECTIVES KZN. The members of CATO MANOR fell under direct command of the Applicant, and the Applicant was a subordinate to Major General Masemola.

Ad Paragraph 47.3-47.4

The alleged suspects who are deceased in the indictment did not die in the course of an attempt to arrest them, but died on a direct cause by CATO MANOR UNIT under management, leadership and command of the Applicant. There was no reason and or justification to kill the alleged suspects hence the prosecution.

AD PARAGRAPH 48

Evidence will be placed before the trial court.

AD PARAGRAPH 49

"NJ1" indicates the Applicant's participation hence he was personally REWARDED. Therefore it is not only alleged that he knew about the killing activities by CATO MANOR UNIT but also participated in the killing activities of CATO MANOR UNIT.

AD PARAGRAPH 50

It is a matter of evidence in the trial court.

AD PARAGRAPH 51

Evidence will show in the trial court that as a DIRECTOR in the ORGANISED CRIME and PROVINCIAL HEAD ORGANISED CRIME KZN, the Applicant was in direct command of the Organised Crime Unit and specifically used CATO MANOR UNIT for his operations.

Evidence will further show that the Applicant has enjoyed a close relation with CATO MANOR UNIT above all other Organised Crime Units in the Province.

AD PARAGRAPH 52

The evidence will show in the trial court that Independent Complaints Directorate (ICD) now called IPID would arrived late on the crime scene after the scenes have been interfered with.

Furthermore evidence in the trial court ICD only the murder scenes and were not privy to information which led to the killings.

The murder dockets considered individually shadowed the judicious mind of decision makers hence *nolle prosequi* and informal inquests, but taken together and considering the leading information, the similarities, monetary rewards and association with rival parties by the Applicant and the members reveal a clear picture that the Applicant and the members he is charged with were involved in an ongoing pattern of RACKETEERING ACTIVITIES to wit: killing civilians.

AD PARAGRAPH 53

Evidence will be adduced in the trial to show the First and Second Respondent's averments in this regard.

AD PARAGRAPH 54

The First and the Second Respondent verily believe that a *prima facie* case will be proved before the trial court compelling the Applicant to answer.

AD PARAGRAPHS 55-56

It is within the Applicant's right to deny the allegations against him.

AD PARAGRAPH 57-60

We have demonstrated herein that statements under oath and other information were available to prosecute the Applicant.

AD PARAGRAPH 61-64

"NJ6" indicates personal knowledge of the Applicant about CATO MANOR SVC section's activities hence the Provincial Commissioner requested him to dispose to an affidavit protecting the activities of CATO MANOR SVC UNIT.

AD PARAGRAPH 65

Noted

AD PARAGRAPH 66

The First and the Second Respondent had reliable and admissible evidence when the decision to prosecute was taken and the trial court will determine this averment.

AD PARAGRAPHS 67-70

The Applicant requests, in essence, this Honourable Court to usurp the functions of the trial court and determine admissibility and truthfulness of evidence which was in possession of the First and Second Respondent when the decision was taken to prosecute.

AD PARAGRAPHS 71-76

The Applicant is deliberately attempting to prevent the First and Second Respondent from presenting the STATE case in a Public Court.

PROCESS

The First Respondent consulted with the investigation and prosecution team. An oral presentation was done to her. The Prosecution Memorandum and case dockets were presented for her consideration before the decision was taken.

NOWTHEREFORE, the First Respondent took a rational and conscious decision to prosecute the Applicant together with his subordinates without fear, favor or prejudice.

Kind Regards

CATO MANOR PROSECUTION TEAM

DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG

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Kind Regards

CATO MANOR PROSECUTION TEAM

DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG

ANNEXURE "SM 4"

Director of Public Prosecutions
South Gauteng

NATIONAL PROSECUTING AUTHORITY

DPP South Gauteng
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MEMORANDUM

TO : ADV KMA CHAUKE
THE DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG

FROM: THE CATO MANOR PROSECUTION TEAM
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

DATE: 05 MARCH 2014

REFERENCE NUMBER: JPK2012/0112

JUDGEMENT - BOOYSEN versus THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

A. PURPOSE

1. The purpose of this memorandum is to update the National Director of Public Prosecutions (NDPP) and the Head of NPS, following the judgment delivered by Gorven J of the KwaZulu Natal High Court on 26 February 2014.

   *** The judgement is attached hereto as **ANNEXURE A.**
   *** The indictment as **ANNEXURE B.**

2. The prosecution team also seeks to inform NDPP of our intended course of action in the light of this judgment.

B. JUDGMENT OF GORVEN J

3. In terms of paragraph [37] of the judgment, the applicant Mr Booysen was granted prayers a. b. c. and d. In paragraph [40], the applicant was unsuccessful in respect of prayer e. of the Notice of Motion. In effect, this meant that the authorisation issued by the then Acting National Director of Public Prosecutions on 17 August 2012 for the prosecution of the applicant on the racketeering charges and the decision to prosecute the applicant on the predicate offences (Counts 8 – 12), was set aside.

4. The Applicant had also sought to interdict the NDPP from issuing new authorisations in respect of prayer e. The court dealt with in paragraph 40 of the judgment and the court found that making such an order would amount to fettering the discretion of the NDPP to make the decision in question. The Applicant thus failed in this respect. The prosecution team intends to re-apply for the racketeering authorisations as soon as possible.

The Prosecution Team's view of the Judgment

5. Outside Counsels were briefed by the State Attorney, namely Hodes SC and Manaka to represent the then ANDPP. At this stage, the team has not yet met the outside Counsels who argued the matter in order to incorporate their views on the matter.

6. The prosecution team, however, is of the view that there were crucial concessions which were incorrectly made by our Counsel during his argument: see [29] of the judgment.

7. The concession in paragraph [29] was that there are no statements in the dockets which implicated the applicant in any of the offences with which he has been charged. This was an incorrect concession, as there are statements that implicate the applicant in the dockets, for instance in Howick CAS 106/9/2008, the applicant arrived at the scene in a helicopter and congratulated the members who fired shots for the job done very well. In this matter, it appears that the applicant was informing the tracing unit of the whereabouts of the deceased which resulted in the deceased being located on the N3, this is made clear by the motivation for the monetary awards which was submitted by the applicant.

8. The prosecution team had empowered Counsel with copies of the statements on which the ANDPP based her decision. The court was, however, not favoured with copies of these copies, instead, concession which had the effect of discrediting the rationality of the decision were made. The copies of the relevant statements in the dockets and two memoranda dated 04 June 2013 and 15 August 2013 in response to the applicant's papers were provided. See, **ANNEXURES C** and **D** are attached hereto.

9. The prosecution team was also not favoured with the affidavits prepared by Counsel on behalf of the ANDPP to enable the team to correct or add

the facts which could have been lacking, for example the deafening silence referred to by the Judge in respect of the allegation of mendacity made by the applicant dealt with in paragraph 34 of the judgment.

10. We feel therefore that the concessions were incorrectly made. This is the aspect which informs us that it is undesirable to appeal this matter.

11. In terms of process, since we do not intend to appeal the judgement, we are of the view that we should call upon the applicant to appear before the High Court to formally withdraw the charges in the meantime pending an intended application to you, Sir for a new authorisation.

C. RE-APPLICATION FOR AUTHORISATION CERTIFICATE

12. The prosecution team intends to apply to the NDPP for the reissuing of the certificates. We shall prepare a new memorandum which outlines in detail the evidence against the applicant.

13. We are still firmly of a strong view that there are sufficient facts which justify the re-issuing of the racketeering authorisations.

Kind Regards

CATO MANOR PROSECUTION TEAM

DIRECTOR OF PUBLIC PROSECUTIONS

SOUTH GAUTENG HIGH COURT: JOHANNESBURG

GB/laema29/8/2012

SILVERTON CAS 683/10/2014

MM-10

MM-10

AFFIDAVIT

I, the undersigned,

ANTHONY MOSING,

do hereby make oath and say that:

1. I am an adult male South African citizen with identity number 6209105056080 residing at 655 Hairbell Street, Doornpoort, 0017, Pretoria.

2. I am employed by the National Prosecuting Authority (NPA) based at 123 Westlake Avenue, Weavind Park, Pretoria, 0001 as Senior Deputy Director of Public Prosecutions in the office of the Head: National Prosecuting Service (NPS) at NPA Head Office. The facts contained in this affidavit are true and correct and are within my personal knowledge, unless otherwise stated or the context determine otherwise.

3. I am the head of the Special Projects Division (SPD), a unit that was at all relevant times pertinent to this affidavit based in the Office of the National Director of Public Prosecutions (NDPP) and reporting as such to the National Director. As from about November 2014 the unit was relocated by the NDPP to the NPS and I am now reporting to the Head: NPS. The duties and responsibilities of the SPD included coordinating Organised Crime prosecutions nationally and dealing with all matters assigned to it by the NDPP, including inter alia to advice the NDPP on all racketeering and other applications requiring the approval of the NDPP by law and dealing with high profile matters that the NDPP may assign to the SPD.

4. I am also a duly admitted Advocate of the High Court of South Africa, having thus been admitted on 30 November 1994 and as such am an Officer of the Court.

5. I am requested by the lead prosecutor, Adv. Jan Ferreira to submit a supplementary affidavit in the criminal prosecution of Adv. Jiba (Jiba) relating to the matter of State versus Booysen and Others (Cato Manor case) on certain documents pertaining to that case, as well as an e-mail exchange between Jiba and me on or about April 2014 (see annexures "A" and "B" attached hereto). I must pause to mention that the first affidavit I submitted was as I was informed to facilitate the acceptance into evidence in court of the documents that were made available from files in my possession pertaining to the Cato Manor case in compliance with an apparent section 205 subpoena that was served on the CEO of the NPA. It should be noted that I had at no stage refused to make any evidence or document available that was in my possession in the course of my employment. I was not requested at that stage to submit an affidavit pertaining to my knowledge about the events surrounding this matter. Though I am not entirely familiar with the precise allegations against Jiba and why she is being prosecuted, save what has been mentioned in the media that she is facing two counts of Fraud and Perjury relating to the prosecution of Major General Booysen (Booysen) in the Cato Manor case. As one who was closely associated with this case and as an Officer of the Court I regard it my duty to set out fully my knowledge of this matter in the hope that it might assist the court to come to a just conclusion.

6. As mentioned above my duties entailed inter alia to advice the NDPP on all applications for authorisation in terms of section 2(4) of the Prevention of Organised Crime Act 32 of 1998 (POCA) and to attend to matters assigned by the NDPP. I digress to mention that Jiba was the Acting NDPP at the relevant times of this matter.

7. In the course of the execution of my duties I attended a meeting on or about 8 March 2012 at our offices with three members of the Independent Police Investigative Directorate (IPID), who I gathered came to the NPA concerning an investigation that they were conducting into the crimes allegedly committed by the SAPS members from Cato Manor (Annexure "B" is my handwritten notes on the meeting). The reference to a meeting with the Minister of Police and the Acting National Commissioner of Police, Nhlanhla Vilakazi, is that I was informed by the said members that they (IPID) and the Hawks had a joint meeting with the Minister a week ago, whereby the Minister expressed his dissatisfaction with the slow progress made by the two investigating units, since it has been pending since December 2011. It was apparently decided during that meeting that the two units should conduct the matter jointly and that had been working throughout the previous weekend. The reason they came to see the Acting NDPP was that they needed to rope in prosecutors to handle the matter urgently and that the prosecutors seemingly promised by the Acting DPP of KZN, Adv. Mlotshwa, was not materialising. They mentioned that seized with 51 cases, but that in 12 of the cases they were convinced that they have a case. Of the 12 cases, 6 of them were now ready and they wanted me to decide on the six dockets by tomorrow. They also wanted a decision on whether the prosecutors to be made available by the NPA will be able to join with the investigating team by Monday next. I undertook to discuss the matter with the Acting NDPP, Jiba, which I did so and I think that she mentioned that there will be a meeting the next day with General Mabula from the Hawks on the same matter.

8. On or about 9 March 2012, the day following the first meeting, the meeting did indeed take place with Jiba. Certain members of the NPA, being Adv. A Chauke, the DPP of South Gauteng (Chauke), Adv. Maema (Maema), the DDPP from the North West office, Adv. Mathenjwa, DDPP from South Gauteng and two other Senior State

Advocates from the DPP South Gauteng, being Mlotshwa (not the former Acting DPP of KZN) and Ntlakaza were present. I was informed that these members are the appointed prosecuting team in the matter with Maema being the lead prosecutor for his experience in prosecuting organised crime cases, particularly on racketeering. It was also mentioned that there were fears of partiality should the matter be handled by prosecutors from KZN due to the close working relationship that the suspects in the matter, being police officials, had had with local prosecutors, especially with regard to the very incidents that were the subject of the investigation. Adv. Chauke' s role as I understood it was merely to manage the team as they were mainly from his office, but would not be vested with any decision making powers regarding prosecutorial decisions as he indeed did not have same, as the case fell outside of his area of jurisdiction. I make this point as I am aware that questions have been cast about Chauke's role in the matter and the composition of the prosecuting team being from outside KZN. Having regarded to the circumstances and the allegations in the matter this made perfect sense to me at the time. It was also decided that the team would utilise the budget of the Office of the NDPP for all expenses relating to the prosecution of the matter as it was envisaged that costs would be involved in the matter.

9. Major General Mabula (Mabula) Mabula who was also present at this meeting indicated to the meeting that they too (the Hawks) are seized with the investigating of the same allegations and were carrying certain other dockets, other than what the IPID had been investigating and that the meeting with the Minister dealt with the problems between the two investigating units. It was decided at that meeting that the Hawks should assist the IPID in its investigations. He said that they (Hawks) had three dockets which are ready to be handed over to the prosecutors for decision. It was decided that he would be the contact person regarding all dockets and Mathenjwa is the NPA contact person. I had made mention of the dockets received

from IPID the day before and it was decided that they be handed over to the prosecuting team, which I did the same day after the conclusion of the afore-said meeting and they acknowledged receipt thereof. The meeting was adjourned thereafter. It must be stressed that neither I, nor to my knowledge, Jiba attended such a meeting with the Minister of Police as it appears the impression is gained from reading my handwritten notes. We were merely informed that such a meeting took place by Mabula and the IPID investigators. I cannot recall whether Mabula had said that Adv. Mlotshwa, the former Acting DPP of KZN, attended the said meeting though it seems as if that is what I recorded in my notes.

10. As my unit would be involved in the matter as was the practice with such cases, it being an organised crime matter, I also decided to not involve any of the members of my unit in the matter, due to the fact that I was aware that some of them have had a similarly close working relationship with the suspects, especially Booysen, in the course of their duties regarding organised crime related matters and may find themselves in a difficult position. I also wanted the matter to be handled with due regard to the sensitive nature thereof. Hence I was the only person in my team and to my knowledge at NPA head office, apart from Jiba, that was familiar with the matter.

11. My role in the matter was to interact with the prosecuting team and guide them as far as racketeering issues were concerned and to act as liaison between the Acting NDPP and the team and to advice the Acting NDPP on developments as conveyed by the team or as gleaned from my interaction with them. As such I attended several meetings with the team when compiling the application for racketeering and indictment and made some contributions with advice as I would do with most such matters. I must mention that I was not an integral part of the prosecuting team and did not read and decide the dockets, but did deliberate with them on the merits of the

evidence, mostly from a critic point of view. The memorandum dated 23 May 2012 and marked as annexure "A" was as a result of my interaction with the team at some stage made available to me. I cannot recall the precise circumstances under which I received it. It is clearly a memorandum addressed to Chauke by the prosecution team and according to its heading was intended for the briefing of the Acting NDPP. It is furthermore clear from the contents that it was probably drafted in anticipation of the impending arrest of the suspects and consequent court appearance. I attended the first appearance of the accused in court in Durban, but did attend any subsequent hearings. Again this was done as observer in order to brief the Acting NDPP, which I duly did.

12. On or about 15 August 2012 I received the application for racketeering authorisation from the prosecuting team under cover of the letter from the DPP: KZN dated 15 August 2012. On or about the same time I also received an application for centralisation under cover of a letter from the DPP South Gauteng. I cannot recall the precise circumstances surrounding the receipt of these applications and must have not noticed that they were submitted under different letterheads from the two DPP offices. I drafted a memorandum for the Acting NDPP recommending the approval of the applications for authorisation of the racketeering prosecution and centralisation on the following day, being 16 August 2012. On 17 August 2012 Jiba approved the two applications and issued authorisations in terms of section 2(4) of POCA in respect of contraventions for section 2(1)(e) and (f) of POCA as well as in terms of Section 111 of Act 51 of 1977 read with sections 44 and 22(3) of Act 32 of 1998.

13. It appears that shortly after the matter was authorised and on or about 27 August 2012 an application for centralisation in respect of the offence allegedly committed in North West province was submitted by Maema under cover of a letter from the DPP KZN dated

20 August 2012. He pointed out to me that the first centralisation authorisation was erroneously submitted under cover of the letter from the DPP South Gauteng instead of KZN. He requested the issuing of a new centralisation directive on the new application. There was nothing new about the application and was merely a correction of the office under which the first directive was granted and I proceeded to request same. On 27 August 2012 I wrote a memo to Jiba explaining the matter and requesting a new centralisation directive to be issued. Jiba signed and issued a new centralisation directive on 27 August 2012. What may possibly explain the situation why the application emanated under cover of Chauke's office, is that it seems that Chauke and the DPP of KZN, Adv. Noko (Noko), had agreed to such an arrangement in order to expedite the matter and avoid any possible delay on account of Noko being based in KZN. It seems that it was later considered prudent that the Noko rather sign the documents instead, but that the application for centralisation signed by Chauke had already been submitted by him as indicated above. (See the attached e- mail from Maema dated 15 August 2012 at 12:02 marked "C1-3).

Ad Review application by Booysen

14. The accused, Mr Booysen, brought an application to review his prosecution on racketeering charges and other charges. As soon as the application was received on or about 7 May 2013, I drafted a memorandum seeking permission for the appointment of outside counsel to handle the matter on behalf of the NPA. Initially the State Attorney of Durban had recommended that counsel from KZN be appointed, but in view of the fact that the team was based in Gauteng, we recommended that counsel from Gauteng, particularly Johannesburg be appointed. The State Attorney, Durban indicated that he will consequently transfer the matter to his counterpart in Johannesburg and that he will act as correspondent only. Adv.

Laurens Hodes, SC, assisted by Adv. Manaka, was appointed to handle the matter. A first consultation with counsel attended by Chauke and the prosecuting team (excluding Mathenjwa, who was on leave of absence), including myself, took place at counsel's chambers on or about 4 June 2013 (Adv. Manaka was also present). I immediately drafted a memorandum for Jiba about the outcome of the consultations: Jiba had not been part of the consultations (see unsigned copy retrieved from my computer marked annexure "D"). It is to be noted that the team undertook to furnish counsel with all the facts and evidence in the docket surrounding the prosecution of Booysen and I later was informed that same was done as planned. It was also agreed that the NPA will oppose the application and that Jiba would file the answering affidavit on behalf of the NPA. I must add that it was thought that confirmatory affidavits would be filed by at least the lead prosecutor, Adv. Maema, who was cited as the second respondent. Counsel had also advised that the decision to issue a racketeering authorisation was not reviewable in terms of Rule 53 of the Uniform rules of court and it was decided that no "record of decision" need therefore be filed as these were not 'proceedings" as envisaged by Rule 53. I and I belief also the prosecuting team, had no further interaction with counsel, except perhaps Adv. Chauke until after the judgement was delivered by Gorven, J, when a consultation was again held with counsel at counsel's chambers. More about this later. When the answering affidavit by Jiba was filed, neither I, nor the prosecuting team members, had seen it before it was commissioned and filed nor had we seen a draft thereof (they all mentioned this afterwards) and I tend to belief that neither did Jiba see it except on the day she signed it, but I may be wrong on this. The contents of the answering affidavit only came to my attention sometime after it was filed when it transpired that there was a problem with two of the annexures not being attached during serving and filing, although referred to in the affidavit. I received an e- mail in this regard from Chauke on 11 July 2013 (see annexure "E") with trailing e- mail from the State Attorney, Mr Govender. I was surprised why Chauke

required me to attend to this, but I nevertheless contacted Govender and the missing annexures were later filed by him after receiving them from Adv. Manaka as he mentioned in the afore-said e- mail. In the same e- mail Govender had also mentioned that the applicant intended taking the point about the unsigned affidavit of Danikas. I noticed this as well as the other annexures filed and I expected the applicant to challenge this, which they duly did in the replying affidavit. The prosecuting team met with Adv. Chauke at his behest at his office on or about 14 August 2013 to discuss the response in the light of replying affidavit (see annexure "F"). I also attended this meeting and these issues regarding the annexures were pertinently raised. It was agreed that a memorandum would be compiled by the prosecution team wherein these issues would be raised with counsel with a view of addressing same. A copy of the said memo to counsel was circulated by Mathenjwa via e- mail on 16 August 2013 and I believe was handed to counsel (see annexure "G"). The expectation was that some attempt would be made by counsel, if possible, by way of filing a supplementary affidavit by Jiba explaining the issues relating to the annexures in her affidavit, even though it could be said that pleadings had closed. I must digress somewhat at this point to explain the reason for the apparent reluctance to have personal consultations with counsel in this regard. It seems that shortly after the first consultation with counsel as mentioned herein, the secretary to counsel wrote an e- mail to the State Attorney about a "Public Prosecutor" that contacted her enquiring about a copy of the letter that was written to applicant's attorney and that was not received by such "Public Prosecutor". The State Attorney had reported it to Chauke, who was apparently annoyed by this and issued a stern reminder to the prosecuting team that communication with counsel was to be strictly via the State Attorney, either by him or Maema or by one of the team members as mandated by Maema (see e- mail attached as annexure "H1-2"). This I believe explains the reluctance to engage with counsel by the prosecuting team and reliance placed on the DPP, Adv. Chauke, in maintaining communication with

counsel. This was fortified due to Adv. Chauke's experience with the practices of the Bar, having been a member of the Bar Council of Johannesburg previously. I directed a follow-up enquiry about our response to the replying affidavit to Chauke and the team (see e- mail dated 5 August 2013, annexure "J1-2"), but it seems that the message was misunderstood. On 19 August Jiba also directed an e-mail in response to my e- mail and was apparently not impressed by the response to my earlier e- mail. Chauke responded merely that counsel was busy with the State Attorney and that we had submitted our inputs for counsel to consider (see annexure "K1-2"). I was later informed that counsel advised that no further action is required to be taken, though I cannot recall from whom and at what stage this was mentioned. None of the prosecuting team members attended the hearing of the matter and only Adv. Chauke attended.

15. The Media, reporting on the hearing of the matter, alleged that Jiba lied in her affidavit. This it transpired was submissions made by applicant's counsel during argument. This raised a concern and Adv. Jiba requested the team to come and brief her on the matter in the light of the media reports. The meeting took place on or about 13 February 2014. Adv. Chauke explained what transpired in court and Jiba was assured that there is no cause for concern. It was portrayed as simply a matter of KZN media reporting negatively. As a result hereof it was decided that the team should prepare a media statement, which was eventually done and issued. This all transpired *before* judgment was delivered.

Events post Judgement of Gorven, J

16. After judgment was delivered on 26 February 2014 we all acquired a copy thereof and perused it. I requested a meeting with the prosecuting team and Adv. Chauke to discuss the judgment and it was agreed to meet on 3 March 2014 at the DPP's offices in

Johannesburg. During the meeting we discussed the judgment in detail and we came to the conclusion that the court arrived at its judgment mainly on the basis of the concession attributed to our counsel that there was no evidence that implicated Booysen with the predicate offences, coupled with the problems regarding the annexures to Jiba's answering affidavit and the corresponding silence to address the shortcomings thereof. Adv. Chauke, who was present during the hearing in court, explained to us what transpired when this concession was made and indicated that it was during counsel's address to court. It was apparent to us that there may have been some misunderstanding between counsel and the court. The entire team felt that it was in any event an incorrect concession, if it was indeed made consciously and we could not understand how counsel could have made it in the light of all the evidence presented to him by the prosecution team and also included as annexure NJ2 in the answering affidavit of Jiba. We concluded by agreeing as a team that, though not satisfied with the outcome of the matter, at least the door was still open to bring a new racketeering application as indicated in the judgment and it would therefore not be necessary to appeal the judgment. The team would prepare a memorandum for the NDPP informing him accordingly.

17. A few days after this meeting I received an e- mail from Chauke informing that a consultation with counsel had been secured to hear from counsel first-hand what his opinion on the judgment was and to get some explanation for the unfavourable outcome. I naturally attended this meeting on 13 March 2014 and so did the entire prosecuting team, including Adv. Chauke. Counsel raised a number of issues with us that he felt the court had erred, including interpretation of case law. He took us through the entire judgment, pointing out instances where he disagreed with the judgment. Also that court erred in setting aside the decision to prosecute on counts 8-12, as that was not taken by the Acting NDPP, but the DPP.

Counsel also indicated that he did not believe that he made the concession regarding the lack of evidence implicating Booysen as stated at para 29 of the judgment of Gorven, J. The result was that we were satisfied as a team that there were merits to appeal as advised by counsel. It was agreed that counsel should therefor in the meantime prepare the application for leave to appeal, while Chauke would brief the NDPP, Mr Nxasana, who in the meantime had been appointed NDPP, about the need to appeal the judgment and to obtain his consent. After the meeting with counsel, Chauke again reiterated to us that he will call Dr Ramaite, the Head of NPS and his direct supervisor, and also brief the NDPP accordingly. I was not made aware of further developments thereafter concerning the appeal process. On 7 March 2014 Adv. Chauke apparently forwarded to Noko a copy of the memorandum that he was going to present to the NDPP and Ramaite regarding the appeal. I was not copied on this mail and have not seen this memorandum, but merely received an e-mail in this regard from Maema on 11 March 2014 (see annexure "L1-2"). In the meantime the prosecution team and the investigating team met on 14 March 2014 in order to further discuss the implications of the judgment on the entire case. I also attended this meeting, but Chauke was not part thereof.

18. Early in the morning of 24 March 2014 I was called by the personal assistant of the NDPP, Mr Nxasana, to attend at his office with the entire files pertaining to the Booysen matter. I hastily gathered the files and went to his office. Present at the office was the former NPA spokesperson, Mr Nathi Ncube, Mr Nxasana, Adv. T Duma and Dr Ramaite. The NDPP enquired about the notice of appeal in the matter, saying he was not briefed about it. I immediately encountered the environment to be hostile towards me and decided to explain the whole sequence of events as I have done in this affidavit above, including the meeting with counsel and that Chauke undertook to brief the NDPP. The NDPP questioned the merits of an appeal and

suggested that counsel may be advising this to save his own reputation. He also suggested that the reason for appealing is to save the reputation of Jiba. I think Ncube raised the fact that a meeting took place in Jiba's office *after* the judgment which was attended by Chauke, Maema, Mathenjwa and other team members, including me and said that Jiba wanted us to appeal. I could not immediately place which meeting he was referring to, but I indicated that that was not the case. Later I realised that he was referring to the meeting referred to at para. 13 supra and which took place on or about 13 February 2014. Judgment was only delivered *after* this on the 26th of February 2014 and it was therefore impossible for Jiba to have already given us an instruction to appeal as judgment was not yet handed down.

19. Ramaite had to be excused to attend I think a doctor's appointment and the meeting continued in the same hostile vein, if not even more so. My role in attending to the meetings at the DPP office in Johannesburg in the Booysen matter was questioned, including who I reported to. On explaining that I and my team are based in the office of the NDPP and that I was informed by my former supervisor, Jiba, that she had briefed the NDPP about my team and me and what our mandate was, the NDPP, confirmed that indeed he was briefed, persistently so according to him, by Jiba, but that he never said that he was considering the location of my team and that's why he understands why the rumours are being spread by Jiba about him wanting to disband my unit. He also asked me why I attended the meeting of the National Operations Management Meeting (NOMM) of the NPS, saying it's a meeting attended by DPP's. I explained as best I could under the circumstances that the issue of the coordination of organised crime at head office was raised in the previous minutes of this meeting and it was decided by the meeting that I as head of the SPD should in future attend this meeting for better coordination of organised crime issues, much like SOCA was invited to attend NOMM. I realised that my attendance at this meeting was being

questioned because the NOMM meeting was chaired by Jiba then as the head of NPS. Mr Nxasana went as far as to suggest that it seems as if I am loyal to a person, Jiba. I realised that I found myself in a very precarious position, where it seemed that my immediate supervisor and head of NPA was at loggerheads with my former supervisor and I was smack bang in the middle. To cap it all off, I believe that this was the first verbal interaction of any kind with Mr. Nxasana since he took office in October 2013, some six months prior to this meeting. Needless to say that this situation has caused me endless distress to the point of affecting not just my professional life, but also my personal and family life. I had tried to keep it as quiet as possible and have not disclosed this to anyone, but am now forced to do so in order to properly explain the circumstances of the e- mail exchange between myself and Adv. Jiba dated 1-3 April 2014 that the prosecutor in the case, Adv. Ferreira, especially want me to address in "**full**" in my affidavit. I would have preferred it to be otherwise.

20. Dr Ramaite returned later to the meeting and the NDPP informed us all that the appeal is to be withdrawn, but only after he has informed the team of the decision. The next day, 25 March 2014 I was again called to the NDPP's office. This was before the meeting could commence that was arranged to take place later that day with the entire prosecution team and Chauke, wherein the decision of the NDPP he was going to conveyed. I am not sure whether there was anyone else present during this meeting with me. The NDPP informed me that after he had spoken to his spokesperson of reading about the appeal in the media, he has never been briefed. He said that he only came to hear about the application of Booysen when he read about the judgment thereof in the media. He discussed it at Exco and made it clear he was awaiting a memorandum on the matter. He read from the media that the court dismissed the applicant's interdict application and that his view was therefor that there is no need to appeal the judgment. To his surprise he did not

receive any memorandum, was not briefed and only received the media query about the appeal. He said only the NDPP can authorise the institution of an appeal. He does not know how it happened (i.e the filing of leave to appeal). Appeal is in the name of the NPA. I merely listened and was not sure why all this was being addressed to me as the meeting was going to take place shortly.

21. The team from Johannesburg, including Maema, arrived and the meeting proceeded. Present was the NDPP, Dr Ramaite, Duma, Chauke, members of the team and I. Apparently an e- mail from the Personal Assistant of the NDPP was sent to Chauke requesting the written instruction of why the matter was being dealt with by the DPP of South Gauteng being a matter arising in KZN. I was surprised at this as well as it was the first time that questions arose about this. Chauke explained that he attended a meeting in 2012 with the then Acting NDPP, Jiba and the former Acting DPP of KZN, Adv. Mlotshwa and that he was requested to assist with a team to prosecute the matter. On the issue of briefing the NDPP or lack thereof, Chauke made it clear that he had sent memo's to head office regularly about the matter and that he briefed Ramaite about the appeal in following protocol as he expected Ramaite in turn to brief the NDPP. He explained that the application for leave to appeal was filed due to time running out within which to file and that he felt that it could always be withdrawn should the NDPP not agree with the decision to appeal. The NDPP said he felt that he was being undermined. He said that he was angry yesterday on hearing about the notice to appeal and had already taken a decision to withdraw the notice. Ramaite did confess to having received the documents from Chauke, but said that it was detailed and he did not look at the documents, though he said he raised his view with the NDPP not to go ahead with the appeal. Chauke or someone, I am not sure who, mentioned that during a prior briefing with Jiba she had said that the team should submit a memorandum to the NDPP for his briefing. I think this was a

reference to the meeting the team had with Jiba during February 2014. The meeting was then adjourned with the understanding that the team would prepare a detailed briefing of the NDPP of the entire case that would take place on 7 April 2014. I could not attend this latter meeting as I was booked off sick, but am aware that it took place. The following day on 26 March 2014 Chauke issued an e- mail to the State Attorney conveying the decision of the NDPP (see annexure "M"). It is notable that Jiba was not present during all these discussions regarding the matter, although to my understanding she was present at work.

22. The afore- going is the context in which the e-mail exchange between myself and Jiba took place (see annexure "N" which is a copy I retrieved from my computer and annexure "P" is the copy supplied to me by Jan Ferreira, which indicates onward communication to a third party). I cannot recall precisely what transpired before I wrote the e-mail, but I think that Jiba called me about the matter and because I found myself in the difficult position already mentioned above in that I was in the middle to an apparent dispute between her and the NDPP, I wanted to cut short any discussion on the matter at hand, lest this lead further to the difficult situation I found myself in. I did not feel that I was allowed to discuss the matter with her in the light of what had transpired and the manner in which the matter was dealt with in her absence. More can be said about the context of the e- mail exchange, but I think that I have provided enough contexts so as to properly interpret the e- mail exchange between us. To my mind the enquiry directed to me by Jiba was not something sinister and her response to my e- mail is perfectly understandable in the light of my e- mail to her and in context. After carefully considering the contents of the e- mails in trying to understand the relevance thereof, I can now see how this exchange, viewed without a knowledge of the context, can be construed by someone to make it look sinister and therefor I have tried to give an accurate and honest account of the

events leading up to it as they unfolded.

23. I trust that I have dealt fully with all relevant aspects of the matter. Any omissions should not be construed as a deliberate attempt at deceit, but may have arisen from imperfect recollection of things that happened in the ordinary course of the execution of my duty after the elapse of some time, while not anticipating the sort of legal process such as is currently under way.

I know and understand the contents of this affidavit. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at Pretoria on this the 5th day of May 2015, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

MAJ. GEN.
N.O. TAIOE
COMMISSIONER OF OATHS

Director of Public Prosecutions
South Gauteng

NATIONAL PROSECUTING AUTHORITY
South Africa

INTERNAL MEMORANDUM

TO : MA CHAUKE
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

FROM: THE CATO MANOR TASK TEAM
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

DATE: 23 MAY 2012

KZN MANOR NATIONAL PROSECUTION TEAM BASED IN SOUTH GAUTENG HIGH COURT: BRIEFING TO THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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Regional Office

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A. INTRODUCTION

The prosecution team has identified three (3) criminal offence categories committed by the Cator Manor Organised Crime Unit and Kwa-Zulu Natal National Intervention Unit, namely

- Conspiracy to kill members of the Kwa-Maphumulo Taxi Association
- Conspiracy to kill ATM Bombing syndicate gangs operating in KZN
- Conspiracy to kill criminal gangs suspected of business and private robberies.

There are substantial outstanding investigations on the Taxi and ATM bombing matters which could motivate charges relating to racketeering and inclusion of KZN and Cato Manor Organised Crime management.

The Task Team is confident on the available evidential material that there are prospects of a successful prosecution on ten (10) dockets involving the Conspiracy to kill criminal gangs suspected of involvement in business and private robberies.

There are fourteen (14) deceased persons in ten (10) dockets which will be coupled by compilmentary offences as depicted in the following table:

B. **PROSECUTABLE CASES AND IDENTIFIED SUSPECTS**

Column 1	Column 2	Column 3	Column 4	Column 5
Serial No	Case Docket	Deceased	Suspects	Possible charges
1.	Kwa – Mashu 698/11/2009	Sakhile Prince Thabede	Padayachee Stoltz Mostert	Murder Unlawful possession of firearm Unlawful possession of ammunition
2	Esikhawini 03/04/10	Kwazi Ndlovu	Padayachee Nel Mostert Ghaness Olivier Makhanya George Shaun Mkhwanazi Thabethe Mdlalose	Murder Unlawful possession of firearm unlawful possession of ammunition
3.	Esikhawini 50/9/11	Qhilisani Gwala	Paul Mostert John Smith PhumeleleMakhanya Jeremia Morten MbkekiseniMkwanazi Thatayipi Mdlalose	Murder Unlawful possession of firearm unlawful possession of ammunition
4.	Melmoth 142/11/2008 146	Bongani Biyela Khanyisani Biyela	Eric Nel Innes Smith Nzama Ngodwana Padayechee David McInness S Naidoo Gannes Paul Mostert	Murder X2 Theft of firearm Theft of a firearm license Theft of cash Theft of cellphones Theft of

			Raymond Lee Makhanya	airtime Assault GBH x2 . MITP Unlawful possession of firearm X2 Unlawful possession of ammunition X2
5.	Durban North 69/07/11	Dumisani Mgobhozi	Naidoo Morten Mostert Lockeem Ganneas Lee	Murder Attempted murder MITP Theft X4 Unlawful possession of firearm Unlawful possession of ammunition
6.	Durban North 71/07/2011	Boysie S Mbonambi	Lee Morten Mostert Lockeem Ganees Naidoo	Murder Possession of firearm Possession of ammunition
7.	Durban North 67/07/2011	Jabulani Bhengu	Mostert Lockeem Naidoo Ghaness Lee	Murder Unlawful possession of firearm Unlawful possession of ammunition
8.	Kwa Mashu 629/04/09	Thokozani Njapha	Nel Mostert Padayachee Eva	Murder Unlawful possession of firearm Unlawful possession of ammunition
9.	Phoenix 377/08/09	Lindokuhle Nzuza	Mostert Lockem Naidoo	Murder Unlawful possession of firearm Unlawful possession of ammunition
10.	Berea 288/05/08	Thabo Msimango	Mostert Naidoo Maharaj Makhanya	Murder Unlawful possession of firearm

			Mdlalose Eva	Unlawful possession of ammunition

11 13 March 2012. Mdlalose Crimes, 1 Count

C. LOGISTICAL ARRANGEMENTS

The date of first appearances would be determined by the Director of Public Prosecutions (DPP) having attended to all procedural issues regarding the arrest of the police officials in terms of Part 8 of the Prosecution Manual , compliance with Section 17 of the Inquest Act 58 of 1959 and in consultation with the prosecution and investigation team.

The office of the DPP will also manage communications in all relevant spheres of government.

D. RECOMMENDATIONS

It is recommended that the National Prosecuting Authority (NPA) Security and Risk Division provide security for the team as of the date of arrests.

Hawks and ICD have already provided security for their personnel.

CATO MANOR TASK TEAM

SOUTH GAUTENG HIGH COURT: JOHANNESBURG

MM/09/04/2012

"B"

8/3/12. Meeting with ICD.

I [illegible] 083 780 1154 } HO
[illegible] 083 5655320 } ICD
Mr Khuba 084 702 2741.

1st Meeting - meeting with Min of PSA
SAPS - Help in NAT Com. NRCLA V. Pikoli.
Where two items Mandate - Matter
Pending since Dec. 2011 - Hit squad
allegation - Visit carried by Min - week.
worked throughout weekend.
Challenge to Royce - NPA pos. - PA submitted
to KZN DPP but to NDPP.
Gen Mdluli met with Minister - Promise
that first 2 Adv
Plan - soon only by next week.

51 Cases - Then 356 (19) Report dockets
93 Cases Carried first
Now 6 Cases first that are ready
Other five outstanding -
Brought to Cases which they want to Come
here and take some Cases. Wants decision by
tomorrow.
Experts — 12 in Unit - Boyce - PE - DC.

Evidence of Photos with General Mdluli - Cases.
Lead to Set.

Way forward : Whether to proceed with you by Monday
next weekend. ICD officers, DSN.

9/3/2012 - Meeting on Cato Manor
Gen Mbhele
Gen Mabula -
Teams from South Gauteng } see attached list.
Matters
Investigators by ICD
with Min.
Meeting on Monday - Gen Mbhele attended.
Issues of KZN prov. to deal with same. DPP SG
Mr Mbhele.
Gen Mbhele -

Give brief on dockets - Missing.

Gen Mabula -
Team of Prof - Human Cadaveric experts to inform
on Strms report. Submitted report - Support ICD,
not going into dockets. ICD rely on their findings
guidance. Offering their expertise. Called their chief
Head Chief. Min not happy with what
they've done.
Min said - now Provincial help ICD. Now have access
to case dockets.
Using independent Ballistic Expert - Did PE 96
Screened this person
Expert discredited in KZN.
Asked forensics to give people
3 dockets that came present to Hrs.

Gen Mabula - no Contact person - all dockets
to go through Min - Mathenjwa is NPA Contact
SAPS team - 18 - F/O = 10

Way Forward

Pros to go to KZN as per Heads J. BR
Pros will go to Kzn for work

Pros team to leave for KZN on Tuesday (13/7)
provided SAPS can arrange for accommodation. Can Mosuwa to arrange for
NPS Com.

A. MOSING 054 758 8076 a.mosing@npa.gov.za

G SMAEMA 018 381 9093 0842944934 g.smaema@npa.gov.za

K.F. Mapoulo	079 884 2204	Kgomotso.Mapoulo@npa.gov.za
Col Mabula	082 856 1403	mabulam@saps.gov.za
J.J. MOTSHWA	073 502 9602	jjmotshwa@npa.gov.za
M. MTLAKAZA	084 817 7795-9	mtlakaza@npa.gov.za

SEQ 34/2020-809

Tongaat 19/3/2009.
O/North 67/7/2011
D/North 71/7/2011
D/North 69/7/2011
Kwa Mashu 628/11/2009.
Hornick 106/9/2008
Pinetown 668/5/2009
Kwa Mkhulu 629/4/2009. 08/03/2012

Dockets handed to adv. Matthewson on 9/3/2012

"A1"

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

INTERNAL MEMORANDUM

TO : **ADV. N JIBA**
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM : **ADV A. MOSING**
HEAD: SPECIAL PROJECTS DIVISION

SUBJECT : **STATE VERSUS BOOYSEN AND OTHERS (CATO MANOR CASE)**

DATE : **4 JUNE 2013**

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1. PURPOSE

The purpose of this memorandum is to inform the Acting NDPP of the outcome of the meeting/consultation with appointed counsel on 4 June 2013 in Sandton.

2. BACKGROUND

"A2"

2.1 The appointed counsel is Laurens Hodes SC from the Johannesburg Bar. He is ably assisted by Adv. Manaka, an African female from the same Bar council. The purpose of the meeting was to brief counsel fully on the application in the above case. Present was Adv. Chauke, who led the entire prosecution team, barring Adv. Mathenjwa, who was on leave. The team had prepared notes for counsel in reply to the points raised in the founding affidavit. In addition the prosecution memorandum, indictment and memorandum written by the applicant in support for the payment of rewards for himself and the rest of the accused for work done during the killings, was also made available to counsel. This last piece of evidence is in counsel's view very important to overcome the application.

3. DISCUSSION

3.1 The first point discussed in view of its urgency was the issue of the submission of the record of the decision of the ANDPP in authorising the racketeering prosecution. You will recall from the papers that the applicant wants us to lodge with the Registrar such record, including all documents, etc. After some debate in which junior counsel differed slightly from the SC, it was decided that there is no such record to be lodged and a letter is to be written immediately to the opposing party informing them of such That what was made available to the ANDPP is the information pertaining to the case, including the docket which is currently in the possession of the defence and that such information will be disclosed in affidavits. There was no record kept of such decision. This is particularly relevant and interesting approach. The relevant Rule 53 was consulted before we came to the conclusion. Adv. Chauke was adamant that the prosecution memo to the ANDPP is privileged communication between the prosecution and not open for disclosure. I agree with this view point.

3.2 The team gave counsel a briefing on the background of the case and it was decided that the entire docket will be made available to counsel asap.

"D3"

3.3 Hodes raised a very interesting point about the jurisdiction of the application, stating that all except one respondent is based in Gauteng and that the applicant is wrong to issue the application out of the Pietermaritzburg Court. The very real risk that our response is open to a real disadvantage if this is not challenged. The applicant may argue that the trial is in the High Court Pietermaritzburg, thereof we should consider moving the trial as well given the risks involved should it remain in KZN. Section 111 of the CPA is apposite. We will consider this more fully and advice on it. Suffice to say that the entire team that we will not have a realistic chance of success should things remain as they are. The issue of jurisdiction will similarly be raised in the letter to be send to the applicant attorneys and that the issue should be argued as a point before filing any affidavits.

RECOMMENDATIONS

3.4 It is recommended that The ANDPP consider the issue of the trial taking place in another jurisdiction such as Gauteng. The issue will be researched more fully and the ANDPP advised accordingly.

3.5 Further consultations with counsel are envisaged. The consultations were very fruitful.

I trust that you will find this in order.

Kind regards.

ADV A MOSING
HEAD: SPECIAL PROJECTS DIVISION
OFFICE OF THE NDPP.

(a) All documentation forwarded to the National Director of Public Prosecutions, to enable him to consider a prosecution in Section 2(4) of Act 121 of 1998, including and not being exclusive of, any motivation of summary,..or correspondence forwarded to him, and received from him.

(b) The State is furthermore hereby requested to supply to the defence a complete and full list of all information sent to the National Director of Public Prosecution, to enable him to exercise his judicial discretion as to whether to prosecute or not in terms of Act 121 of 1998.

2. That the accused/applicants be granted further or alternative relief.

[2] The Applicants stand indicted in the criminal trial on the following charges.

Count 1: Contravening Section 2(1) (e) read with Sections 1, 2(2) and 3 of the Prevention of Organised Crime Act 121 of 1998, as amended (whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprises affairs through a pattern of racketeering).

Counts 2-14: Contravening Section 5(b) read with sections 1, 13(f), 17(e), 19, 25 and 64 of the Drugs and Drug Trafficking Act No. 140 of 1992 – Dealing in Cocaine. (Accused as indicated in Schedule 1).

Alternative to Count 14: Contravening Section 4(b) read with sections 1, 13(f), 17(e), 19, 25 and 64 of the Drugs and drug Trafficking Act No. 140 of 1992 – Possession of Cocaine. (Accused as indicated in Schedule 1)

[3] The Indictment sets out the particulars of the offences in great detail and the roles played by the respective Applicants.

[4] After various postponements the matter was eventually set down for trial from 7th to 15 December 2011.

[5] At a pre-trial held in my chambers in May 2011 it was brought to my attention that an application may be instituted to compel the State to make available to the Applicants the Prosecutors Memorandum, which accompanied the application to the National Director of Public Prosecutions to institute a prosecution in terms of the Prevention of Organised Crime Act 121 of 1998(POCA). The Application to compel disclosure was eventually instituted but not sufficiently early to prevent the matter from being postponed once again.

[6] The Applicants now seek an order as aforesaid.

[7] The deponent to the Founding Affidavit, Arnold Nathaniel Naidoo states that he is currently accused no.4 in the criminal trial. He submits that since he and his co-applicants are charged, *inter alia*, with a contravention of s 2(1)(e)read with sections 1, 2(2) and 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and because the authorization of the National Director of Public Prosecutions is required before the institution of a prosecution in respect of such a contravention, he made a written request on 30 May 2011, to the State to disclose all the documentation forwarded to the National Director of Public Prosecutions, including any motivation summary or correspondence forwarded to him, or received from him.

[8] In addition a request was made for a full list of all the information sent to the National Director of Prosecutions. Put simply, what was required was the information supplied to the National Director of Public Prosecutions (NDPP) to enable him to carry out his functions as stipulated in Section 2(4) of POCA

[9] On 22 July 2011, the Director of Public Prosecutions (DPP) replied to his request, annexing only the authorisation in terms of Section 2(4) of POCA, but refused to supply any further information on the ground that it did not form part of the case docket and was not required for the accused to plead to the charges or prepare their respective defences.

[10] Much of the Applicants Founding Affidavit was devoted to expounding various constitutional rights and relevant case law. A glimpse into why they require the Prosecutor's Memorandum is contained in paragraph 36 of the said affidavit, wherein the deponent asserts his right to challenge the decision making process of the NDPP and that he will be unable to if denied the information requested.

[11] There is thus no indication that at this stage that there will in fact be any application to review that decision. Evidently the only reason that the Applicants seek the Prosecutor's Memorandum, is to enable them to audit the material placed before the NDPP in order to determine whether the authorization was correctly granted in order to exercise their right to a fair trial.

[12] Miss Bissessur who deposed to the affidavit on behalf of the State furnished the background and process that led to the eventual grant of the authorization as follows:

11.1 I was located a file, codenamed 'Project Delilah' on 19 November 2009, by my then supervisor, Deputy Director of Public Prosecution:KZN ("DDPP"), Adv. Sandesh Sankar ("Sankar"). The applicant's had not been arrested then.

11.2 Following consultations with the investigation team and discussions with colleagues, including Gangal and Sankar, a decision was taken to institute a prosecution. Although it was discussed, no firm decision was taken regarding whether the accused would be charged in respect pf contravening the provisions of POCA; The decision in that regard was postponed for further consideration once all the evidence had been filed in the case docket.

11.3 Subnsequently, on 8 February 2010, the accused were arrested and the process to bring the matter to trial commenced. At that stage a decision was taken to charge the accused in respect of contravening the provisions of section 2(1)(e) of POCA.

11.4 This necessitated the drafting of an application (referred to as the Prosecutors Memorandum) to the NDPP for an authorization to institute the prosecution of accused in respect of contraventions of section 2(1) of POCA>

11.5 Although the Prosecutors Memorandum is prepared by the Prosecutors who deal with the matter in court (*in casu*, by Gangal and I) it is the product of many minds.

11.6 In this case it is the product of many telephonic discussions consultations, e-mails, meeting and research by and between the aforementioned prosecutors and/or the investigators and/or Advocate Johan Kruger ("Kruger") and Elijah Mamabolo (both Senior State Advocates from the office of the NDPP) and/or Deputy Directors of Public Prosecutions (Sankar and Advocate Kalaivani Govender ("Govender").

11.7 In the interactions between the aforementioned every aspect of the case is dealt with in detail including:Strengths/Weaknesses in the case,

11.7.1 Strength/Weaknesses in the case;

11.7.2 Investigative Techniques used,

11.7.3 Candid discussions regarding informers. Consideration is given to whether it is necessary to lead the evidence of informers, thereby revealing their identities.

11.7.4 Trial strategies for the presentation of evidence are discussed.

11.7.5 Possible defenses to be raised by the accused are considered and discussed.

11.7.6 Details of discussions with co-accused in terms of section 204 and/or section 105A of Act 51 of 1977.

11.7.7 Outstanding Suspects.

11.8 Eventually, a Prosecutors Memorandum is prepared which contains information under the following topics:

11.8.1 Identification of the Accused – The Accused are identified similarly to the way they are identified in an Indictment, the exception being that their roles in the commission of the offence and their relationship to each other which are normally led during evidence in the trial is also included.

11.8.2 List of Proposed Charges - These are those charges that are to be brought against the Accused and is exactly the same as those contained in the Indictment.

11.8.3 Summary of Substantial Facts – Similar to the Summary included in the Indictment with the exception that evidence to be led may also be included. Sometimes names of informers, investigation techniques etc are also revealed.

11.8.4 Statement of Law – Under this heading those sections of POCA that are to be relied upon are set out as it is done in the Indictment. In addition thereto the facts of the case are then analysed to show how the provisions of POCA have application in this case. A thorough analysis of each element relating to the charges under POCA is made and the State's case against each accused is tabled to demonstrate why the POCA charges are being preferred against each accused.

11.8.5 List of Witnesses and Summary of the Evidence –The crux of each witness's (including accomplice witnesses, if applicable) evidence is tabled.

11.8.6 Anticipated defences – Under this heading possible defences that may be raised by an accused are considered. On each occasion the prosecutors demonstrate how based on the available evidence such defence will be overcome and in effect reveal their trial strategy.

11.8.7 POCA Policy – Under this heading a motivation for the POCA racketeering provisions is made showing the advantages of using these provisions rather than prosecuting the matter in the conventional manner.

11.8.8 Conclusions and Recommendations.

[13] On 15 November 2011 the accused were furnished with copies of the indictment. The accused were by then in possession of copies of statements of all witnesses in the case docket.

[14] On 27 July 2011, the authorisation and a further 500 pages of additional information requested by the Applicants were handed over.

[15] Simply put, the Applicants were furnished with.

1. All the witness statements contained in the docket.
2. The Indictment (including a summary of facts and a list of witnesses).
3. The NDPP's Authorisation.
4. Approximately 500 pages of additional information as requested.

[16] Confirmatory affidavits were filed by K Govender, Gangal and Simphiwe Cyril Mlothshwa (Mlotshwa).

[17] The Deputy Director of Public Prosecutions (K Govender), in her affidavit, confirmed that before submitting the Prosecutions Memorandum to the Provincial DPP (in this case, Mlotshwa), she satisfied herself that the application was properly motivated and that the information contained therein was consistent with the content of the case docket. No basis is laid to impugn the veracity of this assertion.

[18] According to Mlotshwa he was the Acting Director of Public Prosecutions, KZN, when the decision to institute the prosecution in terms of POCA was taken. On 6 September 2010 he received the Indictment, a Prosecutor's Memorandum, attached to which was a summary of substantial facts and list of witnesses and a draft authorization prepared in terms of Section 2(4) of POCA in this matter.

[19] Upon perusing the aforementioned documentation he called for a meeting with Advocate Y Gangai and raised certain issues with the latter. After the discussions he was satisfied that the case was one in which the provisions of POCA, ought to be utilized.

[20] On 14 September 2010, he forwarded the indictment together with its attachments, the Prosecutors Memorandum and the draft authorization to the office of the NDPP. On October 2010 the authorization was returned after it had been duly signed.

[21] In reply, the Applicants assert that the contents of the Prosecutor's Memorandum may be manipulated or even exaggerated to convince the National Director of Public Prosecutions to prosecute for organized crime. It is submitted that the only way to ensure that this cannot happen or has not happened is to give a challenger access to this document and all other incidental documents that have been requested.

[22] It is apparent from Bissessur's affidavit that the Prosecutor's Memorandum, contains *inter alia*, investigative techniques trial strategy and the States potential arguments on technical issues, anticipated defenses of the accused and the States strategy to counter those defences. In addition the document contains details of discussions with co-accused in terms of section 204 and/or section 105A of Act 51 Of 1977. It is clear that the state's concern is that compelling disclosure of the Prosecutor's Memorandum may compromise the effective prosecution of the case and the safety of co-accused who might wish to give evidence for the state.

[23] What emerges from Bissessur's affidavit is that what appears to have been included in that Memorandum is information, bar strategy, that has already been furnished to the Applicants. It will serve no purpose to supply the same information again.

[24] The question which thus follows is- are the Applicant's entitled to the Prosecutor's Memorandum, over and above all the

aforementioned information already furnished, in order to exercise their right to a fair trial?

[25] Section 2(4) of POCA reads as follows:

> *"(4) A person shall only be charged with committing an offence contemplated in ss(1) if a prosecution is authorized in writing by the National Director".*

[26] It follows therefore that no prosecution of offences, as contemplated in Section 2(1) of POCA, can be instituted without such written authorization.

[27] It is so that section 32 of the Constitution provides that:

> *"(1) Everyone has the right to access to-*
>
> *(a) any information held by the state; and*
> *(b) .....*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state."*

[28] The promotion of Administrative Justice Act No 3 of 2000 (PAJA) was enacted in 2000 to give effect to the abovementioned rights.

"30. Section 1(i) states:

> (1) "administration action" means any decision take, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision.

[29] Which adversely affects the rights of any person and which has a direct, external legal effect, but does not include

....

(ff) a decision to institute or continue a prosecution

....

[30] It follows that a decision to institute or continue a prosecution are specifically excluded from the definition of administrative action under PAJA.

[31] Notwithstanding the above the Applicants submit that the decision to prosecute still amounts to an exercise of public power and is consequently subject to the rule of law generally and the principle of legality specifically.

[32] In this regard, I was referred to the decision in *S v Chao and Others*[1] where the following was said:

> *"[27] All decisions to prosecute are arguably administrative actions in the traditional sense. However, s 1(i)(b)(ff) of PAJA explicitly excludes a 'decision to institute or continue to prosecute' from the regulatory scope of PAJA, and can therefore not be reviewed in terms of the Act. This fact was emphasized by Harms DP in national Director of Public Prosecutions v Zuma.*
>
> *[28] Regardless of this exclusion, the authorization and/or decision to prosecute or continue to prosecute still amounts to the exercise of public power and is consequently subject to the rule of law generally and the principle of legality specifically. An administrator exercising a public power bestowed on him or her, which the NDPP in this instance did, must therefore apply*

[1] 2009 (1) SACR 479 (C) at 28

SEQ 34/2020-824

his or her mind to the decisions taken in terms of that authority and do so rationally."

[33] This court is not faced with a substantive application for a review of the NDPP's decision. It is therefore unnecessary, in my view, to examine or determine whether the grant of an authority to institute a prosecution by the NDPP, in terms of POCA, is excluded from the regulatory scope of PAJA. All this court is called upon to determine is whether the Applicants require the Prosecutor's Memorandum, in addition to all the other documents furnished, to exercise their rights to a fair trial.

[34] The right to a fair trial was aptly enunciated in *National Director of Public Prosecutions v David Cunningham King* [2] *as follows:*

"[4]....The right to a fair trial is, by virtue of the introductory words to a s 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past.[3] *This does not mean that all existing principles of law have to be jettisoned nor does it mean that one can attach to the concept of a 'fair trial' any meaning whatever one wishes it to mean.*[4]

---

[2] 2010 ZASCA 8 (1st March 2010) Para 4 - 5
[3] Zuma para 16
[4] Zuma para 17

[5] There is no such thing as perfect justice – a system where an accused person should be shown every scintilla of information that might be useful to his defence – and discovery in criminal cases must always be a compromise.[5] Fairness is not one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state.[6] This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose pf the fair trial provision is not to make it impracticable to conduct a prosecution.[7] The fair trial does not mean a predilection for technical nicetles and ingenious legal stratagems,[8] or to encourage preliminary litigation [9]- a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that person facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and

[5] R v O'Connor [1955] 4 SCR 411 para 193 - 195
[6] Shaik loc cit
[7] Montgomery v HM Advocate General and another [2003] 1 AC 641 (PC) 673 per Lord Hope of Craighead quoting Pullar v United Kingdom 22 EHRR 391
[8] Key v Attorney general, Cape Provincial Division & another 1996 (4) SA 187 (CC) para 13
[9] Zuma v National Director of Public Prosecutions & Others 2009 (1) SA 1 (CC) paras 65-66

SEQ 34/2020-826

delay.' [10] *One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."*

[35] Bissessur makes the point that if the State were required to redact those sections containing information that it needed to protect from the Prosecutor's Memorandum, such an action would result in the information contained in the document to be substantially the same as is in the Indictment, the Summary of substantial facts and the List of witnesses already provided to the Applicants.

[36] It is clear therefore that the Applicants have the above-mentioned information in their possession and can therefore easily assess whether a prosecution in terms of POCA is justified. If the information supplied does not support such a prosecution then they have a right to institute an application for a review of the NDPP's decision to grant the authorization, at which time the NDPP will be obliged to furnish reasons for his decision. I obtained the distinct impression that the request was not founded on any genuine concern on the part of the Applicants that they will not receive a fair trial. Having perused the detailed Indictment and the summary of substantial facts, I make the observation, that it would not have been difficult for the NDPP to make the decision to grant the authorization in question, aided as he was by a summary of the case docket. Considering the content of the Prosecutor's Memorandum as aforesaid and its possible negative impact on the proper prosecution

[10] Regina v H & others [2004] UKHL 3 para 22 per Lord Bingham of Cornhill

of this case if disclosed, my view is that the State was entitled to refuse to furnish it in its entirety.

[37] The application is accordingly dismissed.

K PILLAY J

Director of Public Prosecutions
South Gauteng

NATIONAL PROSECUTING AUTHORITY
South Africa

DPP South Gauteng
Regional Office

Tel: +27 11 220 4122
Fax: +27 11 220 4232

Inner Court Building
74 Kerk Street
Cnr Pritchard &
Von Brandis
Johannesburg
2000

Private Bag X8
Johannesburg
2000

www.npa.gov.za

Reference: JPK2012/0112
Enquiries: G S Maema

Date: 26 September 2012

Mr G Angus
Independent Police Investigative Directorate
KZN Cato Manor Project
DURBAN

AND

General Mabula
Directorate for Priority Crimes Investigation
KZN Investigation Project
North West

REQUEST FOR SECURING A CONSULTATION WITH A WITNESS: COLONEL AIYER 1- 4 OCTOBER 2012 AND SKHUMBUZO NDHLOVU 5 OCTOBER 2012.

The prosecution team had a consultation with Colonel Aiyer on Thursday to Friday 6-7 September 2012 in the DPP office, Johannesburg. The witness still has a lot to consult about, he had dealt with the background of the Cato Manor Unit, how it was composed, how they operated etc. When we ran out of time on Friday 7 September 2012, he had just started dealing with what he knew about the various scenes at which the Cato Manor office was involved in.

We are of the view that we will require consultation with Colonel Aiyer for the dates 1-4 October 2010 to conclude his consultation. The plan is that we also consult Skhumbuzo Ndlovu, the gentleman from the civilian secretariat in the Minister's office, who was introduced to us by Colonel Aiyer on Friday 5 October 2012. It appeared from what Skhumbuzo Ndhlovu was telling us that he has a lot of background information or possible clues to unlock some crucial information that we will require going ahead with the case.

Kindly make the necessary arrangements so that the witness, Colonel Aiyer is transported to and accommodated in Johannesburg for consultation purposes on 1 – 4 October 2012 and Skhumbuzo Ndhlovu on 5 October 2012. It will also be crucial that the investigating officers are also in so far as it is possible available at the consultation session.

Kind Regards,

MA CHAUKE
DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG HIGH COURT: JOHANNESBURG

"KI"

Anthony Mosing (A)

From: Andrew KMA. Chauke
Sent: 19 August 2013 08:20 PM
To: Nomgcobo Jiba; Anthony Mosing (A); Sello MAEMA (GS); Raymond R. Mathenjwa; klekabe@justcie.gov.za; NeGovender@justcie.gov.za
Cc: Bulelwa Makeke
Subject: RE: Hawks boss hits back at Jiba

Counsel is busy with State Attorney, last Thursday we submitted our inputs to state attorney and some affidavits for counsel to consider.

Regards,

MA Chauke
Director of Public Prosecutions, South Gauteng
NNESBURG
: 011 220 4122
Fax: 011 220 4232

From: Nomgcobo Jiba
Sent: 19 August 2013 11:06 AM
To: Anthony Mosing (A); Andrew KMA. Chauke; Sello MAEMA (GS); Raymond R. Mathenjwa; klekabe@justcie.gov.za; NeGovender@justcie.gov.za
Cc: Bulelwa Makeke
Subject: RE: Hawks boss hits back at Jiba

Colleagues

This in unacceptable. Is the replying affidavit filed. Why is it that there is throwing from Andrew to Mosing and vice versa.

---

n: Anthony Mosing (A)
ent: Monday, August 05, 2013 4:59 PM
o: Andrew KMA. Chauke; Sello MAEMA (GS); Raymond R. Mathenjwa; klekabe@justcie.gov.za; eGovender@justcie.gov.za
c: Bulelwa Makeke; Nomgcobo Jiba
ubject: FW: Hawks boss hits back at Jiba

ear colleagues fyi. What is the current status. As I recall we had filed but that a supplementary affidavit was to be ubmitted. The applicant then has to reply if he choose to. Your assistance is appreciated. Regards.

MOSING
EAD: SPECIAL PROJECTS DIVISION
FFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
ATIONAL PROSECUTING AUTHORITY
EPUBLIC OF SOUTH AFRICA

EL: +27 128456366

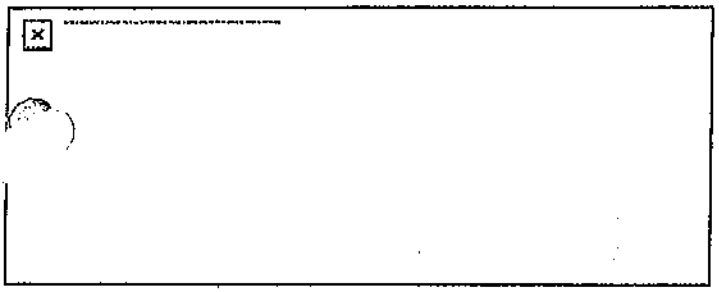
MOBILE: +27 847388076

From: Bulelwa Makeke
Sent: 05 August 2013 04:38 PM
To: Nomgcobo Jiba
Cc: Anthony Mosing (A)
Subject: Hawks boss hits back at Jiba

Dear ANDPP

FYI, in case you missed it.

Regards
Bulelwa



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"AH"

Anthony Mosing (A)

From: Andrew KMA. Chauke
Sent: 12 June 2013 12:33 PM
To: Sello MAEMA (GS); Raymond R. Mathenjwa; Jabulani J. Mlotshwa; Mahlubi Ntlakaza (MT); Pumeza Futshane; Patience PM. Moleko; Anthony Mosing (A)
Cc: Govender Nelson
Subject: FW: New Fax Received

Dear Colleagues,

I am informed by Mr Govender, the state attorney that one of you has asked from adv Laurence Hodes's pa or something to that effect about the letter from Carl van der Merwe that I have sent to you on 6/6/2013 already. I am waiting for Govender to confirm with me who is the person who asked for the copy of the letter from counsel and on what basis. Written communication between attorneys of Booysen and us in respect of this application must be done through the state attorney by me or Maema or one of you as mandated by Maema.

I am awaiting a response from Govender and from any of you who would have asked counsel for the copy of the attached letter which was copied to you on 6/6/2013 as indicated by the email below.

Regards,

MA Chauke
Director of Public Prosecutions, South Gauteng
JOHANNESBURG
Tel: 011 220 4122
Fax: 011 220 4232

From: Andrew KMA. Chauke
Sent: 06 June 2013 04:23 PM
To: Raymond R. Mathenjwa; Sello MAEMA (GS); Jabulani J. Mlotshwa; Mahlubi Ntlakaza (MT); Pumeza Futshane; Patience PM. Moleko
Anthony Mosing (A)
Subject: FW: New Fax Received

fyi

Director of Public Prosecutions, South Gauteng
JOHANNESBURG
Tel: 011 220 4122
Fax: 011 220 4232

From: Govender Nelson [mailto:NeGovender@justice.gov.za]
Sent: 06 June 2013 03:13 PM
To: Adv N Manaka (adv_nmanaka@law.co.za); hellenssec@law.co.za
Cc: Andrew KMA. Chauke
Subject: FW: New Fax Received

From: IVT [mailto:fax@ivt.co.za]
Sent: 06 June 2013 11:11 AM
To: Govender Nelson
Subject: New Fax Received

Fax Details

For Attention	Govender Nelson
Email Address	NeGovender@justice.gov.za
Service Provider	Doj
Fax Number	0865077137
Pages Sent	5
From Fax Number	0313068428
Time Received	2013-06-06 11:11:08

Regards,

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(118.3KB)

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J 1

Anthony Mosing (A)

From: Andrew KMA. Chauke
Sent: 06 August 2013 06:59 AM
To: Anthony Mosing (A); Sello MAEMA (GS); Raymond R. Mathenjwa; klekabe@justcie.gov.za; NeGovender@justcie.gov.za
Cc: Bulelwa Makeke; Nomgcobo Jiba
Subject: RE: Hawks boss hits back at Jiba

Noted. We are awaiting feedback from advocate Mosing and the state attorney regarding the filing etc..

Regards,

MA Chauke
Director of Public Prosecutions, South Gauteng
JOHANNESBURG
Tel: 011 220 4122
Fax: 011 220 4232

From: Anthony Mosing (A)
Sent: 05 August 2013 04:59 PM
To: Andrew KMA. Chauke; Sello MAEMA (GS); Raymond R. Mathenjwa; klekabe@justcie.gov.za; NeGovender@justcie.gov.za
Cc: Bulelwa Makeke; Nomgcobo Jiba
Subject: FW: Hawks boss hits back at Jiba

Dear colleagues fyi. What is the current status. As I recall we had filed but that a supplementary affidavit was to be submitted. The applicant then has to reply if he choose to. Your assistance is appreciated. Regards.

A MOSING
HEAD: SPECIAL PROJECTS DIVISION
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTING AUTHORITY
REPUBLIC OF SOUTH AFRICA

TEL: +27 128456366
MOBILE: +27 847388076

From: Bulelwa Makeke
Sent: 05 August 2013 04:38 PM
To: Nomgcobo Jiba
Cc: Anthony Mosing (A)
Subject: Hawks boss hits back at Jiba

Dear ANDPP

FYI, in case you missed it.

Regards
Bulelwa

"JT2"

Ms Bulelwa Makeke
The National Prosecuting Authority
Executive Manager: Communications
Tel: 012 845 6145
Cell: 084 702 5617
Email: bmakeke@npa.gov.za
Twitter: @BulelwaMak
Website: www.npa.gov.za

Anthony Mosing (A)

From: Andrew KMA. Chauke
Sent: 26 March 2014 01:13 PM
To: Estelle; NeGovender@justice.gov.za; Moipone Noko
Cc: 'Laurance Hodes'; Adv_nmanaka@law.co.za; Mxolisi M. Nxasana; Anthony Mosing (A); Sello MAEMA (GS); Raymond R. Mathenjwa; Silas Ramaite; Jabulani J. Mlotshwa; Mahlubi Ntlakaza (MT); Patience PM. Moleko; Pumeza Futshane; Nathi V.N. Mncube
Subject: RE: Appli for leave to appeal - Booysen v the Acting National Director of Public 17 3 2014

Good day State Attorney Govender,

On Tuesday, 25 March 2014 the NDPP has decided not to appeal the judgment in the Booysen's matter. Accordingly the notice of application for leave to appeal must be withdrawn.

)ds,

MA Chauke
Director of Public Prosecutions, South Gauteng
JOHANNESBURG
Tel: 011 220 4122
Fax: 011 220 4232

From: Estelle [mailto:jhblaw@law.co.za]
Sent: 17 March 2014 04:27 PM
To: NeGovender@justice.gov.za
Cc: 'Laurance Hodes'; Adv_nmanaka@law.co.za; Andrew KMA. Chauke
Subject: Appli for leave to appeal - Booysen v the Acting National Director of Public 17 3 2014

Dear All

)sed please find final Leave to Appeal to be served and filed on 18 March 2014.

Regards

Laurance Hodes SC

"N"

Anthony Mosing (A)

From: Nomgcobo Jiba
Sent: 01 April 2014 01:13 PM
To: Anthony Mosing (A)
Subject: RE: Booysen

Dear Anthony

No. Anthony you got it wrong. I was not asking you to discuss that. My request was simply to make me understand the whole issue about the evidence that we had when the authorization was issued. As a person who was assisting me in my capacity as such, I thought you will be in a position to do so. I cannot ask you to advise on the reasons for the withdrawal. It is logical that if we do not appeal, then charges must be withdrawn.

Regards

From: Anthony Mosing (A)
Sent: Tuesday, April 01, 2014 11:49 AM
To: Nomgcobo Jiba
Subject: Booysen

Dear Adv Jiba, with regard to your enquiry on the withdrawal of the notice to appeal the Judgment of Gorven J, please take not that it was the NDPP, Mr Nxasana's decision that the notice be withdrawn. Consequently all enquiries are to be directed to the NDPP directly. I am not at liberty to discuss the matter without his express direction. I trust that you will find this in order. Kind regards.

A MOSING
HEAD: SPECIAL PROJECTS DIVISION
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTING AUTHORITY
REPUBLIC OF SOUTH AFRICA

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CELL: +27 847388076

"L1"

Anthony Mosing (A)

From: Sello MAEMA (GS)
Sent: 11 March 2014 02:04 PM
To: Anthony Mosing (A)
Cc: Raymond R. Mathenjwa
Subject: FW: CATO MANOR

Hi Anthony

Copy for your information. Ray, can we prepare a copy of the annexures for Adv Mosing please, he will require in particular a copy of the file that we prepared for counsel which has statements of Comm Brown Ndlondlo etc, for our Friday meeting.

G S Maema
Deputy Director
nised Crime
th West Division
018 381 9003
084 294 7934

-----Original Message-----
From: Molpone Noko
Sent: 10 March 2014 12:06 PM
To: Andrew KMA. Chauke
Cc: Sello MAEMA (GS); Pamela Rhoda PR. Saltmarsh
Subject: FW: CATO MANOR

Dear Adv. Chauke

Thank you for the update regarding the Cato Manor matter.
Pam, kindly save the attached memorandum.

ds,

Adv. Molpone Noko
Director of Public Prosecutions
National Prosecuting Authority
KwaZulu-Natal
Tel: (033) 845 4405

---Original Message-----
rom: Andrew KMA. Chauke
ent: 07 March 2014 12:01 PM
o: Molpone Noko
c: Sello MAEMA (GS); Raymond R. Mathenjwa; Silas Ramaite; Nomgcobo Jiba
ubject: FW: CATO MANOR

ood day Colleague,

"L2"

Herewith a copy of the memo that is going to be presented to the NDPP and Head of NPS for your information and attention. You will note that I have not attached the annexure because you have copies of all of them. I am intending to see the head of NPS as well as the NDPP sometime next week to present this memo with annexure.

In case a full briefing is required I will as always keep you posted on the developments as they occur.

Regards,

MA Chauke
Director of Public Prosecutions, South Gauteng JOHANNESBURG
Tel: 011 220 4122
Fax: 011 220 4232

<<

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(61.7KB)

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"P1"

Jan Ferreira (JM)

Subject: FW: Soos versoek 1 van 2

From: Nomgcobo Jiba
Sent: 03 April 2014 03:00 PM
To: Jackie Lepinka
Subject: FW: Booysen

Jacky

This email communication is quite interesting.

From: Nomgcobo Jiba
Sent: Tuesday, April 01, 2014 1:13 PM
To: Anthony Mosing (A)
Subject: RE: Booysen

Dear Anthony

No. Anthony you got it wrong. I was not asking you to discuss that. My request was simply to make me understand the whole issue about the evidence that we had when the authorization was issued. As a person who was assisting me in my capacity as such, I thought you will be in a position to do so. I cannot ask you to advise on the reasons for the withdrawal. It is logical that if we do not appeal, then charges must be withdrawn.

Regards

From: Anthony Mosing (A)
Sent: Tuesday, April 01, 2014 11:49 AM
To: Nomgcobo Jiba
Subject: Booysen

Dear Adv Jiba, with regard to your enquiry on the withdrawal of the notice to appeal the Judgment of Gorven J, please take not that it was the NDPP, Mr Nxasana's decision that the notice be withdrawn. Consequently all enquiries are to be directed to the NDPP directly. I am not at liberty to discuss the matter without his express direction. I trust that you will find this in order. Kind regards.

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REPUBLIC OF SOUTH AFRICA

TEL: +27 128456366
MOBILE: +27 847388076

P2

Jan Ferreira (JM)

Subject: FW: 2 van 2

From: Nomgcobo Jiba
Sent: 03 April 2014 02:59 PM
To: Jackie Lepinka
Subject: FW: Booysen

Nice communication from Anthony, don't you think.

From: Anthony Mosing (A)
Sent: Tuesday, April 01, 2014 11:49 AM
To: Nomgcobo Jiba
Subject: Booysen

Dear Adv Jiba, with regard to your enquiry on the withdrawal of the notice to appeal the Judgment of Gorven J, please take not that it was the NDPP, Mr Nxasana's decision that the notice be withdrawn. Consequently all enquiries are to be directed to the NDPP directly. I am not at liberty to discuss the matter without his express direction. I trust that you will find this in order. Kind regards.

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TEL: +27 128456366
MOBILE: +27 847388076

E 1

Anthony Mosing (A)

From: Sello MAEMA (GS)
Sent: 15 August 2012 03:13 PM
To: Anthony Mosing (A)
Subject: RE: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

HI Anthony

I just spoke to the DPP's secretary, she is still busy with the documents. Perhaps the DPP send you the one he gave me this morning. Prudence is sorting out the font, spacing and lines. She says she needs time until tomorrow.

GS Maema

From: Anthony Mosing (A)
Sent: 15 August 2012 03:07 PM
To: Sello MAEMA (GS)
Subject: RE: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

I just received the documents send by the DPP for authorisation and they are obviously not the up to date docs. We must just make sure that the DPP is happy with the latest docs as part of his request to the ANDPP and I thought you were referring to additional managers. Regards.
A

From: Sello MAEMA (GS)
Sent: 15 August 2012 02:37 PM
To: Anthony Mosing (A)
Subject: RE: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

Hi Anthony

The other two, Lockem (accused 15)and van Tonder (accused 16) were added, were added by you in the management of the enterprise after we read Alyer's statement, you would remember that he refers to them as group or section commanders. I am of course agreeable as it makes proper sense. Look at the formulation of the enterprise where you added SAPS abbreviation in brackets after South African Police Service, three line from the bottom in that paragraph.

I will send to you the corrected versions of all the documents. The DPP secretary is still looking at the spacing, aligning etc.

I appreciate your help and will always communicate.

GS Maema

From: Anthony Mosing (A)
Sent: 15 August 2012 12:36 PM
To: Sello MAEMA (GS)
Subject: RE: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

"C2"

Hi Gladstone, can you forward me the amended copies. I also need to see the basis of including the other two as managers. I think we are getting there ito getting an authorisation. Please ensure you have dealt with all my queries throughout the indictment. Most of it was just to assist with the language and phrasing aspects. Regards.

A MOSING
HEAD: SPECIAL PROJECTS DIVISION
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From: Sello MAEMA (GS)
Sent: 15 August 2012 12:02 PM
To: Anthony Mosing (A); Raymond R. Mathenjwa
Cc: Mahlubi NTLAKAZA (MT); Jabulani J. Mlotshwa; Patience PM. Moleko; Pumeza Futshane
Subject: RE: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

Dear Colleagues

Anthony I had a look at the proposed changes; it is more to complete the participants in the Enterprise to include the Port Shepstone Organised Crime accused. I have worked it into the indictment at the whereases, at the summary of substantial facts and into the prosecution memo. You asked whether we are not repeating the same paragraph at the summary of the case in the prosecution memorandum, I think it completes the introduction well and is not necessarily repetition although it has been mentioned at the introductory part.

We have also added Lockem and van Tonder as managers of the enterprise. I will make contact with you today or tomorrow to bring the hard copies. I have also done the prosecution memo on the KZN letterhead, although our DPP will sign as arranged with the Acting DPP, KZN.

Thank you for your valuable contribution. We await your facilitation for approval of the racketeering certificates. Remember we require them next week. We apologise for putting you under pressure.

Regards

GS Maema

From: Mahlubi NTLAKAZA (MT)
Sent: 15 August 2012 08:34 AM
To: Raymond R. Mathenjwa; Jabulani J. Mlotshwa; Patience PM. Moleko; Pumeza Futshane; Lizzie M. Maphutha
Cc: Sello MAEMA (GS)
Subject: FW: Final Cato Manor Indictment as modified by Adv KR Mathenjwa
Importance: High

These are minor changes on the enterprise only. I think from this we can get our certificates. I am not sure whether Adv Maema has printed the hard copies. I'll be at the Constitutional Court today.

From: Anthony Mosing (A)
Sent: 14 August 2012 04:21 PM

"E3"

To: Mahlubi NTLAKAZA (MT); Sello MAEMA (GS)
Subject: Final Cato Manor Indictment as modified by Adv KR Mathenjwa

COLLEAGUES HEREWITH MORE CORRECTIONS TO THE SUMMARY OF FACTS AND THE MEMRANDUM REGARDS.

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"G"

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INTERNAL MEMORANDUM

TO: LAURANCE HODES SC

MAISELES CHAMBERS, SANDTON

FROM: THE CATO MANOR PROSECUTION TEAM

DIRECTOR OF PUBLIC PROSECUTIONS

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DATE: 15 AUGUST 2013

REF NUMBER: JPK 2012/0112

BOOYSEN versus ANDPP

(RE: REPLYING AFFIDAVIT OF BOOYSEN)

AD PARAGRAPHS 1-4

Noted

AD PARAGRAPH 5-8

Noted, the First Respondent still maintains the averments in the answering affidavit

AD PARAGRAPHS 9 -11

Noted

AD PARAGRAPH 12

The evidence under oath is the evidence in the dockets.

AD PARAGRAPH 13

Correct, save with the statement of DANIKAS which is unsigned statement.

AD PARAGRAPH 14

We refer to the Brenton Frank and others versus NDPP unreported decision of KZN HIGH COURT, under case NO.: CC 58/11 delivered by the Honorable K Pillay J, wherein it was held that " ... considering the content of the Prosecutor's Memorandum as aforesaid and its possible negative impact on the proper prosecution of this case if disclosed, my view is that the State was entitled to refuse to furnish it in its entirety" see ANNEXURE A

Therefore it is correct to state that the NDPP did not intend to detail all of the information that was placed before her.

AD PARAGRAPH 15-18

Noted, For the purposes of the prosecution, the disclosures have been done in the ordinary course.

THE STATEMENT OF AIYER

AD PARAGRAPH 19-21

"NJ2" is a statement of AIYER taken on the 03 of August 2012 stating the applicant's managerial responsibilities, participation and interferences in activities of a section of Durban Organized Crime based in CATO MANOR. This section under the management and supervision of the Applicant committed horrendous pattern of criminal acts.

This statement was obtained before the 17th of August 2012, being the date on which the certificate was authorized.

"NJ4" is a statement of AIYER taken on 31 August 2012 following a consultation with the prosecution team. Whatever is contained in this statement was already information related to the prosecution team by the deponent during the consultation with the prosecution team.

Therefore the Applicant's averments are unfortunate, unfounded and misleading.

THE STATEMENT OF DANIKAS

AD PARAGRAPH 22-25

These paragraphs refer to "NJ3" which is DANIKAS's draft statement. The Applicant's averments in these paragraphs are deliberately misleading or misleading due to lack of information. DANIKAS was reservist in Durban Organised Crime Unit based in CATO MANOR, he was recruited into the reservist component of SAPS by the Applicant, he was the CONFIDANT of the Applicant and a family associate of the Applicant. The draft statement deals with the activities of the Applicant as a Director of KwaZulu-Natal Organised Crime Unit actively involved in operational activities of CATO MANOR based section of the Organised Crime.

The draft statement details the method of operation by the CATO MANOR section with the Applicant involved in killing suspects and the Applicant condoning and or covering the same.

The draft statement was in possession of the prosecution team in June 2012 and thus formed part of information considered in authorizing the prosecution of the Applicant as a manager and a participant.

The averments by the Applicant that on 09 May 2013, the Second Respondent was in the process of getting a statement from DANIKAS through MLA process was only meant to formalize the draft statement through International Treaties, so that International Avenues of testifying and securing a witness should be followed on a common understanding of two countries involved.

The draft statement does not relate to a specific incident covered in the indictment, but is intended to corroborate the evidence in possession of the State that the Applicant was involved in CATO MANOR activities and that the Applicant encouraged, and was like-minded in the CATO MANOR component in killing suspects.

THE STATEMENT OF NDLONDLO

AD PARAGRAPH 26

"NJ6" which is NDLONDLO's statement gave a breakthrough in the killing of members of KWA-MAPHUMULO TAXI ASSOCIATION by CATO MANOR UNIT under the management of the Applicant in that CATO MANOR section was used by STANGER TAXI ASSOCIATION to kill its rivals being KWA-MAPHUMULO TAXI ASSOCIATION. Further CATO MANOR SECTION received gratification for this discourse.

The statement is hearsay as to the direct link of the Applicant, but that the First Respondent had information which corroborated this hearsay against the Applicant, and that information has subsequently been converted into evidential material directly linking the Applicant.

Hearsay evidence is admissible in law and it is the RESPONSIBILTY of the trial court to determine the admissibility of any hearsay material.

AD PARAGRAPHS 27-30

Ad Paragraph 27.1

The averment by the Applicant is misleading. The First Respondent was in possession of AIYER's statement on 04 AUGUST 2012, NDLONDLO's statement of 31ST JULY 2012, DANIKAS's draft statement in JUNE 2012 and that was before the authorization to prosecute the Applicant which was taken on 17th August 2012.

Ad Paragraph 27.2

The averments by the Applicant is misleading due to lack of information that the date (11 April 2013) referred to relate to a further statement by AIYER after consultation based on previous statement submitted by AIYER.

THE LETTER DATED 25 SEPTEMBER 2012

Ad Paragraph 28

The decision by the First Respondent was not based on subsequent consultations with AIYER, but the purpose of the consultation was to unravel inter-provincial and inter-city operational protocol in the RSA Organised Crime Unit which subsequently became DPCI.

The First and the Second Respondent are not responsible for BLACKENED OUT of the letter (marked AA), but are in possession of an original letter which is NOT BLACKED. The BLACKNED PART OF THE letter refer to SIKHUMBUZO NDLOVU a-was-to-be a prospective witness, which was subsequently found to be irrelevant to the matter at hand.

The letter was not addressed to the Applicant, the First and the Second Respondent wonder how the Applicant scavenged the said letter. The original letter is **ANNEXURE B.**

Ad Paragraph 29

The First and the Second Respondent were in possession of the statements of the witnesses herein referred to, before the 17th of August 2012.

"NJ4" is a further statement of AIYER obtained after "NJ2" which was obtained on the 04 of August 2013.

Paragraph 30

Ad Paragraph 30.1

The dockets placed before the First Respondent on or before the 17TH of August 2012 relate to 29 deceased persons killed by the CATO MANOR UNIT under the pretext of solving crime in KwaZulu-Natal. The dockets relate to deceased in the TAXI INDUSTRY and alleged suspects in Criminal Activities without substance, which the Applicant was fully aware of and in certain incidents, participated and got rewarded.

Ad Paragraph 30.2

The Applicant seems to concentrate only on the statements of NDLONDLO, AIYER and DANIKAS as the only information that was considered in taking the decision to prosecute him. The First and the Second respondent had further material in their possession to consider before 17 August 2012, which is:

i) The Monetary Award for the CATO MANOR UNIT including the Applicant, motivation of which was drafted by the Applicant; and

ii) Court Papers relating to the Interdict (Case number 13759/2008) against the KZN MEC for Safety and Security and Others, filed by BONGANI ELPHUS MKHIZE who is the deceased in count 20 on the INDICTMENT, where the deceased was seeking Court recourse to prevent the Police from killing him which they subsequently did in breach of the COURT ORDER. The Applicant filed an answering affidavit on behalf of the SAPS marked "NJ6". In this replying affidavit, the Applicant demonstrated his intimate knowledge and participation in the investigation and subsequent killing of members of KWA-MAPHUMULO TAXI ASSICIATION the rival of STANGER TAXI ASSOCIATION.

AD PARAGRAPHS 31-36

The Applicant bases these averments on misleading allegation that we did not have information, viz. "NJ2", "NJ3", "NJ4" and "NJ6" which we have demonstrated by dates and months that we had these sworn affidavits and information before the 17th of August 2012. And further that we had the Monetary Award documentation as well as the Applicant's answering affidavit in an application for an interdict by one of our deceased.

The Applicant further bases these averments that the information has no evidential weight, which we respectfully differ with and is a matter for the trial court to determine.

Ad Paragraph 35.4

NDLONDLO (NJ5) was a member of STANGER TAXI ASSOCIATION together with SANELE ZONDI and BANGIZWE MHLONGO. "NJ5" clarifies the connivance of STANGER TAXI ASSOCIATION with CATO MANOR UNIT to kill their rival (KWA-MAPHUMULO TAXI ASSOCIATION MEMBERS), using CATO MANOR UNIT under disguise of Police Operations and their official title.

On 09 May 2013, the Second Respondent discovered "NJ5" to the Applicant and a few days later SANELE ZONDI and BANGIZWE MHLONGO responded via their Attorney SD MOLOI marked "CC" refuting NDLONDLO's statement. Logically, the Applicant presented SANELE ZONDI and BANGIZWE MHLONGO with NDLONDLO's statement which is an obstructive and counter investigation act by the Applicant. Further, it shows the Applicant's accessibility to SANELE ZONDI and BANGIZWE MHLONGO.

The First and Second Respondent considered "NJ5" and available information corroborating "NJ5" which has been subsequently converted into evidential material, clearly stating the horrendous relationship between STANGER TAXI ASSOCIATION and CATO MANOR UNIT managed by the Applicant and the Applicant's participation in those activities.

Now therefore, we argue that the First and the Second Respondent complied with the provisions of the PROSECUTION POLICY MANUAL.

AD PARAGRAPHS 37-47

Counsel's submission

AD PARAGRAPH 46

It is a matter to be argued in the trial court.

AD PARAGRAPH 47

The Applicant held the ranks of Senior Superintendent SVC KZN, Provincial Director Organised Crime KZN and subsequently Major General DPCI KZN province. The offences as detailed in the indictment were committed by CATO MANOR UNIT in the applicant tenure as DIRECTOR ORGANISED CRIME KZN and subsequently MAJOR GENERAL ORGANISED CRIME KZN.

Ad Paragraph 47.2

The Applicant was the line manager of Organised Crime KZN whereas Major General Masemola was overall HEAD OF DETECTIVES KZN. The members of CATO MANOR fell under direct command of the Applicant, and the Applicant was a subordinate to Major General Masemola before he become a MAJOR GENERAL DPCI.

Ad Paragraph 47.3-47.4

The alleged suspects who are deceased in the indictment did not die in the course of an attempt to arrest them, but died on a direct cause by CATO MANOR UNIT under management, leadership and command of the Applicant. There was no reason and/or justification to kill the alleged suspects hence the prosecution.

AD PARAGRAPH 48

Evidence will be placed before the trial court.

AD PARAGRAPH 49

"NJ1" indicates the Applicant's participation hence he was personally REWARDED. Therefore it is not only alleged that he knew about the killing activities by CATO MANOR UNIT but also participated in the killing activities of CATO MANOR UNIT.

AD PARAGRAPH 50

It is a matter of evidence in the trial court.

AD PARAGRAPH 51

Evidence will show in the trial court that as a DIRECTOR in the ORGANISED CRIME and PROVINCIAL HEAD ORGANISED CRIME KZN, the Applicant was in direct command of the Organised Crime Unit and specifically used CATO MANOR UNIT for his operations.

Evidence will further show that the Applicant has enjoyed a close relation with CATO MANOR UNIT above all other Organised Crime Units in the Province.

AD PARAGRAPH 52

The evidence will show in the trial court that Independent Complaints Directorate (ICD) now called IPID would arrived late on the crime scene after the scenes have been interfered with.

Furthermore evidence in the trial court will show that ICD only arrived at the murder scene after the killings and were not privy to information which led to the killings.

The murder dockets considered individually shadowed the judicious mind of decision makers hence *nolle prosequi* and informal inquests, decision at some dockets but taken together and considering the leading information, the similarities, monetary rewards and association with rival parties by the Applicant and his subordinates reveals a clear picture that the Applicant and his subordinates he is charged with were involved in an on-going pattern of RACKETEERING ACTIVITIES to wit: killing civilians.

AD PARAGRAPH 53

Evidence will be adduced in the trial to demonstrate the First and Second Respondent's averments in this regard.

AD PARAGRAPH 54

The First and the Second Respondent verily believe that a *prima facie* case will be proved before the trial court compelling the Applicant to answer.

AD PARAGRAPHS 55-56

It is within the Applicant's right to deny the allegations against him.

AD PARAGRAPH 57-60

We have demonstrated herein that statements under oath and other information were available to prosecute the Applicant before the decision was taken.

AD PARAGRAPH 61-64

"NJ6" Indicates personal knowledge of the Applicant about CATO MANOR SVC section's activities hence the Provincial Commissioner requested him to depose to an affidavit defending the activities of CATO MANOR SVC UNIT.

AD PARAGRAPH 65

Noted

AD PARAGRAPH 66

The First and the Second Respondent had reliable and admissible evidence when the decision to prosecute was taken and the trial court will determine this averment.

AD PARAGRAPHS 67-70

The Applicant requests, in essence, this Honourable Court to usurp the functions of the trial court and determine admissibility and truthfulness of evidence which was in possession of the First and Second Respondent when the decision was taken to prosecute.

AD PARAGRAPHS 71-76

The Applicant is deliberately attempting to prevent the First and Second Respondent from presenting the STATE case in a Public Court.

PROCESS

The First Respondent consulted with the investigation and prosecution team. An oral presentation was done to her. The Prosecution Memorandum and case dockets were presented for her consideration before the decision was taken.

NOWTHEREFORE, the First Respondent took a rational and conscious decision to prosecute the Applicant together with his subordinates without fear, favour or prejudice.

Kind Regards

CATO MANOR PROSECUTION TEAM
DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG

ANNEXURE "A"

IN THE KWAZULU-NATAL HIGH COURT
REPUBLIC OF SOUTH AFRICA

CASE NO : CC 58/11

In the matter between:

BRENTON FRANK	Accused 1
SALIM KHAN (Deceased)	Accused 2
LEON GOVENDER	Accused 3
ARNOLD NAIDOO	Accused 4

Vs

NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS (KWAZULU-NATAL)

J U D G M E N T

K PILLAY J

[1] The Applicants (Accuseds 1,3 and 4) seek an order against the State in the following terms:

1.That the State be ordered to supply to the accused/applicants, the documents requested by the accused/applicants in paragraph 2 and 3 of a request for information dated 30 May 2011 which paragraphs read as follows:

(a) All documentation forwarded to the National Director of Public Prosecutions, to enable him to consider a prosecution in Section 2(4) of Act 121 of 1998, including and not being exclusive of, any motivation of summary, or correspondence forwarded to him, and received from him.

(b) The State is furthermore hereby requested to supply to the defence a complete and full list of all information sent to the National Director of Public Prosecution, to enable him to exercise his judicial discretion as to whether to prosecute or not in terms of Act 121 of 1998.

2. That the accused/applicants be granted further or alternative relief.

[2] The Applicants stand indicted in the criminal trial on the following charges.

Count 1: Contravening Section 2(1) (e) read with Sections 1, 2(2) and 3 of the Prevention of Organised Crime Act 121 of 1998, as amended (whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprises affairs through a pattern of racketeering).

Counts 2-14: Contravening Section 5(b) read with sections 1, 13(f), 17(e), 19, 25 and 64 of the Drugs and Drug Trafficking Act No. 140 of 1992 – Dealing in Cocaine. (Accused as indicated in Schedule 1).

Alternative to Count 14: Contravening Section 4(b) read with sections 1, 13(f), 17(e), 19, 25 and 64 of the Drugs and drug Trafficking Act No. 140 of 1992 – Possession of Cocaine. (Accused as indicated in Schedule 1)

[3] The Indictment sets out the particulars of the offences in great detail and the roles played by the respective Applicants.

[4] After various postponements the matter was eventually set down for trial from 7th to 15 December 2011.

[5] At a pre-trial held in my chambers in May 2011 it was brought to my attention that an application may be instituted to compel the State to make available to the Applicants the Prosecutors Memorandum, which accompanied the application to the National Director of Public Prosecutions to institute a prosecution in terms of the Prevention of Organised Crime Act 121 of 1998(POCA). The Application to compel disclosure was eventually instituted but not sufficiently early to prevent the matter from being postponed once again.

[6] The Applicants now seek an order as aforesaid.

[7] The deponent to the Founding Affidavit, Arnold Nathaniel Naidoo states that he is currently accused no.4 in the criminal trial. He submits that since he and his co-applicants are charged, *inter alia*, with a contravention of s 2(1)(e)read with sections 1, 2(2) and 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and because the authorization of the National Director of Public Prosecutions is required before the institution of a prosecution in respect of such a contravention, he made a written request on 30 May 2011, to the State to disclose all the documentation forwarded to the National Director of Public Prosecutions, including any motivation summary or correspondence forwarded to him, or received from him.

[8] In addition a request was made for a full list of all the information sent to the National Director of Prosecutions. Put simply, what was required was the information supplied to the National Director of Public Prosecutions (NDPP) to enable him to carry out his functions as stipulated in Section 2(4) of POCA

[9] On 22 July 2011, the Director of Public Prosecutions (DPP) replied to his request, annexing only the authorisation in terms of Section 2(4) of POCA, but refused to supply any further information on the ground that it did not form part of the case docket and was not required for the accused to plead to the charges or prepare their respective defences.

[10] Much of the Applicants Founding Affidavit was devoted to expounding various constitutional rights and relevant case law. A glimpse into why they require the Prosecutor's Memorandum is contained in paragraph 36 of the said affidavit, wherein the deponent asserts his right to challenge the decision making process of the NDPP and that he will be unable to if denied the information requested.

[11] There is thus no indication that at this stage that there will in fact be any application to review that decision. Evidently the only reason that the Applicants seek the Prosecutor's Memorandum, is to enable them to audit the material placed before the NDPP in order to determine whether the authorization was correctly granted in order to exercise their right to a fair trial.

[12] Miss Bissessur who deposed to the affidavit on behalf of the State furnished the background and process that led to the eventual grant of the authorization as follows:

11.1 I was located a file, codenamed 'Project Delilah' on 19 November 2009, by my then supervisor, Deputy Director of Public Prosecution:KZN ("DDPP"), Adv. Sandesh Sankar ("Sankar"). The applicant's had not been arrested then.

11.2 Following consultations with the investigation team and discussions with colleagues, including Gangal and Sankar, a decision was taken to institute a prosecution. Although it was discussed, no firm decision was taken regarding whether the accused would be charged in respect pf contravening the provisions of POCA: The decision in that regard was postponed for further consideration once all the evidence had been filed in the case docket.

11.3 Subnsequently, on 8 February 2010, the accused were arrested and the process to bring the matter to trial commenced. At that stage a decision was taken to charge the accused in respect of contravening the provisions of section 2(1)(e) of POCA.

11.4 This necessitated the drafting of an application (referred to as the Prosecutors Memorandum) to the NDPP for an authorization to institute the prosecution of accused in respect of contraventions of section 2(1) of POCA>

11.5 Although the Prosecutors Memorandum is prepared by the Prosecutors who deal with the matter in court (*in casu*, by Gangal and I) it is the product of many minds.

11.6 In this case it is the product of many telephonic discussions consultations, e-mails, meeting and research by and between the aforementioned prosecutors and/or the investigators and/or Advocate Johan Kruger ("Kruger") and Elijah Mamabolo (both Senior State Advocates from the office of the NDPP) and/or Deputy Directors of Public Prosecutions (Sankar and Advocate Kalaivani Govender ("Govender").

11.7 In the interactions between the aforementioned every aspect of the case is dealt with in detail including:Strengths/Weaknesses in the case.

11.7.1 Strength/Weaknesses in the case;

11.7.2 Investigative Techniques used.

11.7.3 Candid discussions regarding informers. Consideration is given to whether it is necessary to lead the evidence of informers, thereby revealing their identities.

11.7.4 Trial strategies for the presentation of evidence are discussed.

11.7.5 Possible defenses to be raised by the accused are considered and discussed.

11.7.6 Details of discussions with co-accused in terms of section 204 and/or section 105A of Act 51 of 1977.

11.7.7 Outstanding Suspects

11.8 Eventually, a Prosecutors Memorandum is prepared which contains information under the following topics:

11.8.1 Identification of the Accused – The Accused are identified similarly to the way they are identified in an indictment, the exception being that their roles in the commission of the offence and their relationship to each other which are normally led during evidence in the trial is also included.

11.8.2 List of Proposed Charges - These are those charges that are to be brought against the Accused and is exactly the same as those contained in the Indictment.

11.8.3 Summary of Substantial Facts – Similar to the Summary included in the Indictment with the exception that evidence to be led may also be included. Sometimes names of informers, investigation techniques etc are also revealed.

11.8.4 Statement of Law – Under this heading those sections of POCA that are to be relied upon are set out as it is done in the Indictment. In addition thereto the facts of the case are then analysed to show how the provisions of POCA have application in this case. A thorough analysis of each element relating to the charges under POCA is made and the State's case against each accused is tabled to demonstrate why the POCA charges are being preferred against each accused.

11.8.5 List of Witnesses and Summary of the Evidence –The crux of each witness's (including accomplice witnesses, if applicable) evidence is tabled.

11.8.6 Anticipated defences – Under this heading possible defences that may be raised by an accused are considered. On each occasion the prosecutors demonstrate how based on the available evidence such defence will be overcome and in effect reveal their trial strategy.

11.8.7 POCA Policy – Under this heading a motivation for the POCA racketeering provisions is made showing the advantages of using these provisions rather than prosecuting the matter in the conventional manner.

11.8.8 Conclusions and Recommendations.

[13] On 15 November 2011 the accused were furnished with copies of the Indictment. The accused were by then in possession of copies of statements of all witnesses in the case docket.

[14] On 27 July 2011, the authorisation and a further 500 pages of additional information requested by the Applicants were handed over.

[15] Simply put, the Applicants were furnished with.

1. All the witness statements contained in the docket.
2. The Indictment (including a summary of facts and a list of witnesses).
3. The NDPP's Authorisation.
4. Approximately 500 pages of additional information as requested.

[16] Confirmatory affidavits were filed by K Govender, Gangal and Simphiwe Cyril Mlothshwa (Mlotshwa).

[17] The Deputy Director of Public Prosecutions (K Govender), in her affidavit, confirmed that before submitting the Prosecutions Memorandum to the Provincial DPP (in this case, Mlotshwa), she satisfied herself that the application was properly motivated and that the information contained therein was consistent with the content of the case docket. No basis is laid to impugn the veracity of this assertion.

[18] According to Mlotshwa he was the Acting Director of Public Prosecutions, KZN, when the decision to institute the prosecution in terms of POCA was taken. On 6 September 2010 he received the Indictment, a Prosecutor's Memorandum, attached to which was a summary of substantial facts and list of witnesses and a draft authorization prepared in terms of Section 2(4) of POCA in this matter.

[19] Upon perusing the aforementioned documentation he called for a meeting with Advocate Y Gangai and raised certain issues with the latter. After the discussions he was satisfied that the case was one in which the provisions of POCA, ought to be utilized.

[20] On 14 September 2010, he forwarded the indictment together with its attachments, the Prosecutors Memorandum and the draft authorization to the office of the NDPP. On October 2010 the authorization was returned after it had been duly signed.

[21] In reply, the Applicants assert that the contents of the Prosecutor's Memorandum may be manipulated or even exaggerated to convince the National Director of Public Prosecutions to prosecute for organized crime. It is submitted that the only way to ensure that this cannot happen or has not happened is to give a challenger access to this document and all other incidental documents that have been requested.

[22] It is apparent from Bissessur's affidavit that the Prosecutor's Memorandum, contains *inter alia*, investigative techniques trial strategy and the States potential arguments on technical issues, anticipated defenses of the accused and the States strategy to counter those defences. In addition the document contains details of discussions with co-accused in terms of section 204 and/or section 105A of Act 51 of 1977. It is clear that the state's concern is that compelling disclosure of the Prosecutor's Memorandum may compromise the effective prosecution of the case and the safety of co-accused who might wish to give evidence for the state.

[23] What emerges from Bissessur's affidavit is that what appears to have been included in that Memorandum is information, bar strategy, that has already been furnished to the Applicants. It will serve no purpose to supply the same information again.

[24] The question which thus follows is- are the Applicant's entitled to the Prosecutor's Memorandum, over and above all the

aforementioned information already furnished, in order to exercise their right to a fair trial?

[25] Section 2(4) of POCA reads as follows:

> *"(4) A person shall only be charged with committing an offence contemplated in ss(1) if a prosecution is authorized in writing by the National Director".*

[26] It follows therefore that no prosecution of offences, as contemplated in Section 2(1) of POCA, can be instituted without such written authorization.

[27] It is so that section 32 of the Constitution provides that:

> *"(1) Everyone has the right to access to-*
>
> *(a) any information held by the state; and*
> *(b) .....*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state."*

[28] The promotion of Administrative Justice Act No 3 of 2000 (PAJA) was enacted in 2000 to give effect to the abovementioned rights.

*30. Section 1(i) states:

(1) "administration action" means any decision take, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision.

[29] Which adversely affects the rights of any person and which has a direct, external legal effect, but does not include

....

(ff) a decision to institute or continue a prosecution

....

[30] It follows that a decision to institute or continue a prosecution are specifically excluded from the definition of administrative action under PAJA.

[31] Notwithstanding the above the Applicants submit that the decision to prosecute still amounts to an exercise of public power and is consequently subject to the rule of law generally and the principle of legality specifically.

[32] In this regard, I was referred to the decision in *S v Chao and Others*[1] where the following was said:

> *"[27] All decisions to prosecute are arguably administrative actions in the traditional sense. However, s 1(l)(b)(ff) of PAJA explicitly excludes a 'decision to institute or continue to prosecute' from the regulatory scope of PAJA, and can therefore not be reviewed in terms of the Act. This fact was emphasized by Harms DP in national Director of Public Prosecutions v Zuma.*
>
> *[28] Regardless of this exclusion, the authorization and/or decision to prosecute or continue to prosecute still amounts to the exercise of public power and is consequently subject to the rule of law generally and the principle of legality specifically. An administrator exercising a public power bestowed on him or her, which the NDPP in this instance did, must therefore apply*

[1] 2009 (1) SACR 479 (C) at 28

his or her mind to the decisions taken in terms of that authority and do so rationally."

[33] This court is not faced with a substantive application for a review of the NDPP's decision. It is therefore unnecessary, in my view, to examine or determine whether the grant of an authority to institute a prosecution by the NDPP, in terms of POCA, is excluded from the regulatory scope of PAJA. All this court is called upon to determine is whether the Applicants require the Prosecutor's Memorandum, in addition to all the other documents furnished, to exercise their rights to a fair trial.

[34] The right to a fair trial was aptly enunciated in *National Director of Public Prosecutions v David Cunningham King* [2] as follows:

"[4]:...The right to a fair trial is, by virtue of the introductory words to a s 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past.[3] This does not mean that all existing principles of law have to be jettisoned nor does it mean that one can attach to the concept of a 'fair trial' any meaning whatever one wishes it to mean.[4]

---

[2] 2010 ZASCA 8 (1st March 2010) Para 4 - 5
[3] Zuma para 16
[4] Zuma para 17

[5] There is no such thing as perfect justice -- a system where an accused person should be shown every scintilla of information that might be useful to his defence -- and discovery in criminal cases must always be a compromise.[5] Fairness is not one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state.[6] This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.[7] The fair trial does not mean a predilection for technical niceties and ingenious legal stratagems,[8] or to encourage preliminary litigation [9]- a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that person facing serious charges -- and especially minimum sentences -- have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and

---

[5] R v O'Connor [1955] 4 SCR 411 para 193 - 195
[6] Shiffi loc cit
[7] Montgomery v HM Advocate General and another [2003] 1 AC 641 (PC) 673 per Lord Hope of Craighead quoting Pullar v United Kingdom 22 EHRR 391
[8] Key v Attorney general, Cape Provincial Division & another 1996 (4) SA 187 (CC) para 13
[9] Zuma v National Director of Public Prosecutions & Others 2009 (1) SA 1 (CC) paras 65-66

delay.' [10] *One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."*

[35] Bissessur makes the point that if the State were required to redact those sections containing information that it needed to protect from the Prosecutor's Memorandum, such an action would result in the information contained in the document to be substantially the same as is in the Indictment, the Summary of substantial facts and the List of witnesses already provided to the Applicants.

[36] It is clear therefore that the Applicants have the above-mentioned information in their possession and can therefore easily assess whether a prosecution in terms of POCA is justified. If the information supplied does not support such a prosecution then they have a right to institute an application for a review of the NDPP's decision to grant the authorization, at which time the NDPP will be obliged to furnish reasons for his decision. I obtained the distinct impression that the request was not founded on any genuine concern on the part of the Applicants that they will not receive a fair trial. Having perused the detailed indictment and the summary of substantial facts, I make the observation, that it would not have been difficult for the NDPP to make the decision to grant the authorization in question, aided as he was by a summary of the case docket. Considering the content of the Prosecutor's Memorandum as aforesaid and its possible negative impact on the proper prosecution

[10] Regina v H & others [2004] UKHL 3 para 22 per Lord Bingham of Cornhill

of this case if disclosed, my view is that the State was entitled to refuse to furnish it in its entirety.

[37] The application is accordingly dismissed.

K PILLAY J

Silverton CAS 6[22/33]/10/2014

MM - 11

STATEMENT OF LAURANCE MANFRED HODES

1. I am an adult male Advocate with senior counsel status practising as such at 3rd Floor, Maisels Chambers, 4 Protea Place, Sandown.

2. During June 2013, I was briefed by the State Attorney, Nelson Govender, with Naomi Manaka as my junior to represent the Acting National Director of Public Prosecutions, Nomgcobo Jiba, in a review application that had been brought against her by Major General Johan Wessel Booysen.

3. My junior drafted an answering affidavit based upon the instructions received in an internal memorandum dated 4 June 2013 as well as the docket pertaining to this matter.

4. The internal memorandum provided short responses to the various paragraphs of the founding affidavit. In particular, in relation to paragraph 50, the instruction received was *inter alia* that:

> *"The following evidence was placed before the First Respondent. In that:*
>
> - *The Applicant was the **de facto** commander of the Cato Manor Unit;*
> - *The monetary awards documents were before the First Respondent with regard to how the Applicant participated and benefited in the Taxi Violence cases;*

Silverton CAS 688/10/2014 A-8

- *The statements of the following witnesses were also before the First Respondent, which incriminated the Applicant; viz.*

  I. Ndlondlo;

  II. Col. Alyer;

  III. Danlkas.

- *The Answering Affidavit of the Applicant in the High Court Application by one Bongani Mkhize where the Applicant details his personal knowledge of the Taxi Violence killings."*

5. This was utilized and incorporated in paragraph 17 of the answering affidavit where the following appears:

> *"17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, Mr Aris and Danikas, and Mr Ndlondlo from which it is apparent that the Applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof YouTube. I annex copies of these statements as* ***"NJ2", "NJ3", "NJ4"*** *and* ***"NJ5"*** *respectively."*

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6. Once this affidavit had been drafted by my junior, I settled it and had it sent to Adv Jiba for her verification and signature.

7. When the matter was argued before the Honourable Mr Justice Gorven, I only made one concession and that was in relation to that court possibly having jurisdiction. I did not make the other concessions that were attributed to me in his judgment. A record of the proceedings may be obtained to substantiate my contentions in this regard.

8. Nevertheless, as alluded to above, the Honourable Mr Justice Gorven attributed various other concessions to me as appears from his reported judgment.

9. My junior and I consequently compiled an application for leave to appeal. A copy of this document is available and was discussed in a consultation with various members of the National Prosecuting Authority. It was then filed on behalf of the Acting National Director of Public Prosecutions.

10. However, on 25 March 2014, the newly appointed National Director of Public Prosecutions, Mr Mxolisi Nxasana, decided not to appeal against the judgment in the Booysens matter. This resulted in the notice of application for leave to appeal being withdrawn.

11. I have various emails relating to the exchange of communications pertaining to this matter available. Should they be required, please do not hesitate to contact me.

SEQ 34/2020-877

NATIONAL PROSECUTING AUTHORITY

SUBSISTENCE & TRAVELLING CLAIM

MM - 12

APPLICATION DETAILS

Surname & Initials	JM FERREIRA
Persal No.	11364836
Tel no.	0847025290

Description: Consultation with adv Motshwa and Gen. Booysen in the case involving NPA officials. See requesting memo approved.

Durban

Vehicle details						
Model	HONDA JAZZ	A Sedan Station Wagon	Type fuel	Engin Capacity	1300
KM's driven	1424		Petrol	Cost p/km	313.30

Do you receive a fixed travel allowance as part of your monthly salary: Yes

State km's travelled if claiming meals as per par 2.1.1 of the S&T Policy

Fuel Code: Se1550P

Vehicle Registration Number: BW69KZGP

Period from:	2015/07/22	Time	11:30
Period to:	2015/07/24	Time	15:30
Total no. of days	2	Total No. of hours	4
Daily Allow Rate	R 108.50	Daily Allow Rate p/h	R 4.52

ALLOCATION DETAILS

PERSAL	Mark:X	Description (Persal function #5.3.11)	SARS Code	Amount
0093	X	S&T: Motor Financing-Official KM for SMS members	3702	R 4 461.39
0436	X	S&T Allowance not exceeding amount set by SARS	3705	R 236.08
0443		S&T Allowance exceeding amount set by SARS	3704	R 0.00
0444		S&T Overseas: Exceeds the set by SARS	3715	R 0.00
0462		S&T Actual Domestic expenditure (Accommodation)	N/A	R 0.00
0463		S&T General Public Transport	N/A	R 0.00
0464	X	S&T Parking expenditure	N/A	R 16.00
0465	X	S&T Toll fees	N/A	R 418.50
0466		S&T Telephone cost (Excl. cellphone)	N/A	R 0.00
0469		Travel Allowance with Vehicle Allowance	3702	R 0.00
0470		Travel allowance : > 8000km's (Tariff < R3.18 p/km)	3703	R 0.00
0473		S&T Overseas: Not exceeding amount set by SARS	3716	R 0.00
0476		S&T: Actual Foreign Expenditure (Accommodation)	N/A	R 0.00
0526		S&T: No receipts (Tea & Meals)	3713	R 0.00
0564		S&T: Cell Phone Cost(Excl. Telephone)	N/A	R 0.00
0588		S&T Actual Domestic expenditure (Meals)	N/A	R 0.00
0589		S&T Actual Foreign expenditure (Meals)	N/A	R 0.00
		SUB-TOTAL		R 5 130.97
0043		Advance : S&T — Not applicable	N/A	R 0.00
		NET AMOUNT OF CLAIM		R 5 130.97

CERTIFICATE

I certify that I was actually and necessarily employed travelling or detained on public service during the period (s) stated above, that the charges are in accordance with the authorised rate, that the incidental have been actually and necessarily disbursed. I also declare that no claim has been made for alcohol beverages.

APPLICANT		CERTIFIED CORRECT The details of the claim are correct		APPROVED IN ACCORDANCE WITH TREASURY REGULATION 8.2	
	DDPP	Signature Checker			
Signature: Applicant	Rank	Finance Officer		Director: Administration	
JM FERREIRA	21-Jun-16				
Surname and Initials	Date	Surname and Initials	Date	Surname and Initials	Date

Persal transaction

Captured by: _____ Authorised by: _____ Rejected ☐

Date captured ☐☐☐☐☐☐☐☐ Date authorised ☐☐☐☐☐☐☐☐

DETAILED CLAIM INFORMATION		JM FERREIRA	DDPP		11354836
DESCRIPTION	Is this a foreign claim?	N	Contact Number	0847026290	
Consultation with adv Mlotshwa and Gen. Booysen in the case involving NPA officials. See requesting memo approved.		Incidental expenditure		SMS MEMBER	Yes
		Click here for instructions			

Left from	Destination	Date from	Date to	Time from	Time to	Number of Days	Number of Hrs	Amount Daily Rate		Amount Hourly Rate	
PRETORIA	Durban	22-Jul-15	24-Jul-15	11:30	15:30	2	4	108.50	217.00	4.52	18.08
		2015/07/22	2015/07/24			2	4				

DETAILS OF EXPENDITURE

Proof of expenditure with receipts

Dates	Breakfast	Lunch	Dinner	
22 Jul 15				
23 Jul 15				
24 Jul 15				
Totals	R 0.00	R 0.00	R 0.00	R 0.00
			R 0.00	

Claim for expenditure without receipts

Breakfast	Lunch	Dinner	
R 0.00	R 0.00	R 0.00	R 0.00
		R 0.00	

Toll Fees	Accommodation
195.00	
19.00	
204.50	
418.50	R 0.00

Advance claimed: No

Amount of Advance	Date advance received
R 0.00	Not applicable

Periodical Court Claim: No

Number of Trips to Courts	0
Number of Km from office to Court	0

Only meals claimed: NO

SEQ 34/2020-879

TRAVEL CLAIM

Make and model of vehicle	VEHICLE REG NO	BW69KZGP	Fuel Tariff (Rate)
HONDA JAZZ			313.30

Engin capacity	1300	Vehicle type/fuel and engine	Sedan/Station Wagon Petrol/Diesel1251 to 1550

Car allowance structured: Yes ▼ | Type of fuel: Petrol ▼

Date	End KM Reading	Official KM travelled	Departed from	Destination	Purpose of trip
22 Jul 15	75917	618	PRETORIA	Durban	ATTEND CONSUTLATION
23 Jul 15	76092	178	Durban	Pietermaritzburg	ATTEND CONSUTLATION
24 Jul 15	76721	628	Durban	Pretoria	ATTEND CONSUTLATION

MM-13

Tax Invoice

Adv P Ellis SC

320 Parkdev Building
(Circle Chambers)
570 Fehrsen Street
BROOKLYN

CIRCLE CHAMBERS
ADVOCATES

Date	Invoice No.
2015/06/01	6156

VAT Registration Number	
4770126334	
Phone	012 424 4960
Fax	012 424 4439
E-mail	pellis@lawcircle.co.za

Invoice To
State Attorney Private Bag X91 PRETORIA 0001

Terms	Due Date	Your VAT reg. no.
Net 30	2015/07/01	

Date	Time	Description	Qty	Rate	Amount
		GCB v Ilbe, Mrwebi and Mzinyathi (Ref: Mr Maxwell Matubatuba/2142/2015/Z74/MM)			
10/12/2015	14h00 - 15h00	Consultation with Mr van der Hoven and Ms Van Rensburg	1	2 400.00	2 400.00
22/01/2015	10h00 - 13h00	Peruse documents received on memory stick	3	2 400.00	7 200.00
	16h30 - 19h00	Peruse documents received on memory stick	2.5	2 400.00	6 000.00
23/01/2015	15h30 - 18h00	Peruse documents received on memory stick	2.5	2 400.00	6 000.00
24/01/2015	09h30 - 15h00	Peruse documents received on memory stick and draw founding affidavit	5.5	2 400.00	13 200.00
	17h00 - 18h00	Draw founding affidavit		2 400.00	2 400.00
01/02/2015	09h00 - 13h00	Draw founding affidavit	4	2 400.00	9 600.00
	14h00 - 17h30	Draw founding affidavit	3.5	2 400.00	8 400.00
11/02/2015	13h00 - 16h00	Consultation with Mr Van der Hoven, Ms van Rensburg, Mr Hofmeyr and Mr Lesak	3	2 400.00	7 200.00
13/02/2015	14h00 - 18h00	Peruse further documents received from NPA office	4	2 400.00	9 600.00
15/02/2015	08h00 - 12h00	Complete draft founding affidavit	4	2 400.00	9 600.00
16/02/2015	11h00 - 12h30	Consultation with Gen Booysen	1.5	2 400.00	3 600.00
17/02/2015	16h00 - 19h30	Settle founding affidavit	3.5	2 400.00	8 400.00
21/02/2015	09h00 - 13h00	Peruse chairman's notes and finally settle founding affidavit	1	2 400.00	2 400.00

Subtotal	R96 000.00
VAT Total	R13 440.00
Total	R109 440.00
Payments/Credits	R0.00
Balance Due	R109 440.00

Bank:Nedbank
Branch:Nedbank Private Wealth
Code:172805
Account:1637002262
Swift:NEDSZAJJ

MM-13A

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

CASE NO. 13759/2008

In the matter between :

BONGANI ELPHAS MKHIZE Applicant

and

MINISTER OF SAFETY & SECURITY: SOUTH AFRICA First Respondent

MEMBER OF THE EXECUTIVE COUNCIL: KZN COMMUNITY SAFETY & LIAISON Second Respondent

SAPS PROVINCIAL COMMISSIONER: KZN Third Respondent

COMMISSIONER J. BOOYSEN: HEAD OF THE ORGANISED CRIME UNIT – SAPS: KZN Fourth Respondent

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RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

JOHAN WESSEL BOOYSEN,

do hereby make oath and state :-

1.

I am an adult male, a member of the South African Police Service, and am also the Provincial Commander: Organised Crime for the Province of KwaZulu-Natal.

MNU

6.

Apart from that the relief sought in paragraph (b) (i) constitutes nothing more than mere lip service couched in interdictory language enjoining the Police to do exactly that which is their duty to perform.

7.

In seeking that relief, and as a general statement, the Applicant relies on nothing more than innuendo, hearsay, unconfirmed rumour and generalized unconfirmed reports made in the popular press.

8.

I turn now to deal with the specific allegations made in the Applicant's Affidavit.

9.

AD PARAGRAPH 1

I admit the identity of the Applicant and that he is an adult male taxi owner. I have no knowledge as to his place of residence.

10.

AD PARAGRAPH 2

Having regard to that set out in this Affidavit I dispute the contents of paragraph 2.

("the Act"). In my respectful submission this Court is enjoined to ensure that the Police comply with their duties and obligations as set out in the Act. It is imperative that right at the outset I make it abundantly clear that as matters presently stand a Warrant of Arrest has not been sought or issued with regard to the Applicant and, at present, he has no reason absolutely to fear arrest. However, as the investigation into the matters generally described in the Founding Affidavit progresses further I am unable to state with any certainty whether that position will change. If it does and there indeed arises a situation where it becomes necessary to either question or detain or arrest the Applicant, those functions will be carried out strictly in accordance with the law. If and when that happens, the Applicant has available to him all of his constitutional and other rights which the Police are obliged to respect and observe.

16.

AD PARAGRAPHS 9, 10, 11, 12 AND 13

I have no knowledge of the allegations contained in these paragraphs, question their relevance to this application and, to the extent that the Applicant contends that they are indeed relevant, put him to the proof thereof.

17.

AD PARAGRAPH 14

While there has certainly been tension between the two associations mentioned by the Applicant, the violence in the taxi industry is not limited to those two alone. Violence in the taxi industry is endemic, rife and spreads

scene. This assailant was found in possession of an AK47 rifle.

21.

AD PARAGRAPH 18

Although I am aware of the fact that the services of a security company were retained by the association, I am not aware of the remaining allegations contained in this paragraph. To the extent that the Applicant contends that they are relevant I put him to the proof thereof.

22.

AD PARAGRAPH 19

I dispute the allegations contained in paragraph 19. The forensic investigation into the firearms of the security company was only done much later under different circumstances. I deal with those later in this Affidavit.

23.

AD PARAGRAPH 20

I deny the allegations contained in paragraph 20. To the extent that the Applicant seeks to rely on rumour and the unsubstantiated evidence of an unknown person who claims to be a policeman, I cannot deal with same.

24.

AD PARAGRAPH 21

I admit that a person was detained and questioned. I deny that that person was in any way assaulted. In any event these allegations constituted hearsay and ought to be struck out.

context. On 05 September 2008 Hlapane Attorneys addressed, *inter alia*, the Provincial Commissioner. A copy of that letter is annexed hereto marked "JWB1". That was responded to on 11 September 2008, a copy of which is annexed hereto marked "JWB2". Annexure "B" to the founding affidavit was then received. In any event, in the absence of an affidavit from the author of the letter the contents thereof are hearsay.

28.

AD PARAGRAPH 25

I deny the allegations contained in this paragraph. It is not the intention of the Police to kill anyone. It is certainly the intention of the Police to properly investigate all crime and to bring the persons responsible therefor to book.

29.

AD PARAGRAPH 26

I deny the allegations contained in this paragraph. It is not the intention of the Police to falsely implicate anyone in any of the crimes concerned. Again the unsubstantiated hearsay referred to in this paragraph is not a basis for the grant of the interdicts sought and ought to be struck out.

30.

AD PARAGRAPH 27

No list existed and therefore there was no list that could have been supplied to the Second Respondent. In this regard I refer to the Affidavit of the Second

32.

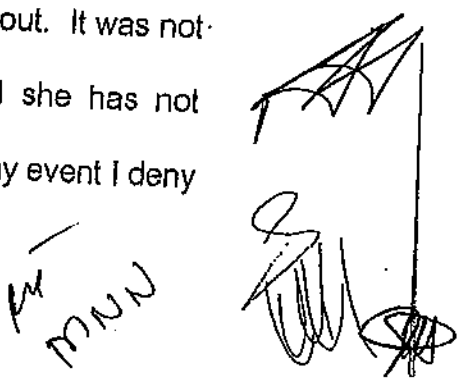
AD PARAGRAPH 29

There is simply no basis for what the Applicant contends is "widely believed". I have no knowledge of what services the Applicant has engaged and who or what the "various entities" are. I have already explained that NDIMANDE and TEMBE were again sought as a result of new information received. There is nothing untoward about that. In any event, why the Applicant refers to the N3 highway as a "quite (sic) back-road" escapes me unless it is nothing more than a thinly veiled attempt to colour the information (whether true or not) placed before this Court.

33.

AD PARAGRAPHS 30 AND 31

I have already said that there was no list in existence. On 3 September 2008 an attempt was made to arrest BUTHELEZI. He resisted arrest and attempted to shoot at the members of the South African Police Services who returned fire in self-defence. BUTHELEZI was killed in that exchange of fire. His firearm, a CZ 7.65 automatic was recovered at the scene. Whether or not BUTHELEZI was a prominent member of the Applicant's association is unknown to me. I accordingly deny the allegations contained in paragraphs 30 and 31 to the extent that theirs are at odds with what I say here. The Affidavit put up from SOKHULU is hearsay and must be struck out. It was not obtained or put up for the purposes of this application and she has not confirmed those facts for the purposes of this application. In any event I deny



36.

AD PARAGRAPH 34

I am surprised to note that the Applicant identifies himself with the unnamed person referred to in the unsubstantiated newspapers article. How the Applicant concludes that the report suggests that he is intending to flee the country is a mystery. I accordingly deny the allegations contained in paragraph 34 to the extent that they are relevant to this application.

37.

AD PARAGRAPH 35

I have repeatedly said that the list referred to is simply a figment of the Applicant's imagination. The Applicant is not a suspect at present and neither has a warrant of arrest been contemplated or sought with regard to him. However it is interesting to note that the Applicant has a "source" within the Police services. Why he would need such a "source" is food for interesting speculation. There is no plan to kill the Applicant. I accordingly deny the allegations contained in paragraph 35.

38.

AD PARAGRAPH 36

I deny these allegations.

contained in paragraph 38.

41.

AD PARAGRAPH 39

I note the allegations contained in paragraph 39.

42.

AD PARAGRAPH 40

I note that the Applicant states that he has no information whatsoever that could assist the South African Police Service in its ongoing investigation into the issues of taxi violence. If that is indeed the Applicant's position then he has nothing to fear. Even if the Police conclude otherwise and determine, at some point in the future, that the Applicant might well be a suspect and liable to detention, the Applicant is well within his rights to refuse to respond to any questions put to him. He is also well within his rights, at that point in time, to demand that he has his legal representative present when being questioned. All those rights the Police Services are obliged to respect and will respect. I also note that the Applicant's stated intention is never to make any confession before a Magistrate or anyone else relating to the investigation into taxi violence. I accordingly deny the allegations contained in paragraph 40.

43.

AD PARAGRAPH 41

I have already said that no warrant for the arrest of the Applicant has been

has indeed been corresponding with the Police Services. However, and with specific reference to annexure "H", it is disingenuous for the Applicant to put up the response from me without putting up his letter of 29 August 2008. This is yet another indication of why I say the Applicant has crafted together this application to suit his own purposes because the Applicant does not see fit to put up his letter, obviously considering it to be relevant, I will refrain from doing so.

47.

AD PARAGRAPH 45

The references contained in this paragraph are scurrilous and inflammatory. This paragraph and the newspaper articles referred to have no bearing whatsoever on the matter at hand and ought to be struck out.

48.

AD PARAGRAPHS 46, 47 AND 48

I deny the allegations contained in these paragraphs.

WHEREFORE I pray that it may please this Honourable Court to dismiss the application with costs.

DEPONENT

The terms of Regulation R.1258 published in Government Gazette No. 3619 of the 21st July, 1972, as amended, having been complied with, I hereby certify that the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit, which was signed and sworn to at on this day of 2008.

MARGARET-ANN MARAIS
64 SELATI STREET
ALPHEN PARK, PRETORIA
COMMISSIONER OF OATHS EX OFF
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA

COMMISSIONER OF OATHS

(Full names)

(Bus. Address)

Capacity:

Area:

MM-14

2008 Nov 27 8:37 HP LASERJET FAX MM-14 p.13

[redacted]

OP.-S.002-0222 SAP 21

SUID-AFRIKAANSE POLISIEDIENS SOUTH AFRICAN POLICE SERVICE

136 Victoria Embankment
Durban, 4000

Verwysing Reference	12/18/2
Navrae Enquiries	S/Supt Alyer Supt W Olivier
Telefoon Telephone	(031) 333 8045 (031) 203 7323
Faksnommer Fax number	(031) 203 7318 ( )

OFFICE OF THE
TACTICAL COMMANDER
ORGANIZED CRIME
DURBAN

2008-10-14

THE PROVINCIAL COMMANDER
ORGANIZED CRIME
KWA-ZULU NATAL

ATT: DIR BOOYSEN

MONETARY AND NON-MONETARY AWARDS

MAPHUMULO CAS 99/08/2008: MURDER AND ATTEMPTED MURDER ON SAPS MEMBERS SUPT CHONCO AND INSP MKHANYILE

1. Details of candidates:

0070031-2	Dir JW Booysen
0057260-8	Supt W Olivier
0425495-3	Capt SJ Smith
0410381-5	Capt N Eva
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0615350-0	Insp MW Thabethe
0450710-0	Insp Tango
0464815-3	Insp BA Magwaza
0429170-1	Insp E Nel
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0603646-5	Insp M Panday
0173585-3	Insp PW George
0523900-1	Insp B Zondi
0608191-6	Insp RC Maharaj

0492770-2 Sgt Mkhwanazi
0536844-8 Cst S Naidoo
0443522-2 Capt V Auerbach (Brighton Beach SAPS) From: 2nd Lt. Off. 01

(21)

Each of the above candidates played a role in the successful apprehension of the suspects. Some of the candidates played a role in the apprehension of the suspects whilst others assisted at the scene.

2. **Summary of events:**

On Wednesday 2008/08/27 at approximately 10H00, Supt Chonco was in the company of Insp Khanyile, they were attached to the Provincial Taxi Task Unit. The same day they were on route from SAPS Kranskop to KwaDukuza Court. Ahead of them was a marked police vehicle with two accused also on route to take the two accused to KwaDukuza Court.

Whilst Supt Chonco travelled along the R74, approximately 20 kilometers before KwaDukuza on a detour along the R74, he was led into an ambush and was accosted by armed males armed with AK47 and R4 – R5 rifles. He was fatally shot and killed behind the steering of the police vehicle whilst Insp Khanyile, who was in his company, also sustained gunshot wounds but miraculously managed to fight off the suspects, shooting the one about six meters from him. Insp Khanyile was later removed and taken to Umhlanga Hospital by helicopter.

The scene was attended by Supt Minaar, the Station Commissioner of Kranskop SAPS as well as other members of nearby police stations. The same day at 11H00, members of Organised Crime, Cato Manor, was summoned and tasked to the scene and took over from Supt Minaar. The scene was thoroughly secured and a thorough investigation was done at the scene with extensive enquiries made by the members on the scene. Statements were obtained from the local community and other persons nearby.

The same day 2008/08/27, the investigation team which at this stage consisted of Supt W Olivier, Capt S Smith, Capt N Eva, Capt Van Tonder, Insp Mostert, Mdlalose, Zondi, Makhanya, P George, Thabethe, Panday, Stolz and Sgt Mkhwanazi, concluded their investigation at the scene. At the time the deceased, who was shot at the scene by Insp Khanyile, was removed and possession was taken of his cell phone. Capt Eva, Insp Mostert and Cst Naidoo extracted vital information from the phone. It was during this time that Insp Mostert contacted Crime Intelligence and requested immediate assistance. Supt Olivier, Capt Eva, Van Tonder, Stolz and Panday returned to the office whilst Insp Mostert, Mdlalose, Makhanya, Zondi and Mkhwanazi remained at the scene to conduct further enquiries. Later the members departed to Kranskop and Greytown areas and the same day at 23H00 the investigation team still consisting of the above members met at Greytown. From Greytown the above investigation team proceeded to the area called Matimatolo near Maphumulo, however it proved to be a fruitless exercise. The team then returned to the office.

During this time all avenues were utilized to gather the intelligence that was analysed and on 2008/09/03 the first breakthrough was made by the investigation team with the assistance from Crime Intelligence. The investigation team now consisting of Supt Olivier,

Capt Eva, Smith, Van Tonder, Lockem, Insp Mostert, Panday, Nel, Makhanya, Mdlalose, Magwaza, RC Maharaj, Zondi, Sgt Mkhwanazi and Cst Naidoo as well as Capt V Auerbach of SAPS Brighton Beach, proceeded to the KwaDukuza area. The informer pointed the house out to the investigation team which was situated next to the R74 at 59 Rose Avenue, KwaDukuza. The same evening at 23H30, the same investigation team proceeded to 59 Rose Ave. The following members penetrated the house:

0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0536844-8	Cst S Naidoo
0443522-2	Capt V Auerbach (Brighton Beach SAPS)

whilst the remaining members took guard outside the house. As the above members entered the house a gun fight ensued and the first suspect, Lindani Buthelezi, was fatally shot and found next to him was a 9mm pistol with the serial number erased. The case is being investigated by KwaDukuza SAPS vide CAS 150/08/08. The investigation team then returned to the office.

Insp Mostert continued to gather information with the assistance of Crime Intelligence.

3. The Apprehension of two more suspects

Details of candidates:

0070031-2	Dir JW Booysen
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0429170-1	Insp B Nel

Summary of events:

On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he had information pertaining to the suspect that had organized the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

On Tuesday 2008/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 08H30, the investigation team still consisting of the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the

investigation team, the occupants being two persons, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted of Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva whom followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his body guard. The following firearms were found in the vehicle; one AK47 Rifle with loaded magazine, one Ruger Mini 14 Automatic Rifle and two magazines as well as two 9mm Norinco Pistols, both with loaded magazines.

The following cases were opened:
Howick CAS 106/08/08: Attempted Murder and possession of unlicensed firearms
Howick CAS 107/08/08: Inquest

The above members returned to the office and continued to gather further information.

4. Apprehension of two more suspects

Details of candidates:

0426991-8	Capt Lockem
0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0523900-1	Insp B Zondi
0492770-2	Sgt Mkhwanazi
0536844-8	Cst S Naidoo

Summary of events:

On 2008/09/18 at 13H00, Insp Mostert received information about the hideout of two more suspects in the Mandini area. The investigation team consisting of the above members proceeded to Mandini where the house was pointed out by the informer to Insp Mostert. Insp Mostert returned and briefed the members and at 15H10 the investigation team proceeded to 4 Oribi Place, Mandini. The following members entered the house:

0084512-4	Insp P Mostert
0413171-1	Insp A Stolz
0536844-8	Cst S Naidoo

whilst the remaining members stood guard outside the house. At the door, Insp Mostert found a black male and while in the process of identifying himself to this person, this male ran into the house. Insp Mostert, Stolz and Cst Naidoo then entered the house and

systematically proceeded through the house starting in the lounge area and proceeding down the passage. Turning left into the next passage a young school child was found standing in the one doorway who pointed to a closed door and informed Insp Mostert that "they are hiding there". The child was asked to depart from the house for his own safety. Once the investigation team reached the closed door, they found it to be locked and proceeded to announce themselves stating "It is the police, open up". This was repeated several times but no response was received. The door was then kicked in by Insp Mostert and at the same time a shot was fired from the room towards the investigation team and the sound of glass breaking was heard. The team then entered the room and a shootout took place between the police and the suspects, fatally wounding two suspects. The two suspects were positively identified as Nathi Mthembu and Mdu Khopoloto Ntuli. Found in the room was one Z88 9mm Pistol loaded with the serial number erased and one CZ75 9mm Pistol also loaded with the serial number intact. Insp Mostert was in possession of a warrant of arrest for the suspect Mdu Khopoloto Ntuli vide Maphumulo CAS 2/02/05: Murder which was being investigated by Supt Chonco.

During the investigations it was clear that Supt Chonco was a thorn in the side of these criminals who did not hesitate to take the law into their own hands. Investigations also revealed that the following suspects were directly involved in the assassination of Supt Chonco:

Dumisani Ndlovu who was shot by Insp Khanyile, one of Supt Chonco crew
Lindani Buthelezi who was shot by the investigation team
Nathi Mthembu who was shot by the investigation team
Mdu Khopoloto Ntuli who was shot by the investigation team and who was also wanted on Maphumulo CAS 02/02/2005: Murder (Attached, find J50 Warrant of arrest)
Timson Magojela Ndimande and his body guard, Sibusiso Tembe, who were shot by the investigation team and who orchestrated the hit on Supt Chonco.

Attached find newspaper clippings from the Daily Sun, The Natal Mercury and the Daily News as well as statements of members who were involved in the individual scenes.

As depicted in this report, it is clear that several members contributed and played an important role of which some members were continuously confronted with the dangers of the apprehensions of the suspects whilst other members played their individual roles which contributed to the success. These members should receive a benefit.

Comments: Recommended that members receive a certificate of commendation from the national Commissioner and a monetary of R10,000.

DEPONENT

The terms of Regulation R.1258 published in Government Gazette No. 3619 of the 21st July, 1972, as amended, having been complied with, I hereby certify that the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit, which was signed and sworn to at on this day of 2008.

MARGARET-ANN MARAIS
64 SELATI STREET
ALPHEN PARK, PRETORIA
COMMISSIONER OF OATHS EX OFF
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA

COMMISSIONER OF OATHS

(Full names)

(Bus. Address)

Capacity:

Area:

MM-14

[redacted]

GP.-S. 062-0222 SAP 21

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

136 Victoria Embankment
Durban, 4000

Verwysing Reference	12/18/2
Navrae Enquiries	S/Supt Alyer Supt W Olivier
Telefoon Telephone	(031) 333 8045 (031) 203 7323
Faksnommer Fax number	(031) 203 7318 ( )

OFFICE OF THE
TACTICAL COMMANDER
ORGANIZED CRIME
DURBAN

2008-10-14

THE PROVINCIAL COMMANDER
ORGANIZED CRIME
KWA-ZULU NATAL

ATT: DIR BOOYSEN

MONETARY AND NON-MONETARY AWARDS

MAPHUMULO CAS 99/08/2008: MURDER AND ATTEMPTED MURDER ON SAPS MEMBERS SUPT CHONCO AND INSP MKHANYILE

1. Details of candidates:

0070031-2	Dir JW Booysen
0057260-8	Supt W Olivier
0425495-3	Capt SJ Smith
0410381-5	Capt N Eva
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0615350-0	Insp MW Thabethe
0450710-0	Insp Tango
0464815-3	Insp BA Magwaza
0429170-1	Insp E Nel
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0603646-5	Insp M Panday
0173585-3	Insp PW George
0523900-1	Insp B Zondi
0608191-6	Insp RC Maharaj

SEQ 34/2020-898

0492770-2 Sgt Mkhwanazi
0536844-8 Cst S Naidoo
0443522-2 Capt V Auerbach (Brighton Beach SAPS) From: 2008.07.01

(21)

Each of the above candidates played a role in the successful apprehension of the suspects. Some of the candidates played a role in the apprehension of the suspects whilst others assisted at the scene.

2. **Summary of events:**

On Wednesday 2008/08/27 at approximately 10H00, Supt Chonco was in the company of Insp Khanyile, they were attached to the Provincial Taxi Task Unit. The same day they were on route from SAPS Kranskop to KwaDukuza Court. Ahead of them was a marked police vehicle with two accused also on route to take the two accused to KwaDukuza Court.

Whilst Supt Chonco travelled along the R74, approximately 20 kilometers before KwaDukuza on a detour along the R74, he was led into an ambush and was accosted by armed males armed with AK47 and R4 – R5 rifles. He was fatally shot and killed behind the steering of the police vehicle whilst Insp Khanyile, who was in his company, also sustained gunshot wounds but miraculously managed to fight off the suspects, shooting the one about six meters from him. Insp Khanyile was later removed and taken to Umhlanga Hospital by helicopter.

The scene was attended by Supt Minaar, the Station Commissioner of Kranskop SAPS as well as other members of nearby police stations. The same day at 11H00, members of Organised Crime, Cato Manor, was summoned and tasked to the scene and took over from Supt Minaar. The scene was thoroughly secured and a thorough investigation was done at the scene with extensive enquiries made by the members on the scene. Statements were obtained from the local community and other persons nearby.

The same day 2008/08/27, the investigation team which at this stage consisted of Supt W Olivier, Capt S Smith, Capt N Eva, Capt Van Tonder, Insp Mostert, Mdlalose, Zondi, Makhanya; P George, Thabethe, Panday, Stolz and Sgt Mkhwanazi, concluded their investigation at the scene. At the time the deceased, who was shot at the scene by Insp Khanyile, was removed and possession was taken of his cell phone. Capt Eva, Insp Mostert and Cst Naidoo extracted vital information from the phone. It was during this time that Insp Mostert contacted Crime Intelligence and requested immediate assistance. Supt Olivier, Capt Eva, Van Tonder, Stolz and Panday returned to the office whilst Insp Mostert, Mdlalose, Makhanya, Zondi and Mkhwanazi remained at the scene to conduct further enquiries. Later the members departed to Kranskop and Greytown areas and the same day at 23H00 the investigation team still consisting of the above members met at Greytown. From Greytown the above investigation team proceeded to the area called Matimatolo near Maphumulo, however it proved to be a fruitless exercise. The team then returned to the office.

During this time all avenues were utilized to gather the intelligence that was analysed and on 2008/09/03 the first breakthrough was made by the investigation team with the assistance from Crime Intelligence. The investigation team now consisting of Supt Olivier,

Capt Eva, Smith, Van Tonder, Lockem, Insp Mostert, Panday, Nel, Makhanya, Mdlalose, Magwaza, RC Maharaj, Zondi, Sgt Mkhwanazi and Cst Naidoo as well as Capt V Auerbach of SAPS Brighton Beach, proceeded to the KwaDukuza area. The informer pointed the house out to the investigation team which was situated next to the R74 at 59 Rose Avenue, KwaDukuza. The same evening at 23H30, the same investigation team proceeded to 59 Rose Ave. The following members penetrated the house:

0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0536844-8	Cst S Naidoo
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whilst the remaining members took guard outside the house. As the above members entered the house a gun fight ensued and the first suspect, Lindani Buthelezi, was fatally shot and found next to him was a 9mm pistol with the serial number erased. The case is being investigated by KwaDukuza SAPS vide CAS 150/08/08. The investigation team then returned to the office.

Insp Mostert continued to gather information with the assistance of Crime Intelligence.

3. The Apprehension of two more suspects

Details of candidates:

0070031-2	Dir JW Booysen
0426991-8	Capt Lockem
0066633-5	Capt JJE Van Tonder
0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0429170-1	Insp E Nel

Summary of events:

On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he had information pertaining to the suspect that had organized the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

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The same day at 08H30, the investigation team still consisting of the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the

investigation team, the occupants being two persons, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted of Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva whom followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his body guard. The following firearms were found in the vehicle; one AK47 Rifle with loaded magazine, one Ruger Mini 14 Automatic Rifle and two magazines as well as two 9mm Norinco Pistols, both with loaded magazines.

The following cases were opened:
Howick CAS 106/08/08: Attempted Murder and possession of unlicensed firearms
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The above members returned to the office and continued to gather further information.

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0410381-5	Capt N Eva
0084512-4	Insp P Mostert
0621413-4	Insp Makhanya
0638209-6	Insp Mdlalose
0413171-1	Insp A Stolz
0523900-1	Insp B Zondi
0492770-2	Sgt Mkhwanazi
0536844-8	Cst S Naidoo

Summary of events:

On 2008/09/18 at 13H00, Insp Mostert received information about the hideout of two more suspects in the Mandini area. The investigation team consisting of the above members proceeded to Mandini where the house was pointed out by the informer to Insp Mostert. Insp Mostert returned and briefed the members and at 15H10 the investigation team proceeded to 4 Oribi Place, Mandini. The following members entered the house:

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0413171-1	Insp A Stolz
0536844-8	Cst S Naidoo

whilst the remaining members stood guard outside the house. At the door, Insp Mostert found a black male and while in the process of identifying himself to this person, this male ran into the house. Insp Mostert, Stolz and Cst Naidoo then entered the house and

systematically proceeded through the house starting in the lounge area and proceeding down the passage. Turning left into the next passage a young school child was found standing in the one doorway who pointed to a closed door and informed Insp Mostert that "they are hiding there". The child was asked to depart from the house for his own safety. Once the investigation team reached the closed door, they found it to be locked and proceeded to announce themselves stating "It is the police, open up". This was repeated several times but no response was received. The door was then kicked in by Insp Mostert and at the same time a shot was fired from the room towards the investigation team and the sound of glass breaking was heard. The team then entered the room and a shootout took place between the police and the suspects, fatally wounding two suspects. The two suspects were positively identified as Nathi Mthembu and Mdu Khopoloto Ntuli. Found in the room was one Z88 9mm Pistol loaded with the serial number erased and one CZ75 9mm Pistol also loaded with the serial number intact. Insp Mostert was in possession of a warrant of arrest for the suspect Mdu Khopoloto Ntuli vide Maphumulo CAS 2/02/05: Murder which was being investigated by Supt Chonco.

During the investigations it was clear that Supt Chonco was a thorn in the side of these criminals who did not hesitate to take the law into their own hands. Investigations also revealed that the following suspects were directly involved in the assassination of Supt Chonco:

Dumisani Ndlovu who was shot by Insp Khanyile, one of Supt Chonco crew
Lindani Buthelezi who was shot by the investigation team
Nathi Mthembu who was shot by the investigation team
Mdu Khopoloto Ntuli who was shot by the investigation team and who was also wanted on Maphumulo CAS 02/02/2005: Murder (Attached, find J50 Warrant of arrest)
Timson Magojela Ndimande and his body guard, Sibusiso Tembe, who were shot by the investigation team and who orchestrated the hit on Supt Chonco.

Attached find newspaper clippings from the Daily Sun, The Natal Mercury and the Daily News as well as statements of members who were involved in the individual scenes.

As depicted in this report, it is clear that several members contributed and played an important role of which some members were continuously confronted with the dangers of the apprehensions of the suspects whilst other members played their individual roles which contributed to the success. These members should receive a benefit.

Comments: Recommended that members receive a certificate of commendation by the national Commissioner and a monetary of R10,000.

PROV HEAD: DET SERVICES: KWAZULU-NATAL
PROVINCIAL COMMANDER: ORGANIZED CRIME
DIRECTOR J.W. BOOYSEN
ASST. COMM. P.T. BROWN
Provincial Head Detective Service KZN.

5. Award Options:

5.1 Monetary Awards

5.1.1 South African Police Service Gold Cross for Bravery
R35 000.00 (plus applicable tax)

5.1.2 South African Police Service Silver Cross for Bravery
R30 000.00 (plus applicable tax)

5.1.3 South African Police Service Commendation Medal
R25 000.00 (plus applicable tax)

5.1.4 Certificate of Commendation by the Minister for Safety and Security
R15 000.00 (plus applicable tax)

5.1.5 Certificate of Appreciation from the Minister for Safety and Security
R15 000.00 (plus applicable tax)

5.1.6 Certificate of Commendation by the National Commissioner
R10 000.00 (plus applicable tax)

5.1.7 Certificate of Appreciation from the National Commissioner
R10 000.00 (members of the public : tax not applicable)

5.2 Non-Monetary awards

5.2.1 Commendation by the Divisional Commissioner or Provincial Commissioner

5.2.2 Certificate of Appreciation from the Divisional/Provincial Commissioner

-SAP 21

SUID-AFRIKAANSE POLISIEDIENS SOUTH AFRICAN POLICE SERVICE

~~Privaatsak/Private Bag~~
Posbus/Post Office Box 1968 DURBAN

Verwysing Reference	12/2/4 (860)
Navrae Enquiries	Snr Supt A Wessels Supt M P Mkhize / CPO L Marais
Telefoon Telephone	(031) 326- 4932 / 5821
Faksnommer Fax number	(031) 326-4798

THE PROVINCIAL COMMISSIONER
DIE PROVINSIALE KOMMISSARIS

PERSONNEL SERVICES
PERSONEELDIENSTE

KWAZULU-NATAL

2008-11-26

A. The National Commissioner
Promotions and Awards
PRETORIA

ATT : **SNR SUPT GOVENDER**
PPO STOOP

B. The Provincial Commander
Organized Crime
KWAZULU-NATAL

MONETARY AND NON-MONETARY AWARD : MEMBERS OF THE SOUTH AFRICAN POLICE SERVICE : MAPHUMULO CAS 99/08/2008 - MURDER AND ATTEMPTED MURDER ON SAPS MEMBERS (SUPT OHONGO AND INSP KHANYILE)

NO 0070031-2 DIRECTOR J W BOOYSEN
NO 0057260-8 SUPERINTENDENT W C OLIVIER
NO 0616026-3 SUPERINTENDENT C M NYUSWA
NO 0425496-3 CAPTAIN S J SMITH
NO 0410381-5 CAPTAIN N B EVA
NO 0426991-8 CAPTAIN A LOCKEM
NO 0066633-5 CAPTAIN J J E VAN TONDER
NO 0443522-2 CAPTAIN V AUERBACH
NO 0433967-3 CAPTAIN N CROUSE
NO 0084512-4 INSPECTOR P J MOSTERT
NO 0621413-4 INSPECTOR P MAKHANYA
NO 0616360-0 INSPECTOR M W THABETHE
NO 0450710-0 INSPECTOR T O THANGO
NO 0464815-3 INSPECTOR B A MAGWAZA
NO 0429170-1 INSPECTOR E A NEL
NO 0636209-6 INSPECTOR T E MDLALOSE
NO 0413171-1 INSPECTOR A J F STOLTZ
NO 0603646-5 INSPECTOR M PANDAY
NO 0173585-3 INSPECTOR P W GEORGE
NO 0523900-1 INSPECTOR B ZONDI
NO 0608191-6 INSPECTOR R C MAHARAJ
NO 0499995-9 INSPECTOR E M NKABANE
NO 0614095-5 INSPECTOR M S NYAWOSE
NO 0449974-3 INSPECTOR B CROUSE
NO 0492770-2 SERGEANT T M MKHWANAZI
NO 0536844-8 CONSTABLE R NAIDOO

THE COMMISSIONER OF THE S.A. POLICE SERVICE
SERVICE REWARDS
2008 -11- 27
HEAD OFFICE
THE COMMISSIONER OF THE S.A. POLICE SERVICE

A. 1. Herewith please receive the under-listed documents in regard to the recommendation of the above-mentioned officers and members for the award of the Certificate of Commendation by the National Commissioner for your necessary attention:

1.1. Minute of the Provincial Good Work Committee dated 2008-11-18
1.2. The Tactical Commander, Organized Crime, Durban's minute 12/18/2 dated 2008-10-14
1.3. The Provincial Commander, Organized Crime, KwaZulu-Natal's minute 0600665-5 dated 2008-10-15
1.4. The Unit Commander, Organised Crime, Port Shepstone's minute Maphumulo CAS 99/08/2008 dated 2008-10-26
1.5. News articles (Daily News dated 2008-09-19, 2008-09-17 and 2008-09-04) as well as (Daily Sun dated 2008-09-22 and 2008-09-23)

****

B. 1. The Tactical Commander, Organized Crime, Durban's minute 12/18/2 dated 2008-10-14 as well as the Unit Commander, Organised Crime, Port Shepstone's minute Maphumulo CAS 99/08/2008 dated 2008-10-26 have bearing on this matter.

2. Copy for information.

f/PROVINCIAL COMMISSIONER :
A WESSELS

SENIOR SUPERINTENDENT
KWAZULU-NATAL

monetary.award.6obyten.jw.25others/lm/llb17

MM - 15

PROVINCIAL GOOD WORK COMMITTEE

1. **DATE OF MEETING** : 2008-11-18

2. **PRESENT** : Snr Supt A Wessels
Supt M P Mkhize
CPO L Marais (Secretary)
PPO B V Mbhele
SPO S C L Nkosi

3. **REF NO** : 12/2/4 (860)

4. **DETAILS OF CANDIDATES:**

No 0070031-2 Director J W Booysen
No 0057260-8 Superintendent W C Olivier
No 0616026-3 Superintendent C M Nyuswa
No 0425495-3 Captain S J Smith
No 0410381-5 Captain N B Eva
No 0426991-8 Captain A Lockem
No 0066633-5 Captain J J E van Tonder
No 0443522-2 Captain V Auerbach
No 0433967-3 Captain N Crouse
No 0084512-4 Inspector P J Mostert
No 0621413-4 Inspector P Makhanya
No 0615350-0 Inspector M W Thabethe
No 0450710-0 Inspector T O Thango
No 0464815-3 Inspector B A Magwaza
No 0429170-1 Inspector E A Nel
No 0638209-6 Inspector T E Mdlalose
No 0413171-1 Inspector A J F Stoltz
No 0603646-5 Inspector M Panday
No 0173585-3 Inspector P W George
No 0523900-1 Inspector B Zondi
No 0608191-6 Inspector R C Maharaj
No 0499995-9 Inspector B M Nkabane
No 0614095-5 Inspector M S Nyawose
No 0449974-3 Inspector B Crouse
No 0492770-2 Sergeant T M Mkhwanazi
No 0536844-8 Constable R Naidoo

5. **SUMMARY OF GOOD WORK:**

- On 2008-08-27 at approximately 10:00, Supt Chonco and Insp Khanyile, who were attached to the Provincial Taxi Task Unit, were on route from SAPS Kranskop to KwaDukuza Court. Ahead of them was a marked police vehicle with two accused, also on route, to take the two accused to KwaDukuza Court.

- Whilst Supt Chonco travelled along the R74, approximately 20 kilometres before KwaDukuza on a detour along the R74, he was led into an ambush and was accosted by armed males armed with AK 47 and R4 - R5 rifles. The officer was fatally shot and killed behind the steering of the police vehicle, whilst Insp Khanyile, who was in his company, also sustained gunshot wounds but miraculously managed to fight off the suspects, shooting the one (**Dumisani Ndlovu**) about six metres from him. Insp Khanyile was later removed and taken to Umhlanga Hospital by helicopter.

- The scene was attended by Supt Minnaar, the Station Commissioner of Kranskop SAPS as well as other members of nearby police stations. The same day at 11:00, members of Organised Crime, Cato Manor, was summoned and tasked to the scene and took over from Supt Minnaar. The scene was thoroughly secured and a thorough investigation was done at the scene with extensive enquiries made by the members on the scene. Statements were obtained from the local community and other persons nearby. Maphumulo CAS 99/08/2008 - Murder and Attempted Murder case was opened.

- On the same day (08-08-27), the investigation team, which at this stage consisted of Supt W C Olivier, Captains S J Smith, N B Eva, J J E van Tonder, Inspectors P J Mostert, T B Mdlalose, B Zondi, P Makhanya, P W George, M W Thabethe, M Panday, A J F Stoltz and Sgt Mkhwanazi, concluded their investigation at the scene.

- The deceased, who was shot at the scene by Insp Khanyile, was removed and possession was taken of his cell phone. Capt Eva, Insp Mostert and Cst Naidoo extracted vital information from the phone. Insp Mostert immediately contacted Crime Intelligence and requested immediate assistance. Supt Olivier, Captains Eva and van Tonder, Inspectors Stoltz and Panday returned to the office, whilst Inspectors Mostert, Mdlalose, Makhanya, Zondi and Sgt Mkhwanazi remained at the scene to conduct further enquiries. Later the members departed to Kranskop and Greytown areas and the same day at 23:00 the investigation team, still consisting of the above members, met at Greytown. From Greytown the investigation team proceeded to the area called Matimatolo (near Maphumulo), however it proved to be a fruitless exercise. The team then returned to the office.

- All avenues were utilized to gather the intelligence that was analysed and on 2008-09-03 the first breakthrough was made by the investigation team with the assistance from Crime Intelligence.

- On the same day (08-09-03), the investigation team, now consisting of Supt Olivier, Captains Eva, Smith, van Tonder, Lockem and Auerbach, Inspectors Mostert, Panday, Nel, Makhanya, Mdlalose, Magwaza, Maharaj and Zondi, Sgt Mkhwanazi and Cst Mkhwanazi, proceeded to the KwaDukuza area. The informer pointed the house out to the investigation team, which was situated next to the R74 at 59 Rose Avenue, KwaDukuza. At 23:30 the same evening, the same investigation team proceeded to 59 Rose Avenue. Capt Auerbach, Inspector Mostert and Makhanya and Cst Naidoo penetrated the house, whilst the remaining members took guard outside

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the house. As the officer and members entered the house, a gun fight ensued and the **first suspect, Lindani Buthelezi**, was fatally shot and a 9mm pistol was found next to him with the serial number erased. The case is being investigated by KwaDukuza SAPS vide CAS 150/08/08. The investigation team then returned home. Insp Mostert continued to gather information with the assistance of Crime Intelligence

- On 2008-09-15, Dir Booysen contacted Insp Mostert and informed him that he had information pertaining to the suspect that had organized the hit on Supt Chonco. The suspect was hiding in Virginia in the OFS and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

- On 2008-09-16, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4 x 4 (NRB 3904) and that he was armed and dangerous. The investigation team which consisted of Captain Lockem, van Tonder and Eva, Inspectors Mostert, Makhanya and Nel, immediately departed to Pietermaritzburg.

- The same day at 08:30 in Pietermaritzburg, the same investigation team continued to receive further information from Dir Booysen and at 10:10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The investigation team spotted the vehicle near the Cedara turn off with the occupants being two persons. The team, which consisted of Inspectors Mostert, Nel and Makhanya in one vehicle while Captains van Tonder, Lockem and Eva followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team, resulting in the driver of the vehicle being injured in the process, which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle, which resulted in him being flung out of the moving vehicle. Both suspects were fatally injured in the shootout. The driver was positively identified as **Timson Magojela Ndimande** and was the main brain behind the assassination of Supt Chonco. The other suspect was his body guard, **Sibusiso Tembe**. An AK 47 Rifle with loaded magazine, one (1) Ruger Mini Automatic Rifle and two magazines as well as two (2) 9mm Norinco Pistols, both with loaded magazines, were found in the vehicle. Howick CAS 106/08/08 - Attempted Murder and Possession of Unlicensed firearms and Howick CAS 107/08/08 - Inquest were opened.

- On 2008-09-18 at 13:00, Insp Mostert received information about the hideout of two more suspects in the Mandini area. The investigation team, which consisted of Captain Lockem and Eva, Inspectors Mostert, Makhanya, Mdlalose, Stoltz and Zondi, Sgt Mkhwanazi and Cst Naidoo, proceeded to Mandini where the house was pointed out by the informer to Insp Mostert. Insp Mostert returned and briefed the members and at 15:10 the team proceeded to 4 Oribi Place, Mandini.

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- Inspectors Mostert and Stoltz as well as Cst Naidoo entered the house, whilst the remaining members stood guard outside the house. At the door, Insp Mostert found an African Male and while in the process of identifying himself to this person, the male ran into the house. The three members then entered the house and systematically proceeded through the house. During their search the members found a young school child, standing in the one doorway, who pointed to a closed door and informed Insp Mostert that "they are hiding in there". The child was asked to depart from the house for his own safety. When the team reached the door, they found it to be locked. After the members announced themselves repeatedly and requested to open the door, to which no response was received, Insp Mostert kicked in the door. At the same time a shot was fired from the room towards the investigation team and the sound of glass breaking was heard. The team then entered the room and a shootout took place between the members and the suspects, fatally wounding two suspects. The two suspects were positively identified as **Nathi Mthembu** and **Mdu Khopoloto Ntuli**. One (1) Z88 9mm Pistol loaded with the serial number erased and one (1) CZ75 9mm Pistol, also loaded with the serial number intact, were found in the room. Insp Mostert was in possession of a warrant of arrest for the suspect Mdu Khopoloto Ntuli vide Maphumulo CAS 2/02/05 - Murder, which was being investigated by Supt Chonco.

- During the investigation it was clear that Supt Chonco was a thorn in the side of these criminals, who did not hesitate to take the law into their own hands. Investigations also revealed that the following suspects (6) were directly involved in the assassination of Supt Chonco:

  * Dumisani Ndlovu who was shot by Insp Khanyile
  * Lindani Buthelezi who was shot by the investigation team.
  * Nathi Mthembu who was shot by the investigation team
  * Mdu Khopoloto Ntuli who was shot by the investigation team and who was also wanted for murder (Warrant of Arrest attached)
  * Timson Magojela Ndimande and his body guard, Sibusiso Tembe, who were shot by the investigation team and who orchestrated the hit on Supt Chonco

- The case received wide media coverage (attached).

<u>Summary in respect of the apprehension of the 7th suspect by officers and members of the Organized Crime, Port Shepstone and Detective Services, Scottburgh</u>

- On 2008-09-11 Supt Nyuswa was appointed to take over the investigation by Dir Booysen and on 2008-09-12 the case docket was allocated to him. He was briefed by Supt Olivier as well as other members of the initial task team to assist in the investigation.

- On 2008-09-12 Supt Nyuswa formulated a task team comprising members of Port Shepstone Organized Crime to co-investigate the afore mentioned case docket. The task team comprised the following members : Supt C M Nyuswa, Capt N Crouse, Inspectors E M Nkabane, M S Nyawose and B Crouse.

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On 2008-09-15 Insp Mostert briefed the above-mentioned members of foregone investigations and successes achieved wrt this matter. After the meeting the task team came to the conclusion that the crime scene had to be re-visited, residents had to be re-interviewed, witness statements had to be re-confirmed, informers had to be recruited from both Maphumulo and the opposing taxi assosciation, etc.

On the same day the members proceeded to the crime scene to familiarize themselves with the scene. When the members arrived at the scene at 13:00 some commenced to interview persons working on the construction of the road on the R74, whilst the rest of the members walked on foot to homes in the immediate vicinity to have a "birds eye view" of the crime scene. Vital witnesses were identified, but they resisted the request of submitting statements in fear of reprisals or death from suspects. The witnesses however supplied vital information pertaining to suspicious motor vehicles and in particular a specific Minibus taxi, with 2 passengers (of which the names were unknown), who had passed by the crime scene during the attack on the members. At 23:00 the members recruited 2 persons, one from each of the taxi associations. The recruited persons were tasked to trace the two passengers from the Minibus taxi as well as obtain certain cellphone numbers of taxi operators possibly involved. The members returned to Port Shepstone at 02:00 on the morning of 2008-09-16.

On 2008-09-16 Insp Mostert made contact with Supt Nyuswa and supplied information in respect of Magojela Ndimande who intended to flee the province. Insp Mostert would keep Supt Nuyswa updated on any new developments wrt the whereabouts of the suspect.

On the same day Capt Crouse and Insp Nyawose proceeded to Maphumulo to see one of the newly recruited informers as new information had surfaced, whilst Inspectors Nkabane and Crouse went to Mandeni to follow up from the 2nd newly recruited informer.
The informer at Maphumulo supplied Capt Crouse and Insp Nyawose with the names and information of 4 suspects who were believed to be part and parcel of the planning and the execution of Supt Chonco ie. Lindani Buthelezi, Nathi Mthembu, Magojela Ndimande and Khopoloto Ntuli.
The informer at Mandeni supplied Inspectors Nkabane and Crouse with the same names as supplied by the informer of Maphumulo. The informer however supplied the name of another person **Mdu Mkhize** who was the owner of a taxi minibus. The source alleged that he was seen at the scene of the murder carrying an AK47 rifle. He was of the opinion that the passenger in the taxi on this day might substantiate his claims.

Later on the same day (2008-09-16), Insp Mostert reported to the team that they had traced Magojela Ndimande to the N3 near Howick and whilst trying to stop him and a person seated on the backseat of their motor vehicle, opened fire at them. The members returned fire, killing both occupants. Supt Nyuswa dispatched all his members to Howick to assist with the crime scene and to seize the suspects' cellphones for down loading and further investigation. During the processing of the suspects' vehicle, a piece of paper was found with a cellphone number on it with the words "Nkabi" on it. The cellphone number was given to the informers to confirm or

deny if they knew the cellphone number. The cellphone number was later confirmed by the informer as being that of Nathi Mthembu.

- On 2008-09-19, during an interview, Capt Crouse, Inspectors Nkabane, Nyawose and Crouse's informers confirmed that Mdu Mkhize was present on the day of the murder. No-one knew the exact whereabouts of Mdu Mkhize, but according to both sources, Mdu Mkhize was currently hiding in Gauteng. He fled the next day after Supt Chonco's murder.

- On 2008-09-22 a meeting was held with Mrs Teressa Botha, an Analyst Notebook operator, and existing cellphone records were scrutinized and disected. Vital cellphone linkages were discovered and new applications ito Sec 205 of the Criminal Procedure Act was drafted. The subpoena's were iro forty cellphone numbers that appeared in the linkages, of which most of the numbers were allocated to the same suspects. By 16:00 on the same day approximately 500 pages of cellphone records had been examined. On 2008-09-26 the request ito the above Act was submitted to Stanger court and approved. The applications for cellphone itemized billing was submitted to the Technical Support Unit.

- On 2008-10-01 Supt Nyuswa and his members traced the said passenger who was in a minibus taxi just prior to the attack on Supt Chonco. The witness was interviewed and a detailed statement obtained wherein the witness confirmed that he had seen Mdu Mkhize in possession of an AK47 rifle just before Supt Chonco was ambushed. The witness confirmed that the suspect was in Gauteng and would return on the 14th or 15th October 2008.

- On 2008-10-03 a warrant of arrest was obtained for the arrest of "Mdu" Mduduzi Mkhize from Stanger Court.

- On 2008-10-13 Inspectors Nkabane and Crouse went to Mandeni to meet the informer who supplied them with Mdu Mkhize's cellphone number that no-one else had. The informer confirmed that Mdu Mkhize was arriving on the 14th October 2008 and will be staying near Kranskop area. The informer stated that the suspect had received information that a witness had implicated him and that he was returning to kill his witness.

- On 2008-10-14 the members based themselves in Durban to continue with their attempts wrt interception of the suspect.

- On 2008-10-15 Capt Crouse and Insp Crouse made an application to protect a witness's life, which was in danger. Mdu Mkhize had to be apprehended before eliminating the witness. Inspectors Nkabane and Nyawose proceeded back to Kranskop SAPS to request "TMS" printouts for all the police station's extensions for 2 days prior to the murder and 2 days after the murder. The members also recruited a taxi owner from Maphumulo taxi association who did not agree with the corruptive and intimidating modus operandi of this association. It became known that a "hit list" had been compiled by members of the Maphumulo taxi association to eliminate the investigating team, 2 members from Kranskop Police Station, a taxi owner of

Maphumulo taxi association and the aforementioned witness who identified Mdu Mkhize.

- On 2008-10-16 an application in terms of Sec 8, Act 70, 2002 was approved and the tracking commenced on the cellphone of Mdu Mkhize. The tracking of the cellphone number was approved for a period of 48 hours and the members were required to base themselves in Maphumulo area and sleep in their motor vehicles in order to follow the movement of Mdu Mkhize. Information that was forthcoming did not pin point the exact location of the suspect nor did the team know what Mdu Mkhize looked like. The members utilized the help of the taxi owner at Maphumulo taxi association in transporting Inspectors Nkabane and Nyawose in his taxi to try and find the suspect. The suspect further made it difficult by switching off his cellphone at night and therefore no information with regards to his whereabouts was known. With the assistance of the taxi owner, the members were dropped off in areas at night and proceeded on foot to raid all the recent places where the suspect had frequented recently.

- On 2008-10-17 Capt Crouse and Insp Crouse approached a private person, who was a previously registered informer, to assist with the interpretation of the GPS co-ordinates by narrowing down the exact location of the suspect. At 17:00 on the same day the officer and members joined up with Inspectors Nkabane and Nyawose at Maphumulo area and waited till dark to raid the new locations. At 23:00 the members raided the different homes of the suspect and the information was found to be correct. However, the suspect had left with a person by the name of "Mkhize" to a funeral in Kranskop and it was unknown when he would be back.

- On 2008-10-18 the members took up their positions at a nearby home that was burnt down and which was close to the homestead of the suspect. Whilst busy with observation, Insp Nkabane received a call from a taxi driver informing them to withdraw as Mdu Mkhize had mobilized a gang to attack them at the homestead. The members withdrew to an area outside of Maphumulo town. It was later confirmed that armed persons sent by Mdu Mkhize had raided the observation post to look for the members.
The members then left the area where they were monitoring motor vehicles entering into Maphumulo and tried to trace the suspect's vehicles as they suspected Mdu Mkhize to be in these motor vehicles - the vehicle could not be traced.
Inspectors Nkabane and Nyawose, whilst looking for the suspect's vehicle, received a call from an informer who informed them that the suspect was in the Kwa Mxhosa area and that he was planning an ambush on people returning from a funeral. The members requested the help of additional manpower from Kranskop Police Station as the eminent attack was in their area. Additional manpower was dispatched to the funeral to escort the persons returning from the funeral - this caused Mdu and his accomplices to flee the area.
Inspectors Nkabane and Nyawose then received information from their source that Mdu Mkhize had boarded a white Toyota Hi-Lux bakkie and was heading back to Maphumulo. The members immediately rushed to Maphumulo area and noticed a bakkie fitting the description given by the informer. The members forced the vehicle

off the road and forced all the occupants from the vehicle. The informer, who was hiding in Insp Nkabane's vehicle, identified one of the occupants as being Mdu Mkhize. Mdu Mkhize was then approached and informed of the charges against him and he then became very aggressive.
Whilst at Scottburgh, Mdu Mkhize stated that he wanted to point out the home of Nathi Khumalo. Supt Nyuswa and the rest of the members followed in convoy. Whilst on route to Durban, the suspect, who was in the company of Capt Crouse (driver) and Insp Nkabane, seated in the front passenger seat, attempted to overpower Capt Crouse and as a result momentarily lost control of the official vehicle. The suspect was then fatally wounded by the members in protecting themselves.

The investigation and successes achieved by this team was a team effort and could not have been achieved without applying a "team approach" and contribution.

6. **AWARD OPTIONS**

6.1. **MONETARY AWARDS**

6.1.1. South African Police Service Gold Cross for Bravery
R35 000,00 (plus applicable tax)

6.1.2. South African Police Service Silver Cross for Bravery
R30 000,00 (plus applicable tax)

6.1.3. South African Police Service Commendation Medal
R25 000,00 (plus applicable tax)

6.1.4. Certificate of commendation by the Minister for Safety and Security
R15 000,00 (plus applicable tax)

6.1.5. Certificate of Appreciation from the Minister for Safety and Security
R15 000,00 (members of the public : tax not applicable)

6.1.6. Certificate of Commendation by the National Commissioner
R10 000,00 (plus applicable tax)

6.1.7. Certificate of Appreciation from the National Commissioner
R10 000 (members of the public : tax not applicable)

6.2. **NON-MONETARY AWARDS**

6.2.1. Commendation Certificate by the Divisional Commissioner or Provincial Commissioner

6.2.2. Certificate of appreciation from the Divisional/Provincial Commissioner

7. **RECOMMENDATION BY THE PROVINCIAL HEAD, DETECTIVE SERVICE KWAZULU-NATAL AS WELL AS THE PROVINCIAL COMMANDER, ORGANISED CRIME, KWAZULU-NATAL**

Certificate of Commendation by the National Commissioner as well as R10 000,00 to the officers and members.

8. **RECOMMENDATION BY THE COMMITTEE MEMBERS**

Certificate of Commendation by the National Commissioner as well as R10 000,00 to the officers and members.

.....SENIOR SUPERINTENDENT
I/PROVINCIAL HEAD : PERSONNEL SERVICES : KZN
A WESSELS

9. **COMMENDATION BY THE PROVINCIAL COMMISSIONER**

As per recommendation by the Committee.

PROVINCIAL COMMISSIONER : KWAZULU-NATAL
M/H NGIDI
goodworkcommittee.booysen.25others/lm/05

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MM-1L

Applicant [redacted]

Durban Central Cas 185/02/2009

G.P.-S. 01/02

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[redacted] "[redacted]"

States under oath in English

1

I am an adult male with I.D. no 8006/5602 9083 32 years old residing at no: 4734 Melville Stanger with cellphone 0823988165 I am Fesci owner at Stanger Fesci association.

2

Sometime year 2007 Vella Mkhize was killed at Kwamakhutha township. Vella Mkhize was killed by Sanele Zondi and Nkosi Zondi was also present during the killing of Vella Mkhize. Plan of killing of Vella happened in this way. Nkosi Zondi went to Vella Mkhize pretending to buy Venture from Vella Mkhize. On his arrival he told Vella that he had only R20000 and Vella was asking R25000. Nkosi Zondi promise to bring R5000. Vella was promised to meet them at certain spot to be Paid the whole amount of R25000.

3

At the spot they agreed, Vella was kidnapped by people who introduced themselves as police officers. Vella was taken on hand cuffs to Kwamakhutha township and Sanele Zondi and

* Bonthlyana

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Nicos Zondi was not there.
Sanele first hit Vella with
open hand. Sanele then took out
gun and fired shot at Vella
who was on hand cuff.
Vella was found in Durban
Ethekwini and taken to the
cemetery.

4

I would also like to state
that after the death of well
known provincial commander
or fasci violent crime MR
Chonco, I was one of the
trustee at Stanger fasci
association. I was a chairman
of disciplinary department within
the association. I knew every
secrety that the members
do not have to know.

5

I always have a secrety
meeting with the following
members in the association
MR Chanyile who was the
chairman, MR Ngcobo who
was the Vice Chairman and
also the treasurer Bongizwe
Mthongo who was a P.R.O
and Sanele Zondi who was
an additional member.

6

Bm Mthiyane

Durban Central Cas 185/02/2009

A 90

Our meeting was so sensetive
even to discuss the people who must
be killed. Borgi'zwe was a close
friend of mr Cfforcho. mr Cfforcho
was always make favour to the
hitman of stanger id order to arrest
Jwamaphumulo fasci association. If
there was something against stanger
fasci association Borgizwe would
organise payment to mr Cfforcho.

7

The cause of mr Cfforcho's
death he was investigating and
arrested maphumulo fasci association
members. mr Cfforcho was
killed by maphumulo fasci association
Nkosi Zondi was a policeman
working for Cato manor unit.
information was taken to Nkosi
Zondi and Nkosi Zondi arranged
with his unit Cato manor and
also Booysens his commando.

8

The first member of maphumulo
fasci association to be assassinated
was Lindelani Buthelezi. Lindelani
Buthelezi was killed by Cato
manor unit as one of the hutfee
I was there when the money was
arranged to pay Cato manor
for well job done. It was a lot
of money. Sanele and Borgizwe

Ramthiyana

G.P.-S. 01/02 Durban Central / CAS 185/02/2009 A 90 P. 21 (81/143198)

were send to see N/COL Zondi and paid him the money. We were told back that N/COL Zondi was paid the money. I cannot recall how much it was

9

The second people to be killed by Capo major, with was Mpopolota Mtuli and Nathi Mthembu nickname mangombotwane. Two were killed at Marden Both were killed inside the same house. Five of us been Mr Khanyile, Mr Ngcobo, Sanele, Bongizwa and I took out, I cannot remember how much it was but it was a lot of cash. Sanele and Bongizwe were tasked to go and pay Capo major. I heard that Capo major was met at Torgard toll plaza and paid money, also for Tobeka dark.

10

The third person was Mdu Mkhize. Mdu Mkhize was killed by the police and money paid to those police officers.

11

The fourth incident was the killing of Mr Ndimande. Mr Ndimande was killed in Howick area.

Bmthlyane

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Mr Ndimande was killed by
Cato Manor Unit. All three
of us sat down and had
a secret meeting to arrange
payment to Cato Manor
Unit, the amount of R750 000
was raised. Money was
given to Sandile Zondi
and Bongiwe to go and
pay Cato Manor. Always
when Sandile and Bongiwe
left with money, they would
tell us that the money was
going to be given to the Boss
Referring to Mr Booysens
and they would say, we
have come clean and we
pay Booysens at least

12.

The last person to be killed
or mapkura who had association
was Bongani Mkhize. Bongani
Mkhize was the chairperson.
Bongani Mkhize was killed
by Cato Manor Unit. Money
about R1 million was raised
and given to Sandile and
Bongiwe to pay Cato Manor.
Sandile told us that R1
million would be paid to
Booysens by Boss of Cato
Manor Unit.

Bmthlyane

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Always when payment was done Sarese would say he was going to pay Cato manor Big boss / Mr Booysens. Sarese was a registered attorney of Booysens. I was a registered interpreter of Mr Morfett. Morfett used to fasted me and in return I would give him information

13

That is all for now and what I would recall I would call the police.

14

I know and understand the content of this statement. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience

X Bmthiyane

I certify that the deponent has acknowledge that he knows and understand the content of this statement. This statement is sworn before me and the deponents signature was placed thereon in my presence at Pietermaritzburg on 20/2-09 at 21:54

Bmthiyane

Durban Central Cas 185/02/2009

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Bmthijana

Name(s) and Surname
of Witness
of Office
Richard Kanowski
Police Station
Glenwood
Police

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national (http://www.citizen.co.za/category/news/news-national/) 7.7.2015 05:02 pm

Abrahams seeks a better tomorrow for NPA

Valeska Abreu

(http://www.citizen.co.za)

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Newly appointed National Prosecuting Authority (NPA) head Advocate Shaun Abrahams says he is going to lead the troubled organsation without fear, favour or prejudice.

Abrahams was addressing staff and media during his welcoming ceremony by Justice and Correctional Services Minister Michael Masutha in Pretoria this afternoon.

Abrahams said he was a career prosecutor, a people's lawyer and would continue to be that.

"I have the deepest commitment to lead the NPA to a better tomorrow in its pursuit for justice and to make the republic a safer place for all."

Abrahams conceded that a few months ago he was ready to leave the organisation and embark on a different journey but he stayed.

"I had to be honest with myself and felt that I still had so much to offer the NPA and couldn't just walk away."

He cautioned prosecutors to be proverbial cardinal gatekeepers of the criminal justice system.

"We are bound by the Constitution, it's values and ethos and the rule of law. We are ultimately duty bound to assist the court in seeking the truth."

He also warned officials about media leaks.

"It is extremely concerning to have observed how information is leaked to the media and public. It can only be NPA officials. In most instances very senior NPA officials."

He said this kind of conduct would not be condoned and placed the NPA into disrepute.

"I remind officials of the provisions of Section 41(6) of the NPA Act and the MISS policy. These provisions require you to obtain my permission to disclose any information. I implore you not to place me in a position to use this section. I will not hesitate to do so."

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MM18

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: *89849/2015*

In the matter between:

FREEDOM UNDER LAW (RF) NPC	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	Second Respondent
NOMGCOBO JIBA	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
LAWRENCE SITHEMBISO MRWEBI	Sixth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

SHAUN KEVIN ABRAHAMS

do hereby declare under oath and state that: -

1. I am the National Director of Public Prosecutions of the Republic of South Africa (**"NDPP"**), duly appointed by the First Respondent on 18 June 2015 in terms of section 179 (1) of the Constitution of the

Republic of South Africa (**"the Constitution"**), read with sections 10 and 12 of the National Prosecuting Authority Act 32 of 1998 (**"the NPA Act"**).

2. I am the Head of the National Prosecuting Authority (**"NPA"**) and the First Respondent in these proceedings.

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

4. I have read the affidavit of **MARSHALL MOKGATLHE** dated 1 July 2016 and confirm the contents thereof insofar as they relate to me.

SHAUN KEVIN ABRAHAMS

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **SILVERTON** on this **1st** day of **JULY 2016** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS
ALBERTUS MARTHINUS MATTHYS FLYNN
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
218 VISAGIE STREET
PRETORIA
COLONEL: SILVERTON

MM19

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: *89849/2015*

In the matter between:

FREEDOM UNDER LAW (RF) NPC	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	Second Respondent
NOMGCOBO JIBA	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
LAWRENCE SITHEMBISO MRWEBI	Sixth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

GLADSTONE SELLO MAEMA

do hereby declare under oath and state that: -

1. I am a Senior Deputy Director of Public Prosecutions.

GSM

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

3. I have read the affidavit of **MARSHALL MOKGATLHE** dated 1 July 2016 and confirm the contents thereof insofar as they relate to me.

GLADSTONE SELLO MAEMA

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **SILVERTON** on this **1st** day of **JULY 2016** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

SUID-AFRIKAANSE POLISIEDIENS
KLIËNTEDIENSSENTRUM
PRIVAATSAK/PRIVATE BAG X537
2016 -07- 01
SILVERTON 0127
CLIENT SERVICE CENTRE
SOUTH AFRICAN POLICE SERVICE

JOHAN WESSEL BOOYSEN

State under oath;

1. I am a major male. I reside in Pretoria. I am employed in the private security industry.
2. I previously testified at the Zondo Commission of Inquiry into allegations of State Capture.
3. One of the individuals that I testified about was Advocate Marshall Mokgathle (Mokgatle) from the National Prosecuting Authority. (NPA)
4. Mokgatle has now deposed to an affidavit regarding my evidence and applied to cross-examine me.
5. Whereas I have no difficulty in been cross-examined by Mokgatle I deem his very late application cynical. I draft and type my own affidavits to the Commission. Mokgatle has the luxury and benefit of being assisted by the State Attorney and outside council. I have consistently endeavoured to file papers to the Commission in time. The same cannot be said from Mokgatle and his colleagues whom I have testified about at the Commission.
6. I will respond to some of Mokgatle's imputations and remarks. It is not an ad seriatim reply. Where I do not address a specific point, it should not be interpreted that I agree with it. I will also restrict my reply to matters where I am referred to. I suspect that others, who are mentioned in Mokgatle's statement ie Advocates Ferreira and Van Eeden including Mr Willie Hoffmeyr, will respond to the imputations levelled at them.

   Ad par 9-11 I take note of Mokgatle's experience as a prosecutor. He embellishes his experience by listing a raft of cases where he had been 'involved' in as a junior with outside council. He does not detail exactly what he did. He lists a number of cases which his subordinates

prosecuted. He goes on to list the type of cases that he had prosecuted himself without mentioning the specific cases and the outcome thereof.

Ad par 27-31 The very nature of some of my complaints against certain prosecutors is that they do not have regard to court findings. Notwithstanding the findings of Govern J in Booysen v Acting NDPP [2014] ZAKZDHC 1 4665/2010, two prosecutors, Gladstone Maema and Moipone Noko procured authorisation to re-prosecute me by fabricating evidence in a prosecution memorandum to the erstwhile NDPP, Advocate Shaun Abrahams. I have set out these falsehoods succinctly in a criminal complaint against the two Advocates. This investigation is currently with the Investigative Directorate of the NPA.

Ad par 34-36 I refer to the credibility finding against Mokgatle by the High Court when the withdrawal of charges against Jiba was set aside by a full bench. These finding have not been appealed. They remain in force whether Mokgatle likes it or not. It is evident from the judgement that Shaun Abrams and Mokgatle connived to withdraw charges against Jiba. Jiba was herself fired by the President consequent to my evidence at the Mokgoro inquiry. The fact that Mokgatle seems to support Abrahams and others whom I testified about, squarely places him in their fold. In fact, based on the judgement Mokgatle was prepared to perjure himself to come to their aid.

Ad par 37 Mokgatle misses the point. Smit declined to prosecute Jiba after the FUL court ruling. In any event, it is my respectful submission that Smit was *functus officio.* Abrahams acted *ultra vires* by second guessing the court's findings. He was enjoined to place the case back on the court roll. Instead he forwarded it to Smit.

Ad par 41 I have no reason to cast aspersions on 'professional integrity *and good name' of Mokgatle. I deny the suggestion.*

Ad par 42 When I became aware of the credibility findings against Mokgatle, I opened a criminal case against him. This investigation is currently with the ID at the NPA.

Ad par 43 It is not clear what Mokgatle tries to convey.

Ad par 44 I did open a criminal case against Mokgatle.

Ad par 45-51 Some of the individuals mentioned by Mokgatle have been sanctioned. Riah Phiyega, Mthandazo Ntlemeza and Shaun Abrahams

were removed from their posts. Mmamonye Ngobeni resigned on the eve of an enquiry into her fitness to hold office. She is facing racketeering charges. Nomgcobo Jiba and Lawrence Mwrebi have been fired by the President. Moipone Noko resigned pending an inquiry into her fitness to hold office. Abrahams, Noko and Maema is under criminal investigation along with Mokgatle himself. Conversely those mentioned in **par 47** who were prosecuted, Anwa Dramat, Shadrack Sibija, Ivan Pillay, Glynnis Breytenbach, Robert Mc Bride [including myself] were either acquitted or charges against them were withdrawn.
It is within this context that I associate Mokgatle with enabling State Capture. It appears from Mokgatle's statement that he seems comfortable with the decisions and actions of some of his colleagues, despite a number of adverse findings against them.
Ad par 50 . Mokatle is deliberately obtuse. Had it been someone like Glynnis Breytenbach the outcome would have been much different.
Ad par 61 State Capture did not occur overtly for obvious reasons. Mokgatle knew or at a minimum ought to have known that some of those I testified about were either enablers of State Capture or actively partook therein.
Ad par 99 This may be so but I am aware of an instance where the NDPP has of his own volition reported the conduct of a prosecutor to the GCB. For instance Gorven J did not refer Jiba's conduct to the GCB but the NDPP at the time, Mxolisi Nxasana did.
Ad par 100 I submit that Mokgatle participated in the unlawful conduct of a criminal enterprise under the guise of the NPA or he knew or ought to have known that they acted unlawfully.
Ad par 128 Most of these issues have been ventilated previously. I believe that Advocate Ferreira will deal with it. I do however wish to point out another falsehood Mokgatle perpetuates, by saying we were awarded for the 'killing of Kwa Maphumulo Taxi members. I invite Mokgatle to present evidence to show that we received awards for the killing of taxi members.
Ad par 129 Mokgatle regurgitates the same material which has been comprehensively debunked by *inter alia* eight experienced Advocates from the NPA itself. One is a former NDPP who testified at the

Commission that there was not a shred (sic) of evidence against me. The current Deputy National Director for Public prosecutions as well as three other Advocates from the NPA has obliterated what Mokgatle contends for. (**De Kock report**). So too does Advocates Van Eeden and Ferreira as well as Willie Hofmeyr from the NPA. The current DPP in KZN has also concluded as much. She has declined to prosecute me for any of the so called predicate offenses.

Mokgatle's averment that several senior prosecutors, including the current **NDPP, deputy NDPP** and a **DPP** are incorrect in concluding that there is no case against me, is self-serving. It confirms his allegiance to those who enabled State Capture. It is disconcerting how Mokgatle ignores court rulings and the opinion of numerous council within the NPA and instead support those in the NPA such as Jiba, Mwrewbi, Noko, Maema *et al* Some of them have been fired by the President or resigned pending inquiries against them and the majority are under criminal investigation including Mokgatle himself.

Ad par 129.2 Mokgatle is mendacious. He quotes from his answering affidavit in the FUL matter that I *'participated'* in [Cato Manor's] unlawful conduct. There is no such evidence. I challenge Mokgatle to produce any evidence that I 'participated in any unlawful conduct' which he purports.

Ad par 129.4 129.9 In some of the killings inquests have been finalized. Magistrates made findings favourable to Cato Manor. No one was prosecuted for any of the killings. Mokgatle cannot *ipse dixit* speculate that the killings were unlawful. If that is his position he exhibits his contempt for courts and their findings.

The fact that I assisted police investigators to locate a wanted suspect, who then died in a shootout with the police, does not axiomatically translate that my actions were unlawful. I had a statutory obligation to do so.

Mokgatle, misleads the Commission regarding the Mkize interdict. The interdict, which was by consent of the parties, stipulated that Mkize could not be 'killed unlawfully. To suggest that he may not be killed no matter the circumstances is preposterous. This is the false narrative Mokgatle perpetuates. In the circumstances, Mkize was wanted for

murder and died during a shootout with the police. Mokgatle speculates that Mkize was sought for Lt Col Chonco's murder. If he had made an effort to study the relevant dockets, he would've been aware that Mkize was sought for the assassination of Chief Zondi. Instead he presents a false theory to fit his narrative that Cato Manor was out to kill Chonco's killers.

Mokgatle says I defended Cato Manor in the answering affidavit in the Mkize matter and therefore had 'knowledge of the activities' of Cato Manor. There is no evidence that those activities were unlawful. It is a fallacious assumption by Mokgatle.

Mokgatle fails to tell the Commission that I was respondent number four. The other respondents were the Minister, the MEC and the Provincial Commissioner, all whom have deposed confirmatory affidavits in this matter. It once again demonstrates how Mokgatle and his associates specifically targeted me.

Ad par 129.10 it is unclear what Mokgatle tries to convey. However Mokgatle should be acutely aware that a conviction can follow on the evidence of a single witness. In this instance it is corroborated by documents.

Ad par 145-146 Mokgatle would do well to read the judgement in the FUL review application. Jiba was not prosecuted for her decision to authorize my prosecution neither was she prosecuted for exercising her statutory obligations which Mokgatle claims. Mokgatle appears to rely on section 78 of the act on Prevention of Organized Crime Act 121 of 1998. (POCA) If he had had regard to the FUL judgement, he would've been cognisant that such an approach is clearly incorrect.

Jiba was prosecuted for the falsehoods and misrepresentations she made in her answering affidavit pursuant to my review application. *Booysen v Acting NDPP*.Even if Mokgatle insists to rely on this section, he surely cannot advocate that she lied or misrepresented facts under oath to a court *'in good faith'*

Ad par 147 I note this paragraph. I also note here too it is in contrast to what was held by the court in the FUL application but more significantly to what the current NDPP has decided.

Ad par 196-198 Mokgatle misinterprets Gorven J's judgement. I have ventilated this *ad nauseum* over time. The judgement is unambiguous. Jiba's council conceded that there was no evidence in the docket to link me to the offenses I was charged with. The court was *ad idem* that none of the other material Jiba purportedly relied on, link me to the commission of the offenses I was charged with.
I invite Mokgatle to carefully read paragraphs **29-31** of *Booysen v Acting NDPP and others [2014 ZAKZDHC 1 4665/2010*
It was not a criminal trial therefore the judge deemed it prudent to indicate that his findings does not amount to a finding of '*not guilty*' *Gorven J's dictum* does not reverse his finding regarding the purported evidence Jiba claims to have relied on.(Par 29-30 of judgement.)

10. In conclusion. Mokgatle and others I have testified about at the Commission, makes long winded statements concerning the Gorven J Judgement. Mokgatle also does it regarding the FUL judgement. They criticize their own council and in some instance their own superiors' decisions. They refuse to take responsibility for their injudicious decisions Instead they argue ceaselessly, trying to convince the Commission that they acted correctly. In doing so they impute that Gorven J is wrong. They think nothing of throwing their own council and others under the bus by blaming them for discrepancies during litigation.

Disturbingly however, is their implied indifference for legal opinions and decisions by their superiors. As I have stated above, they defy the findings by the Deputy National Director of Public Prosecutions (De Kock report) and therefore the final decision of the NDPP. They are seemingly at odds with various other actors within the NPA too, including a previous NDPP.

In the process they convey falsehoods, misrepresent facts and mislead the Commission to substantiate their argument. I have listed some of these above.

I am aware that litigants and council differ at times. However, I submit that Mokgatle *et al* are vexatious to the extent that they bring the NPA in disrepute.

As much as they dissent from these court findings, the judgements remain in force. They were not appealed by Mokgatle, Jiba and Abrahams. The explanations tendered by Mokgatle *et al* are irrelevant. Jiba, Abrahams and

Mokgatle are not ordinary litigants. They are acutely aware that these findings could have devastating consequences for them. If the NPA did not deem it fit to appeal these findings, which I submit was the correct position to adopt in these circumstances, nothing precluded Jiba, Mokgatle or Abrahams to appeal the credibility findings in their personal capacity.

One would reasonably expect, given the gravity of these findings and the keen way in which Mokgatle *et al* have protested these findings, they would have appealed these findings personally.

To now belatedly decry the court findings is self-serving and opportunistic.

What has crystalized from Mokgatle *et al's* statements are the recalcitrant positions they have adopted regarding decisions taken by their superiors, courts and other senior advocates of the NPA and conversely their obstinate defence of transgressors at the NPA such as Maema, Noko, Jiba, Abrahams and Mwrebi.

Jiba and Mwrebi were fired by the president. Noko resigned pending an in inquiry into her fitness to hold office .Maema, Noko, Jiba and Abrahams face possible criminal charges.

It is within this context that I reiterate that Mokgatle enabled elements within the NPA to capture the institution.

I know and understand the contents of this declaration.

I have no objection to take tha prescribed oath.

I consider the oath to be binding on my conscience.

JW BOOYSEN Maj-Gen (r)

Pretoria

I certify that the deponent declares that he knows and understand the contents of this declaration It was sworn to in my presence on this the 15th day of March 2021 at Pretoria.

COMMISSIONER OF OATHS (RSA)
Jonathon M Bowles I LB (UP)
Attorney of the High Court (Non Practising)
Fidelity Security Group
Block F Corporate 66 Office Park
269 Von Willich Avenue Centurion

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

***IN RE*: APPLICATION OF MARSHALL MOKGATLHE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULE 11.2 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

AFFIDAVIT IN RESPONSE TO THE AFFIDAVIT FILED BY BOOYSEN DEPOSED ON 15 MARCH 2021

I, the undersigned,

MARSHALL MOKGATLHE

do hereby declare under oath and state that: -

1. I am an adult male employed at the National Prosecuting Authority (*"NPA"*) as Senior Deputy Director Public Prosecutions, Gauteng Division, Pretoria c/o

the State Attorney, Pretoria, 316 Thabo Sehume Street, SALU Building, Pretoria.

2. The facts contained in this affidavit are within my personal knowledge, save where otherwise stated, or where the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. Where I rely on facts and/or statements made by third parties, I do so based on the belief that same is true and correct and I annex to this affidavit the confirmatory affidavit of Luyanda Kopman (*"Kopman"*) marked as annexures **"MM32"**.

4. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept as correct.

5. The Chairperson is requested to read the contents of all the annexures referred to herein as if specifically incorporated into this affidavit.

6. Where I make reliance on the contents of the affidavits of Khulekani Raymond Mathenjwa ("Mathenjwa") and Sello Gladstone Maema ("Maema"), I request the Commission to read such contents as if specifically incorporated into this affidavit. Further, I verily believe the correctness and veracity of the contents of their affidavits.

A. INTRODUCTION

7. On 10 April 2019, I was served with a Rule 3.3 notice, dated 9 April 2019, wherein I was informed, among other things, that Booysen has filed an affidavit and will testify before the Commission on 2 May 2019 and that Booysen may implicate me during the course of his evidence.

8. For reasons set out in my Rule 3.4 statement, I made an application to cross examine Booysen and also sought condonation for late filing of the application to cross examine Booysen.

9. As a result, the purpose of this affidavit is not to restate what I have stated in my Rule 3.4 statement which also serves as the application to cross examine Booysen. Instead, it is to simply, to the extent necessary, reply to any matter raised in Booysen's answer to my affidavit, which matter may require expatiation or is a new matter. To the extent that I do not respond to each allegation set out in Booysen's affidavit, under reply, I deny same.

B. CONDONATION FOR THE FILING OF THIS AFFIDAVIT AND OVERVIEW

10. Although the rules do not make provision for the filing of further affidavits, I deem it necessary to request the Commission to accept my replying affidavit as evidence before these proceedings. Such is made out of respect for the Commission.

11. Booysen's affidavit was deposed to on 15 March 2021, which is an answer to my affidavit which I deposed to on 29 September 2020 (although not dated, I

recall this date as it was the date that counsel after drafting and settling the affidavit arranged that I appear before a Commissioner of Oaths, and having commissioned the affidavit, Counsel emailed same to Mr Kopman to serve on the commission) and Mr. Kopman only emailed it to the Secretary on 30 September 2020. I attach marked annexure **"MM33"** an email sent to Kopman attaching the affidavit, and this fact is also confirmed in Kopman's confirmatory affidavit.

12. Kopman received an email from Ms Shannon Van Vuuren ("Van Vuuren"), from the office of the Secretariat of the Commission on 30 April 2021, at 1:17PM, attached to that email was the aforementioned affidavit of Booysen. On the same day, at 15:55, Kopman forwarded the email and its attachment to counsel and the NPA's Marco Voller ("Voller") who is an official in the Legal Affairs Division ("LAD") to send same to me. I attach the email Kopman received from Van Vuuren and the email he forwarded to counsel and Voller and mark same **"MM34"**.

13. On 30 April 2021, Kopman sent me an email attaching Booysen's affidavit. I attach hereto marked **"MM34.1"** the email I received from Kopman. Kopman advised me that after he had sent counsel and myself Booysen's affidavit, he communicated with counsel to arrange a date for consultation. At that stage, counsel was finalising the Rule 3.4 statements of Maema and Mathenjwa, which were finalised on 16 May 2021 and deposed to on 17 May 2021. I then received a telephone call, on 12 May 2012, from Kopman advising me that a consultation was arranged to meet with counsel on 17 May 2021 at 08:00AM.

14. At the consultation, I informed counsel and Mr Kopman that most of the issues raised by Booysen pertain to the Cato Manor matter, the FUL judgment wherein the Gauteng Division High Court, make adverse remarks about Advocate Shaun Abrahams ("Abrahams") and I pertaining to the withdrawal of the charges against Advocate Nomgcobo Jiba ("Jiba") and the delay in filing my answering affidavit to his affidavit and my application to cross examine him, which he takes no difficulty with save for the fact that he deems it cynical as I have the luxury of being assisted by the State Attorney and outside Counsel. I must state that I am entitled to be assisted by the State Attorney, and outside Counsel, as at the time that relates to matters that the Commission is to determine, I was acting within the course and scope of my employment with the NPA.

15. At the consultation I advised counsel that I am of the view that I have substantively dealt with the issues raised in Booysen's affidavit. I have fully set out reasons why my Rule 3.4 Statement and application to cross examine Booysen was filed late. I have also extensively set out the reasons why I did not appeal the FUL judgment. I do not deem it necessary to deal in detail with these two issues, and I request the Commission to have regard to what is stated in my Rule 3.4 Statement already filed with the Commission.

16. The only issue that perhaps requires some expatiation is the Cato Manor matter. I say so because I was advised at the consultation held with Counsel and Mr Kopman on 17 May 2021 that Advocates Sello Maema ("Maema") and

Raymond Mathenjwa ("Mathenjwa") have filed substantive affidavits that set out the evidence that they had before them and on which they relied in making a prosecutorial decision to charge Booysen and members of the Cato Manor Serious Violent Crimes Unit ("Cato Manor SVC Unit") with racketeering and predicate offences for the killing of a number of people in KwaZulu Natal and other places.

17. At the consultation, I was advised that it may be prudent for me to read the affidavits of Maema and Mathenjwa ("the prosecution team"), and should I endorse what is set out in their affidavits, I could attach them and refer to the relevant paragraphs therein instead of repeating the laborious task of setting forth the evidence that is in the docket. I do so to demonstrate the *prima facie* evidence that the prosecuting team had against Booysen and the Cato Manor SVC Unit which was presented before Jiba in order for her to make a decision to issue the racketeering certificates.

18. The consultation then adjourned to afford me an opportunity to read the said affidavits. However, I was only furnished with Maema and Mathenjwa's affidavits on 18 May 2021, as the affidavits were being commissioned at the time the consultation was taking place.

19. A second consultation took place on 27 May 2021, wherein I advised Counsel that I endorse what Maema and Mathenjwa have stated in their affidavits. The contents of their affidavits accord with what they informed me when I consulted

with them before preparing the opinion that Abrahams sought from me pertaining to the decision whether to prosecute Jiba.

20. The statements of Maema and Mathenjwa as well as the information they conveyed at the consultation and not Booysen's statement, convinced me that the charges against Jiba could not succeed. Johan Smit (former DPP: North-West) opined that Maema and Mathenjwa would be able to give evidence to disprove the element of intent which is required to prove perjury against Jiba. As such, he was also of the view that the State would not be able to prove its case against Jiba, and therefore, should not be prosecuted.

21. Again, the affidavits of Maema and Mathenjwa fully discuss the judgment of the *General Council of the Bar of South Africa vs Jiba and Others* 2017 (2) SA 122 (GP) ("the Legodi J judgment"). wherein, the full facts pertaining to what Booysen considered to have been mendacity on Jiba's part was considered and Legodi J, as he then was, (referred to herein as Legodi J) together with Hughes J, concurring, found that Jiba could not have been mendacious neither could she be found to have acted in bad faith. The findings made by Legodi J were not set aside by the Supreme Court of Appeal when the matter went on appeal and therefore stand in the judgment of *Jiba and Another vs GCB and Another* 2019 (1) SA 130 (SCA) ("the Jiba SCA judgment").

22. I am advised that what Legodi J found, in respect of the full facts being placed before Gorven J, was also acknowledged by Mokgoro J in the Enquiry in Terms of Section 6(12) of the National Prosecuting Authority Act No. 32 of

1998 ("NPA Act"). At paragraph 296.1 (on page JMC-097 of exhibit Z(g)) of the report, Mokgoro J stated as follows:

> "*First, there is evidence before the Enquiry that was not before Gorven J, and second, the purpose of which the Enquiry is considering the evidence underlying the Booysen matter is materially different to what Gorven J was seized with. Gorven J may have either come to a materially different conclusion had he had the same information before him as we do or may have come to the same conclusion for the same or different reasons.*" (Own emphasis)

23. Of course, the judgement of Legodi J and the SCA's as well as the findings made by Mokgoro J in the Enquiry in terms of Section 6(12) of NPA Act, do not support the story sought to be advanced by Booysen. For that reason, he completely disregards them and clings to the judgment of Gorven J in *Booysen vs NDPP and Others* (4665/2010) [2014] ZAKZDHC 1 (26 February 2014)).

24. In light of the aforesaid, I fully endorse the affidavits filed by Maema and Mathenjwa and I attach their respective affidavits, without annexures, marked as **"MM35"** and **"MM36"**. Maema deals with the Cato Manor matter, the analysis of Legodi J's judgment, as well as the de Kock report at paragraph 87 to 265 of his affidavit. Mathenjwa deals with the Cato Manor matter, the analysis of Legodi J's judgment, as well as the de Kock report at paragraph 57 to 185 of his affidavit.

C. AD SERIATIM RESPONSE

25. **Ad paragraph 5**

25.1. I deny that my application to cross examine Booysen is cynical, I have explained in my initial affidavit, the reasons for its lateness and need not repeat same herein.

25.2. The Commission was made aware, long before, the implicated NPA officials had legal assistance offered to them that the NPA, through the letters written by Marco Voller and referred to in my initial affidavit, requested to adopt a strategy where all NPA implicated officials would be represented by one team and also that all evidence implicating them be adduced and the NPA officials answered all the allegations of different persons in each of their affidavit to avoid piecemeal affidavits and the concomitant costs thereto.

25.3. Regrettably, the Commission neither accepted nor rejected the proposal. The leading evidence leader, Adv Pretorius SC, informed our legal representatives at the meeting held on 20 January 2020 that the message would be conveyed to the Chairperson to decide. To date hereof, there has been no response to that request.

25.4. As such, the delay was unavoidable and Booysen is not justified in alleging that the delay was cynical.

26. **Ad paragraph 6**

26.1. I take note of Booysen's suspicion that the officials of the NPA whose opinions he takes as infallible, Advocates Ferreira and Van Eeden and Mr Hoffmeyr, as demonstrated by the tenor of his affidavit have not been served on me, if at all filed at the Commission. It appears, their delayed response, if any, finds no distaste from Booysen.

27. The response paragraphs below are a response to Booysen's unnumbered paragraphs. I have taken the liberty to assign to them the next chronological number and will label them as "unnumbered" and thereafter use the chronological number following 6, as that is the last paragraph that is numbered.

28. **Ad unnumbered paragraph 8**

28.1. Booysen refers to paragraphs 27 to 31 of my affidavit.

28.2. It is unclear who are the prosecutors Booysen is referring to herein.

28.3. The allegation that Maema and Advocate Moipone Noko fabricated evidence against Booysen is irrelevant to me. My involvement, so to speak, is peripheral in the Cato Manor story. I declined to charge Jiba because there was no evidence to show that she intended to perjure

herself in the proceedings before Gorven J. Maema and Mathenjwa fully demonstrate this in their affidavit where they analyse the judgment of Legodi J. Maema deals with this at paragraph 193 to 205 of his affidavit. Mathenjwa deals with same at paragraph 163 to 175 of his affidavit.

29. **Ad unnumbered paragraph 9**

29.1. Booysen refers to paragraphs 34 to 36 of my affidavit.

29.2. I specifically deny that I connived to withdraw the charges against Jiba and also deny that I am prepared to perjure myself for Abrahams, Jiba or any other person for that matter.

29.3. The fact that I made prosecutorial decisions that Booysen does not like neither makes me a supporter of those I did not prosecute nor "*squarely place me in their fold*".

29.4. I have fully explained the steps I took to request the assistance of the NPA to appeal the judgment of the FUL and reiterate what I have stated in my initial affidavit in that regard.

30. **Ad unnumbered paragraph 10**

30.1. Booysen refers to paragraphs 37 of my affidavit.

30.2. It is incorrect that Smit SC was *functus officio,* he had never made a prior decision pertaining to the charges against Jiba such that he would be *functus officio.*

31. **Ad unnumbered paragraph 15**

31.1. Booysen refers to paragraphs 45 to 51 of my affidavit.

31.2. All these persons were mentioned in Booysen's initial affidavit, and I merely responded to what he said. I had no reason to mention those people other than to respond to Booysen, who now appears to be senile in attributing their reference to me.

32. **Ad unnumbered paragraph 16**

32.1. Booysen refers to paragraph 50 of my affidavit.

32.2. I deny that I am deliberately obtuse.

33. **Ad unnumbered paragraph 17**

33.1. Booysen refers to paragraph 61 of my affidavit, that paragraph merely quotes the specified paragraphs in Booysen's Witness Statement.

33.2. I deny that I knew or ought to have known that the persons that Booysen testified about were either enablers of state capture or actively partook therein and put Booysen to the proof thereof. In the all the affidavits filed with the Commission and in his Evidence in Chief, Booysen failed to adduce and/or provide evidence in support of his allegations relating to how the said persons enabled State Capture.

33.3. Booysen expects me to know or ought to have known that Phiyega, Ntlemeza, Xaba, Ncube, and Ngobeni were enablers of State Capture, disregarding the fact that these were at the time members of the SAPS. Intriguingly, Booysen expects everyone to believe that he did not know or could not have known that the conduct of the Cato Manor SVC Unit constitutes extra-judicial killings. Booysen's hypocrisy regarding his pretence being unaware that a high number of suspects and other persons who were not suspects were killed extra-judicially by members of a Unit that was under his ultimate command is quite glaring.

34. **Ad unnumbered paragraph 18**

34.1. Booysen refers to paragraph 99 of my affidavit.

34.2. I have no knowledge of the allegations in this paragraph. It is intriguing how Booysen would have knowledge of what action an

NDPP has taken when an NDPP does not report to Booysen or any other official in the NPA. If it was any Tom, Dick and Harry, Booysen would probably accuse such person of "capturing the NDPP".

35. **Ad unnumbered paragraph 19**

35.1. Booysen refers to paragraph 100 of my affidavit.

35.2. I deny that I participated in any unlawful conduct of any enterprise and or acted unlawfully.

35.3. From what is set out in the affidavits of Maema and Mathenjwa, it appears that instead, it is Booysen who knew or ought to have known that he and the Cato Manor SVC Unit participated in an enterprise involved in extrajudicial killing of persons they deemed to be suspects.

35.4. I dare say Booysen is the pot calling the kettle black, needless to say, in this instance Booysen has not demonstrated evidence to prove the alleged capture he accuses me of. In contrast, Maema and Mathenjwa have presented evidence of the killings that the members of the Cato Manor SVC unit perpetrated and yet Booysen saw nothing wrong with their conduct.

36. **Ad unnumbered paragraph 20**

36.1. Booysen refers to paragraph 128 of my affidavit.

36.2. Once again, I reiterate I have not been served with the affidavit of Ferreira, if one was filed at the Commission. Booysen appears to know more about the happenings at the NPA and the conduct of its officials than I, an official of the NPA.

36.3. The motivation for monetary and non-monetary awards attached to Maema's affidavit, marked "**CM4.2**" and referred to in paragraph 114 of Maema's affidavit clearly indicates that the awards were made in respect of "*MAPHUMULO CAS 99/08/2008: MURDER AND ATTEMPTED MURDER OF SAPS MEMBERS SUPT CHONHO AND INSP M MKHANYILE*". Maema and Mathenjwa had also summarised the dockets which clearly indicate that the murder of superintended Choncho was alleged to have been orchestrated by members of the Kwa Maphumulo Taxi Association and hence it was most of its members (and including other suspects in different dockets) who were killed as evident from the relevant dockets.

36.4. I specifically refer the Commission to paragraphs 114, 119.4.2.7, 124.6 and 154 to 158 of Maema's affidavit wherein he sets out the monetary and non-monetary awards given to Booysen and members of the Cato Manor SVC Unit.

37. **Ad unnumbered paragraph 21**

37.1. Booysen refers to paragraph 129 of my affidavit.

37.2. I deny that the justification of the prosecution of Booysen has been debunked by the Advocates that Booysen refers to. To the contrary, some of the conduct that Booysen relies on as debunking the prosecution is demonstrated to be irrational when regard is had to the judicial authority referred to in Maema and Mathenjwa's affidavit. As such, it is unclear how such irrational conduct can be said to debunk anything. Maema and Mathenjwa also demonstrate the irrationality of the report prepared by the De Kock panellists.

37.3. I can do no better than refer to the relevant portions of Mathenjwa's affidavit where he demonstrates the irrationality of the decision to withdraw the charges against Booysen and members of the Cato Manor SVC Unit, the unreliability of Mr. Mxolisi Nxasana's ("Nxasana") evidence and the irrationality of De Kock's report. The relevant paragraphs, in Mathenjwa's affidavit, are:

37.3.1. Paragraphs 75.7, 178 – 183, and 328 – 377 set out the irrationality of the decision to withdraw racketeering authorisations and the charges relating to predicate offences against Booysen and the Cato Manor SVC Unit members; as well as the irrationality of the De Kock report.

37.3.2. Paragraph 300 to 319, deal with the unreliability of Nxasana's evidence before the Commission.

38. It is apposite to note that all the Advocates whose opinions Booysen refers to and relies on regarding the Cato Manor matter, have not interviewed witnesses, attended inspections, studied the ballistic crime scene reconstruction reports, and the post-mortem reports. On the other hand, Booysen argues that Maema and Mathenjwa who studied and applied themselves to all this evidence, ought not to be believed. It is not surprising that Booysen chose the opinions of the Advocates who have not applied themselves to judicial authorities over those who are prosecuting him. Mathenjwa was spot on at paragraph 181 when he noted what Harms DP, as he then was, stated in the judgment of *The NDPP vs King* (86/09) [2010] ZASCA 8 (8March 2010); 2010 (2) SACR 146 (SCA) that it is those who face serious charges that have little inclination to cooperate and have the tendency of attacking the prosecution instead of facing the charges. That is exactly what Booysen is doing.

39. **Ad unnumbered paragraphs 22**

39.1. Booysen refers to paragraph 129.2 of my affidavit.

39.2. Again, Maema and Mathenjwa have extensively demonstrated how Booysen knew or ought to have known about the crimes perpetrated

by the Cato Manor SVC Unit and how he managed same instead of their direct superior.

39.3. The relevant paragraphs in Mathenjwa's affidavit that demonstrate Booysen's direct and tacit knowledge are 57 to 185, and with specific reference to paragraphs 64 to 66 and 103 to 107.

40. **Ad unnumbered paragraph 23**

40.1. It is not clear whether Booysen refers to paragraphs 129.4 and 129.9 or from paragraph 129.4 to 129.9 of my affidavit.

40.2. At paragraph 89.4.20.10 Mathenjwa states that:

> *"Magistrate Geldenhuys, who presided in the inquest of Majola, found that Nel (Accused 5) was criminally responsible for the death of the deceased. It is clear that the De Kock panellists did not take into consideration such finding in their recommendation in the De Kock report and neither did the NDPP when the charges were withdrawn..."*

40.3. From the above, it is evident that Booysen is the one who is mendacious when he states that *"Magistrates made findings favourable to Cato Manor."* The contrary is true and yet the charges were not only withdrawn against Booysen, but all accused. No wonder

Maema and Mathenjwa contend that the decision to withdraw the charges relating to predicate offences was irrational.

40.4. As such, it is not my *ipse dixit* speculation that the killings were unlawful. The prosecutors who were seized with the matter demonstrate such evidence and as Harms DP, as he then was, observed that the prosecutors are being attacked for demonstrating such evidence.

40.5. With regard to the allegation that suspects died as a result of a shoot-out with police, Maema and Mathenjwa set out various examples of how such a version is not borne out by objective evidence and most importantly, expert evidence. The evidence in the docket summarised by Maema and Mathenjwa demonstrates the unlawful killing spree that members of the Cato Manor SVC Unit went on and to this day Booysen still denies that their conduct was unlawful.

40.6. One example is the killing of Mkhize and Mathenjwa succinctly sets out same at paragraph 89.4.5.1 to 5.

40.7. It is irrelevant for who's killing Mkhize was wanted by police. What is relevant is that the arrest of a suspect should happen in terms of the law, and where necessary, the proportionate force should be used in terms of section 49 of the Criminal Procedure Act No. 51 of 1977 ("CPA"), read with the Standing Orders.

40.8. With regard to the court interdict obtained by Mkhize, I refer the Commission to paragraph 109 to 119 of the affidavit of Mathenjwa.

41. **Ad unnumbered paragraph 24**

41.1. Booysen refers to paragraph 129.10 of my affidavit.

41.2. I am acutely aware that a conviction can be obtained from the evidence of a single witness. However, when I had regard to what the prosecutors stated in their statement, the statement of Hodes SC, I was not satisfied that the State could prove the offence of fraud and perjury against Jiba.

41.3. It is not clear, what documents Booysen is referring to when he states that "*In this instance it is corroborated by documents.*"

41.4. To the contrary, the documents do not corroborate that Jiba perjured herself when she deposed to the affidavit that she served before Gorven J. This much was correctly analysed in the judgment of Legodi J which I have already referred to above and dealt with in the affidavits of Maema and Mathenjwa and in the report of Mokgoro J.

42. **Ad unnumbered paragraphs 25**

42.1. Booysen refers to paragraphs 145 to 146 of my affidavit.

42.2. I am aware that Jiba was prosecuted for fraud and perjury. However, the alleged fraud and perjury arose from an affidavit she deposed to in the review application instituted by Booysen and culminated in the Gorven J judgment where some adverse remarks were made against Jiba, because she failed to file a supplementary affidavit to respond to the inconsistencies that Booysen pointed out in her affidavit and accused her of mendacity. The failure to take up the challenge is the primary source of the findings.

42.3. I have referred to the affidavits of Maema and Mathenjwa who were members of the prosecution team that prepared the prosecution memorandum for Jiba's approval. They state under oath that the prosecution team had requested Hodes SC to prepare a supplementary affidavit to explain the alleged inconsistencies, and same was not done. They have also gone to great lengths to explain how they sought to have the Gorven J judgment appealed, only to be stopped by Nxasana, who on Booysen's version, allegedly laid a complaint at the General Council of the Bar ("GCB") against Jiba. In this regard, I refer the Commission to paragraph 303 to 312 of Mathenjwa's affidavit. I also refer to Mathenjwa's affidavit wherein he discussed the judgment of Legodi J, which also dealt with Jiba's alleged mendacity.

42.4. To this day, despite the judgment of Legodi J whose finding on this issue was not disturbed by the SCA, Booysen refuses to acknowledge those judgments and yet criticises all and sundry for ignoring the Gorven J judgment. Again, this is indicative of Booysen's hypocritical stance on matters that are not favourable to his version and stance.

43. **Ad unnumbered paragraphs 26 and 27**

43.1. Booysen, respectively, refers to paragraph 147 and paragraph 196 to 198 of my affidavit.

43.2. I refer to what I stated in my affidavit pertaining to the FUL judgment, the Gorven J judgment and the Legodi J judgment.

43.3. With regard to the current NDPP's decision to withdraw charges against Booysen, I refer to what Mathenjwa states at paragraph 303 to 342.

43.4. The very judgment which Booysen alleges to have ventilated *ad nauseum*, he continues to misconstrue to this very day and also ignores the judgment of Legodi J and that of the SCA. Legodi J deals with the very evidence that Jiba relied on and discusses how she was alleged to be mendacious and states that such finding has to be seen within its proper context. Legodi J dealt with this at paragraph 53 to paragraph 55 of his judgment and it is set out in Mathenjwa's affidavit.

44. **Ad renumbered paragraphs 28 (numbered 10 in Booysen's affidavit) and unnumbered 29**

44.1. I have indicated that in order to chronologically respond to Booysen's affidavit, I have renumbered his paragraphs. This paragraph is in response to what is numbered paragraph 10 in Booysen's affidavit and the unnumbered paragraph directly below that labelled number 10.

44.2. I deny that my decisions were injudicious.

44.3. I have demonstrated that Hodes SC clearly stated that he did not make the concession that Gorven J attributed to him.

44.4. It is telling that Booysen expects me to agree with my superiors even where it is clear that they are wrong. This goes against the constitutional and legislative injunction to all prosecutors to prosecute without fear, favour, or prejudice.

45. **Ad unnumbered paragraph 30 to 37**

45.1. These are the paragraphs that begin from the second paragraph after the paragraph numbered 10.

45.2. Booysen appears to be ranting and raving about everyone and everything in the most generalised manner that characterised his initial affidavit and evidence.

45.3. I contend that my initial affidavit filed before the Commission as well as this reply to Booysen's affidavit, to the extent necessary, addressed and addresses, respectively, the allegations levelled against me, and thus, I do not intend to respond to the remainder of these paragraphs and deny them with the contempt they deserve.

D. CONCLUSION

46. In conclusion, I request the honourable Chairperson to consider my initial affidavit and this affidavit together with both their annexures in order to make a finding on the allegations whether I enabled the alleged capture of the criminal justice system, and by extension the capture of the State, simply because I made a prosecutorial decision which Booysen disagrees with.

47. It is important that the Chairperson make the findings based on the evidence presented before the Commission, even if I may not be granted leave to cross examine Booysen. This is so because the accusations levelled against my colleagues and I were made publicly under the auspices of the Commission.

48. And for that reason, it is this very Commission's findings that can effectively vindicate my colleagues and I to demonstrate to the public who await the

Commission's report with bated breath that we were wrongly accused simply because we performed our duties without fear, favour or prejudice. We dared to prosecute those who held powerful positions and thought themselves beyond the reach of the law, and thus, thought they could subvert the constitutional principle of equality before the law.

49. As such, the Commission's findings will help restore the public's trust in the integrity of the NPA as an institution, and also encourage all prosecutors to uphold their oath of office and allegiance to the Constitution of the Republic of South Africa, and thus, strengthen its criminal justice system to be rooted in fairness and equality which underpin the rule of law.

MARSHALL MOKGATLHE

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this 12th day of June 2021 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

LERATO MOPELI
PRACTISING ATTORNEY OF THE RSA
EX OFFICIO COMMISSIONER OF OATHS
LEDWABA MAZWAI BUILDING
141 BOSHOFF STREET
NIEUW MUCKLENEUK . PRETORIA
TEL: (012) 346 - 7313 FAX: (012) 346 - 7314

COMMISSIONER OF OATH

FULL NAMES: _____

ADDRESS: _____

AREA : _____

CAPACITY: _____

List of Annexures to Adv Marshall Mokgatlhe's Affidavit		
Annexure	Description	Paragraph
MM32	Confirmatory Affidavit of Luyanda Kopman	3
MM33	Email sent to the Secretary of the Commission on 30 Sep 2020	11
MM34	Email Luyanda Kopman received from van Vuuren on 30 Apr 2021	12
MM34.1	Email from Luyanda Kopman to Adv Marshall Mokgatlhe on 30 Apr 2021	13
MM35	Affidavit of Adv Sello Maema	24
MM36	Affidavit of Adv Raymond Mathenjwa	24

MM32

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

***IN RE*: APPLICATION OF MARSHALL MOKGATLHE ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN (*"BOOYSEN"*) IN TERMS OF RULE 11.2 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

CONFIRMATORY AFFIDAVIT

I, the undersigned,

LUYANDA KOPMAN

do hereby declare under oath and state that: -

1. I am an adult male employed as an Attorney at the State Attorney, Pretoria, 316 Thabo Sehume Street, SALU Building, Pretoria, Gauteng Province.

2. The facts contained in this affidavit are within my personal knowledge, save where otherwise stated, or where the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. I have perused the affidavit of Marshall Mokgatlhe, together with the annexures and confirm the correctness and veracity of the contents thereof insofar as same relates to me.

_____

LUYANDA KOPMAN

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this ___ day of _____ **2021** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

_____

COMMISSIONER OF OATH

FULL NAMES: _____

ADDRESS: _____

AREA : _____

CAPACITY: _____

MM33

Johannesburg, 2193|Gauteng| South Africa|

Cell: 060 749 5687

Email: shannonv@commissionsc.org.za | |www.sastatecapture.org.za

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From: Kopman Luyanda [mailto:LKopman@justice.gov.za]
Sent: Wednesday, 30 September 2020 09:13
To: Brigitte Shabalala <BrigitteS@commissionsc.org.za>; Garth Hulley <GarthH@commissionsc.org.za>; Susan Wentzel <SusanW@commissionsc.org.za>; Shannon S. Van Vuuren <ShannonV@commissionsc.org.za>; Andre J. Lamprecht <AndreL@commissionsc.org.za>
Cc: kopmanluyanda@gmail.com
Subject: M MOKGATLHE APPLICATION (NOM)

Morning All

Herewith the signed notice of motion of adv Mokgatlhe's application for your filing to the commission.

Thank you so much

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3 attachments

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J Booysen Ans. Affidavit 15 03 2021.pdf
184K

MM 34.1

Adv Kgaogelo Ramaimela

From: Luyanda kopman <kopmanluyanda@gmail.com>
Sent: Friday, 30 April 2021 16:10
To: mpmokgatlhe@npa.gov.za
Subject: Fwd: M MOKGATLHE APPLICATION // JOHAN BOOYSEN
Attachments: image002.jpg

Dear Adv Mokgatlhe

See the email below and attached adv Booysen affidavit for your perusal.

Thank you

-------- Forwarded message --------
From: **Shannon S. Van Vuuren** <ShannonV@commissionsc.org.za>
Date: Fri, 30 Apr 2021, 1:17 PM
Subject: M MOKGATLHE APPLICATION // JOHAN BOOYSEN
To: Kopman Luyanda <LKopman@justice.gov.za>
Cc: kopmanluyanda@gmail.com <kopmanluyanda@gmail.com>, Garth Hulley <GarthH@commissionsc.org.za>, Susan Wentzel <SusanW@commissionsc.org.za>, William Nicholson <WilliamN@commissionsc.org.za>, Andre J. Lamprecht <AndreL@commissionsc.org.za>, Lionel L. Groenewald <LionelG@commissionsc.org.za>

Dear Luyanda

RE: MR. MARSHALL MOKGATLHE ("YOUR CLIENT")

We trust this email finds you well.

Adv Garth Hulley SC may have sent this affidavit on to you already for your client's consideration, but for recordal purposes please note that we are also sending same to you via the Secretariat.

Attached hereto please find, for your client's consideration, Major-General Johan Booysen's affidavit filed in answer to your client's application.

You are reminded that this affidavit provided to yourselves is confidential. Your attention is drawn to Regulations 11(3) and 12(2)(e) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document submitted to the Commission by any person in connection with the Commission's inquiry.

The papers have been made available to the Chairperson of the Commission and we will update you regarding further developments as soon as same become available.

Kind regards,

Shannon Van Vuuren

Legal Advisor: Operations & Investigative Support

COMMISSION OF INQUIRY INTO STATE CAPTURE

Hillside House, 17 Empire Road, Parktown,

Johannesburg, 2193|Gauteng| South Africa|

Cell: 060 749 5687

email: shannonv@commissionsc.org.za | |www.sastatecapture.org.za

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Cc: kopmanluyanda@gmail.com
Subject: M MOKGATLHE APPLICATION (NOM)

Morning All

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Thank you so much

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 MM34

Gmail

Kgaogelo Ramaimela <adv.kaygee@gmail.com>

Fwd: M MOKGATLHE APPLICATION // JOHAN BOOYSEN

Luyanda kopman <kopmanluyanda@gmail.com> 30 April 2021 at 15:55
To: Tebogo Mathibedi <Mathibedi@thulamelachambers.co.za>, zuko.madlanga@gmail.com, Lindiwe Vilakazi <lindiwev63@gmail.com>, Kgaogelo Ramaimela <adv.kaygee@gmail.com>, "Marco MP. Voller" <MVoller@npa.gov.za>

Dear all

Find the email below and attached affidavit of Booysen for your attention.

Thank you

---------- Forwarded message ---------
From: **Shannon S. Van Vuuren** <ShannonV@commissionsc.org.za>
Date: Fri, 30 Apr 2021, 1:17 PM
Subject: M MOKGATLHE APPLICATION // JOHAN BOOYSEN
To: Kopman Luyanda <LKopman@justice.gov.za>
Cc: kopmanluyanda@gmail.com <kopmanluyanda@gmail.com>, Garth Hulley <GarthH@commissionsc.org.za>, Susan Wentzel <SusanW@commissionsc.org.za>, William Nicholson <WilliamN@commissionsc.org.za>, Andre J. Lamprecht <AndreL@commissionsc.org.za>, Lionel L. Groenewald <LionelG@commissionsc.org.za>

Dear Luyanda

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The papers have been made available to the Chairperson of the Commission and we will update you regarding further developments as soon as same become available.

Kind regards,

Shannon Van Vuuren

Legal Advisor: Operations & Investigative Support

COMMISSION OF INQUIRY INTO STATE CAPTURE

Hillside House, 17 Empire Road, Parktown,

MM35

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

IN RE: **APPLICATION OF GLADSTONE SELLO MAEMA ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN ("BOOYSEN"), ROBERT McBRIDE ("McBRIDE"), HELEN ELIZABETH VAN JAARSVELD ("VAN JAARSVELD"), KAREN HELEN VAN RENSBURG ("VAN RENSBURG"), CYRIL SIMPHIWE MLOTSHWA ("MLOTSHWA"), MATTHEWS SESOKO ("SESOKO"), MXOLISI SANDILE OLIVER NXASANA ("NXASANA") AND INNOCENT HUMBULANI KHUBA ("KHUBA") IN TERMS OF RULE 11.2 READ WITH RULE 3.3.6 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

WITNESS STATEMENT IN TERMS OF RULE 3.4

I, the undersigned,

GLADSTONE SELLO MAEMA

do hereby declare under oath and state that: -

1. I am an adult male State Advocate employed at the National Prosecuting Authority (*"NPA"*) as a Deputy Director of Public Prosecutions ("DDPP") and attached to the office of the Director of Public Prosecutions, North West Division, Mmabatho, situated at Mega City Complex, East Gallery, 3139 Sekame Road, Mahikeng.

2. The facts contained in this affidavit are within my personal knowledge, save where otherwise stated, or where the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. Where I rely on facts and/or statements made by third parties, I do so on the belief that same is true and correct and I annex to this affidavit the explanatory affidavit of Nolusindiso Gejengane (*"Gejengane"*), which marked as annexure **"GSM1"**, the explanatory affidavit of Marco Voller (*"Voller"*), marked as annexure **"GSM2.1"**, and the explanatory affidavit of Luyanda Kopman (*"Kopman"*), marked as annexure **"GSM2.2"** and the confirmatory affidavit of Adv Raymond Mathenwa ("Mathenjwa"), marked as annexure **"GSM2.3"**. The annexures that solely pertain to me, are marked as **"GSM"**. The annexures relating to the Cato Manor matter, as they pertain to Mathenjwa and I will be marked as **"CM"**.

GSM

4. Where I make submissions of a legal nature, I do so on the advice of my legal representatives on record, which advice I accept to be in accordance with the prevailing legal position.

5. The Chairperson is requested to read the contents of all the annexures referred to herein as if specifically incorporated into this affidavit, to avoid prolixity.

A. **SHORT RESUMÉ AND CAREER HIGHLIGHTS**

6. I matriculated at Thulare High School in 1981 at Lebotwane in the Moretele District in the North West Province. I obtained my B Proc, LLB degree at the University of Fort Hare in 1989 and 1991, respectively.

7. I served my articles of Clerkship at Botha Du Plessis & Kruger Attorneys in Johannesburg in November 1991 and joined the Department of Justice on 1 March1993 where I worked as a prosecutor stationed at Fort Beaufort in the Eastern Cape. I worked at the district court and regional court in Fort Beaufort, Port Elizabeth, Grahamstown and King Williams Town.

8. I was admitted as an Advocate of the High Court on the 3rd May 1995 in the Southern Gauteng Division of the High Court. I joined the Office of the Director of Public Prosecutions ("DPP") in Grahamstown as a State Advocate and Senior State Advocate, whereafter I worked in the Office of

the DPP in Johannesburg in 3 March 1995 until 1 November 1998 when I joined the National Director Public Prosecutions ("NDPP"), Mr Bulelani Ngcuka and established the Human Rights Investigative Unit, the predecessor to the Priority Crimes Litigation Unit ("PCLU") at the NPA Head office.

9. I joined the Office of the DPP, Mmabatho on 1 May 1999 as a Deputy Director of Public Prosecutions ("DDPP") where I am currently based. I acted as a DPP, North West in 2005 for almost seven (7) months when the former DPP, Adv Smit ("Smith") was sick.

10. I acted as DPP in South Gauteng from 1 December 2009 to 31 May 2010 when the incumbent, Charin de Beer was sick. I have also acted as Acting Head of the PCLU in 2016 when Adv Pretorius was out of the country.

11. I have done a number of well-known cases including the *Siderlik* case (S v Nel CCT 24/02 and CC 81/08) where the accused was sentenced to a four (4) life imprisonment for a number of racially motivated murders. I have represented the State in a number of cases at the Supreme Court of Appeals.

12. As DDPP, I have been entrusted with Special Prosecutions, Governance and presently Organised Crime. I have been in charge of Organised

Crime since 2008 and have handled five racketeering prosecutions in person. My unit has, to date, dealt with seven racketeering prosecutions.

13. One of the prosecutions in which I was the lead prosecutor, *S v Ndlela and others* (CC 48/2010) ("the *Ndlela* matter") commenced in 2010 and was finalised in 2012. In this matter, an individual person was convicted as an enterprise and sentenced for an effective 15 years. There were five accused in the matter and all accused were convicted.

14. I wish to draw the Commission's attention to the fact that the *Ndlela* matter commenced and was finalised before my involvement in the Cato Manor matter. I attach hereto the charge sheet in the *Ndlela* matter marked as annexure "GSM3". I [illegible] because of the *Ndlela* matter, in my view, that I was approached and appointed as the lead prosecutor in the Cato Manor matter by the Acting NDPP, Advocate Nomgcobo Jiba ("Jiba").

15. The other six prosecutions are still pending, and I am managing all of them. Five prosecutions are being prosecuted in the High Court, and one is being prosecuted in the Regional Court.

B. OVERVIEW

16. The evidence of Booysen and McBride which has already been presented at the Commission in the early part of 2019, implicates me, *inter alia*, of

being a core group of advocates at the NPA who are captured for either political or corrupt reasons, and who were instrumental in the collapse of the criminal justice system. It is alleged that the implicated colleagues and I allowed ourselves to be used and/or voluntarily pursued what has been termed "corruption busters" by persecuting them and others with unmerited prosecutions on trumped up charges. I am accused of violating my oath of office, the constitutional and legislative prescripts that govern the NPA and thus violating the principle of legality which is the cornerstone of the rule of law.

17. In addition to the evidence of Booysen and McBride, the Commission has also received the affidavits of Van Jaarsveld and Van Rensburg who are DDPPs in the office of the DPP: North Gauteng. Their evidence appears to have been obtained with a view to corroborate the evidence of McBride which has already been led to demonstrate that I pursued charges against Sesoko and Khuba and/or interfered with the investigations into the former Acting Commissioner of the South African Police Services ("SAPS"), General Phahlane ("Phahlane") in order to undermine the independence of the Independent Police Investigative Directorate ("IPID") and thus, preventing it from fulfilling its oversight mandate over the SAPS.

18. All the allegations levelled against me are without merit. In fact, with particular reference to the evidence of Booysen, I will demonstrate that when the prosecution was initiated against Booysen and his co-accused, there was, and still is *prima facie* evidence that compels the NPA to

proceed with not only the racketeering charges as envisaged in the Prevention of Organised Crime Act No 121 of 1998 ("POCA"), but also with regard to his co-accused in the matter to proceed with the predicate offences. In this affidavit, at the relevant section, I set out in full detail the evidence that was and is still in existence in this respect.

19. Instead of fulfilling its constitutional and statutory mandate of prosecuting without fear, favour, and prejudice, the NPA has withdrawn not only the POCA authorisations, but also the predicate offences against Booysen and all his co-accused, notwithstanding the continued existence of the *prima facie* evidence against them. The predicate offences are dealt with in this affidavit under the section that deals with the Cato Manor matter.

20. In this affidavit, I demonstrate that the conduct of the incumbent NDPP of withdrawing such charges and the manner in which the charges were withdrawn is unlawful and contrary to the judicial authorities, in that the decision to withdraw the authorisations and predicate offences was irrational and contrary to the principle of legality and thus, subverting the rule of law. I shall demonstrate that as required by the law, the Cato Manor prosecuting team was not consulted and their input was not sought prior to the withdrawal of the charges. It also appears that the affected families of the deceased, the DCPI and IPID investigators were not consulted.

21. In the judgment of *Zuma vs Democratic Alliance* (838/2013) [2014] ZASCA 101 (28 August 2014), the Supreme Court of Appeal ("SCA") endorsed the trite principle below:

> *"The NPA, as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. It has a duty to explain to the citizenry why and how it arrives at the decision to quash the criminal charges against the accused persons, particularly where the matter involves very senior state officials. In pursuance of its constitutional obligations it is incumbent upon the NPA to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP."*

22. In the judgment of *Zuma vs Democratic Alliance and Others* 2018 (1) SA 200 (SCA), the SCA also stated:

> *"[69] The exclusion of the prosecution team from the process leading up to the decision to prosecute, especially the final deliberations that took place on 1 April 2019, was in itself irrational. The compelling conclusion is that this exclusion was deliberate... They were senior litigators steeped in the case, acquainted with the legal issues and had a critically important*

contribution to make regarding the ultimate decision to terminate the prosecution..."

23. The admonition of the SCA above was blindly ignored by the incumbent NDPP when she reconsidered the decision of Abrahams and Jiba whether to prosecute Booysen. The NDPP decided to withdraw the charges against Booysen and his co-accused. I will demonstrate under the relevant section how that decision is a subversion of the rule of law under the topic dealing with the Cato Manor matter where the State has strong evidence, *inter alia*, ballistic crime scene reconstruction evidence, as opposed to the mere allegations made by Booysen. It is also interesting to note that some of the persons whom Booysen makes reference to in his affidavit and oral evidence before the Commission and alleging that they were persecuted, have not corroborated Booysen's version. I will further demonstrate the facts and context within which a decision to charge Booysen and the members of the Cato Manor SVC Section was taken and the evidence supporting the charges despite the incumbent NDPP's decision to withdraw the prosecution. I will further demonstrate the facts and context within which such a decision was taken and its rationality despite the NDPP's decision to withdraw the prosecution at a later stage.

24. With regard to the decision to institute prosecution against Booysen, McBride, Sesoko, and Khuba, I took into account the responsibility of the NPA as set out in the above admonition, the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the National Prosecution

Authorities Act 32 of 1998 ("NPA Act"), and Prosecution Policy Directives ("the NPA Directives"). All the above prescripts point to the duty that where there is *prima facie* evidence of the commission of crime, irrespective of the identity and rank of the suspect, as a prosecutor I have a duty to act without fear, favour or prejudice in instituting prosecution.

25. In respect of the affidavits of my colleagues, Van Jaarsveld and Van Rensburg, I categorically deny the allegations levelled against me. Van Jaarsveld and Van Rensburg did not furnish any evidence implicating me. I deny that I had anything to do with the investigation of the *Kameelsdrift* matter involving Phahlane. I deny that I sent any police officer to Van Jaarsveld or Van Rensburg or that I was guiding the *Kameelsdrift* investigation behind the scene. The Phahlane matter is being dealt with in the Pretoria office and at that time I was seconded to the PCLU. In this regard, I refer to the confirmatory affidavit of Molatlhwa Michael Mashuga ("Mashuga"), attached hereto marked as annexure "GSM4".

26. At the time of the Kameelsdrift investigation, I was burdened with the heavy load of dealing with the SARS Rogue Unit matter and had no time to devote to matters that were not assigned to me. In any event, the prosecutor who dealt with the prosecution of O'Sullivan and Trent is Mashuga, who has also filed an extensive affidavit with the Commission to demonstrate the evidence that was before him when the decision to prosecute was taken. If my colleagues, van Jaarsveld and van Rensburg had information which shows that I was unduly influencing them as

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alleged, they should have brought such conduct to the attention of Adv Torie Pretorius, the Acting Head of PCLU who was known to them.

27. Not only does Van Jaarsveld and Van Rensburg impute unprofessional conduct on my part, but they also impute criminal conduct on my part, namely defeating the ends of justice. It is surprising that two high ranking prosecutors did not press any criminal charges in this regard. No disciplinary steps were initiated against me with regard to this alleged conduct.

28. The fact that my name has been mentioned by the said police officers, which I deny, is not proof that I sent them to Van Jaarsveld and/or Van Rensburg.

C. **PURPOSE OF AFFIDAVIT**

29. Bearing in mind what the courts have stated pertaining to prosecution decisions and the withdrawal thereof, the purpose of this affidavit is to demonstrate that:

29.1. the prosecution of Booysen and of members of the Cato Manor Serious Violent Crimes Section of the Durban Organised Crime Unit ("the Cato Manor SVC Section") was and is still justified;

29.2. it was justifiable to recommend to the office of the Acting National Director of Public Prosecutions ("the ANDPP") that the

racketeering certificates be issued in respect of Booysen and others in view of the overwhelming evidence in support thereof;

29.3. the withdrawal of the charges against Booysen and others by the NDPP is unlawful;

29.4. the prosecution of McBride, Sesoko and Khuba was justified when such decision was taken;

29.5. the utterances of Van Jaarsveld and Van Rensburg, insofar as they relate to me, are unfounded and untrue;

29.6. support my application for leave to give evidence before the Commission and the cross-examination of Booysen, McBride, Van Jaarsveld, Van Rensburg, Sesoko, Nxasana and Khuba;

29.7. there is no merit whatsoever in the allegations that I am captured for either political or corrupt reasons, with the result that I did not, or I currently do not carry out my legal obligations and duties; and

29.8. respond to the allegations made against me by Booysen, McBride, Sesoko, Khuba, Van Jaarsveld, Nxasana and Van Rensburg as provided for in Rule 3.4 of the Rules, the various affidavits, and the evidence before the Commission;

29.9. there is no evidence from Pravin Gordhan ("Gordhan"), Ivan Pillay ("Pillay"), Johan van Loggerenberg ("Van

Loggerenberg"), and Vlok Symington ("Symington"), supporting the allegations made against me by Booysen and McBride;

29.10. the process that was followed in arriving at the conclusion of the report that was compiled by Adv Rodney de Kock ("De Kock"), Adv Ivy Thenga ("Thenga"), Adv S Riley ("Riley") and Adv E Mamabolo ("Mamabolo") (hereinafter referred to as the "De Kock report") was irregular and consequently, unlawful. The Commission is urged to not place any weight on the De Kock report; and

29.11. all prosecutorial decisions and the prosecutions I were involved in which form the subject of investigation in this inquiry, were properly and lawfully done.

30. Prior to responding to the unfounded and malicious allegations expressly or by implication levelled against me, I have been advised that I should first set out the legal and regulatory prescripts applicable to the functions of the NPA prosecutorial functionaries to put my version before the Commission in a proper context.

D. **MANDATE OF THE NATIONAL PROSECUTING AUTHORITY ("NPA")**

31. Before dealing with the various allegations that McBride, Sesoko, Nxasana and Booysen expressly or by implication made against me. It is important that I clarify the purpose, functioning, and mandate of the NPA

to demonstrate that the averments made against me are unsubstantiated and unfounded.

(a) Legislation

32. The NPA obtains its mandate in terms of Section 179 of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*"). Section 179(1) establishes the NPA as a single prosecuting authority in the Republic of South Africa and structured in terms of an Act of Parliament. The Act of Parliament referred to is the National Prosecuting Authority Act, 1998 (Act 32 of 1998) ("*NPA Act*").

33. In terms of Section 179(2) of the Constitution, the NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.

34. The preamble to the NPA Act and Section 32(1)(a) of the NPA Act, in line with Section 179(4) of the Constitution, provides for the NPA to exercise its functions without fear, favour or prejudice.

35. The NDPP is the Head of the NPA and is appointed by the President. In such capacity, the NDPP shall have the authority over the exercising of all the powers and the performance of all the duties and functions conferred, imposed or assigned to any member of the NPA by the Constitution, the NPA Act, or any other law.

36. In terms of Section 32(1)(a) of the NPA Act, a member of the NPA shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith, without fear, favour or prejudice and subject only to the Constitution and the law. The NPA has, as its core values, independence, accountability, credibility, professionalism, and service excellence.

37. Section 32(1)(b) provides that:

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

38. Section 41 provides that:

> *"41. Offences and penalties*
>
> *(1) Any person who contravenes the provisions of Section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."*

39. Section 42 provides that:

"42. No person shall be liable in respect of anything done in good faith under this Act."

(b) **Other regulatory prescripts**

40. In deciding whether or not to institute a prosecution, a prosecutor is guided, among others, by the Code of Conduct of Members of the National Prosecuting Authority ("the NPA Code of Conduct") published in the Government Gazette No 33907 dated 29 December 2010. The pertinent sections thereof are set out below:

40.1. Article C provides:

"Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should –

(c) take into consideration the public interest as distinct from media or partisan interests or concerns, however vociferously these may be presented;

(f) act with objectivity and pay due attention to the constitutional right to equality;

(i) assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented."

40.2. Article D provides:

"1. *Prosecutors should perform their duties fairly, consistently and expeditiously and –*

(d) *in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence."*

"2. *Prosecutors should, furthermore –*

(a) *preserve professional confidentiality."*

41. In terms of the NPA Directives, a prosecution can only be instituted where there are reasonable prospects of a successful prosecution.

42. It follows from the above that the NPA has the sole preserve in instituting criminal proceedings against any person suspected of having committed an offence. Therefore, any person, regardless of his or her profile or social standing, should be prosecuted if there is a reasonable prospect of successful prosecution.

43. As I have already indicated, McBride, Sesoko, Khuba and Booysen have presented before the Commission unsubstantiated averments which seek

to project me as an officer of the Court who abuses his position and authority regarding prosecutions, to advance purposes that are ulterior to the mandate, functioning and purpose of the NPA. What is quite disturbing is that the averments are not only unsubstantiated, but they also have been made without giving regard to the constitutional imperatives that define how the NPA is to be structured and operated. Also, these averments are made without having due regard to the legal and regulatory imperatives that govern the NPA prosecutorial functionaries.

44. It is important that one should guard against the NPA being hamstrung by popular sentiment canvassed, especially in the media, from executing on its constitutional mandate. Whilst McBride and Booysen complained, among others, that part of the strategy for state capture is that the targeted persons are paraded in the media as bad and corrupt persons, or that their institutions are inefficient, they are the ones who went to the media and came to this Commission, making serious allegations against me without any substantiation whatsoever. Nothing in their submissions tells this Commission exactly in which respect my prosecutorial recommendations and prosecutions under attack, deviated from the legal and constitutional mandate of the NPA.

45. It should be borne in mind that both Booysen and McBride are accused persons in the matters in which they were involved. It is critical to indicate that none of the implicated members of the Cato Manor SVC Section have

either deposed to affidavits or came before the Commission, in support of the unfounded and malicious allegations made by Booysen against me.

46. Having regard to the past and present working environment of the witnesses that implicated me, as well as their experience, they should have a clear understanding of the operation of the law and the circumstances in which a decision to prosecute is taken and the process that leads to the prosecutorial decision.

47. In both the Cato Manor prosecution as well as the prosecution of Booysen on the one hand and the prosecution of Jamnadas Pravin Gordhan ("Gordhan"), Ivan Pillay ("Pillay"), Oupa Magashule ("Magashule"), Johann van Loggerenberg ("Van Loggerenberg") and Andries Petrus Jansa van Rensburg ("Skolie") on the other, the fact that there were reasonable prospects of successful prosecution justifying the institution of criminal proceedings against the accused cannot be gainsaid, as I shall demonstrate below.

48. I am a career prosecutor and have made it my duty in my career, as I am enjoined, not to institute or allow institution of any prosecution that is not in line with the Constitution, the NPA Act, the NPA Directives and the NPA Code of Conduct or based on irrelevant considerations.

E. CONDONATION

49. At the outset I must point out that contrary to the Rules of the Commission, I was never served with the Rule 3.3 notices of Booysen,

Seeiso, Nxasana and Khuba, even after their evidence was led. With regard to the evidence of McBride, I was only served with the Rule 3.3 notice after his evidence had long been led. I say this because on 22 January 2020, my legal representatives held a meeting with the evidence leaders and brought it to their attention that I have never received the aforesaid Rule 3.3 notices. The evidence leaders indicated that the notices were sent to me by email and the email address to which the statement was sent is pat.maema@gmail.com. The evidence leaders further pointed out that they received a response from the said email address where the addressee requested further documents. I do not know who the email belongs to or where the evidence leaders got the email address from. It is certainly not my email address.

50. It is apposite that I bring it to the attention of the Commission that my email addresses are gamaema@gmail.com and gsmaema@nca.gov.za. It is therefore apparent that the email address to which the Rule 3.3 notice of Booyesen was sent to the wrong recipient. I thus never received same.

51. After the meeting that was attended by my legal representatives and the evidence leaders, the State Attorney acting on behalf of the implicated NPA officials addressed a letter to the Commission recording the issues and matters that were discussed at the meeting. My legal representatives advise me that the evidence leaders indicated that the Secretary of the Commission will send the Rule 3.3 Notice to the correct email address. Based on this undertaking, I agreed to be named as part of the NPA officials who wished to cross examine Booyesen, McBride, Van Jaarsveld

and Van Rensburg as set out in the letter, dated 23 January 2020, from the office of the State Attorney to the Secretary of the Commission. I annex hereto a copy of the letter sent by the State Attorney to the Commission, dated 23 January 2020, marked **"GSM5"**. However, the relevant rule 3.3 Notice was never served on me.

52. My legal representatives advised that on 09 September 2020 they held a meeting with Advocate Garth Hulley SC ("Hulley"), one of the evidence leaders, at which meeting Hulley indicated that due to the short lifespan of the Commission even where one has not received the Rule 3.3 notice, but is implicated, one must nevertheless respond to the allegations.

53. Based on the undertaking made at the meeting of 22 January 2020 which the evidence leader undertook to serve me with the Rule 3.3 Notice, and the discussions that took place on 09 September 2020 between my legal representatives and Hulley, I was prepared to respond to the allegations levelled against me by Booysen (April and May 2019) and McBride (April 2019).

54. On 12 January 2021, the Secretary of the Commission sent me an email at 4:32 attaching the Rule 3.3 notice of Van Jaarsveld. I annex a copy of the Rule 3.3 notice and the email to which the notice was attached and mark same **"GSM6.1"** and **"GSM6.2"**, respectively.

55. The Rule 3.3 notice pertaining to the evidence of McBride, was sent to me by the Secretary of the Commission on 5 February 2021 when he sent me an email at 03:33. I annex a copy of the Rule 3.3 notice and the email to

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which the notice was attached and mark same "GSM7.1" and "GSM7.2", respectively.

56. It is apposite to mention that I received above the Rule 3.3 notice after the evidence of McBride had long been led on 11, 12, 15 and 16 April 2019 a period of approximately ten (10) months after the evidence was led. This is contrary to the Rules of the Commission which state that I have a right to attend the hearing when the evidence is led, as evident from paragraph from paragraph 5 of the Rule 3.3 notice. It boggles the mind how I am expected to attend the hearing when the evidence has already been long heard.

57. On the same day, 5 February 2021, at 03:37, the Secretary of the Commission sent me a second email attaching the Rule 3.3 notice of Van Rensburg. I annex a copy of the Rule 3.3 notice and the email to which the notice was attached and mark same "GSM8.1" and "GSM8.2", respectively.

58. I must reiterate that to date hereof, I have never been served with the Rule 3.3 notice pertaining to the evidence of Booysen, Nxasana, Sesoko and Khuba.

59. I was further informed, through the Rule 3.3 notices, in what respect the evidence of McBride, Van Jaarsveld and Van Rensburg will implicate me. The notices further informed me that I may attend the proceedings and that in so doing, I may be assisted by a legal representative when McBride Van Jaarsveld and Van Rensburg give evidence.

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60. I was further notified, that in terms of Rules 3.3.6.1 to 3.3.6.3 should I wish, I may give evidence or call any witness to give evidence in support of my case, or even cross-examine McBride Van Jaarsveld and Van Rensburg.

61. Furthermore, in the event I choose to invoke the provisions of Rules 3.3.6.1 to 3.3.6.3 above, I should bring an application within 14 calendar days in writing to the Commission for leave to do so. In terms of Rule 3.4, an application in terms of Rule 3.3.6 must be accompanied by a statement from me in response to the allegations made by McBride Van Jaarsveld and Van Rensburg against me.

62. It is my submission that, in terms of the Rules of the Commission, the date for the submission of my statement should be determined from the dates on which the Rule 3.3. notices were received. I shall demonstrate that, taking into account that the notices were served on me in January and February 2021 respectively, the date on which my statement is submitted to the Commission was not done after the lapse of an unreasonable time period.

63. During November 2020, whilst the legal team was drafting and settling the statement of Mosing, an arrangement was made with the legal team to consult with myself and Mathenjwa on 12 December 2020. I, together with Mathenjwa, attended to the Chambers of Mathibedi where the consultation was to be held.

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64. After waiting for two hours and having made numerous telephone calls to Mathibedi's cell phone which were not answered, Mathenjwa and I decided to leave. It later transpired that Mathibedi had been admitted to hospital due to complications related to Covid-19. I am advised that Gejengane and other members of the legal team were also not aware that, at that stage, Mathibedi had been admitted to hospital.

65. Gejengane and Adv Ramaimela also attended at Mathibedi's chambers on the same day, also unaware of the fact that Mathibedi had been admitted to hospital.

66. The arrangement was that my statement was going to be attended to after the finalisation of Chauke's affidavit. I only learnt of the fact that Mathibedi was admitted to hospital after his discharge on the 16th of December 2020, on which occasion Mathibedi indicated that once he has recovered and after the finalisation of Chauke's statement, the legal team will commence with the necessary consultation, drafting, settling and finalisation of my statement and that of Mathenjwa.

67. I am advised that Chauke's statement was finalised on the 12th of February 2021.

68. An initial consultation between Mathenjwa, myself, Gejengane, Ramaimela and Mathibedi occurred on 20 February 2021, during which consultation Mathenjwa and myself were advised of the approach that was to be adopted in our statements.

69. The next consultations with the legal team were held on numerous days during February, March, April and May 2021.

70. During the reading and analysis of the documents that had been provided to the legal team, certain further documents were required from myself and Mathenjwa, on an ongoing basis. Many of the documents had already been archived and some had to be obtained from some of our colleagues.

71. The legal team also had to peruse, analyse and familiarise themselves with:

71.1. Voluminous case dockets that related to the Cato Manor matter;

71.2. Various Prosecution Memoranda, Power Point presentations, a comprehensive and extensive indictment, a response to the request for further particulars which were in excess of 1000 pages in the Cato Manor matter;

71.3. Numerous Court applications that were instituted reviewing the POCA authorisations;

71.4. Documents relating to the Rogue Unit and the Pillay Early Retirement matter;

71.5. Documents relating to the matter of defeating the ends of justice for McBride, Khuba and Sesoko;

71.6. The statements of our colleagues already filed with the Commission, as there were overlaps;

71.7 Various judicial authorities pertaining to the issues that arise in this affidavit;

71.8. Transcribed records of the evidence of Booysen, McBride, Khuba, Vlok Symington, Mlotshwa, Nxasana, Seseko, Nihleko, Gordhan, Mabula.

72. The following documents only pertained to Mathenjwa, but had to be read and analysed with the abovenamed documents:

72.1. Documents relating to the Breytenbach matter;

72.2. Memoranda relating to the Reference group;

72.3. Affidavits of McBride, Khuba, Nxasana and Booysen.

73. During the consultations and perusal of documents which had been provided to the legal team, a request was made for providing the legal team with the necessary documentation where applicable.

74. During the period that these consultations and perusal and analysis of the documents were taking place, members of the legal team had professional, personal and family commitments which they could not extract themselves from. Similarly, I had a part heard criminal matter involving a minor in the Klerksdorp Circuit Court (S v Kgotso Moeletsi and

seven others (CC 27/2020)) which was set down for two to three weeks. This matter could not be postponed because the Child Justice Act, 2008 requires that this kind of matter be finalised within certain period of time. Besides this matter, I had other part heard matters and other matters that had long since been set down for hearing. All the accused in these matters are in custody and it would not be in the interest of justice for the matters to be postponed. I also had various administrative responsibilities which I could not extract myself from.

75. I have also been advised to deal with the time period from the holding of the consultation on 20 November 2019. I attended a consultation with the legal team where Counsel was appointed to represent the NPA officials implicated. At this meeting I informed the legal team that I was not served with a Rule 3.3 notice, although I was implicated by some witnesses. I requested the legal team to take up the matter of the non-service of the Rule 3.3 notices with the evidence leaders, despite the fact that I was implicated.

76. I am advised that the legal team attended a meeting with the evidence leaders on 22 January 2020. At that meeting, the evidence leaders were advised that I was not served with the necessary Rule 3.3 notices. The evidence leaders indicated that service was effected. As set out elsewhere in this statement, the notice was not served on me.

77. Despite the meeting referred to above, as at July 2020, I had not received the necessary and required Rule 3.3 notices from the evidence leaders.

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As at July 2020, when I was requested by the legal team to submit my summary of the response to the allegations levelled against me, I have not received the Rule 3.3. notices.

78. I am advised that a further meeting was held between my legal team and Adv Garth Hulley ("Hulley") on 9 September 2020, where the legal team again advised Hulley that I have not received the Rule 3.3. notices. Hulley advised my legal team that his view was that all the implicated persons should file their affidavits despite the fact that they have not been served with a Rule 3.3. notice.

79. It was after this meeting that I perused and analysed the evidence presented to the Commission and the documents related thereto in preparation for the summary of my response to the allegations levelled against me, as requested by the legal team.

80. It bears noticing that during this time, I was on Circuit Court at Klerksdorp and Mogwase, and I did not have access to my NPA records relating the matters I am implicated in.

81. I compiled a summary of my response to the allegations levelled against me and furnished same to our legal team during November 2020.

82. During November 2020, I was advised by Mathibedi that, at that stage, the legal team was busy with consultations, drafting, setting and finalisation of Mosing's statement, which would be followed by the consultations, drafting, setting and finalisation of Chauke's statement. A consultation

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was arranged for 12 December 2020, at which stage it was hoped that the legal team would have finalised Chauke's statement.

83. I once again must bring it to the attention of the Commission that as at the date of deposing to this affidavit, I have not received a Rule 3.3. notice in respect of Booyesen, Nxasana, Seeiso and Khuba.

84. From the aforesaid, I respectfully submit that I have made out a good case for the relief prayed for in the Notice of Motion to which this affidavit is attached.

85. The voluminous papers together with annexures thereto were ultimately finalised on the 17th of May 2021. The filing of my papers at this stage is not as a result of any conduct on the part of myself or our legal team with the view to undermine the authority and process of the Commission.

F. **RULE 3.4 STATEMENT**

86. To demonstrate that the allegations levelled against me have no merit, it is necessary that I deal with the evidence as set out in the affidavits of Booyesen, McBride, Van Jaarsveld and Van Rensburg and, to the extent necessary, their oral evidence before the Commission. To the extent I do not deal with each averment contained in the affidavits or oral testimony, such failure should not be construed as an admission thereof.

G. CATO MANOR INVESTIGATION AND PROSECUTION INCLUDING PROSECUTION OF BOOYSEN AND MEMBERS OF THE CATO MANOR SECTION

(a) Background

87. Sometime in February 2012, Adv J J Smit SC (***"Smit"***) the DPP of Gauteng Local Division asked me to be one of the prosecutors who were to form a team which was to guide IPID and DPCI investigators in the investigation relating to various murder dockets where members of the public were killed by police officers based at the Cato Manor SVC Section of the Durban Organised Crime Unit, as well as to conduct prosecutions, should it be necessary ***("the prosecution team")***.

88. As advised by Smit, the reason for forming a team of prosecutors from outside KZN was, as the then Acting DPP of KwaZulu-Natal, Adv Simphiwe Mlotshwa ("Mlotshwa") had indicated to Adv Jiba that the implicated police members had close working relationship with the prosecutors based in KwaZulu-Natal.

89. The prosecution team consisted of:

89.1. Myself, DDPP North West Division (team leader);

89.2. Adv K R Mathenjwa, DDPP South Gauteng Division (co-team leader);

89.3. Adv M Ntlakaza, Senior State Advocate based at South Gauteng Division ("Ntlakaza");

89.4. Adv J J Miotahwa, Senior State Advocate based at South Gauteng Division ("Miotshwa");

89.5. Adv P Futshane, Senior State Advocate based at South Gauteng Division ("Futshane") and

89.6. Adv P Moleko, Senior State Advocate, based at South Gauteng Division ("Moleko").

90. After its formation, a briefing session was held on 9 March 2012 where Chauke introduced the prosecution team to Adv N Jiba, the Acting National Director of Public Prosecutions ("ANDPP"/"Jiba"). In the briefing session we were informed that there were several murder dockets emanating from KwaZulu-Natal in which the suspects were police officers. The prosecution team was also informed that the cases were investigated by a team made up of members of both the Directorate for Priority Crime Investigation ("DPCI") and the Independent Police Investigative Directorate ("IPID") (collectively "the investigation team").

91. ANDPP and Chauke neither mentioned any corruption cases which were investigated by the suspects, nor did they exhibit any ulterior motive for assigning us to look at the murder dockets.

92. I attended the first meeting with the investigating team in Durban, the investigation team gave the prosecutors more than fifty (50) dockets for perusal, guidance and decision. From the dockets, the prosecution team identified twenty-three (23) murder dockets with twenty-eight (28) deceased, in which the police officers' killings were unjustified.

93. The prosecution team directed the investigation team to obtain further evidence, trace the witnesses and call for ballistic crime scene reconstruction reports.

94. It was established that the offences were committed by members of the Cato Manor SVC Section. According to the organogram of the KZN Provincial Organised Crime Unit, the Durban Organised Crime Unit was under the command of Senior Superintendent Alyer ("*Alyer*"). A copy of the organogram of the KZN Provincial Organised Crime Unit is attached as annexure "CM1".

95. However, when approached by the investigation team to make a statement, Alyer made a statement and explained that the Provincial Commander, Booysen side-lined him in the management of the Cato Manor SVC Section and liaised directly with the section commander. Alyer contended that he was not involved in the operations of the Cato Manor SVC Section of the Durban Organised Crime Unit. A copy of Alyer's statement dated 4 August 2012 is attached as annexure "CM2".

96. The prosecution team also held a consultation with Alyer and he gave us additional information, effectively confirming his exclusion in the activities

of the Cato Manor SVC Section of the Durban Organised Crime Unit, which additional information was later given in a form of a statement. A copy of this statement dated 31 August 2012 is also attached as annexure "CM3".

97. The investigation revealed that there was a feud between the Stanger Taxi Association ("STA") and the KwaMaphumulo Taxi Association ("KTA"), which feud was investigated by Superintendent Chonco ("Chonco"), a member of the Taxi Violence Task Team. Chonco was killed in an ambush on 27 August 2008.

98. Thereafter, members of the Cato Manor SVC Section began to kill those who they suspected of Chonco's murder and killed six (6) people from 3 September to 18 October 2008. Five of the deceased were members of KTA and one was a bodyguard.

99. Although Chauke was the coordinator of the prosecution team, Mathenjwa met with Mlotshwa, the KwaZulu-Natal Acting Director of Public Prosecutions on the first visit and apprised him of the purpose and nature of our assignment in KwaZulu-Natal.

100. Throughout the period we were engaged in the assignment referred to above, we were regularly briefing Chauke on progress in our task, and he in turn would brief the ANDPP. At times, Chauke would arrange briefing sessions with the ANDPP where we would do the briefing to the ANDPP directly.

101. Having considered all the evidence that was uncovered during the investigation, we formed a view that the suspects committed the offences, and had done so in a planned, ongoing and repeating similar pattern. We thus recommended to the KwaZulu-Natal ADPP that the suspects, being members of the Cato Manor SVC Section and Booysen, ought to be prosecuted for committing offences in terms section 2(1)(e) and 2(1)(f) of POCA. Accordingly, the KZN ADPP, who at the time was Adv M Noko ("*Noko*"), made an application to the ANDPP, for authorization of racketeering charges against the suspects.

(b) <u>Overview</u>

102. On 11 December 2011 there were media reports, *inter alia* in the Sunday Times, about the killings that were alleged to have been perpetrated by members of the Cato Manor SVC Section. These media reports were severely criticised by those implicated and later on their supporters and various Non-Governmental Organisations ("NGO") to the extent that the media house that published the stories later on retracted same.

103. When all those media reports and criticism dominated the public discourse members of the prosecution team and I, in accordance with our ethics, code of conduct and the NPA Act could not make our inputs to set the record straight and inform the public what the correct position was at least in so far as the prosecution team was concerned.

104. In this affidavit I will demonstrate what the prosecution of Cato Manor SVC Section was all about. In a nutshell it is about the following:

104.1. After the killing of Choncho, the Cato Manor SVC Section went on a killing spree of both suspects in Choncho's killing and suspects in other criminal activity such as ATM bombings. Most disturbingly, in this killing spree innocent persons, including a teenager, was killed;

104.2. When the killings were reported in the Sunday Times, members of IPID and the DPCI were tasked to investigate the allegations that members of the Cato Manor SVC Section were unlawfully killing suspects and or innocent persons;

104.3. Due to the complexity of the matter, such as the need to procure ballistic crime scene reconstruction, and the high-ranking officials implicated, the IPID sought the NPA's assistance to guide the investigation;

104.4. A prosecution team was appointed to peruse more than fifty (50) murder dockets to determine whether any of the killings were justifiable;

104.5. The prosecution team identified approximately twenty-three (23) dockets where approximately twenty-eight (28) deceased, in which the killings executed by members of the Cato Manor SVC Section were unjustified and contrary to the provisions of section 49(2) of the Criminal Procedure Act, 51 of 1977 (CPA) and the relevant portions of the Standing Order (General) 251 Part III Police Duties, Duties of the Relief and Use of Arms;

104.6. The killings were unjustified because the ballistic crime scene reconstruction found that in some cases the deceased were shot in supine positions or in instances where they did not pose danger to the police officers and or an instance where a fire-arm alleged to have been in possession of the deceased could not discharge;

104.7. In some dockets, witnesses gave statements to the effect that the deceased were unarmed and did not pose any danger to the police officers when they were killed.

105. Section 49(2)(a) and (b) of the CPA provides as follows:

"(2) *If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-*

(a) ***the suspect poses a threat of serious violence to the arrestor or any other person;*** *or*

(b) ***the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.*"** (my emphasis)

105.1. It was, and it still is, the view of the prosecution team that, based on the objective evidence, the conduct of members of Cato Manor SVC Section was not justified as such conduct did not fall within the parameters of Section 49(2)(a) and (b) of the CPA.

105.2. All the deceased were shot either on the chest or the head. Some of the deceased sustained bullet injuries on the hands which is an indication that they were trying to ward off the bullets;

105.3. Having identified the killings as unjustified, the evidence further pointed to a peculiar repeated pattern of killing, namely shooting the victims and thereafter placing a fire-arm next to the deceased, which the prosecution team considered to be the *modus operandi* of the Cato Manor SVC Section;

105.4. The prosecution team considered this *modus operandi* and was satisfied that the requirements of racketeering, as envisaged in the POCA, were met;

105.5. As a result of the evidence procured through the prosecution guided investigation conducted by IPID and the DPCI, the prosecution team was duty bound, after preparing the indictment, to seek a POCA authorisation from the then ANDPP in order to enable them to prosecute not only the "foot soldiers" but also those responsible for the management and control of the enterprise;

105.6. The indictment and POCA authorisations were vociferously opposed in a review applications and other legal stratagem, which culminated in the judgment of Gorven J;

105.7 These legal battles to resist the commencement of the criminal trial bore fruit when the incumbent NDPP irrationally withdrew the POCA authorisations issued by Abrahams and Jiba, her predecessors, without consulting and soliciting the views of the prosecution team, as well as the withdrawal of the predicate offences by the KwaZulu-Natal DPP. I am unaware whether Abrahams and Jiba were consulted before such withdrawal. I am aware of instances where previous NDPPs were invited to comment on their decisions whilst they were in office, by the NPA, after they left office.

106. To further demonstrate that all the killings were unjustified, the Commission is referred to the relevant section set out below, which clearly, and in detail, analyse the *modus operandi* of the suspects.

107. Standing Order (General) 251 provides:

"251.4. *As a member is often required to act on his own initiative, it is essential that all members have a thorough knowledge of the circumstances under which fire-arms may legally be used.*

251.5. *Members may be justified in using their fire-arms under the following circumstances:*

251.5.3. *to defend themselves or any other person or persons from death or serious injury if attacked,;*

251.5.4. *when other means are ineffectual, to effect the arrest or to prevent the escape of a prisoner convicted of a serious crime or of a person who has committed or is suspected of having committed an offence included in Schedule 1 to Act No 51 of 1977. [In this connection attention is especially drawn to the provisions of Section 49(2) of Act No 51 of 1977.]*

251.6.1. *It must constantly be borne in mind that, however justified a member may consider himself to be in shooting, whether or not the*

results are accompanied by the loss of life, this act with all its accompanying circumstances will have to be subjected to an investigation. A member who is placed in such circumstances, shall have to prove that he acted with all reasonable care and without recklessness or negligence, but that he was compelled by circumstances to make use of his fire-arm and that the degree of force and the nature of the weapon used, were not out of proportion to the circumstances necessitating the use of it.

251.15.5.2. *The member(s) who acted as marksman (-men)*

251.15.5.2.1. *Full particulars of the member(s), including the station to which attached, capacity in which appointed [permanent, reserve or reservist], sex, age and years of service.*

251.15.5.2.2. Whether the member was on duty or had placed himself on duty.

251.15.5.2.3. Whether he had acted on his own initiative or had reacted to an order.

251.15.5.2.4. Whether he had given a verbal warning before firing.

251.15.5.2.5. Whether he fired any warning shots, and if so, the number of shots fired.

251.15.5.2.6. Whether he attempted to hit the target with the minimum of violence, eg did he aim at the victim's legs, the vehicle's tires, or whatever the case may be. (my emphasis)

251.15.5.2.7. Number of rounds fired [excluding warning shots].

251.15.5.2.8. Whether his actions were legal, or not. [If doubtful, this should be specifically mentioned.]

251.15.5.2.9. If the incident is being investigated, the CR or inquest reference number must be furnished.

251.15.5.2.10. Whether or not a member has been suspended.

251.15.5.3. *<u>The fire-arm(s) concerned</u>*

251.15.5.3.1. The type of fire-arm, stating the calibre and whether it was an official or a fire-arm belong to the member.

251.15.5.3.2. Mechanical condition of the fire-arm.

251.15.5.3.3. The number of rounds issued when reporting for duty. [If less than the capacity of the relative

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weapon, the reason therefor must be recorded.]

251.15.5.3.4. The number of shells found at the scene.

251.15.5.4. Target/victim

251.15.5.4.1. Nature and number of the target(s)/victim(s), eg, brick building, motor vehicle, person, or whatever the case may be.

251.15.5.4.2. Whether or not it was the original target(s)/victim(s) fired at. [If not, the relationship between the target(s)/victim(s) and the incident, eg an innocent pedestrian, part of the mob, or whatever the case may be.]

251.15.5.4.3. Whether or not the target(s)/victim(s) was hit, and if so, a full description of

the position, eg left thigh, from the front/back/side, etc.

251.15.5.4.4. *Surname and initials of each victim, stating the race, sex and age.*

251.15.5.4.5. *Condition of the victim/target after the incident.*

251.15.5.4.6. *Whether the victim/target was implicated in, or was sought for, any crime, other than that from which the incident arose, reporting full particulars.*

251.15.5.5. *Arrest(s) resulting from the incident Number of arrests, stating race and age.*

251.15.5.6. *The date and time at which an officer [or other member] arrived at the scene, as well as his name. [Should an officer not have visited the scene, the reasons for this must be stated.]*

251.15.6. *Should the member who fired the shot prefer to remain silent, the information as required in paragraph 15.5 must be obtained by means of witnesses and from own observations. The Commander [or other senior member] shall specify in his report the manner by which he obtained the information and, if a witness is not available, the fact that his report is based on presumptions.*

251.15.7. *If a member who was involved in a shooting incident, shows signs of shock, he must be given the necessary support, but without detracting from the applicable legal aspects.*

251.15.8. *The District Commissioner in whose District the shooting occurred, may order any officer under his command further to investigate the incident. If the shooting gives rise to the investigation of a case docket for an alleged crime against the member(s) concerned, the directions in SO 107(5)(c) must not be lost sight of.*

251.15.9. *As other provisions apply in the case where fire-arms were used in the combating or suppression of riots, such an occurrence must not be treated in accordance with these provisions. If, however, a criminal investigation or an inquest follows as a result of a shooting incident during riots, the provisions in SO 107 and 110 must not be lost sight of.*

251.16. *If a member has handled a fire-arm recklessly or negligently, or if he was not justified in discharging it or to order it to be discharged, the designated officer shall, after the conclusion of any criminal and/or disciplinary action, give serious consideration to the question as to whether a board of inquiry should not be convened in terms of Regulation 64.*

251.17. *Since all members have been adequately trained in the handling of fire-arms, it is the bounden duty of every member, irrespective of rank, who has the good name of the Force at heart, to be safety conscious and*

to use fire-arms with the greatest care, prudence and competence."

106. I attach hereto a copy of the Standing Order 251, marked as annexure "CM4.1".

109. The prosecution team's view was that a reasonable commander in the position of Booyesen would have investigated the circumstances under which the killings occurred, if regard is to be had to:

109.1. the number of killings that took place from 2008 to 2011;

109.2. the manner in which the killings were committed, namely some of the victims were shot at close range in the upper body, the victims were either seated or in a supine position when shot, and many of the victims had gunshot wounds to the hands, indicating that they were trying to ward off the bullets; and

109.3. the circumstances in which the killings were committed, namely that all victims were alleged to have been in possession of firearms and/or attempted to shoot at police and/or posed danger to the police, whereas there was not a single incident where a member of the Cato Manor SVC Section was killed and/or injured nor was there an incident where police property such as motor vehicles, were shot at or damaged.

110. Booysen ought to have suspected that something was amiss and ought to have directed that an investigation be conducted into the killings. It is on this basis, as well as Booysen's active command of the Cato Manor SVC Section, that the prosecution team was and still is of the view that Booysen managed, participated, knew or ought to have known of the commissions of the crimes as envisaged in Section 2(1)(e) and (f) of POCA.

(c) **Relevant legislation**

111. The Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA) provides as follows:

111.1. In Section 1 under the definitions, "enterprise" is defined as follows: -

> *"includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity"*

111.2. Section 2 provides:

> *"2 Offences*
>
> *(1) Any person who-*

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c) *(i)* *uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise;*

And

(ii) *knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;*

(d) *acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;*

(e) *<u>whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;</u>*

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(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

Or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence.

(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

(3) For purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsection (1), it shall be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other official having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other official or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such trial, and such copy shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded.

(4) A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director."

112. Section 78 provides:

"78. Liability

Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal capacity, be liable for anything done in good faith under this Act."

(d) **Bases for recommending prosecution against Booysen and members of the Cato Manor Section of Durban Organised Crime Unit**

113. I wish to indicate that I am neither appealing nor criticising the Gorven judgment. However, it is critical to state that from a careful reading and analysis of the judgment, some important annexures are not addressed in the judgment, namely, Annexures "NJ1" and "NJ6" to the Answering Affidavit deposed to by Jiba in the review application that was launched by Booysen. Annexure "NJ1" dated 14 October 2008, is attached hereto, marked as annexure **"CM4.2"**. Annexure NJ6 is attached hereto, marked as annexure **"CM5"**.

114. Annexure **"CM4.2"** is the motivation for the awards, including the monetary and non-monetary awards. In the summary of events, the following is set out:

"Summary of events

On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he had

information pertaining to the suspect that had organised the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

On Tuesday 2008/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 08H30, the investigation team still consisting of the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the investigation team, the occupants being two person, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted of Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva who followed in a seperate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects'

vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his bodyguard. The following firearm were found in the vehicle; one AK47 Rifle with loaded magazine, one Ruger Mini 14 Automatic Rifle and two magazines as well as two 9mm Norinco Pistols, both with loaded magazines.

The following cases were opened:

Howick CAS 106/08/08: Attempted Murder and possession of unlicensed firearms

Howick CAS 107/08/08: Inquest

The above members returned to the office and continued to gather further information."

115. In relation to Howick CAS 106/08/2008, which was investigated by Mr Moslapoa, a member of IPID, Booysen and Olivier arrived at the scene in a helicopter and congratulated the members for work well done. Booysen played a key role in tracking and tracing Magojela which tracing led to his murder by the members of the Cato Manor SVC Section along N3

towards Howick. Booysen managed to track Magojela through an informer. This evidence is also confirmed in the motivation for awards, amongst others, in favour of Booysen and members of Cato Manor SVC Section.

116. Annexure "CM5" is an affidavit deposed to by Booysen in the matter of **Bongani Elphas Mkhize v Minister of Safety and Security: South Africa and Others**[1]. From a careful perusal, consideration and analysis of the content of the annexure, the only plausible inference is that Booysen was, or should have been aware of the unlawful conduct of members of the police, also taking into account that he was the Provincial Commander of Organised Crime for the Province of KwaZulu-Natal.

117. It is clear that, in the opposing affidavit, it is not Booysen's case that the entire content of the information as set out in the affidavit was gained from other members of the Cato Manor Police unit. It is also clear that the facts which Booysen relies on in the affidavit, are within his personal knowledge and belief, alternatively have been obtained by him from files and documents under or in the control of the South African Police Service.

118. In the Mkhize matter, despite opposition, the police were interdicted from unlawfully killing Mkhize. However, Mkhize was murdered by the very same Cato Manor SVC Section under the command of Booysen. It is my submission that the two annexures referred to above, clearly demonstrate that Booysen was aware or ought to reasonably have been aware, of the

[1] Case Number 13759/2008, High Court of South Africa, Durban & Coast Local Division, Durban

unlawful and criminal conduct that was perpetrated by members of the Cato Manor SVC Section.

119. In addition to the above, the following evidence, which was in the dockets, was relied on when the decision to prosecute Booysen and the members of the Cato Manor SVC Section was taken:

119.1. Statements of Mr Bhekinkosi Mthiyane "Diondio" ("*Mthiyane*") and Alyer respectively dated 31 July 2012 and 4 August 2012. Copies of the above statements are attached as annexures "CM6" and "CM2" respectively. Mthiyane's evidence is that there was an arrangement between members of the Cato Manor SVC Section and the STA in terms of which the members of the Cato Manor SVC Section would kill members of the KTA and get paid for it by STA. On the other hand, Alyer in his statement confirms that the members of the Cato Manor SVC Section acted under the command of Booysen all the time at the relevant time.

119.2. Statement of Mr Bongani Mandla Mkhize dated 1 August 2012 whose evidence corroborates that of Mthiyane. The gist of his evidence is that there was an arrangement between members of the Cato Manor SVC Section and the STA in terms of which the members of the Cato Manor SVC Section would kill members of the KwaMaphumulo Taxi Association and get paid

for it by STA. A copy of the statement of Mr Bongani Mandla Mkhize is attached as annexure **"CM7"**.

119.3. Statement of Mr Nkosinathi Shozi (*"Shozi"*). He is an attorney who represented KTA since 2003. In 2007 to 2008 he was approached by Bongani Mkhize (Chairman) and Bhengu (Treasurer) to assist KTA to communicate with the South African Police Service (SAPS) with a view to prevent the ongoing killings after the death of Lindelani Buthelezi ("Buthelezi") on 3 September 2008. His instructions were to tell the police that if there was any member of the association being sought for any criminal matter, including the investigation of Chonco they were prepared to hand the member over so that the law could take its course. He was never told by the police or Booysen when his clients, being members of KTA were sought. A copy of the statement of Shozi is attached as annexure **"CM8"**.

119.4. When analysing modus operandi of the suspects the following was established:

119.4.1. <u>Counts 3 to 7: KwaDukuza CAS 39/09/2008 Lindelani Buthelezi</u>

119.4.1.1. On 3 September 2008, the deceased was found with gunshot wounds in the

bedroom at the house that he was renting.

119.4.1.2. The deceased was a member of KTA and suspected of being involved in the killing of Chondho.

119.4.1.3. The police came to the house during the early hours of the morning and broke open the door. They found the deceased in the bedroom with his girlfriend, Thandeka Sokhulu.

119.4.1.4. According to Thandeka, as the police entered the bedroom, the deceased raised his hands in the air as a sign of surrender, and he was not armed.

119.4.1.5. The police took the deceased into another room.

119.4.1.6. Thandeka alleged that she was assaulted with open hands and kicked, and they covered her head with a blanket. She then heard gunshots from the room the deceased was taken into.

119.4.1.7. The police had the deceased under their control from the moment the police entered the bedroom and the deceased raised his hands in surrender. The allegation that the deceased posed a threat to the police is improbable.

119.4.1.8. The deceased was shot in the head and in the chest. A firearm was placed next to the body on the floor.

119.4.1.9. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.1.10. I attach hereto photos of the scene, marked as annexures "CM9.1" to "CM9.7".

119.4.2. <u>Counts 8 to 12: Howick CAS 106/09/2008 Magojela Timson Ndimande and Sibusiso Thokozani Tembe</u>

119.4.2.1. On 16 September 2008, the deceased were found in a Hyundai Tucson

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vehicle on the N3 Highway in the direction of Howick from Pietermaritzburg. Ndimande was found seated in the driver's seat, slumped over onto the passenger seat with a gunshot wound to the head and several gunshot wounds to the chest. Tembe was found on the road surface on the left side of the vehicle with a gunshot wound to the head and severe scrape marks on his arm and hands.

119.4.2.2. Ndimande was the Vice-Chairperson of the KTA and Tembe was his bodyguard, in the employment of a security company, Taxi Violence VIP Protection Unit. Tembe was issued with a 9mm Parabellum Pistol and a Ruger 14 rifle by his employer.

119.4.2.3. Several weeks before the shooting, Mostert approached the owner of Taxi Violence VIP Protection Unit, Warren Julie, and told him to remove his employees that were rendering protection services to the executive of

KTA or risk that his employees will be killed by the police. He refused and continued to render protection services to the executive of KTA.

119.4.2.4. Two weeks before the day of the shooting incident, the deceased were arrested by SAPS, Mthunzini and taken to Cato Manor SVC Section's premises, as they were suspects in the killing of Chonco. The Cato Manor SVC Section indicated to SAPS, Mthunzini that the deceased were not suspects and that they should be released, which they were.

119.4.2.5. On that day, the deceased pleaded with SAPS, Mthunzini to take them back to where they were arrested as they feared that Cato Manor SVC Section will murder them.

119.4.2.6. On 16 September 2008, the deceased were on their way to the Free State where they were hiding out from the Cato Manor SVC Section after

collecting the monthly taxi takings in KwaZulu Natal. They have just left Pietermaritzburg and were travelling on the N3 Highway.

119.4.2.7. Mostert (Accused 4), Eva (Accused 6), Makhaya (Accused 8), Lockem (Accused 15) and Van Tonder (Accused 16) followed the deceased after receiving information from Booysen that the deceased were travelling in the Hyundai Tucson. They were travelling in two vehicles. It is clear from the motivation for the monetary award ("CM4" hereto) that Booysen actively managed and directed the operation that led to the murder of the deceased, even though he was not present at the time of the shooting.

119.4.2.8. The two vehicles pulled up next to the Hyundai Tucson. The police opened fire on the deceased's vehicle and shot the deceased. The deceased's vehicle veered off the highway and came to a

standstill at the side of the road. Whilst the deceased's vehicle was moving, Tembe fell out of the vehicle, his foot got stuck in the vehicle and he was dragged for approximately 20 meters. From the scrape marks on Tembe's body, it is clear that Tembe was already shot before he was dragged by the vehicle.

119.4.2.9. The police alleged that Tembe leaned out of the left rear passenger door of the vehicle and shot at them with an AK47.

119.4.2.10. When the vehicles came to a standstill, Mostert approached the Tucson, opened the driver's door and fired further shots at Ndimande, who slumped over onto the front passenger seat.

119.4.2.11. Apart from the 9mm Parabellum Pistol and the Ruger 14 rifle that was issued to Tembe by his employer, a Norinco

pistol and an AK47 assault rifle were placed on the scene.

119.4.2.12. The Norinco pistol was found on the front passenger seat behind Ndimande's head. The AK47 rifle was found on the back seat. The Ruger 14 rifle was found in the boot of the vehicle and the 9mm Parabellum pistol was found next to Tembe's body.

119.4.2.13. Herman Thiart, an employee of Taxi Violence VIP Protection Unit, Tembe's employer, attended at the scene and viewed Tembe's body. He also inspected the deceased's vehicle and noticed that all the bullet holes were from shots fired from outside the vehicle and there were no shots fired from inside the vehicle. He further noticed that there were no bullet holes on any of the police vehicles.

119.4.2.14. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to

conclude that the aforestated Norinco pistol and AK47 rifle were planted.

119.4.2.15. Booysen (Accused 1) and Olivier (Accused 9) arrived at the scene by helicopter and congratulated Mostert and the other members.

119.4.2.16. I attach hereto photos of the scene, marked as annexures "CM10.1" to "CM10.5".

119.4.2.17. I attach hereto a statement from Warren Julie, marked as annexure "CM11.1" and a statement from Herman Thiart marked as annexure "CM11.2".

119.4.2.18. <u>Counts 13 to 18: Mandini CAS 76/09/2009 Nzameni Ntuli (Kopolofa) and Nkosinathi Mthembu</u>

119.4.2.19. On 18 September 2008, the deceased were found lying in a house at Mandini after being shot at by the accused;

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119.4.2.20. It is alleged that Stoltz (Accused 3) and Mostert (Accused 4) discharged their firearms in self-defence against the purported attack with firearms, launched by the deceased;

119.4.2.21. The ballistic reconstruction indicates that they were shot whilst lying down, the firearms that were found placed close to their bodies could not match the cartridges on the scene;

119.4.2.22. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

119.4.2.23. The two deceased were members of KTA.

119.4.2.24. I attach the forensic statement of Jacobus Steyl ("Steyl"), marked as annexure **"CM12"**.

119.4.3. <u>Count 19: Umkomaas CAS 235/10/2008 Mduduzi Mkhize</u>

119.4.3.1. On 18 October 2008, the deceased was found slumped with his body halfway out of the vehicle in the backseat of a Mazda Etude vehicle on the N2 freeway in the direction of KwaMakhutha and the deceased was handcuffed.

119.4.3.2. The deceased was arrested in Pietermaritzburg on the day of the shooting on suspicion of involvement in the killing of Choncho. The deceased was being transported by Nkabane (Accused 17) and Crouse (Accused 18) to Scottburgh where the deceased indicated his willingness to point out another suspect, Nathi Khumalo.

119.4.3.3. Before the vehicle left Pietermaritzburg, the deceased, who had his hands cuffed behind his back, requested that his hands be cuffed in the front as it would be uncomfortable to sit in the vehicle with his hands cuffed behind his back. Crouse acquiesced to his request.

119.4.3.4. When the vehicle left, Crouse was driving, Nkabane was seated in the front passenger seat and the deceased was seated in the back seat.

119.4.3.5. The police alleged that, whilst on route, the deceased attempted to strangle Crouse with the handcuffs by putting the handcuffs over Crouse's head from the back and pulling him against the seat with the cuffs on his throat and that the deceased tried to disarm Crouse. Nkabane then shot the deceased in the face from the side. The photos depict that he was shot whilst handcuffed.

119.4.3.6. The deceased was a member of KTA.

119.4.3.7. I attach hereto photos of the scene, marked as annexures "CM13.1" to "CM13.3".

119.4.4. <u>Counts 20 to 24: Durban Central CAS 185/02/2009 Bongani Mkhize</u>

119.4.4.1. On 3 February 2009, the deceased was found lying in the driver's seat of his black Lexus car. The Commission is referred to 5 photos from the photo album of the scene of the shooting, which prove the following:

119.4.4.2. Photo 1 shows:

- The position of the deceased with his hands folded;
- Glass shards which indicated that the windows of the car were closed at the time he was shot at and that the shot came from the right hand side of the car from outside;

119.4.4.3. Photo 2 shows:

- Amongst others, a firearm on the front left hand side;
- Spent cartridges;
- Glass shards on the seat and on the floor;
- According to ballistic crime scene reconstruction report, the

spent cartridges were not fired from the firearm found in the vehicle as stated above;

- The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted;

119.4.4.4. Photos 3 and 5 shows that some shots were fired from the back of the vehicle through the back window into the neck of the deceased.

119.4.4.5. Photos 4 and 5 shows that both right hand side windows of the vehicle were closed at the time it was struck.

119.4.4.6. He was a member and the Chairperson of KTA.

119.4.4.7. According to Sergeant Tilakharee, the ballistic expert, all shots were fired from outside to the inside of the vehicle. The accused Diamuka, Mfene, Padayachee, Rakesh Maharaj and

Stoltz state that the deceased fired shots in their direction and they returned fire wounding the deceased. Sergeant Tlakharee's ballistic finding that all cartridge cases collected from the scene, including the two found inside the vehicle of the deceased, were not linked to the firearm found in the vehicle of the deceased. It is thus clear that this firearm depicted on photos 14 and 15 of Captain Mangena's statement was placed in the vehicle after the shooting to create the impression that Mkhize used it and tried to place the police's life in danger. Copies of statements of Sergeant Tlakharee and that of Captain Mangena are attached as annexures **"CM14"** and **"CM15"** respectively.

119.4.4.8. This deceased obtained an interdict against the Police from murdering him, as more fully dealt with elsewhere in this statement. Furthermore, the deceased was the target on whose

head STA was to pay R1 million as per Ndlondlo's statement.

119.4.4.9. I attach hereto the photos, marked as annexures "CM16.1" to "CM16.5".

119.4.5. Counts 25 – 30: Pinetown CAS 1000/05/2009 Sibongiseni Badumile Ndimande

119.4.5.1. On 23 May 2009, the deceased was found in his house in the bedroom slumped against the bed, on the right-hand side of the bed, with gunshot wounds to his face and body.

119.4.5.2. The police were searching for suspects who were allegedly involved in the killing of Nkosi Zondi. The police came to the deceased's house at New Germany. The deceased, whilst sleeping in the bedroom with his wife, was woken up by noises caused by the police's attempts to open the main door of the house.

119.4.5.3. According to the deceased's wife, Nokuphiwa Zanele Madaba, she

handed their baby that was in the bed with her and the deceased, to the deceased and proceeded towards the main door of the house. As she opened the door, the police burst into the house. At that time, the deceased approached the door from the direction of the bedroom, holding the baby against his bare chest.

119.4.5.4. The police instructed the deceased to hand the baby to Nokuphiwa and Olivier (Accused 9) shoved Nokuphiwa and the baby through the main door outside, whilst the other police officers took the deceased into the bedroom. As Nokuphiwa was in the doorway, she heard gunshots from the bedroom.

119.4.5.5. The police alleged that the deceased was reaching for a firearm and they opened fire on the deceased. Padiyachee (Accused 2) fired two shots with an R5 rifle, Stoltz (Accused 3) fired shots with a Z88 pistol and Van

Tonder (Accused 16) fired shots with a 9 mm Beretta pistol.

119.4.5.6. The gunshot wounds on the deceased's arms indicate that the deceased raised his arms in a defensive manner in an attempt to block the bullets.

119.4.5.7. A firearm was placed on the foot of the bed. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.5.8. The deceased was a family member of Magojela Ndimande, the deceased in counts 8 to 12.

119.4.5.9. I attach hereto photos of the scene, marked as annexures "CM17.1" to "CM17.3".

119.4.5.10. I attach the statement of Nokuphiwa, marked as annexures "CM18."

119.4.6. Counts 31 to 34: Rustenburg CAS 1098/09/2009 Sifiso Ndimande

119.4.6.1. On 20 September 2009, the deceased was found in his house in the lounge with a gunshot wound next to his right eye.

119.4.6.2. The police suspected the deceased to be involved in the killing of Nkosi Zondi. The deceased was sleeping in the house where he was hiding from the Cato Manor SVC Section for fear of them murdering him.

119.4.6.3. The police took up various positions around the house. Padayachee (Accused 2) and Mostert (Accused 4) broke open the kitchen door, entered the premises and proceeded to the bedroom. On entering the bedroom, the police opened fire on the deceased, and alleged that the deceased pointed a firearm at them.

119.4.6.4. A firearm was found on the scene. The ballistic crime scene reconstruction

report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.6.5. The deceased was a family member of Magojela Ndimande, the deceased in counts 8 to 12.

119.4.6.6. I attach hereto photos of the scene, marked as annexures "CM19.1" to "CM19.7".

119.4.7. Counts 35 to 38: Benoni CAS 269/05/2008 Thabo Sunshine Maimango

119.4.7.1. On 24 May 2008, the deceased was found on the ground in the parking area of the block of flats where he resided. The deceased was shot several times.

119.4.7.2. The police came to the deceased's flat as he was the subject of an investigation. The police broke down the flat's door and entered the deceased's flat. The police alleges that the deceased turned and ran towards

the window and shots were fired at him. The deceased then jumped out of the window of his flat on the fourth floor to the parking area below.

119.4.7.3. The police fired several shots at the deceased from the flat whilst the deceased was lying on the ground in the parking area. Further shots were fired at the deceased at closer range.

119.4.7.4. A firearm was placed next to the deceased's body on the ground. It is a physical impossibility for the firearm to be that close to the deceased's body if the firearm was in the deceased's hand when he impacted the ground, as he jumped from the fourth floor of the block of flats.

119.4.7.5. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.7.6. I attach hereto photos of the scene, marked as annexures "CM20.1" to "CM20.4".

119.4.8. Counts 39 to 52: Melmoth CAS 142/11/2008 Bongani Velaphi Bivela ("Bongani") and Khayisani Bivela ("Khayisani")

119.4.8.1. On 23 November 2008, the deceased were found shot at their homestead in Melmoth. Bongani's naked body was found outside laying on top of a stone retaining wall with gunshot wounds. Khayisani's body was found lying on the floor of one of the rondavels with gunshot wounds.

119.4.8.2. Bongani was an accused in a matter in the Durban Magistrate's Court where he failed to appear in Court and a warrant of arrest was authorised but stayed against him. Before the return date of the warrant, a group of police proceeded to his homestead in Melmoth and attacked the homestead during the night.

119.4.8.3. Bongani, who was sleeping with his wife, Bongokuhle Biyela, woke up and attempted to run away. He was naked. He was shot outside the rondavel and a firearm was placed next to his body. Bongokuhle stated that Bongani was naked, as depicted from the photo album and had no firearm in his possession.

119.4.8.4. Khayisani was shot inside the rondavel where he was sleeping. The police alleges that Khayisani shot at them through the rondavel window and one police officer returned fire whilst another kicked the door open and fired shots at Khayisani. A firearm was placed next to Khayisani's body.

119.4.8.5. The police also assaulted Bongokuhle and Richard Biyela, an older brother of Bongani.

119.4.8.6. Photo 1 depicts Bongani lying naked on top of the stone retaining wall with a

firearm close to his left hand on the ground next to his body.

119.4.8.7. Photo 2 depicts Bongani's body covered in a white sheet on top of the stone retaining wall.

119.4.8.8. Photo 3 is similar to photo 1.

119.4.8.9. Photo 4 depicts Bongani's gunshot wound to the head.

119.4.8.10. Photo 5 depicts Khayisani's body on the floor of the rondavel with a firearm next to his body. The photo clearly shows that this firearm was placed on top of the dried blood.

119.4.8.11. Photo 6 depicts the gunshot wounds to Khayisani's body and the firearm which was placed on top of the dried blood. On the supposition that Khayisani was in possession of the firearm, the blood would have been on the firearm and/or the blood would have settled and/or circled around the firearm, being a heavy object.

119.4.8.12. Photo 7 depicts the gunshot wound to Khayisani's body.

119.4.8.13. Photos 8, 9 and 10 depicts how insensitive the police were after having killed Bongani and Khayisani. They are shown to be celebrating their heinous conduct the morning after the killing in the presence of Bongokuhle, who was grieving for Bongani and Khayisani, and who was forced to sit with the police.

119.4.8.14. Photo 9 depicts Mostert drinking a beer.

119.4.8.15. Photo 10 depicts Bongokuhle grieving whilst Accused 4 and 6 throws their hands up in the air in celebration, with Accused 7 looking on with a smile.

119.4.8.16. I attach hereto photos of the scene, marked as annexures **"CM21.1"** to **"CM21.10"**.

119.4.8.17. These photos are the photos which were published in the Sunday Times on

the 11th of December 2011, copies of which articles are attached hereto and marked as annexure "CM22.1", "CM22.2" and "CM22.3" respectively.

119.4.8.18. It is the publication of these photos that triggered the investigation against the members of the Cato Manor SVC Section.

119.4.8.19. I attach hereto the statement of Bongokuhle, marked as annexure "CM23".

119.4.8.20. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.9. Counts 53 to 57: Kwa-Mashu CAS 629/4/2009 Gladwell Thokazani Ntapha

119.4.9.1. On 27 April 2009 the deceased was found on the bed in his house. The deceased was shot in his bedroom.

119.4.9.2. The police violently knocked at the door and, after breaking down the door, stormed into the deceased's house. By then, all the family members in the house were up to see what was going on.

119.4.9.3. The deceased went to picked up his three year old son from the child's bedroom and held his son against his cheat. The police then instructed the deceased to hand the child to the deceased's elder son, Njabulo Njapha, who was 15 years old at the time. On the deceased handing over the child to his elder son, the police shoved the children out of the bedroom. Mostert (Accused 4) pulled the deceased's wife, Portia Njapha ("Portia"), from the bedroom.

119.4.9.4. If the intention of the police was to arrest the deceased, they should have done so as they had ample opportunity arrest him, as they had restrained him. This clearly demonstrates that there

was premeditated intention to murder the deceased.

119.4.9.5. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.9.6. Thereafter the deceased was shot. Explosives were found in the room and a firearm was found next to the right hand of the deceased. According to Portia, the deceased was left handed and had no firearm in his possession.

119.4.9.7 I attach hereto photos of the scene, marked as annexures "CM24.1" to "CM24.3".

119.4.9.8. I attach hereto the statements of Portia and Njabulo, marked as annexures "CM25" and "CM26" respectively.

119.4.10. Counts 58 to 61: Phoenix CAS 377/09/2009 Phillip Lindokuhle Nzuza

119.4.10.1. On 10 August 2009, the deceased was found shot dead in a Honda Ballade vehicle on Malandela Road in Phoenix.

119.4.10.2. The police were looking for the deceased in connection with armed robberies of which he was a suspect. The deceased was allegedly followed by the police and allegedly failed to heed several orders to stop the vehicle. The police fired shots at the deceased and killed him.

119.4.10.3. A silver BMW vehicle which was driven by the police, where Mostert (Accused 4) was present, is depicted on the photos. It must be noted that in the taxi violence money collections, a silver BMW vehicle driven by Mostert, was mentioned.

119.4.10.4. A firearm was placed next to the deceased's body.

119.4.10.5. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to

conclude that the aforestated firearm was planted.

119.4.10.6. I attach hereto photos of the scene, marked as annexures "CM27.1" to "CM27.8".

119.4.11. Counts 62 to 65: Kwa-Mashu CAS 698/11/2009 Prince Sakhile Thabede (Mtako)

119.4.11.1. On 28 November 2009 the deceased was found lying on the bed in his house in the company of his girlfriend.

119.4.11.2. The police first secured two suspects who directed them to the deceased's house. The police were driving a Combi. On the identification of the house, the police alighted and went into the house, and these suspects heard gunshots.

119.4.11.3. One police officer, Mostert (Accused 4), came back to the Combi to fetch his "Mbombay" (firearm). He reached under the driver's seat and took out

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one firearm from a bag of firearms and ran back into the house.

119.4.11.4. Adriaan Stoltz (Accused 3) said in his warning statement that the suspect drew a firearm and fired shots. Padayachee (Accused 2) says the suspect produced a firearm and pointed at them, that is when he decided to fire at the suspect. Sergeant Beharl of the ballistic unit of the Forensic Science Laboratory found that the revolver was defective. Jacobus Steyl, a ballistic reconstructionist, states that the deceased was in a lying position with his head on the pillow when he was shot at. Copies of the statements of Sergeant Beharl and that of Jacobus Steyl are attached as annexures "CM28" and "CM29" respectively.

119.4.11.5. I attach hereto a statement by Nqaba Mdluli, a witness to the incident, marked as annexure "CM30".

119.4.11.6. The deceased's girlfriend, Denise Hurley ("Hurley"), who is a nurse, attempt to assist the deceased, but was prevented from doing so by the Accused. As she was pulled out of the room by the Accused, she saw a firearm being thrown onto the bed on the right side of the deceased's body. I attach hereto copies of Hurley's statement dated 3 December 2009, marked as annexure "CM31.1" and statement dated 22 March 2012, marked as "CM31.2".

119.4.11.7. The ballistic crime scene reconstruction report on the firearm found on the scene, established that the said firearm was defective and could not discharge ammunition.

119.4.11.8. There are two materially contradictory versions from police members who were on the scene. Padayachee (Accused 2), in his statement, attached hereto marked as annexure "CM32", *inter alia*, states that the deceased

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pointed a fire arm at them, whilst Stoltz (Accused 3), in his statement, attached hereto marked as annexure "CM33" alleged that there was an exchange of firearm with the deceased, and consequently the deceased was fatally wounded. Both these versions cannot be true. It is not for the presiding officer to accept one of the versions above the other. These materially contradictory versions supports Hurley's version that the deceased did not have a firearm.

119.4.11.9. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.11.10. I attach hereto photos of the scene hereto, marked as annexures "CM34.1" to "CM34.9".

119.4.12. <u>Counts 66 – 69: Ekhenwini CAS 3/4/2010 Kwazi Ndlovu 16 year old boy</u>

119.4.12.1. On 1 April 2010 at about 02:00 the deceased, a 16-year-old student, who had likely fallen asleep whilst watching television, was shot at whilst in a lying position on a couch with an R5 rifle, a 9mm Norinco Star pistol was placed under his left arm.

119.4.12.2. After the shooting incident, Mostert instructed the deceased's father, Sibusiso Wiseman Ndlovu ("Wiseman") to go and point out other suspects. On the way to where the pointing was supposed to be made, Mostert enquired from Wiseman as to who the person is that was sleeping in the tv room, referring to the deceased. Wiseman responded and said "that is my son" to which Mostert exclaimed and responded "Was it your son?". I attach hereto a copy of Wiseman's statement, marked as annexure "CM35".

119.4.12.3. All cartridges on the scene are 5.56mm compatible with an R5 assault rifle that

was used by Padayachee (Accused 2). The 9mm Norinco Star pistol cannot be linked with any cartridges found on the scene.

119.4.12.4. The ballistic crime reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.12.5. Captain Mangena reconstructed the scene and confirmed after studying the post-mortem report, damages on the wall, the couch on which the deceased was lying and the wounds sustained; that the deceased was lying when shot at and posed no danger to the police. This firearm was clearly placed on the scene after the shooting.

119.4.12.6. This house belonged to Tiill's family, but at the time of this killing, it was rented by the deceased's family.

119.4.12.7. They murdered a wrong person as the police were looking for a prison

escapee called Tiili, and were taken to this house by the informer. A copy of Captain Mangena's statement is attached as annexure "CM36".

119.4.12.8. I attach hereto photos of the deceased, marked as annexures "CM37.1" to "CM37.3".

119.4.13. Counts 70 to 79: Bhekithemba CAS 44/05/2010 Musawenkosi Aubrey Ngcobo, Xolisani Allen Ngcobo and Simphiwe Sydney Shozi

119.4.13.1. On 10 May 2010, the deceased were found dead at their homestead in their room on their beds with gunshots wounds. Firearms were found next to each body.

119.4.13.2. The police came to the deceased's homestead, looking for suspects likely involved in the killing of Capt Reddy during a hi-jacking incident. On enquiry by the police as to the whereabouts of the deceased, one of the family members pointed out the deceased's room.

119.4.13.3. According to the witness, Sibongiseni Ngoobo, the police broke down the door of the deceased's room, and immediately started firing on the deceased who were asleep on their beds.

119.4.13.4. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

119.4.13.5. I attach hereto photos of the scene, marked as annexures "CM38.1" to "CM38.4".

119.4.13.6. I attach hereto a statement of Sibongiseni, marked as annexure "CM39".

119.4.14. Count 60: Durban North CAS 67/07/2011 Jabulani Cameon Bhengu

119.4.14.1. On 4 July 2011, the deceased was found with gunshots to the head next to

a Golf GTI motor vehicle on the corner of Ysplianti and AnnArbor Streets.

119.4.14.2. The police were following the deceased's vehicle as they allege that it fitted the description of the get away vehicle involved in a robbery of a doctor in Mount Edgecombe.

119.4.14.3. When the deceased saw the police, he stopped the vehicle and alighted from the vehicle. The police allege that the deceased brandished a firearm, which prompted Mostert (Accused 4) to fire shots at the deceased. After the deceased fell to the ground, Mostert fired further shots at the deceased. Mostert remained on the scene until the paramedics arrived.

119.4.14.4. A firearm was placed on the ground near the body. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.14.5. According to the police, the crime scene in Counts 80, 81 and 82 was one moving crime scene, as they were pursuing the deceased under all three counts for the alleged robbery committed in Mount Edgecombe. The State evidence is that Mbonambi was in his house the whole day with his sons. Therefore, he could not have been on the said crime scene as alleged by the police.

119.4.14.6. Mgobhozi was called to Mbonambi's house where they had a discussion and, on Mgobhozi's departure, the police murdered Mgobhozi.

119.4.14.7 In this regard, Mbonambi, Mgobhozi and the deceased could not have been at the same crime scene at Mount Edgecombe, as alleged by the police.

119.4.14.8. I attach hereto the photos, marked as annexures "CM40.1" to "CM40.2".

119.4.15. Count 81: Durban North CAS 69/07/2011 Dumisani Blessing Mgobhozi

119.4.15.1. On 4 July 2011, the deceased was found in the garage of Mbonambi, the deceased in Count 82.

119.4.15.2. The deceased visited Mbonambi and as he exited Mbonambi's house through the garage, the police stormed through the garage door that was opening and shot the deceased.

119.4.15.3. The ballistic reconstruction indicates that the deceased was shot whilst standing and again shot whilst lying on the ground.

119.4.15.4. One of Mbonambi's sons, Tshepiso Mbonambi, witnessed the shooting of the deceased and he alleges that, at the time the deceased was shot, he was speaking on his cell phone and he had no firearm in his possession. Tshepiso was narrowly missed by the gun shots aimed at the deceased.

119.4.15.5. A firearm was placed next to the deceased's body.

119.4.15.6. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

119.4.15.7. I attach hereto the photos, marked as annexures "CM41.1" to "CM41.2".

119.4.15.8. I attach hereto the statement of Tshepiso, marked as annexure "CM42".

119.4.16. Count 82: Durban North CAS 71/07/2011 Bovale Sibusiso Mbonambi

119.4.16.1. On 4 July 2011 the deceased was found seated and shot dead in a closed dustbin.

119.4.16.2. Mgobhozi, the deceased in Count 81, visited the deceased. On Mgobhozi's departure, the police stormed into the deceased's garage and shot Mgobhozi. On hearing the gunshots, the deceased ran out of the house away from the police and hid in a dustbin. The

deceased opened and closed the dustbin's lid, which was seen by a witness, Goodness Soelbo ("Soelbo"), who drew the attention of the police to the deceased's hiding place.

119.4.16.3. The police shot at the deceased whilst the deceased was hiding in the dustbin. The police alleged that the deceased opened the lid of the dustbin and pointed a firearm at them, at which stage the police spontaneously reacted with an R5 rifle.

119.4.16.4. The photo album shows a firearm under the deceased's body in the dustbin. Having regard to the seated position the deceased was found in the dustbin, compared to the police's version that the deceased pointed the firearm at them, the firearm would not have been under the deceased's body.

119.4.16.5. The photo album indicated that at the time of the shooting, the dustbin lid was closed, demonstrating that the shooting

must have occurred through the closed lid of the dustbin.

119.4.16.6. The witness who pointed out the deceased's hiding place, saw the deceased climbing over the wall, dressed in shorts and a t-shirt and he had nothing in his possession.

119.4.16.7. The deceased's sons, Wandile and Tshepiso Mbonambi, aged 12 and 17 respectively, saw the deceased running from the house and he had nothing in his possession.

119.4.16.8. A firearm was placed underneath the deceased in the dustbin.

119.4.16.9. The above evidence of Wandile and Tshepiso dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.16.10. I attach hereto the photos, marked as annexures "CM43.1" to "CM43.2".

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119.4.16.11. I attach hereto a statement of Soelbo, marked as annexure "CM44", a statement of Wandile dated 28 October 2011, marked as annexure "CM45.1" and a statement dated 7 January 2012, marked as annexure "CM45.2" and a statement of Tshepiso, marked as annexure "CM42".

119.4.17. <u>Counts 94 to 97: Esikhawini CAS 50/09/2011 Qinisani Philangenkosi Gwala</u>

119.4.17.1. On 4 September 2011, the deceased was found in his house with gunshot wounds to his hand and his head.

119.4.17.2. The police went to the Mabuyeni Community Hall at Esikhawini where they took the deceased away to his home, under the impression that he was Phiani Ndlovu (Bha), despite the deceased and members of the community telling the police that the deceased was not Bha. The police refused to accept his identity.

119.4.17.3. The police took the deceased to his homestead and the deceased younger brother, Sandile Qaphalani Gwala ("Sandile"), followed him.

119.4.17.4. According to Sandile, when the deceased and the police arrived at the homestead, the deceased's hands were tied with cable ties. The deceased was taken into his house and Sandile was shoved into another house, where he was forced to lie down and his head was cover with a washing basin. Sandile heard gunshots from the deceased's house.

119.4.17.5. From the photo album no cable ties are seen, and the police allege that the deceased asked to be untied. The police further allege that the deceased reached for a firearm in the cupboard, as they were searching his room.

119.4.17.6. The allegation that the police was under attack from the deceased is improbable. According to the ballistic

crime scene reconstruction report, the deceased was most probably in a seated position when these wounds were inflicted. The shooter could have stood in front of the deceased. The deceased, from a seated position, just fell back, as found.

119.4.17.7. The position of the deceased's body and the entry wound on his head indicates that that the deceased was facing the gunman and not facing the cupboard. According to the ballistic expert, the bullet first hit the deceased's palm of his hand and went through his hand into his head.

119.4.17.8. A firearm was placed on the ground next to the cupboard, near the deceased's body.

119.4.17.9. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.17.10. The police had control over the deceased since they took control of him at the Mabuyeni Community Hall.

119.4.17.11. I attach hereto the ballistic crime scene reconstruction report by Mangena, which includes photos, marked as annexure "CM46".

119.4.17.12. I attach hereto the statement of Sandile, marked as annexure "CM47".

119.4.17.13. It is clear that the deceased was in the custody of the police after being arrested at the Community Hall. There were more than four police officers present who could easily have subdued the deceased, if necessary. In fact, the deceased was already tied up with cable tie restraints when they entered the house.

119.4.17.14. Taking into account the findings of Mangena that, at the time that the deceased was shot, he was seated, facing the shooter, the version put by the police that the deceased was

reaching for a firearm and resisting, is improbable.

119.4.17.15. The cable tie restraints were removed before the deceased were shot.

119.4.18. Counts 98 to 101: Kwa-Mashu 116/8/2008 Mfanafuthi Armstrong Zwane

119.4.18.1. On 31 July 2008, the deceased was found inside the yard of his home between his car and the boundary wall of his property, with his head resting against the rear tyre of his car. He was shot in the chest and below the ear.

119.4.18.2. The police found the deceased sitting in his car with his girlfriend, Thandeka Pearl Mazibuko ("Mazibuko"), at his house in the yard and ordered them to get out of the car. The police separated the deceased from Mazibuko and pushed him towards the boundary wall of the property and shot and murdered him.

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119.4.18.3. The deceased was not armed and had his arms raised when the police pushed him towards the wall. At the time that the deceased was shot, he was under the control of the police.

119.4.18.4. A firearm was placed next to the deceased's body.

119.4.18.5. I attach hereto the photos of the scene, marked as annexures "CM48.1" to "CM48.18".

119.4.18.6. I attach hereto the statement of Mazibuko, marked as annexure "CM49".

119.4.18.7. Mazibuko's version dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted and that the deceased was posing a danger to the police.

119.4.18.8. The police's version that the deceased was in possession of a firearm is also dispelled by the version of Mazibuko.

119.4.19. Counts 102 to 103: Estcourt CAS 34/08/2006 Muzi Sanele Maiola

119.4.19.1. On 6 August 2006, the deceased was found shot twice in the chest in the public restroom at Midway Caltex Garage in Estcourt.

119.4.19.2. The police were looking for the deceased and Mpendulo Mngomezulu as suspected escapees from Westville Prison.

119.4.19.3. The police arrested the deceased and Mngomezulu at Glencoe and transported them towards Durban. There were two separate cars with two policemen and a suspect in each car travelling in the convoy. They stopped at Midway Caltex Garage in Estcourt for refuelling. The deceased asked to use the toilet and Naidoo (Accused 13) and Nel (Accused 5) took him to the toilet, where Naidoo uncuffed the handcuffs on one hand to enable him

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to use the facilities. The deceased was shot in the toilet.

119.4.19.4. Naidoo alleges that the deceased tried to grab his gun and he was forced to shoot the deceased.

119.4.19.5. After the deceased was murdered, Mostert (Accused 4) and Panday (Accused 30) brought Mngomezulu into the toilet to show him the deceased's body. After having sight of the body, Mngomezulu made a confession.

119.4.19.6. Naidoo's firearm was placed next to the deceased's body.

119.4.19.7. I attach hereto the statement of Mngomezulu, marked as annexure "CM50".

119.4.19.8. I attach hereto the photos of the scene, marked as annexures "CM51.1" to "CM51.8".

119.4.19.9. There is no independent evidence, such as fingerprints, to corroborate

Naidoo's version. No reasons were advanced as to why fingerprints were not lifted from the firearm, which would either have supported or disproved the police's version.

119.4.19.10. Magistrate Geldenhuys, who presided in the inquest of Majola, found that Nel (Accused 5) was criminally responsible for the death of the deceased. It is clear that the De Kock panellists did not take into consideration such finding in their recommendation in the De Kock report and neither did the NDPP when the charges were withdrawn. I attach hereto the J56 form, marked as annexure "CM52".

119.4.20. Counts 104 to 108: Kwa-Mashu CAS 314/11/2008 Nhlanhla Nkuthu Masondo.

119.4.20.1. On 12 November 2008, the deceased was found shot in the back, lying on his side with his legs off the bed, in his bedroom.

119.4.20.2. The police entered the deceased's house, and took control of the deceased. The police took the deceased to his bedroom and closed the bedroom door.

119.4.20.3. The deceased's mother, Jabulisiwe Gladys Masondo, pleaded with the police to enter into the bedroom with her son, but she was refused entry by the police. Jabulisiwe then heard gunshots and the deceased was shot.

119.4.20.4. A firearm was placed next to the deceased's body on the bed. The deceased was shot in the back.

119.4.20.5. Jabulisiwe's version dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.20.6. I attach hereto the photos, marked as annexures "CM53.1" to "CM53.2".

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119.4.20.7. I attach hereto the statement of Jabulisiwe, marked as annexure "C[illegible]54".

119.4.21. Counts 109 to 112: Tongaat CAS 356/03/2009 Dan Chester Phiri

119.4.21.1. On 6 March 2010, the deceased was found shot at close range, seated in his car on Noordberg Road in Tongaat.

119.4.21.2. The deceased was driving on Noordberg Road in Tongaat on route to buy groceries at his friend's shop. He was accompanied by Skhumbuzo Zakhele and Mandla Mavundla.

119.4.21.3. He was stopped by the police. The deceased and his passengers were ordered to get out of the car and to lie down next to the car. Zakhele and Mavundla immediately got out of the car and laid down next to the car. The deceased was a paraplegic and could not instantly comply with the police's instruction. Accused 5 approached the deceased at the driver's side of the car

and shot the deceased, despite the fact that the deceased was crying and begging for his life.

119.4.21.4. The deceased was shot with a contact shot by Accused 5. A firearm was placed in the vehicle. This firearm matched the cartridges that were found at the scene.

119.4.21.5. It is established in the post mortem report that the deceased died as a result of a contact shot to the head whilst seated in the car. The burn marks around the entry wound and bullet shrapnel in the wound is evidence of the close contact. I attach hereto the post mortem report by Dr G Perumal, marked as annexure "CM55".

119.4.21.6. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

119.4.21.7. I attach hereto the photos, marked as annexures "CM56.1" to "CM56.12" respectively.

119.4.21.8. I attach hereto the statements of Mavundla dated 10 January 2021 marked as annexure "CM57" and 21 March 2021, marked as annexure "CM58" respectively.

119.4.22. Counts 113 to 116: KwaDukuza CAS 115/3/2010 Nhlanhla Lucky Mhlongo

119.4.22.1. On 6 March 2010 the deceased was found shot in his home.

119.4.22.2. The police went to the deceased's house in Groutville, Stanger as he was a suspect in the ATM bombings. As the deceased was opening the door for the police, the police shot and murdered him. Naidoo alleges that the deceased was reaching to his side.

119.4.22.3. A post mortem report by Dr M A Deysel is attached hereto, marked as annexure "CM59".

120. Our recommendations supporting the issuing of the section 2(4) authorisations, in respect of Booysen and members of the Cato Manor SVC Section, as already demonstrated, were based on sufficient and reasonable evidence, justifying such recommendations.

121. I submit that, if regard is had to all the above, the criticism to the effect that the recommendation for and subsequent issuing of the racketeering certificates against Booysen and others, were not based on objective evidence and/or were politically motivated, is unfounded. Further, prosecution of Booysen and the members of the Cato Manor SVC Section was far from being malicious.

(e) <u>The evidence Before the Prosecution Team</u>

122. In addition to the statements of the eye-witnesses, victims, ballistic crime scene reconstruction evidence, ballistic crime scene evidence, and post-mortem reports, the prosecution team had the following evidence:

122.1. The Provincial structure;

122.2. Statements and information to prove the management of the Cato Manor SVC Section of the Durban Organised Crime Unit;

122.3. The motive which drove the murdering of the members of KTA;

122.4. The similar pattern through which the murders were perpetrated; and

122.5. The *modus operandi*;

I. Statements and information to prove the management of the Cato Manor SVC section of the Durban Organised Crime Unit

123. The prosecution team obtained two sets of racketeering authorisations. The first one was issued by Jiba on 17 August 2012 and the second one was issued by Abrahams on 13 February 2016.

124. The authorisations were based on the contents of the docket and the following statements to show that there was a police management structure and under whose command responsibility the murder offences were committed:

124.1. The KZN provincial structure;

124.2. Statements from Durban Organised Crime Unit Commander, Alyer;

124.3. Statements from the KZN Provincial Head of Detectives, Assistant Commissioner Brown ("Brown");

124.4. The urgent application papers under case number 13759/2008 instituted by Bongani Mkhize ("Mkhize") wherein he successfully interdicted the Cato Manor SVC unit from unlawfully killing him.

124.5. Draft statements of Danikas, a former police reservist at the Cato Manor SVC;

124.6. Motivation for monetary and non-monetary awards which demonstrate that Booysen and members under his command, excluding Alyer, received monetary and non-monetary awards for the alleged successful arrest of people who were suspected in the killing of Superintendent Choncho;

124.7. Statement of Mathonsi which explains how the plan to eliminate members of the KTA was hatched and orchestrated;

124.8. Statement of Ndlondlo (Mthiyane) which explained the role of STA in the killing of KTA members by the members of the Cato Manor SVC Section; and

124.9. Statement of Mkhize which singles out the incident of the killing of Kopolota Ntuli and Nathi Mthembu who were members of the KTA.

125. The aforesaid is individually discussed below.

II The KZN provincial structure

126. The provincial structure indicates Booysen as the Provincial Commander of the Organised Crime Unit. The Unit had four (4) branches, namely 1) the Durban Organised Crime Unit; 2) Pietermaritzburg Organised Crime

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Unit; 3) Port Shepstone Organised Crime Unit; and 4) the Richards Bay Organised Crime Unit.

127. Each Unit had a Commander with subsections, for example, Serious Violent Crimes; Fraud and Commercial Crimes; Narcotics; Vehicle Theft section, et cetera.

128. The case at hand related Serious and Violent Crimes section of the Durban Organised Crime Unit based at Cato Manor Offices under the command of Alyer. It was noticeable that Booysen was predominately involved in the operations of the Cato Manor SVC Section of the Durban Organised Crime Unit.

III. Statements of Alyer

129. The criminal offences which were investigated by both the IPID and DPCI were committed by the Cato Manor SVC Section, which according to the provincial structure was under the command of Alyer. The investigation led to Alyer depoing to three (3) statements, dated the 4th of August 2012 ("CM2"), 31st of August 2012 ("CM3"), and 31st of March 2013. I attach hereto the statement of Alyer dated 31 March 2013, marked as annexure "CM61".

130. The essence of Alyer's statements is that he was a token Commander of the Cato Manor SVC Section. Booysen, as the provincial head excluded him in the operations and management of the Cato Manor SVC Section. Booysen was the *de facto* Commander of the Cato Manor SVC Section.

131. Alyer stated that he wanted the Cato Manor SVC Section to relocate from Cato Manor offices to the offices in town where he was based as their commander.

132. The members resisted this command and sourced support from Booysen who supported and thwarted his directives. As a result, the members did not move as directed.

133. The statements of Brown corroborate within reasons that Alyer was excluded in the management and operations of the Cato Manor SVC Section.

iv Statements from the KZN Provincial Head of Detectives, Assistant Commissioner Brown

134. The prosecution team had a statement from Brown, who was the Head of Detectives in the province and a member of the KZN SAPS Provincial Management. The prosecution team consulted with the witness over and above the statement. During the consultation, Brown confirmed that Booysen was more operationally involved in the activities of the Cato Manor SVC Section.

135. As evident from the statement of Brown, it appeared to the prosecution team that Booysen had to manage and coordinate the operations of the Cato Manor SVC Section because Alyer and the members therein were not getting along. This was premised on Brown's statement on paragraph 8 which, amongst others, states that:

"...A poor relationship developed between [Alyer] and members of SVC based on [Alyer's] management style and perceived lack of knowledge in respect of investigation of violent crimes. This led to strained relationship between [Alyer] and Major Genl Booysen as the Provincial Commander of Organised Crime...".

136. Brown also states that the conflict between the Alyer and the members culminated to a conflict between Alyer and Booysen. He tried to mediate and the parties would agree to work together, but the conflict would persist. This conflict led to Booysen active involvement in the operations of the Cato Manor SVC Section.

137. It is the prosecution team's view that Booysen was directed to depose to an opposing affidavit in the Mkhize interdict due to his intimate knowledge of the incident.

138. I attach hereto a statement of Brown dated 8 May 2013, marked as annexure **"CM62.1"** and a supplementary statement of Brown dated 9 May 2013, marked as annexure **"CM62.2"**.

v. Urgent Application of Case Number 13758/2008

139. Bongani Mkhize ("Mkhize") was the Chairperson of KTA. He had information from Moses Dlamini ("Dlamini"), a member of KTA, that the Cato Manor SVC Section has a list of people who were suspected of murdering Superintendent Choncho. On this list were, amongst others, Mthembu, Kopolota, Magojela, Buthelezi and himself (Mkhize).

140. According to the affidavit of Mkhize, Diamini told Mkhize that the Cato Manor SVC Section members were bragging that they were going to kill Diamini and the people on the list. Subsequently, Mthembu, Kopolota, Magojela and Buthelezi were killed by the members of the SVC Section, and Mkhize feared that he was next to be killed, as those that were on the list with him, were already killed. Hence the application before Court. The contents of the relevant paragraphs are set out below:

"28. *THE KILLINGS*

MAGOJELA NDIMANDE AND TEMBE

On Friday the 29th August 2008 Magojela Ndimande, who was a member of my Association and whose name appeared on the list mentioned by Moses Diamini, was arrested in Mtunzini area together with his body guard, Tembe, and taken to the Mtunzini police station where they were severely assaulted. They were subsequently released on the same day and Magojela returned to his homestead in or around the KwaMthethwa area in Empangeni. Several days after his release Magojela, who goes by the surname of Ndimande, was waylaid by police in the Merrivale area. He was shot and killed. Tembe, who had also been arrested with him on the 29th August 2008 was also killed. Tembe was a security guard employed by Taxi Violence Protection Unit and was the personal body guard of Magojela. I

annex hereto marked "C" a copy of the communique issued by police after the death of Magojela and Tembe.

I also wish to annex hereto marked "M" an article front page of the Daily Sun relating to the death of Magojela Ndimande.

29. *It is widely believed that the deaths of Magojela and Tembe had been in keeping with the information I had received about the elimination of prominent members of my Association under the guise of them being sought for the murder of Superintendent Chonco. We have engaged the services of various entities in order to investigate these shootings. It is also questionable to say the least that these two individuals who were sought by the Police (See Annexure "C") had been arrested by them and released shortly thereafter and within a few days of their release they are shot and killed on a quite back-road and allegedly to be "dangerous criminals" in possession of dangerous weapons.*

30. *<u>LINDELANI BUTHELEZI</u>*

I must hasten to add that before the death of Magojela and Tembe, Lindelani Buthelezi whose name had also been on the list in question had already been killed by police under spurious circumstances. Lindelani Buthelezi was known as a prominent member of my Association.

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31. On the 3rd of September 2008 Lindelani Buthelezi was confronted in his rented house at Stanger by a large group of policemen. He was killed by them during such "arrest". I annex hereto marked "D" a copy of an affidavit by Lindelani Buthelezi's common law wife who was present when he was killed in which she relates the disturbing circumstances under which he was killed. It is my belief that his death is consistent with the information I had received about the existence of a list of names and the elimination of the people mentioned herein.

32. <u>KOPOLOTA NTULI AND NKOSINATHI MTHEMBU'S</u>

Kopolota Ntuli and Nkosinathi Mthembu, whose names were also on that list, were killed by members of the SAPS at Mandeni whilst at Kopolota's fiance's homestead, also under questionable circumstances. Prior to the killing of Kopolota and Mthembu, the attorney representing the Association had offered to surrender any member of the Association suspected of the murder of Superintendent Chonco should they be sought. I annex hereto marked "E" a letter dated 8th September 2008 and refer this Honourable Court specifically to paragraphs 18 and 19. Despite this offer, the SAPS proceeded to shoot and kill the two individuals once again in circumstances that lead me to believe the correctness of the information referred to above. Once again the police version is that they acted in self-defence.

33. ***MDU MKHIZE***

On Saturday the 18th October 2008 Mdu Mkhize who was a member of my Association was arrested at a funeral service at KwaMaphumulo by members of the South African Police Services. He was handcuffed and led away and we later heard that he was killed. I annex hereto marked "F" a copy of the Daily Sun newspaper article wherein is death is being mentioned. Whilst Mdu Mkhize's name was not on the list mentioned by Mosee Diamini, I have been privy to information that he was also being sought for elimination by police."

141. In response to what Mkhize alleged about the killing of his members and the threat to his life, Booysen responded as follows:

"31. ***AD PARAGRAPH 28***

NDIMANDE and TEMBE were arrested and questioned. They were released. On 16 September 2008 information was received which necessitated NDIMANDE and TEMBE to be questioned again. Information was also received that the two individuals were in the process of fleeing the Province of KwaZulu-Natal, making their way to the Free State. On the busy N3 freeway between Pietermaritzburg and Merrivale an attempt was made to apprehend them. Police vehicles employing their sirens and appropriate flashing lights attempted to stop them. They resisted and shot at the Police. The Police returned fire

and they were killed. Two hand guns, a Luger assault rifle and an AK47 assault rifle were recovered by the Police. To the extent that the information contained in paragraph 28 is at odds with what I say here, I deny same. I also deny the contents of the press report from the Daily Sun to the extent that it is at odds with what I say. TEMBE was an employee of the security company referred to by the applicant in paragraphs 18 and 19 of the founding affidavit. As a consequence of this incident, and when he was discovered in possession of assault weapons, and because he was involved in an incident where he was party to the Police being fired upon, the forensic investigation into the firearms referred to in paragraph 19 of the founding affidavit was commenced.

32. *AD PARAGRAPH 29*

There is simply no basis for what the Applicant contends is "widely believed". I have no knowledge of what services the Applicant has engaged and who or what the "various entities" are. I have already explained that NDIMANDE and TEMBE were again sought as a result of new information received. There is nothing untoward about that. In any event, why the Applicant refers to the N3 highway as a "quite (sic) back-road" escapes me unless it is nothing more than a thinly veiled attempt to colour the information (whether true or not) placed before this Court.

33. *AD PARAGRAPHS 30 AND 31*

I have already said that there was no list in existence. On 3 September 2008 an attempt was made to arrest BUTHELEZI. He resisted arrest and attempted to shoot at the members of the South African Police Services who returned fire in self-defence. BUTHELEZI was killed in that exchange of fire. His firearm, a CZ 7.65 automatic was recovered at the scene. Whether or not BUTHELEZI was a prominent member of the Applicant's association is unknown to me. I accordingly deny the allegations contained in paragraph 30 and 31 to the extent that theirs are at odds with what I say here. The Affidavit put up from SOKHULU is hearsay and must be struck out. It was not obtained or put up for the purposes of this application and she has not confirmed those facts for the purposes of this application. In any event I deny the allegations contained in that Affidavit to the extent that they are at odds with what I say herein. BUTHELEZI was killed while he resisted arrest and shot at the Police.

34. *AD PARAGRAPH 32*

Information was received that implicated NTULI and MTHEMBU in taxi violence related incidents. On 16 September 2008, as a result of that information, members of the South African Police Service attempted to arrest NTULI and MTHEMBU. The Police

were fired upon and had to return fire. As a result both NTULI and MTEMBU were killed. Their firearms, a Z88 and a CZ75 were recovered from the scene. I accordingly deny the allegations contained in paragraph 32 to the extent that it differs from what I say herein.

35. *AD PARAGRAPH 33*

MKHIZE was arrested on 16 October 2008 in Pietermaritzburg. He was attending a funeral at the time. He was transported to Scottburgh for questioning. After questioning, during which he had agreed to effect a pointing-out, he was again transported for that purpose. This was in self-defence. I accordingly deny the allegations contained in paragraph 33 where they are at odds with what I say herein."

142. The contents of the paragraphs quoted above from Booysen's affidavit, detail the minute details which Booysen was aware of, relating to the activities of the Cato Manor SVC Section.

143. I attach hereto Mkhize's affidavit, marked as annexure **"CM83"** and Booysen's affidavit, marked as annexure **"CM84"**.

144. The Court granted an Order on 14 November 2008, which reads as follows:

"IT IS ORDERED [BY CONSENT]

1. *That the respondents are interdicted from unlawfully killing, injuring, threatening, harassing or in any way unlawfully intimidating the applicant.*

2. *That the rule nisi is in all other respects discharged.*

3. *That each party to pay its costs."*

145. I attach hereto the Court Order, marked as annexure "CM65".

146. The Court Order was granted on 14 November 2008 and, despite the Order, Mkhize was killed on 3 February 2009 by the very same Cato Manor SVC Section who had previously killed his colleagues in KTA.

147. In the papers received by the prosecution team, there is nowhere where it is indicated that Booysen made an attempt to restrain the members of the Cato Manor SVC Section against the killing of Mkhize, and if he did, Booysen is invited to produce proof thereof.

148. What the prosecution had, was that there was a plan to kill members of KTA and that plan came to its full realisation by the killing of Mkhize, who was the Chairperson of KTA.

149. It is a reasonable view of the prosecution team that the only reason why Booysen deposed to the opposing affidavit is that he had intimate knowledge of the facts and circumstances that led to launching of the urgent application. Booysen neither annexed a confirmatory affidavit to the opposing affidavit, nor does he allege that other members of the Cato

Manor SVC Section are the source of the information as set out in the opposing affidavit.

vi Draft statements of Danikas

150. The prosecution team had a draft statement of Danikas who was a police reservist. The essence of this draft statement was that Booysen was aware that the members of the SVC Section were, in fact, killing suspects instead of arresting them.

151. This method of operation did not only start in 2008, but it has been a standard operation as far back as in 2001.

152. I attach hereto the draft statement of Danikas, marked as annexure **"CM66"**.

153. The draft statement of Danikas was intended to show similar facts as it is admissible in POCA prosecution in terms of Section 2.2 and, as much as there were no charges preferred on those crimes, but evidence relating to those murders would have become relevant in the main trial to support Danikas' version.

vii Monetary and non-monetary award

154. The awards related to the alleged cracking on the murder of Superintendent Chonco. Chonco was murdered on 27 August 2008.

From 3 September 2008 to 18 September 2008, the Booysen and the members under his command, were able to trace six suspects, and those suspects were all killed on the crime scenes. None of the suspects was ever arrested and brought to Court. They were all murdered under the pretext of self-defence.

155. The monetary awards must be read together with Mkhize's urgent application where he was fearing for his life that his fellow members of KTA are being killed by members of the Cato Manor SVC Section and he was next in line. Mkhize himself was consequently killed despite a Court Order.

156. In these awards, Booysen was a beneficiary for his own role in the operations that lead to those who were suspected of killing Chonco. I attach hereto a copy of the monetary awards dated 14 October 2014, marked as annexure **"CM67"**.

157. The monetary awards, *inter alia*, reads as follows:

> "3. ***Apprehension of two more suspects***
>
> ***Summary of events***
>
> *On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he hade information pertaining to the suspect that had organized the hit on Supt Chonco. He was hiding in Virginia in*

the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

On Tuesday 2008/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 08H30, the investigation team still consisting the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route by the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the investigation team, the occupants being two persons, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted in Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva whom followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the

suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojele Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his body guard. This following firearms found in the vehicle; one AK47 Rifle with loaded magazine, one ruger Mini 14 Automatic Rifle and two magazines as well as two 9m Norinco Pistols, both with loaded magazines."

168. The monetary awards are not the only information which the prosecution team had on this incident. There was also a statement of a pilot crew which confirmed that Booysen procured the services of a helicopter to pursue the deceased, and Booysen was on board of the helicopter. However, the deceased were killed before his arrival. I attach hereto a statement of Andrew Carsen Patrick Cochrane, marked as annexure "CM68". Cochrane is employed as an Airborne Law Enforcement Officer at Flyme Hanger No 8, Virginia Airport, Durban.

viii Statement of Mothonsi

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159. The prosecution team also had the statement of Mathonsi, dated 9 May 2013, wherein Mathonsi, as the then body guard in STA, stated under oath.

160. I attach hereto a copy of a manuscript signed statement under oath of Mathonsi, marked as annexure "CM89.1" and a copy of the typed version of the statement, marked as annexure "CM89.2".

161. The essence of Mathonsi's statement is that the murdering of the members of KTA as detailed by Mkhize and Mkhize himself, was planned between STA, Booysen and Mostert, as members of the Cato Manor SVC Section.

162. According to Mathonsi, Mkhize was the last to be killed and there were payments made to the Cato Manor SVC Section for the killing of Mkhize. This allegation, under oath by Mkhize, is also corroborated by the statement of Bhekhinkosi Mthiyani Diondlo (Diondlo).

ix Statement of Diondlo

163. Diondlo stated under oath that he was a chairperson of the disciplinary department within the STA and he had close working relations with Exco Members of STA. According to Diondlo, the STA paid members of the Cato Manor SVC Section for the killing of members of the KTA and mentions those who were killed as Lindelani Buthelezi, Kopolola Ntuli, Nathi Mthembu, Mdu Mkhize, Ndimande and Bonganl Mkhize.

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164. The most expensive hits were for Ndimande, valued at R750 000.00 and Mkhize, valued at R1 000 000.00. According to Diondlo, Mostert and Booysen, as members of the Organised Crime Unit, were involved in the money exchange through Bongiswe Mhlongo and Sanele Zondi. I attach hereto a statement of Diondlo, marked as annexure "CM70".

165. Mathonsi, and Diondlo's allegations, about the exchange of money and the planning to kill members of the STA, were further corroborated by Bongani Mandla Mkhize. It must be noted that Diondlo alleges that he was an informer of Mostert and Sanele Zondi was an informer of Booysen.

x Statement by Bongani Mandla Mkhize

166. Bongani Mkhize, the body guard of STA Executive, stated under oath that when Kopolota, Ntuli and Bongani Mthembu were killed, Bongiswe Mhlongo was sent pictures, allegedly by Mostert, of the deceased. As the body guard, he accompanied Mhlongo to meet with Mostert and another white man at Tongaat Toll Plaza, where Mhlongo handed plastic with money to Mostert and the other white man in the car.

167. I attach hereto a statement of Bongani Mandla Mkhize, marked as annexure "CM71".

xi Evidential analysis

168. The prosecution team took cognisance that Chonco was killed in the line of duty. However, those who were alleged to be involved in his murder, were killed instead of being arrested and brought to Court. The prosecution team had evidence that Buthelezi was arrested by the police. At the time of his arrest, he was unarmed.

169. The arrest took place in the presence of his girlfriend who survived him and who gave a statement on what transpired at the time of Buthelezi's murder by members of the Cato Manor SVC Section. She also stated that he was unarmed.

170. Mostert was present at this crime scene and the evidence was that the deceased was unarmed and not a threat to the police. When he was shot, the police had already secured him.

171. The prosecution team had a photo album which indicated Mdu Mkhize having been shot and killed while in handcuffs and in custody of the police in their vehicle.

172. The prosecution team had evidence that Ndimande and Tembe were arrested on 29 August 2008 by the members of the Cato Manor SVC Section for the questioning of the alleged murder of Chonco but they were released on the same day. On 16 September 2008, a hot pursuit by the very same members of the Cato Manor SVC Section of Ndimande and Tembe ensued and they were murdered.

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173. On 18 September 2008, the Cato Manor SVC Section also murdered Ntuli and Mthembu.

174. On 3 February 2009, the Cato Manor SVC Section murdered Mkhize.

175. It is noticeable on the photo albums and the post mortem reports that the police aimed at the upper body of each victim, whereas if the intention was to incapacitate the suspect with a view of arresting them, it is expected of them to aim at the lower part of the body.

176. Bongani Mkhize, the Chairperson of the KTA, was shot whilst inside his vehicle and being chased by members of the Cato Manor SVC Section. The photo albums indicate that the bullets were all from outside of the vehicle and he was shot whilst the windows of the vehicle were closed.

177. Taking into account:

177.1. the objective evidence in the dockets which comprised, amongst others, the ballistic crime scene reconstruction reports and eyewitness statement:

177.2. the statements of persons linked to the STA who stated that there was a plan to murder members of the KTA and that rewards were paid after each murder,

177.3. the prosecution team considered the totality of the aforementioned evidence, as an indication that the killings were

deliberate which occurred under the control and management of Booysen.

178. The prosecution team elected not to charge Alyer as a manager of the Cato Manor SVC Section because he features nowhere in any of the evidence, being the monetary awards, statements from the STA linked persons and crime scenes, which corroborated his version that he was excluded in the operations of the Cato Manor SVC Section. There was no evidence to suggest that Alyer knew or that he ought to have known how the criminal activities of Cato Manor SVC Section were committed. Booysen was directly involved in the operations of the Cato Manor SVC Section. Therefore he knew, or ought to have known that the members were killing people/persons other than arresting them.

179. It was noted that Cato Manor SVC Section acted in cahoots with the STA. However, it was the prosecution team's long term strategy to secure more members of the STA to become witnesses, more so because the funds to pay for the killings was from the STA.

180. The prosecution team had identified further persons within the STA which the investigation team was to approach with the view of calling them as State witnesses. At this juncture it is not in the interest of justice to divulge the whole plan and the names of the identified persons.

181 The *modus operandi* that was adopted by the Cato Manor SVC Section in the taxi violence incidents was carried over to the ATM bombings were

the suspects were also killed instead of being arrested and brought before Court.

182. It is critical to bring it to the attention of the Commission that, to the best of my knowledge, since the arrest and prosecution of the members of the Cato Manor SVC Section, the trend of murdering suspects instead of arresting them, has subsided considerably.

183. The trend of component driven and centralised killing of suspects has subsided. To the extent that extracts from the dockets have been attached to my affidavit to support my averments, electronic copies of the dockets are made available for the Commission's benefit on the ScanDisk Cruzer Blade 16GB memory stick affixed to the front page of this affidavit.

(f) <u>Discussion of the Racketeering Principles</u>

i The enterprise

184. Cato Manor SVC Section is the enterprise as defined in the Act. The Organised Crime structures became part of the Directorate for Priority Crimes Investigations (DPCI) which was under the commandership of General Booysen as the Provincial Head: DPCI since 2010. Accused 9 was the section commander of the Cato Manor SVC Section and was at all times in charge of all the activities of the Cato Manor SVC Section. The South SAPS is a legal entity established by legislation in terms of the South African Police Act 68 of 1995. It is comprised of a national office and provincial structures for each province. The Cato Manor SVC Section

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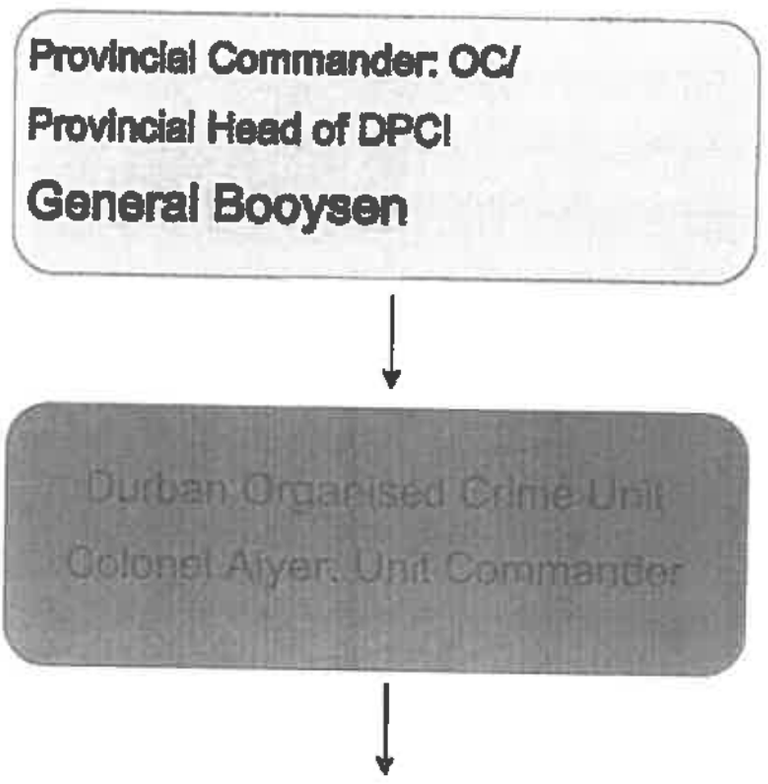
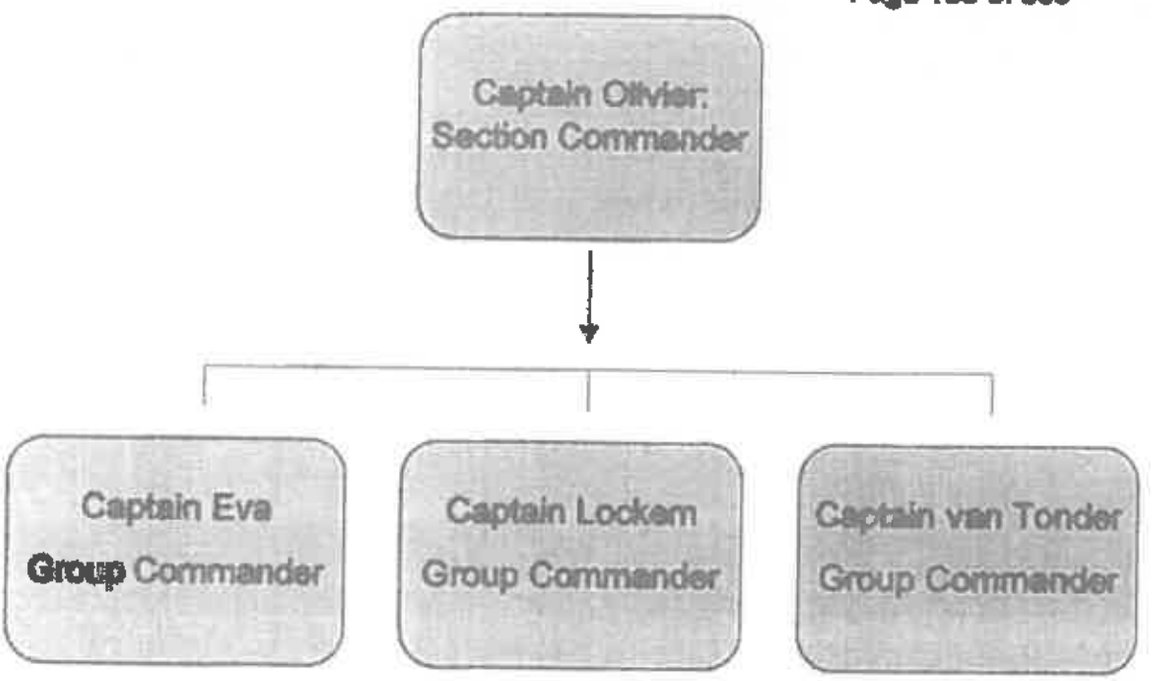
as part of the Durban Organised Crime was supposed to report to Colonel Alyer as the Commander of Durban Organised Crime Unit but did not do so as a result of differences they had with Colonel Alyer, they instead bypassed him and worked under the direct control and direction of General Booysen.

185. In *Jwara and Others v the State* 2015 (2) SACR 525 (SCA), the full bench in the SCA upheld the principle of having a section of the SAPS regarded as an enterprise in terms of POCA. In this matter, members of the Organised Crime Unit in the West Rand participated in a number of offences relating to drugs that were confiscated as exhibits at the OR Tambo Airport, Johannesburg.

186. Below, we set out a table that demonstrates the hierarchy in the Cato Manor SVC Section in terms of which Booysen was depicted as the *de facto* commander.





187 Mathenjwa and I compiled the reply to the request for further particulars and duly filed same. I attended to the answers relating to the racketeering charges. I attach hereto a copy of the relevant part of the reply to the request for further particulars marked as annexure "CM75". Mathenjwa attended to the larger part of the response on the predicated offences. However, since he did not type the response to the further particulars, he is unable to obtain same in order to attach it to his affidavit. I refer to Mathenjwa's affidavit with regard hereto.

188. The response to the request for further particulars, demonstrates:

188.1. The role of each member in the enterprise on more than one occasion;

188.2. The *modus operandi*;

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188.3. The association of each member in a pattern of racketeering activities; and

188.4. How the conduct of each member accelerated or advanced the objectives of the enterprise.

189. It is not necessary for the manager of the enterprise to be present and participate in the commission of the crime. The preamble of POCA states as follows:

> *"...It is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connect with the enterprises which are involved in a pattern of racketeering activities".*

190. The fact that the objective facts demonstrate that Booysen participated in commission of the crime by giving members information on the whereabouts of Magojela and Tembe, counts 6 to 12 in the indictment and attended to the scene immediately after the murder of Magojela and Tembe, is an added factor to prove the requirements as set out in section 2(1)(e) of POCA.

(g) <u>Pattern of Racketeering Activities</u>

191. The objective evidence, as set out above in the portion dealing with the counts constitutes the pattern of racketeering that took place from 03 September 2008 to 04 September 2011.

192. In order not to burden this lengthy affidavit, I refer the Chairperson to the relevant paragraphs as set out in my response to the request for further particulars in the criminal matter CCD11/2013D in the KwaZulu-Natal High Court, Durban which demonstrates the following:

192.1. The pattern is set out from paragraph 3.2 to 3.4 at pages 6 to 24;

192.2. The participation of each Manager in the activities of the enterprise is illustrated in paragraph 4 to 5 at page 24 to 33;

192.3. The knowledge and/or presumed knowledge of each Manager of the activities of the enterprise is illustrated in paragraph 7 to 8 at page 34 to 35;

192.4. Pertaining to the offence set out in section 2(1)(f) of POCA:

192.5. Paragraph 1 on page 36 sets out the management of the operations or activities of the enterprise by each manager;

192.6. Paragraph 6 sets out how each manager is associated with the activities of the enterprise;

192.7. Paragraph 8 sets out how each manager knew or ought to have known of the activities of the enterprise.

192.8. Pertaining to the offence set out in section 2(1)(e) of POCA:

192.8.1. Paragraph 1 outlines the enterprise.

192.8.2. The organisational structure or hierarchal structure detailing all persons in actual positions of management and authority which has been outlined on pages 3 to 5 of this submission and continues to be the same in both Count 1 and Count 2. The activities of the managers, the various incidents in which the members of the enterprise took part, the various dates and places of the activities and the specific members who took part in various activities, have been outlined in detail in the various incidents above.

(h) **The judgment of General Council of the Bar of South Africa vs Jiba and Others 2017 (2) SA 122 (GP) as well as the judgment of Jiba and Another vs GCB and Another 2019 (1) SA 130 (SCA) and the findings thereto pertaining to the issuing of POCA authorisations on against Booysen on 17 August 2012**

193. I am advised that the Chairperson has repeatedly stated that where the issues canvassed at the Commission have been previously ventilated

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before a court of law, such judgments should be brought to his attention by the evidence leaders. I am advised that the chairperson specifically expressed this sentiment in the evidence of Booysen. The Chairperson's remarks are as follows:

> *"The second thing I want to say is this. Major General Booysen from the evidence that he has given has indicated that there are a number of court applications that he had to do. He had to bring to court to deal with various matters. In some of them there are judgments. I would like the legal team to secure not only the judgments in regard to those matters but I would like the full set of papers in each application so that we can have a full picture of exactly what happened in regard to each matter and how people against whom certain allegations were made how they responded in affidavits that were placed before the courts. I would also like to see the findings that were made by those courts in regard to each matter and in this regard I would like the legal team to prepare for me for later use a list of all findings that have been made by the courts in the various applications where there is no appeal pending. Maybe they can make them even if there is an appeal pending but a note can be made that in regard to that one specific ones there is an appeal pending."*[2]

194. Before this Commission, Booysen is complaining about me as a prosecutor who was part of the prosecution team that made

[2] Transcribed record: Day 88, 3 May 2019, p4, line 13 to p5, line 3

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recommendations, and he stated that we acted corruptly and the recommendations we made were unjustified. I wish to bring to attention of Commission that the complaint pertaining to the prosecutors acting *mala fide* and/or with ulterior motive was a subject of complaint against Jiba in the judgment of the *General Council of the Bar of South Africa vs Jiba and Others* 2017 (2) SA 122 (GP) ("the Legodi J judgment"). I attach hereto a copy of the Legodi J judgment marked as "**CM72**". In this matter, the GCB sought to rely on the findings of Gorven J that Jiba was mendacious and could not have considered the statements referred to in her affidavit and sought to rely on those findings in order to justify a case that she was not a fit and proper person to serve as an Advocate of the High Court of South Africa, and thus ought to be struck off the roll of Advocates. The court *a quo* dismissed the GCB's reliance on the adverse findings of Gorven J against Jiba as the basis upon which she should be struck off the roll of Advocates.

195. When Jiba appealed the finding of the court *a quo* to strike her off the roll on another basis other than the Booysen matter, the SCA, in its judgment of *Jiba and Another vs GCB and Another* 2019 (1) SA 130 (SCA) ("the Jiba SCA judgment") also considered the finding of her having acted with ulterior motive and/or *mala fide* in the Booysen matter and shared the sentiments expressed by the court *a quo*. I attach hereto a copy of Jiba SCA judgement which is marked as "**CM73**".

196. I can do no better than quote the pertinent paragraphs where the court *a quo* extensively considered the Gorven J judgment, the explanation of

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Jiba pertaining to the findings of Gorven J and its analysis thereof, as well as its finding in respect of same.

197. Legodi J considered the findings by Gorven J that Jiba was, "*mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the docket before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision*".

198. In paragraph [49] of Legodi J's judgment, he states that:

> "*Before dealing with information placed before Jiba for written authorisation in terms of s 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Gorven J were based on a correct evaluation and understanding of Jiba's answering affidavit*".

199. After reflecting as aforesaid, Legodi J states that:

> "*[51] Having regard to what is quoted above, it does not seem the statement: 'Jiba says that they are all statements made under oath', is correct. Nowhere in Jiba's answering affidavit did she make such a statement, neither did she say any of annexures NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information was made only in paras 16 and 16.6*

of the answering affidavit, without suggesting that all of the annexures referred to in para 17 of the answering affidavit in the Booysen matter were made under oath. Therefore the statement —

'(t)he document referred to as a statement by Mr Daniikas, annexure NJ3, is not a sworn statement' —

as stated in para 31 of Gorven J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred, particularly reading in the context of para 16.7 of her answering affidavit in the Booysen case quoted in [50] above".

200. In considering the fact that Jiba did not file a supplementary affidavit responding to the allegations of mendacity, Legodi J states as follows:

"[52] The fact that Jiba did not avail herself of the invitation to deal with the allegation of being 'mendacious', meaning 'not telling the truth', should also be seen in context. The allegation was made in the replying affidavit. This, too, Gorven J was mindful of. For the purpose of these proceedings, the criticism by Gorven J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen had raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that a supplementary affidavit would be filed to explain the criticism against Jiba with regard to the annexures. On 19 August 2013 an email by Adv Mosing of the NPA was sent to Adv Chauke, Director of Public Prosecutions, Johannesburg, enquiring what progress had been made with regard to the filing of a further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of 'mendacious' made by Booysen. By seeking to file a further affidavit to explain the annexures after the replying affidavit was filed is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement —

> *'(d)espite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence' —*

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made by Gorven J in para 34 of his judgment, ought to be seen in the context of what is explained in [53] above.

201. Having considered Jiba's attempts to place her version before the court in the review application that served before Gorven J, Legodi J goes on to consider the information that was before Jiba when she took the decision to issue the POCA authorisation on 17 August 2012, and states, amongst others, that:

"[56] On 17 August 2012 Jiba approved the application for authorisation in terms of s 2(4) of POCA for contraventions by Booysen of s 2(1)(e) and (f) of POCA... The information and advice that were placed before Jiba for the purpose of granting or refusing authorisation were prepared and compiled by Adv Raymond K Mathenjwa and Adv Gladstone Sello Maema, both Deputy Directors of Public Prosecutions, and Adv Anthony Mosing, a Senior Deputy Director of Public Prosecutions and the head of the Special Projects Division, who acted as the liaison between Jiba and the prosecuting team.

[57] *At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo, and annexure NJ8, being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J*

and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booysen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Danikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booysen. The drafted statement of Danikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booysen. Danikas was a police reservist in the Durban Organised Crime Unit based in Cato Manor, and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Maema asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual-legal-assistance legislation, that is, s 2 and 3 of the International Co-operation in Criminal Matters Act 75 of 1996, be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolisi Ntsaena(sic)), at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was, however, intended to corroborate the evidence in possession of the prosecution team, that Booysen was involved in the various activities giving rise to the charges against him, of similar-fact evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement that —

> *'(t)he document referred to as a statement by Mr Danikas, annexure NJ3 . . . is not a sworn statement. It is not dated. Even if it could be attributed to the named person and even if it were a sworn statement as claimed by the NDPP, the contents do not cover the period clearly [within] the indictment, except for one event which does not relate to Mr Booysen' —*

by Gorven J, ought to be seen in the context of the explanation given by Jiba in these proceedings, and the fact that Jiba never said annexure NJ3 was a sworn statement, as stated earlier in this judgment. I need to caution. I should not be understood as seeking to review or upset Gorven J's judgment. At the time, he did not have Jiba's responses, as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the

authorisation was made, the explanation by Jiba in these proceedings is as follows:

"217. There were also two statements by Colonel Alger (reference to as annexure NJ2 and NJ4). 'One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interference in the activities of a section of Durban & Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Alger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Alger at the consultation.'

[61] Therefore the statement that —

(t)he second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April (August) 2012, some two weeks after the first impugned decision was taken' —

In para 31 of Govern J's judgment, inasmuch as the GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of the explanation quoted in [60] above. I am unable to find any conduct on the part of Jiba that justifies an application contemplated in s 7 of the Admission of Advocates Act.

202. Based on the aforementioned analysis of the information that served before Jiba when she issued the POCA authorisations together with the explanation that was not placed before Gorven J, as the NPA's counsel had decided not to file a supplementary affidavit despite the prosecution team's request to do so after considering the issues raised in Booysen's replying affidavit in the review application, Legodi J goes on to find that:

> *"[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislative framework, what was placed before Jiba and the core function of the prosecuting authority, is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in ss (2) of s 2 of the NPA Act, notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair. This should be seen in the context of the preamble under POCA which inter alia reads:*
>
> > *'AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime . . . criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime . . . and criminal gang activities.*

'AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in the pattern of racketeering activity;

. . .

'AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities; . . .' [Emphasis added.]

[63] In my view the provisions of s 2(1)(e) and (f) referred to in [44] of this judgment are meant for the criminalisation of such activities. The point I am making is this: courts, for the purpose of an exercise of its discretion in terms of s 2(2) referred to in [62] of this judgment, may rely on hearsay evidence, and information and/or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jiba in Booysen's case) be entitled to rely on hearsay and similar-fact evidence for the

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purpose of authorisation as contemplated in ss (4) of s 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities, and resultantly pose harm to the wellbeing of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue, however, is whether in granting authorisation in terms of s 2(4), Jiba was mala fide or had ulterior motive, in which event the requirement of 'fit and proper person' to remain on the roll of advocates becomes relevant. For this purpose, further provisions of POCA are necessary to be considered, also taking into account offences under s 2(1)(e) and (f).

[65] 'Pattern of racketeering activity' means —

> *'the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1 . . .'*

On the other hand, 'enterprise' —

> *'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'.*

[66] The essence of the information before Jiba can be summed up as follows: In addition to what is stated in [56] – [57] and [60] of this judgment, Booysen was the head of the Cato Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of a serious nature, including murders against suspects who were sometimes framed in the commission of offences. Booysen knew, approved and/or ought to have known of the commission of these offences. As reward for the members' unlawful activities, Booysen motivated for an incentive of R10 000 for each of the 26 members of the Cato Manor Crime Unit, including Booysen himself. Booysen was also commended for outstanding services rendered, in that he —

> *'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.*

[67] I cannot find any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA. POCA is like a cry out loud for a declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority, in the exercise of their legislative power, to investigate, through members of their investigating directorate and under the watchful eye of a Special Director so appointed, and to prosecute without fear, favour and prejudice those

implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of s 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[68] One does not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an application for authorisation is made in terms of s 2(4) of POCA. An overriding factor for them to consider should be adherence to the rule of law and the Constitution. It suffices for now to conclude on the Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba."

203. The finding made by Legodi J, with Hughes J concurring, to the effect that he cannot find "*any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA*" was supported by the majority of the court when the matter was taken on appeal to the Supreme Court of Appeal, where the court states as follows:

"[10] The first complaint dealt with by the court a quo was in connection with Booysen's case. In that case Jiba, in her capacity as Acting NDPP, issued two authorisation letters charging Major-General Johan

Wessel Booysen with the contravention of s 2(1)(e) and (f) of the Prevention of Organised Crime Act 121 of 1998 (POCA). In a nutshell Booysen alleged that Jiba was 'mendacious' when she asserted that she considered statements together with other information in the docket before she took the decision to charge him. This allegation was further exacerbated by the negative remarks of Gorven J who presided in the Booysen matter when he drew an inference that none of the information upon which Jiba relied linked Booysen to the offence in question. The court a quo found that '(I)t suffices for now to conclude on [the] Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates'. I do not find it necessary to deal with the detail of the complaint in view of the finding of the court a quo. I share the sentiment expressed. Before us counsel for the GCB dealt with some of the complaints but, in my considered view did not take the matter any further. The court a quo could not find 'any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA'.

204. **As a prosecutor who was part of the team that made recommendations to Jiba, who has been found by courts of law not to have acted with *mala fide* and/or ulterior motive in issuing the POCA authorisations against Booysen, I am also of the respectful view that this Commission should disregard Booysen's contention that in making the recommendation for the issuing of the racketeering authorisations to Jiba, I acted with *mala fide* and/or ulterior motive.**

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205. The Legodi judgment was delivered on the 15th of September 2016 and the SCA judgment on this matter was delivered on the 10th of July 2018. Booysen's affidavit to the Commission is dated 2nd of April 2019. In this regard, Booysen, McBride and Seeoko ought to have known that the court found that there was no *mala fides* and/or ulterior motive in issuing the POCA authorisation and consequently the prosecution against Booysen.

(I) <u>Closing remarks</u>

206. *The Supreme Court of Appeal,* in its judgment of Zuma v DA (836/2013) [2014] ZASCA 101 (28 August 2014), endorsed the finding of the High Court, Gauteng Division which held that:

> *"The first respondent* (the NPA), *as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. It has a duty to explain to the citizenry why and how it arrives at the decision to quash the criminal charges against the accused persons, particularly where the matter involves very senior state officials. In pursuance of its constitutional obligations it is incumbent upon the NPA to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP."*

207. I request the Commission to keep in mind this sound warning when it considers my submission pertaining to my role as part of the prosecution

team in the Cato Manor case. I categorically state that our guidance of the investigation and the decision to draw the indictment and therefore charge, the accused therein, as well as the respective applications to the ANDPP and NDPP to request the issuing of a POCA authorisations were driven by our duty to prosecute without fear, favour or prejudice taking into account only the Constitution, the NPA Act and policies as well as the relevant criminal law.

(l) **Booysen's stratagem**

208. The charges against Booysen have been withdrawn, which the prosecution team view as irrational. Withdrawn charges has the potential of being reinstated, more particularly since murder charges do not prescribe. Booysen has adopted the strategy of attacking the prosecution before the Commission instead of clearing his name before a criminal court, a process which he has resisted through applications.

209. The charges were withdrawn after the accused were served with the indictment, the content of the docket disclosed, further particulars furnished and application to have the criminal case struck of the roll refused by the criminal court and the prosecution was ready to put the charges and lead evidence to prove the criminal case against Booysen. The accused were saved by the withdrawal of the charges by the current NDPP without the NDPP consulting the prosecution team, who was seized with the matter for years.

210. I want to bring to the attention of the Commission that it is not uncommon for those who are facing serious criminal charges to attack the prosecution instead of confronting the charges as set out in the indictment.

211. In the matter of **National Director of Public Prosecutions v King**[3] Harms DP held as follows:

> *"[5] ... Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay.'[4] One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."*

212. I was not briefed on any case which Booysen was investigating and which could be disturbed by his prosecution. In any event, provincial commanders by practice do not carry dockets but their subordinates within respective ranks and units carry dockets and conduct investigations. To the extent that Booysen says that there was an ulterior motive for his prosecution, I, as a prosecutor, acting in good faith, decided on the dockets that were placed before me together with the other members of the prosecution team and came to the conclusion that

[3] (88/09) [2010] ZASCA 8; 2010 (2) SACR 148 (SCA) ; 2010 (7) BCLR 668 (SCA) ; [2010] 3 All SA 304 (SCA) (8 March 2010)
[4] *Regina v H and others* [2004] UKHL 3 para 22 per Lord Bingham of Cornhill.

Booysen has a criminal case to answer. Motive, if it at all existed, is irrelevant in criminal prosecutions and only a judicial officer can pronounce on whether or not an improper motive existed after having heard evidence and accumulatively assessing same.

213. In the matter of National Director of Public Prosecutions v Zuma[5] Harms DP held:

> "[37] *... A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent ...*[6]

214. It is very concerning that only Mathenjwa and myself are being crucified in the Cato Manor SVC Section matter by Booysen, McBride and Sesoko, for the recommendation and subsequent prosecution of Booysen, when the decision was a collective team effort in the execution of our constitutional and statutory mandate.

215. To the best of my knowledge, Motshwa, Futshane, Ntlakeza and Moleko have not been served with Notices indicating that they will be implicated by Booysen, McBride and Sesoko, and were requested to file their affidavits.

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[5] (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) (12 January 2009

[6] *Beukenstrater v Rottcher & Theunissen* 1956 (1) SA 129 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA). For Canada: *Proud v Quebec (Attorney General)* 2001 SCC 66, [2001] 3 SCR 9.

H DE KOCK REPORT

Overview

216. The De Kock report dated the 27th of June 2019, has, as subject heading "RECONSIDERATION OF AUTHORISATIONS IN TERMS OF SECTION 2(1)(e) and (f) OF THE PREVENTION OF ORGANISED ACT, 121 OF 1998". This report does not state what prompted the constitution of the panel. However, ordinarily there will be representations made by the Accused or Complainant or any other person or party whom the National Director considers to be relevant, in terms of Section 179(5)(d) of the Constitution. In this report there is no reference to any representations which were made nor is there any reference to a consultation between the National Director and the Director of Public Prosecutions, as required by the said section of the Constitution.

217 The reconsideration will most probably be based on Section 179(2) of the Constitution where the NPA has the power to institute criminal proceedings on behalf of the State and to carry out necessary functions incidental to instituting criminal proceedings. If the reconsideration is based on this subsection of the Constitution, the panel should have:

217.1. invited the prosecution team to make presentations and clarify the processes which were followed leading to the issuing of the racketeering certificate;

217.2. invited further input from the prosecution team;

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217.3. canvassed any identified shortcomings in the prosecution memo, the indictment and the docket, if any;

217.4. familiarise themselves with the stratagem of the prosecution team;

217.5. appraised themselves with all the processes that have thus far unfolded before the criminal court, including:

217.5.1. disclosure of the content of the docket;

217.5.2. request for further particulars;

217.5.3. State's response to the request for further particulars;

217.5.4. The unsuccessful application by the Accused to have the matter struck off the roll in terms of section 342A of the Criminal Procedure Act, Act 51 of 1977 ("CPA");

217.5.5. The stages at which the motion applications instituted by the Accused were at.

218. The De Kock report was compiled without the panel appraising itself with any of the issues as raised directly above and consequently opted to advise the NDPP on an incomplete set of facts. In the light of the above

shortcomings to the compiling of this report, the NDPP's decision is irrational and unlawful.

219. The De Kock report does not make reference to any representations made to the NDPP in terms of Section 179(5)(d) nor does it make any reference to any objective facts in terms of Section 179(2) which were before the NDPP which prompted her to constitute a panel. The De Kock report also does not make reference at whose instance and on what basis the NDPP had to reconsider the decision to issue the authorisations. In the absence of the above references, it can only be assumed that she acted in vacuum which would render her decision to constitute a panel and to make a decision based on the recommendation of a panel, irrational.

220. In this regard, the De Kock report and the decision by the NDPP does not spell out on which Section of Section 179 of the Constitution the decision and the panel's recommendation are premised on. Consequently, this borders on offending the principle of legality.

221. Although the NDPP said the De Kock report was intended for the reconsideration of the racketeering authorisations, we are informed that even the predicate offences have been withdrawn. I am of the view that the withdrawal of the predicate offences is also as a result of the De Kock Report. The prosecution team, which was long seized with the matter, was further not consulted by the DPP KZN on the withdrawal of the predicate offences. I am aware that neither the investigating officers nor

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the families of the deceased were invited in the decision making process for the withdrawal of the predicate offences. I informed Mathenjwa that I have been inundated with calls from family members of the deceased, enquiring about the progress of the prosecution, after the withdrawal of the matters. I further informed Mathenjwa that investigators from IPID and DCPI, Moslapoa and Kolomote, contacted me and enquired from me about the progress on the matter. Moslapoa later advised me that they had been instructed to advise the families of the deceased that the matters were withdrawn. Moslapoa indicated to me that they were uncomfortable with these instructions as they were not aware of the reasons for the withdrawal of the matters.

Failure to consult prosecution team

222. I have been part of the prosecution team allocated to guide the investigation and decide whether to institute prosecution on the Cato Manor SVC matter since March 2012 and my delegation to that effect has not been withdrawn. What I know is that the NDPP has withdrawn the racketeering authorisation issued by Adv Jiba on the 17th of August 2012 and a subsequent authorisation issued by Adv Abrahams on the 13th of February 2016.

223. On the 12th of April 2019 I, as the team leader, was instructed by McAdam, the Acting Special Director at the PCLU, to hand over to him all the Cato Manor dockets. During this time there was a pending High Court application where the accused had sought to challenge the aforesaid

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racketeering authorisation. This process had halted the commencement of the trial.

224. On the 8th of July 2019, the NDPP, Batohi, convened a meeting where she invited the prosecution team and advised us that she had constituted a panel to look into the Cato Manor prosecutions. A report has been received from the panel which was led by Adv De Kock and the recommendation to which she is in agreement with, was that all the racketeering authorisations should be withdrawn.

225. The prosecution team took an issue as to how could the panel make such a recommendation without consulting with us as prosecutors who have been long seized with the matter. The response from the NDPP was that the recommendation is not about the work of the prosecution team, nor the decision of the prosecution team, but it was about the decision of both Jiba and Abrahams.

226. The said report was not given to the prosecution team, as the NDPP specifically mentioned that the report was meant for her as the NDPP. She, however, made summaries of some of the issues which the panel had said in the report, eg. That the case was based on hearsay evidence, credibility of witnesses, specifically Alyer and that the decisions were blurred by public perceptions and proper procedures were not followed. Ultimately there were insufficient evidence to justify the authorisations, and therefore she was convinced that both the authorisations of Jiba and Abrahams were wrong.

227. In the meeting, Chauke who was the initial coordinator of the prosecution team, commented that since when is the issue of credibility decided outside Court. Noko refused to comment on the matter and said that she had no comment as the NDPP already took a decision.

228. The prosecution team specifically informed the NDPP that it was not in agreement with the panel's recommendation and consequently the NDPP's decision. The NDPP's response was that she was not reviewing the decision of the prosecution team but that of Jiba and Abrahams.

229. I must state that the De Kock report has to date not been furnished to the prosecution team by the NPA. I received a call from a media house, Daily Maverick, who wanted my comment on the De Kock report. I responded that I cannot comment on a report which I have not seen. The reporter then furnished me with a copy which I distributed to the rest of the prosecution team and Chauke.

230. I did not comment on the De Kock report in the media and advised the reporter that I will comment on the report at the appropriate time when the NPA requires his comment thereon. My approach was in accordance with the provisions of Section 41(6) of the NPA Act.

Analysis of the De Kock report

231. The De Kock report was compiled by De Kock, Thenga, Riley and Mamabolo. However, it was only signed by De Kock and Mamabolo. It is not spelled out in the De Kock report as to why Thenga and Riley did not sign the report.

232. I am of the view that Thenga should have recused herself from the panel, for the reasons as set out below. Equally so, I am advised that Mamabolo should have recused himself from the panel for the reasons set out below.

233. Thenga should have recused herself from the panel, because, on the 13th of August 2015, she compiled a legal opinion in the matter of State v Jiba, Silverton CAS 622/10/2014 to Abrahams where she had to comment on the prosecution of Booysen and processes followed therein. I attach hereto the said legal opinion marked as annexure "CM78".

234. In paragraph A.3 of her opinion, Thenga correctly make reference to Section 2.2 of POCA which provides as follows:

> *"The court may hear evidence including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

235. This section provides that hearsay evidence is admissable in racketeering prosecutions. Yet, the De Kock report which she took part in compiling, criticises the State's case on the fact that the case is based on hearsay.

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236. In paragraph E of her opinion, Thenga states that there were various consultations and briefings made by the prosecution team and investigating team to the NDPP. She further states that all the necessary consultations with the NDPP led to the written authorisation of the racketeering certificate by the NDPP, Jiba. Yet, the De Kock report states that proper processes leading to the authorisation of the issuing of the racketeering certificate by Jiba were not followed.

237. In paragraph G of her opinion, Thenga correctly stated that the Court in the Gorven J judgment had incomplete information. The information was unfortunately sitting with the legal representative and was not properly filed as it was supposed to be and therefore was not before Court. She further stated that the NPA prevented Jiba from appealing the Gorven judgment. She, in fact, had to remove papers already filed for the purpose of an appeal because the then NDPP instructed her that the matter must never be appealed. Yet, the De Kock report put more emphasis on the Gorven judgment and does not mention that this was an appealable matter.

238. To compound matters, there is no indication in the De Kock report that Thenga disclosed the existence of her legal opinion to the other panellists.

239. It is my considered view that it would have been professional from Thenga to disclose the above and recuse herself from the panel. Her serving on the panel as a panellist, makes the report irregular, unfair and prejudicial against the prosecution team.

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240. I have been advised by my legal team that, based on what is set out in Mosing's affidavit, Mamabolo should also not have been part of the panel because of the close working relationship he had with Booysen in the past. This working relationship had previously caused Mosing to exclude Mamabolo from the decision-making process in the Cato Manor matter.

241. In the De Kock report there is no indication that Mamabolo disclosed the fact that he was previously excluded by Mosing or that he had a previous working relationship with Booysen. To the best of my knowledge, there is no indication that Mamabolo deposed to an affidavit dealing with his involvement as a panellist.

242. At the time of consulting with my legal team and settling these papers, I had not been provided with affidavits, if any, deposed to by De Kock, Mamabolo, Riley and Thenga, setting out the process that unfolded, which lead to the compilation of the report.

243. The failure of the panellists to consult with the prosecution team deprived itself of the opportunity or advantage to know the extent of the consultative processes and briefings between the prosecution team, the NDPP and the ANDPP, prior to the issuing of the authorisations. The prosecution team had briefings with the ANDPP on the Cato Manor matter on 15 May 2012, 23 May 2012, 12 June 2012, 9 July 2012 and 6 August 2012.

244. The briefings on 15 May, 23 May, 12 June and 9 July 2012 resulted in the prosecution team finalising a prosecution memorandum dated 10 July

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2012. I attach hereto a copy of the prosecution memorandum, marked as annexure "CM77", which application was in the name of Chauke.

245. This memorandum was queried and the prosecution team was directed that the application must not be in the name of Chauke but it must be in the name of Noko, the DPP of KwaZulu-Natal. The prosecution team had to draft the application now in the name of Noko, which was then delivered by me to Mosing on the 16th of August 2012 and was signed on the 17th of August 2012.

246. It was not for the first time for the prosecution memorandum to be before Mosing and Jiba when it was delivered on the 16th of August 2012. The panel would have been made aware of this sequence of events had they consulted with the prosecution team. Instead, the De Kock report reflects that there was no consultation prior to the authorisation dated the 17th of August 2012.

247. In compiling the report, the panellists:

247.1. did not take into account the Judgment delivered by Legodi J in the matter involving the striking of Jiba from the roll of Advocates, which was launched by the GCB, where Jiba's conduct in deciding the Booysen matter was also one of the reasons for which the applicant sought her striking off the roll. In that matter, the Court found that, on the information that was placed before Jiba, which the Court considered, she properly exercised her prosecutorial discretion, and consequently found

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no fault against Jiba. The panellists' conduct as described above, clearly demonstrate lack of objectivity in that they put emphasis on the Govern judgment which was not favouring the issuing of the authorisation of the racketeering certificates, and ignored the Legodi judgment which was favouring the issuing of the certificates;

247.2. did not indicate in the De Kock report whether they considered evidence as contained in the docket such as the ballistic crime reconstruction reports, photo albums, post-mortem reports, expert reports and statements of all witnesses who were present at various crime scenes. In this regard, the panellists did not objectively assess the evidential material as to whether or not there was a pattern and similar *modus operandi* by the Cato Manor SVC Section as a group of SAPS members associated in fact in killing their alleged suspects;

247.3. did not only conclude incorrectly that there are contradictions in the statements of Hurley, but also did not set out the alleged contradictions in the De Kock report. A careful perusal and analysis of the statements of Hurley demonstrates that:

247.3.1. Hurley saw Stoltz throw a firearm on the pillow at the side of the bed.

247.3.2. Stoltz further, after taking Hurley out of the room, asked Hurley where the deceased got the firearm from.

247.3.3. Hurley responded that the deceased had no gun and she saw Stoltz throw the gun on the pillow. Hurley stated in her statement ("CM31.1") *"I swear he didn't have a gun."*;

247.3.4. In Hurley's second statement ("CM31.2"), she stated: *"Sakhile did not have any dangerous weapon or a firearm in his possession ... He was not having anything on him."*. She further in the second statement stated: *"I saw the firearm being placed next to the deceased by the white guy."*

247.4. further pointed out to a contradiction between Hurley, on the one hand, and Nqaba Mdluli and Nkanyiso Ntanza, on the other hand, in respect of the presence of the firearm. The panellists are incorrect in that conclusion as Mdluli and Ntanza were outside the car when Hurley saw the police man throwing the firearm on the pillow next to the deceased;

247.5. did not indicate whether the panellists did consult with IPID and DPCI investigators in the process of analysing the evidential material and consequently finalising the said report;

247.6. did not indicate that they conducted inspections *in loco* and consulted with witnesses *vis a vis* what the prosecution team did;

247.7. did not indicate that they consulted with various ballistic experts, in particular, Mangena and pathologists;

248. The panel criticised the State's case that it is based on hearsay evidence which is, according to them, not admissible. In this regard, the panel overlooked the fact that there is a difference insofar as hearsay is concerned in respect of the racketeering charges and in respect of the predicate offences. There is nowhere in the report where the panel has indicated that Section 2.2 of POCA has been considered. This section provides as follows:

> *"(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

249. Furthermore, the panel overlooked the Constitutional Court decision on this aspect as pronounced in the matter of **Savoi and others v National Director of Public Prosecutions and others**[7] where the Court found that, regarding the potential unfairness of the admissibility of hearsay evidence to an accused person, the Court drew attention to the filter in the

[7] 2014 (5) SA 317 (CC)

form of the proviso appended in Section 2(2) of POCA, namely that the admissibility of such hearsay evidence should not render the trial unfair. The Court further held that the section serves a twin purpose. Firstly, it effectively does away with the hearsay rule on the charges under Section 2(2) of POCA and, indeed, other exclusionary rules. In this respect, this section differs from Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 ("LEA Act") which retains the exclusionary rule but permits the admission of hearsay evidence only under circumstances as set out in Section 3(1)(a) to (c) of the LEA Act, which provides as follows:

> *"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
>
> *(a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) The court, having regard to –*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

250. The panel failed to differentiate between the admissibility of hearsay evidence on racketeering charges, and predicated offences in the indictment which support the existence of a pattern of racketeering.

251. Section 3(1)(c) of the LEA Act is applicable only in predicated offences, and not on the racketeering charges. In this regard, the Commission is referred to the matter of **S v De Vries and others**[6]. The panel usurped the judicial powers of a court to pronounce on whether or not the admissibility of hearsay evidence will render the trial on the racketeering

[6] 2012 (1) SACR 186 (SCA)

charges unfair, a pronouncement which could only be made by a court, having considered the accumulative effect of all the available evidence.

252. The panel relied on what they say is evidence of Nxasana to the Commission to the effect that he informed the prosecution team that there was no case against Booysen. I dispute that Nxasana ever informed the prosecution team that there was no case against Booysen. In fact, in a briefing which was held on the 7th of April 2014, Nxasana requested the prosecution team to bring a prosecution memorandum on Booysen by the end of May 2014. The prosecution team prepared a memorandum signed by me and the application was forwarded by Noko to Nxasana on the 4th of June 2014. As per protocol, such applications go through the Organised Crime desk which was Mosing, at the time.

253. On the 26th of June 2014, Mosing drafted an internal memorandum to Nxasana, confirming that he has received the application for the issuing of the racketeering certificates, but there are shortcomings which he has discussed with the team leader and consequently he returned the documents to be amended and for additional substance to the memorandum.

254. The prosecution team became pre-occupied with the voluminous request for further particulars which had been received on the 26th of May 2014, and furthermore team members were involved in other operational responsibilities and did not get to submit the amended memorandum before Nxasana vacated office. Nxasana did not get to decide on the

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application by the prosecution team due to the reasons as set out above and elsewhere in this affidavit.

255. Consequently it is incorrect that Nxasana advised the prosecution team that there was no case against Booysen, as stated in the De Kock report. There would have been no rational basis for the prosecution team to have submitted an application to Nxasana for his consideration and decision if he had informed the prosecution team that there was no case against Booysen, because he was, at the time, the repository of power to authorise racketeering certificates.

256. This further explains the shortcomings in the De Kock report caused by the lack of consultation with the prosecution team because had the panellists confronted the prosecution team with the evidence of Nxasana, the explanation as set out above would have been placed before them, before compiling the report.

257. With regard to Danikas' statement, I state as follows:

257.1. On the 19th and 20th of January 2016 I met and consulted with Danikas who was accompanied by his Greek lawyer, Spiros Spirobulous and an English barrister, Clive Powell. I was accompanied by the Head of Witness Protection, McAdam. I requested Danikas to ensure that the contents of our consultation forms part of the statement that he will furnish to me through diplomatic channels.

257.2. The Greek version of Danikas's statement was received through diplomatic channels which are in existence between the Republic of Greece and the Republic of South Africa in 2018. I received a copy of the Greek statement from Luckson Mgiba ("Mgiba") of the Extradition desk in the office of the NDPP. Knowing that Danikas is fully conversant in English, I was surprised that the statement was in Greek. On realising this fact, I requested Mgiba to have the statement translated to English. He informed me that the Department of Justice will be dealing with the translation by going out on tender to secure the translators who will then deal with the translation of the statement into English.

257.3. After approximately six weeks I received a statement from Mgiba which was the translated version in English. The statement was translated by one Marilena E M Piperides on the 12th of October 2018. I attach a copy of the English translation, with the Greek version of the statement attached to it, marked as annexure "CM74".

257.4. I contacted Danikas' Greek lawyer in writing. I furnished the lawyer with both the Greek statement and the English translation and informed him that, in terms of South African law, the statement has to be discovered and made available to the defence team, and that I will forthwith do so.

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257.5. Danikas contacted me through Whatsapp and pointed out certain translation mistakes in the English translation. I requested Danikas to address me in a formal way through his attorneys to bring his concerns to my attention.

257.6. Some weeks later, Danikas, through his attorney, brought to my attention a number of translation mistakes in the English translation. I then, in writing, informed Mgiba of the translation mistakes, and asked him to bring such mistakes to the attention of the translator.

257.7. A few days later, Thabisile Ngidi ("Ngidi"), a PA to Mgiba, contacted me and enquired whether a new translator should be appointed or whether the translation mistakes should be referred back to the existing translator. I told Ngidi that it is the Department of Justice's decision what to do but that I would suggest that the existing translator be used.

258. The prosecution team was removed from the matter. Ngidi contacted me after my removal from the matter and enquired about the translation with him. I informed Ngidi that I have been removed from the matter and that she must enquire from the prosecutors appointed to the matter.

259. Had the panellists contacted me, I would have given them the explanation set out above. There are also no reasons furnished as to why Danikas and the translator of the statement, whose details are clearly displayed on the translation certificate, were not contacted.

Aaqroom Pillay (Accused 29) ("A Pillay")

260. At paragraph 158 of the De Kock report, the panellists critised the prosecution team for charging A Pillay without mentioning specifically the offences in which he participated.

261. A Pillay participated in counts 35 to 39 and he is depicted on the photos published in the Sunday Times on the 11 December 2011, relating the crime scene photos in the Melmoth docket. These photos from the docket, depicting A Pillay at the crime scene, are attached hereto as annexures "CM21.8", "CM21.9" and "CM21.10". A Pillay was also identified by Col Mngwengwe.

262. Had the panellist consulted with the prosecution team, A Pillay's involvement would have been explained and the panellists would have had clarity of A Pillay's involvement.

263. Many of the issues raised and criticism against the prosecution team and the State's case, could have been resolved by the panellists consulting with the prosecution team, witnesses and the investigation team.

264. It is trite law that a witness is not expected to state all events at the time of deposing to the affidavit at the Police Station, but other crucial issues may surface at trial.

GSM

265. It is my respectful submission that the Commission should disregard the De Kock report based on the abovementioned procedural and substantive failures.

H. **AFFIDAVIT OF BOOYSEN DATED 2 APRIL 2019**

266. In this portion of my affidavit, I shall demonstrate that there is no factual and legal basis, justifying the allegations that I was manipulated and/or coerced and/or unduly pressured to prosecute any persons or perform my duties in any specific way. It shall further be demonstrated that I am not captured for any political or corrupt reasons.

267. In this affidavit, at the relevant portions, I have extensively dealt with some of the allegations that have been raised in the affidavit deposed to by Booysen on the 2nd of April 2019, as a result of which I do not deem it necessary to repeat my response. I will further not deal with any matters that I have not been involved in.

268. **Ad paragraphs 12 and 13**

268.1. It is critical to state that Booysen, in all the affidavits placed before Court, in his evidence before the Commission, did not disclose the political persons whose interests were served by the NPA, as alleged by Booysen.

268.2. I specifically deny the contents therein contained and that I was party to a meeting with Nathi Mthethwa ("Mthethwa") at which meeting he was alleged to have pressured the NPA officials to

effect arrests in the Cato Manor matter. I was also not involved in the matter that involved Panday, as already demonstrated above.

266.3. I specifically deny that Mthethwa put any pressure on me to prosecute any one or to perform my duties in any specific way.

269. Ad paragraphs 75 and 76

269.1. In this affidavit, in the section that relates to Cato Manor, a plethora of evidence is set out, justifying the prosecution of Booysen and members of the Cato Manor Section.

270. Ad paragraph 80

270.1. In this regard, I refer the Commission to the version of Moaing which I embrace, the relevant paragraph reads as follows:

"80. *On the 8th of March 2012, three members of the IPID (then known as the ICD) came to the NPA Head Office and I was assigned to meet with them by the acting NDPP. They were Mr I Kgamanyane ("Kgamanyane"), Mr Glen Angus ("Angus") and Khuba. The following transpired during that meeting:*

80.1. *They made a request through me to the NPA for the appointment of prosecutors to*

GSM

be assigned to the investigation they were busy with, which related to the so-called "Cato Manor Death Squad";

80.2. *They explained to me the background of the investigations as well as the number of dockets involved, which were 51 dockets, of which they indicated that all of these matters ended up on inquests. In 12 of the cases they were convinced that there was wrongdoing on the part of the Cato Manor Police.*

80.3. *They advised me that 6 dockets were ready for decision making. In fact, they had the 6 dockets with them during that meeting and they insisted on having a decision on those dockets the following day. They handed the dockets to me for consideration.*

80.4. *They further advised me that there were 12 suspects from the Cato Manor Unit. They mentioned Booysen being the Provincial Commander for Organised Crime as one of the suspects. The evidence of photographs of the crimes were with General Mabula's*

("Mabula") team, and they needed to get such photographs.

80.5. *They also explained that they had a meeting with the former Minister of Police, Mr Nathi Mthethwa ("Mthethwa") and the then Acting National Commissioner, Gen Vlakazi ("Mdlwanazi") approximately a week before. They, as the ICD, together with a team from the DPCI, commanded by Mabula, were present at such meeting. They told me that the Minister was unhappy with the progress of the investigations which was pending since December 2011, and that the Minister told the two teams that he wanted arrests by that following week. The Minister also instructed the two teams to merge and to work together. As a result of such instruction, they worked throughout the weekend.*

80.6. *They told me that the challenge they were experiencing, was to involve prosecutors, and that Mabula met with Mlotshwa, the then Acting DPP of KwaZulu-Natal, who promised them that they would have two*

GSM

advocates, but that the prosecutors would only be able to join them the following week. This was not acceptable to the aforesaid IPID members, as they were of the view that the matter required urgent attention.

80.7. *At the conclusion of the meeting, I told them that I would discuss their requests with the NDPP and, if successful, prosecutors would then join the team by the following week at the ICD offices in Durban."*

270.2. From the aforesaid, it is clear that Booysen is not even perturbed by making wild and unsubstantiated allegations.

270.3. Booysen's claims not to have knowledge that it is legally permissible for prosecutors from one division to prosecute in another division, is perplexing.

270.4. Section 20(4)(a) and (b) reads as follows:

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

GSM

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

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

270.5. The lead prosecutor in the much publicised criminal matters that involve Shabir Shaik and currently the former State President, Mr Zuma, is Billy Downer SC who is attached to the Western Cape Division. The prosecution of Shabir Shaik occurred in KwaZulu-Natal, and similarly the matter involving the former State President is taking place in the same division. Initially Mathenjwa, who is from the South Gauteng Division, was part of the prosecution team.

270.6. The prosecutions arising from the recommendation that was made by Farlam J which is taking place in the North West Division, is being prosecuted by prosecutors stationed in the North and South Gauteng Divisions.

270.7. An inquest which arises from the killing of Nokuthula Simelane is being dealt with by Mathenjwa, despite the fact that the incident happened in the North Gauteng province.

GSM

270.8. I refer to my opinion, attached hereto, marked as annexure "GSM9" and the opinion of Torie, attached hereto, marked as annexure "GSM10", which deal with this aspect. Adv Chris McAdam ("McAdam") compiled an opinion on this aspect which materially differs from myself and Torie's opinions. I attach hereto, marked as annexure "GSM11.1" a copy of the opinion.

270.9. It is my considered view that McAdam is wrong in his conclusion that prosecutors from one division cannot prosecute in another division. In this regard, I further refer to the engagement that the Chairperson of the Commission had with Simphiwe Mlotswa ("Simphiwe"). I attach hereto a copy of the relevant transcribed record, marked as annexure "GSM11.2". Simphiwe had a similar view as McAdam and Booysen and, ultimately, was proved wrong and conceded that it was legal permissible for a prosecutor in one division to prosecute in another division.

270.10. The relevant engagement referred to above is set out below and reads as follows:

> "149. *In his oral evidence in the Zondo Commission, he contradicted himself regarding the existence or non-existence of legal prescripts that permits a prosecutor from one province prosecuting a matter in*

GSM LM

another province. The contradictions are more fully set out below:

149.1 The record states:

> *"CHAIRPERSON: I am asking about the general practice or a policy whether when you were Acting DPP in KZN you were aware of what policies exit within the NPA or what prescripts – legal prescripts exited that dealt with or governed the situation where a prosecutor will be taken from one province to go and prosecute in another province.*
>
> *ADV MLOTSHWA: None that I know of.*
>
> *CHAIRPERSON: Yes.*
>
> *ADV MLOTSHWA: Yes.*
>
> *CHAIRPERSON: Do you have any recollection whether the National Prosecuting Authority Act says anything about such things?*

GSM LP

ADV MLOTSHWA: As far as I remember there was nothing in the Act. Except that because of the nature of budget if a prosecutor from – If the DPP requests assistance. We request assistance from the NDDPP and then the NDPP will get assistance from a specific DPP who has to dispatch the prosecutor to go and assist. It is then that the issue of budget will be discussed.

Travelling arrangements and so on and so forth as to which office will have to pick up the tab – to pay the bill. So in this one I was not involved even with the arrangements, accommodation, travelling. I do not know what was – what happened.

CHAIRPERSON: But is your answer that as far as you know or rather that you are not aware of any provision in the National Prosecuting Authority Act that specifically deals with getting

a prosecutor from one province to go and prosecute in another province?

ADV MLOTSHWA: That is affirmative Chair.

CHAIRPERSON: And you are not aware that there were any written policies on this?

ADV MLOTSHWA: None that I recall.

CHAIRPERSON: Are you aware of – were you aware of any practice that may have been followed over the years?

ADV MLOTSHWA: As I have indicated Chair ... (intervenes).

CHAIRPERSON: H'mm

ADV MLOTSHWA: That it will be the DPP because of some certain considerations feeling that look another division must send a prosecutor, but that require – request

GSM

will have to go via – the NDPP will make a determination from which division a request can be made to get a prosecutor to go and prosecute in that division.

CHAIRPERSON: So your understanding is that indeed the5re was a practice?

ADV MLOTSHWA: Yes. Yes."

271. **Ad paragraphs 83 and 84**

271.1. I have already demonstrated in this affidavit, at the relevant sections, the justification of the prosecution of Gordhan, McBride and the Cato Manor Detectives, Van Loggerenberg and Pillay.

271.2. All the decisions to prosecute or the prosecutions that I was involved in, occurred within the confines of all the applicable legal prescripts.

271.3. Save as aforesaid, the remainder of the allegations therein contained, are specifically denied and Booysen is put to the proof thereof.

272. **Ad paragraph 85**

272.1. The manner in which the mandate of the PCLU is set out in this paragraph is not complete. It includes any other priority crimes as determined by the NDPP as set out in the Proclamation itself. In this regard, I embrace the contents of paragraph 14.2.4 of Torie's affidavit in respect of the Omnibus Clause, which reads as follows:

> "14.2.4. *In terms of the Omnibus Clause Regarding "such other priority crimes" referred to in the 2003 proclamation, the discretion granted to the National Director is intended to be used for purposes of referrals regarding matters that require specialised skills or where the implicated persons are very high ranking officials or the matters are very sensitive, such that they may touch on the security of the state or the independence or integrity of state institutions. Such referrals are or were made."*

272.2. Booysen is aware that this list of matters that can be referred to PCLU, is not exhaustive, as he used the abbreviation "etc". From this, he should have been aware that his criticism of the PCLU is not justified in this regard.

273. **Ad paragraph 66**

GSM

273.1. Booysen, on his own version, testified that the prosecution of Gordhan had serious and "catastrophic" financial consequence for the economy of the country and, yet, seeks to trivialise the prosecution of Gordhan.

273.2. It is clear that the conduct that led to the prosecution of Pillay and Gordhan, has an impact on the fiscus of the country, because SARS paid a penalty to facilitate the early retirement of Pillay.

273.3. Gordhan testified before the Commission and, to the contrary, he was not supportive of the allegations made by both McBride and Booysen. It is critical to indicate that I was not given a Rule 3.3 Notice indicating that Gordhan, Pillay and Van Loggerenberg will implicate me in any wrongdoing whatsoever in their testimony before the Commission.

274. **Ad paragraphs 88 and 89**

I deny the contents of this paragraph, specifically that I have been capture. I have already dealt with the allegations contained therein elsewhere in this affidavit, and I do not deem it necessary to repeat same.

275. **Ad paragraph 90**

GSM

275.1. Booysen, in the affidavit deposed to on the 2nd of April 2019, did not disclose the political persons whose interests were served by the NPA or myself, as alleged.

275.2. It is clear from the fact that Booysen did not provide the details of the alleged political elite and/or their associates that had to be protected from prosecutions, that the allegations levelled against me are baseless, unfounded and malicious.

275.3. The Cato Manor prosecution has been fully dealt with in the relevant sections elsewhere in this affidavit and I do not deem it necessary to repeat same.

275.4. The insinuation that me being the lead prosecutor, demonstrates that I acted unprofessionally and unlawfully, is denied. I take the strongest exception to the defamatory allegations in this paragraph that I had been *"the clean-up- and go-to-person whenever the political elite and or their associates have to be protected from prosecutions."* when there are no evidence placed before the Commission to support such malicious allegations.

275.5. Save as aforesaid, the allegations contained in this paragraph are specifically denied, and Booysen is put to the proof thereof.

276. <u>Ad paragraph 100</u>

GSM L

276.1. I admit that in the statement I filed in the investigation against Jiba I have stated that Bheki Diondlo Mthiyane "*has been killed*" when, in fact, he died of natural causes. This was an honest mistake since I had last dealt with the docket over three years before I filed the statement in the investigation against Jiba.

276.2. I have mistaken Mthiyane with another witness, Simphiwe Cyprian Mathonsi who was killed. It was never my intention to either mislead or lie to the Court. It is also critical to state that if Booysen feels strongly that I committed any crime, then, as an experienced police officer, he should have laid a criminal charge against me.

277. **Ad paragraph 101**

277.1. I take note of allegation that a case for perjury and fraud was opened against me, however, I wish to state that I have not been approached by the investigating officer and I do not know the status of the matter.

277.2. I further wish to indicate that I have not been contacted by the GCB in this regard.

277.3. With regard to annexure "JWB17" to Booysen's statement, I shall demonstrate that it is riddled with lies and the intention thereof is to mislead the Commission. It is also critical to note

GSM

that Booysen does not vouch for the truthfulness and correctness of the allegations of what is stated in this annexure.

277.4. I respond to some of the allegations applicable to me, contained in this annexure, below:

277.4.1. Ad paragraph 2

277.4.1.1. The prosecution memorandum was prepared by a team that comprised of myself, Mathenjwa and Mlotshwa, and therefore it is not true that I am the only one who compiled the memorandum.

277.4.1.2. Similarly, the memorandum, together with its relevant annexures, was presented to the NDPP by the team, which included Noko. I attach hereto a copy of the memorandum with annexures hereto, marked as annexure **"GSM12"**.

277.4.2. Ad paragraphs 3 and 4

277.4.2.1. It is evident from this paragraph that Booysen is aware that even the investigating officers collaborates in

GSM

preparation of the presentation to the NDPP, and yet he seeks to single me out and give the wrong impression that I was the only one who was responsible for the preparation of the memorandum and its presentation to the NDPP. This has a material bearing on the reliability of the allegations levelled against me and on the credibility of Booysen.

277.4.2.2. This is a clear indication that Booysen has a vendetta against me. Even though I signed the memorandum, it is a product of the prosecution team's work. I signed the memorandum as team leader.

277.4.3. Ad paragraph 5

277.4.3.1. The allegations therein contained have been fully dealt with and it is not necessary to repeat same.

277.4.4. Ad paragraph 6 and 7

GSM

The allegations are fully dealt with in Brown's supplementary affidavit Annexure 62.2

278. **Ad paragraph 102**

278.1. Van Loggerenberg lodged a complaint with the National Director of Public Prosecution, which was referred to Adv Smit ("*Smit*"), the then Director of Public Prosecution, North West, for investigation. It was prudent for such a complaint to be dealt with by a person who was not involved in the matter of Van Loggerenberg. A copy of the alleged complaint is attached hereto, marked as annexure "GSM13".

278.2. The investigation by Smit concluded that there was no substance or merit in the allegations levelled against me. A copy of the outcome of the investigation is attached hereto, marked as annexure "GSM14".

279. **Ad paragraph 103**

279.1. It is denied that there is an aborted prosecution.

279.2. I have no knowledge of what Nhleko's plans were, as a result of which I cannot respond to these allegations. Full reasons have been advanced as to why McBride was charged.

GSM

280. **Ad paragraph 104**

280.1. It is denied that any investigations that related to McBride suffered a setback. Booysen is a senior police officer. If he was convinced that I committed any offence, he should have registered a case for defeating the ends of justice, which he did not do.

281. **Ad paragraph 106**

281.1. The allegations therein contained are specifically denied and Booysen is put to the proof thereof.

281.2. To the contrary, I prepared a memorandum, advising Simelane to retain Nel and Johnson, as prosecutors in the Agliotti matter.

282. **Ad paragraph 107**

282.1. I did not personally choose to get involved in the three prosecutions. My involvement in these three matters was as a result of the matters being allocated to me. There was no legal justification for me not to deal with the prosecutions complained of.

282.2. I was never involved in the prosecution of the Mphego matter.

282.3. Nel and Johnson were removed from the Agliotti matter by Simelane, who was the NDPP at that stage, contrary to my

GSM

advice, as evidenced by a memorandum I addressed to Simelane dated 3 February 2010, attached hereto, marked as annexure "GSM15".

282.4. That I am based at the DPP office in Mmabatho, does not disbar me from being involved in prosecutions of matters that I was lawfully involved in.

282.5. Booysen's allegation that, in his almost 40 years career, he has never encountered a situation that prosecutors are appointed from one jurisdiction to undertake prosecutions in another jurisdiction, has already been addressed and it is not necessary to repeat same.

283. **Ad paragraphs 109 to 114, 121, 132-133, 215, 217, 227, 229, 230.1, 230.6 – 230.7.**

283.1. Insofar as the contents of these paragraphs are inconsistent with my version as contained in this affidavit, such allegations are specifically denied and Booysen is put to the proof thereof.

I. **DEFEATING THE ENDS OF JUSTICE – McBRIDE, SESOKO AND KHUBA**

284. In order to properly place the decision to prosecute McBride, Sesoko and Khuba with defeating the ends of justice into proper context, it is best to first set out the elements of the offence. They are:

GSM

284.1. Unlawfulness of the act;

284.2. defeating or obstructing;

284.3. administration of justice; and

284.4. intention.

285. In order to demonstrate how McBride, Khuba and Seeoko committed the offence, I list each element and thereafter set out the facts which demonstrate or shows the commission of the offence.

(a) <u>Unlawful conduct</u>

286. The unlawful conduct I considered at the time is as follows:

286.1. McBride, Khuba and Seeoko's action of removing the information which appeared at pages 9, 16, 20, 21, 26, and 30 of the first rendition report dated 22 January 2014 ("first report"), linking Lieutenant-General Anwa Dramat ("Dramat") and General Shadrack Sibiya ("Sibiya") to the commission of a crime when they prepared the second report dated 18 March 2014 ("second report"). I annex copies of the first and second report marked **"GSM16"** and **"GSM17"**, respectively.

286.2. With regard to the portions that appeared in the first report and were removed in the second report, I refer the Chairperson to

GSM 180

the manuscript notes I made on both the first and second report to show the portions removed.

286.3. McBride, Khuba and Sesoko's action of adding new paragraphs in the second report on pages 23, 24, 25, 26 and 30.

286.4. With regard to the additions of new information same is demonstrated, again, by the manuscript notes I made on the second report.

286.5. McBride, Khuba and Sesoko changed the recommendations from the one set out in the first report to the fact that "*no charges should be brought against Lt General Dramat and Major General Sibiya. The investigation established that there is no prima facie case against them.*"

286.6. McBride, Khuba and Sesoko's continued assertions and averments in other judicial processes that Dramat and Sibiya were exonerated from any criminal liability. When McBride in fact knew when he made such assertions and averments that he had no legal authority to exonerate anybody from any criminal liability.

287. The reason I was of the view that the removal and additions made in the second report, were made solely with the intention of exonerating Dramat

and Sibiya was that there was no new evidence which justified the removal and additions.

288. The conclusion I reached when taking a decision to prosecute McBride, Sesoko and Khuba is supported by objective facts as evident from the investigation diary where Khuba changed his report as the investigating officer from being "A100" to "A102" and included a so-called forensic report as "A101" which report is dated 17 March 2014 and the entry in the investigation diary was made on 18 March 2014 the same day that the second rendition report was ostensibly finalised.

289. With regard to the analysis of the change in these entries in the investigation diary, I refer the Commission to paragraphs 389 to 398 of Anthony Mosing's ("Mosing") affidavit which has been filed with the Commission. Mosing is the prosecutor who guided the investigation. I set out paragraphs 389 to 398 for ease of reference. I incorporate the paragraphs referred to above into this affidavit, which reads as follows:

> "388. *Khuba submitted a final report to me on 22 January 2014. Khuba did not prepare his statement as the investigating officer and I requested him to submit same and to incorporate it into the final report. Khuba prepared his statement as the investigating officer, which, according to the investigation diary, was initially entered as "A100", on 5 February 2014. He brought the report to me which incorporated his statement of the investigating officer.*

GSM

Khube did not change the date of the report from 22 January 2014, and I did not insist that he correct the date, as it was not a significant number of days' difference.

389. *I interpose to mention that the entry number into the docket of Khuba's statement was changed from "A100" to "A102". I find this change quite peculiar, particularly when regard is had to what was filed as "A101" which is the "Analysis of statement by Precision Forensics".*

390. *I have since learnt that "A101" is relied on by Khube before this Commission to discredit the statement of Madlonga, who was the police officer who phoned Dramat and confirmed that Dramat instructed him to permit the Zimbabwean police entry into South Africa. Madlonga's version is supported by other, independent objective evidence.*

391. *A further oddity about "A101" is that it is dated October 2013 and yet Khube never discussed this statement with me during the time nor attached it to the docket. As such, it raises very serious questions which point to an attempt to "sanitise" the evidence that implicated Dramat. It is unheard of for an investigator to discredit his own key witness, especially for the reasons allegedly set out in the purported expert report. No wonder, the report dated 18*

GSM LP

March 2014, changed the recommendation of the first report and no longer .recommended that Dramat be charged. This clearly points to an attempt to defeat the ends of justice.

392. *McBride contradicts himself with regard to the weight to be attached to the report in that he complains that the so-called captured prosecutors do not prosecute in certain instances where IPID members have made a recommendation that certain persons should be prosecuted and, in the same breath he wants the Commission to attach no weight to the recommendations made by Khuba with regard to the rendition. The making of a report with recommendations is a statutory requirement as more fully set out in section 7(4) of IPID Act.*

393. *On Khuba's version, it appears that the Executive Director of IPID did not report for duty and that is why he signed the report.*

394. *Below, I set out the key points that demonstrate why the version of Madlanga is critical and carries weight, namely:*

394.1 *Confirmation that he made a telephone call to Dramat;*

394.2 *Confirmation that entry and exit of Zimbabwean Police was in line with the handing over of the victims to the Zimbabwean Police;*

394.3 *The pivotal role played by Maluleka in the illegal handing over of the Zimbabwean nationals to the Zimbabwean police.*

395. *On or about 14 February I delivered the docket to the DPP: South Gauteng for decision. I later in this affidavit set out the processes of how I reported on the investigation to the NDPP who had assigned the matter to me.*

396. *I later learnt that Khuba and his colleagues had retrieved the docket from DPP:SG and prepared a report dated 18 March 2014 and changed the recommendations. By so doing, I am of the considered view that Khuba was undoing his hard work which he did when he made a breakthrough in the case.*

397. *Having regard to the different versions Khuba has put forth in explaining why the report changed, it appears that he was pressurised to change his recommendations. This much is evident when one has regard to his transcript of the interview with Werkmans and the improbable versions he has given from then to now.*

398. *It is clear that the recommendations of the report were changed in order to "exonerate" Dramat and Sibiya, despite the evidence Khuba gathered. I discuss this detail when dealing with the evidence against Dramat."*

290. A further analysis that supports the conclusion that there was no new evidence to justify the alteration of the recommendation made in the first report by producing the second report is set out in the affidavit of Jacobus Petrus Pretorius ("Pretorius"). The relevant paragraphs are incorporated into this affidavit and read as follows:

"160. *It is prudent that I should demonstrate to the Commission the process that unfolded prior to taking the decision of charging McBride, Sesoko and Khuba with defeating the ends of justice.*

161. *At that stage, I was assigned to deal, inter alia, with criminal matters that arose from the recommendations that were made by the Marikana Commission of Enquiry. It was on a Friday afternoon, on the 26th of February 2016, when I was approached by Meams, who briefed and made a presentation to me regarding the matter under consideration. He was in possession of a memorandum which outlined how the investigation was conducted, and what his recommendations were arising from the investigation.*

GSM L

162. *Maema extensively discussed the merits of the investigation that was done with me. A summary of the investigation is contained in a memorandum dated the 22nd of February 2016, attached hereto, marked as annexure "JPP46".*

163. *Maema presented the memorandum to me, which I read and considered over the weekend. I also took into account the probabilities in the matter. From the discussion I had with Maema, together with the contents of the memorandum and the probabilities, I was satisfied that there was prima facie evidence for making out a case for defeating and/or obstructing the ends of justice with reasonable prospects of success.*

164. *Once I was satisfied, I made an appointment with the DPP: NG for Thursday, the 3rd of March 2016 to consult with Mzinyathi in his office and discuss the merits of the case with him. Mzinyathi agreed that there was a reasonable prospect of success and signed the memorandum accordingly. I attach hereto a confirmatory affidavit deposed to by Mzinyathi, marked as annexure "JPP47", in support of this statement.*

GSM L

165. What is set out above is the checks and balances that are in place and have to be followed as a statutory imperative in the decision-making process at the NPA.

166. It follows then that the matter was properly, lawfully and legitimately referred to the PCLU for investigation as it was deemed a priority crime as, inter alia, it involved the Executive Head of IPID. It is a practice for the NDPP to refer for investigation to the PCLU, matters involving high ranking officials or matters that touch on the integrity or independence of state organs and thus it was referred in terms of the Omnibus Clause.

167. McBride, Khuba and Sesoko were adamant that the IPID report does not bind the NPA in making its decision to prosecute. They refer to the statements of Van Zyl, Mzinyathi and Baloyi who all stated that they either did not read the report or, if they did, it was a cursory reading and does not influence their decision, as they only consider the facts as contained in the docket which evidence was not deleted in the docket. Thus the case of fraud or defeating the ends of justice was contrived. It is clear that IPID's officials seek to turn a blind eye to what their mandate is, namely that after an investigation, they are expected to compile a report and make the necessary recommendations.

168. *I deny that the prosecution was contrived, for the following reasons:*

168.1 *It is common cause that the docket was uplifted from the DPP:SG after McBride was briefed on the matter;*

168.2 *McBride instructed that the evidence or investigation be reviewed and the new evidence be included and the report be finalised;*

168.3 *The so-called new evidence does not lay a basis for changing the recommendations contained in the report of 22 January 2020, especially the nature and import of the deletions of the first report, which I regarded as the final report, that convinced me that there is a cover-up. The result would be that only the foot soldiers would be prosecuted, and the Generals would get protected. Having regard to the probabilities, just prosecuting the foot soldiers would constitute a grave injustice.*

168.4 *On his own version, McBride had discussed at length with Nxasana who also agreed that there was no evidence against Dramat and Sibiya. It is unclear this alleged view of Nxasana was before or after he had considered the docket or only the*

report that was presented to him. Even worse, on McBride's evidence it appears this view was held at a meeting they had on 6 March 2014 after McBride was briefed and the docket was still at DPP:SG;

168.5 Even more, McBride issued media statements that the IPID exonerated Dramat and Sibiya, whilst knowing fully well that it is not the duty of the IPID to exonerate people but the role of the court and to that extent sought to create the impression that the NPA was persecuting and maliciously pursuing and charging Dramat and Sibiya;

169. It is therefore not a simple case of an incorrect analysis or summary of the evidence as remarked by the Chairperson, during the evidence of Minister Nhleko, but a very serious matter of the head of an independent and oversight institution envisaged in the Constitution, deliberately misrepresenting facts in the institution's report and issuing wrong media statements."

(b) Defeating or obstructing

291. In establishing this element, I rely on the facts set out below:

GSM L

291.1. The removal of the docket from Adv Z Van Zyl ("Van Zyl"), by Khuba and Glen Angus ("Angus") under the false pretext that there were investigations to be done after which the docket would be returned to Van Zyl, knowing well that no investigations would be conducted and that the docket would not be returned to Van Zyl as undertaken;

291.2. The subsequent inserting and filing of the statement made by the Expert, Anne-Marie Van Staden and the changing of the numbering of the statements in the investigation diary of the docket was meant to give a wrong impression that the new evidence was subsequently obtained which justified the change in the recommendations made in the first report dated 22 January 2014.

291.3. To demonstrate that there was no new evidence obtained, I rely on the evidence as contained in the affidavits of Mosing and Torie. The relevant portion of Mosing's affidavit are quoted below:

> 545.3. *I have demonstrated that the period between the 22 January 2014 and 18 March 2014, the only "evidence" that was entered therein which supposedly justified a dramatic change in the recommendations of IPID is the statement of the*

Secretariat which effectively mirrors her report dated 25 June 2012 and therefore could not amount to new evidence that would justify the change in recommendation.

545.4. *It is also apposite to mention that the statement of the Secretariat was deposed on 17 February 2014 but only filed a month later. This statement must be the reason Khuba wrote me an email on 28 February requesting to file a evidence in the docket and I indicated that he must file the evidence with the DPP: South Gauteng as the docket was with him.*

545.5. *The second entry made on 18 March 2014 is the statement analysis of Madlonga. The absurdity of this report*[9] *is that it is ostensibly a final report on the analysis of the attached statement of Madlonga which was analysed by one Anne-Mari van Staden and yet the analyses conducted on the attached statement is exactly the same analysis that was supposedly conducted sometime in 2013 when this Anne-Mari van Staden emailed Khuba the analysed statement on 4 October 2013.*

[9] A101 in the docket.

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545.6. *The analysed statement of Madlonga and the email from Anne-Mari van Staden are attached to Khuba's main affidavit, deposed to on 16 July 2019, which attached the analysed statement as HIK6. On the other hand, the email dated 4 October 2013, is attached to a supplementary affidavit, deposed on 22 August 2019.*

545.7. *It is bewildering that, if indeed, Khuba obtained the statement analysis on 4 October 2013, he kept such a fact completely secret from me whilst I was guiding the investigation. Even more puzzling is that Khuba did not include this statement in the investigation diary, neither did he include it in his report dated 22 October 2013, a date after he supposedly received the analysed statement. Again, Khuba did not include this statement in his report dated 22 January 2014. All these point to the high probability that the statement was not analysed in 2013. The so-called analysis was a ruse to come up with some sort of "evidence" that casts doubt on the credibility of Madlonga's statement*

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who at all times since April 2013 Khuba considered to be the main witness in the case.

545.8. *The so-called report does not qualify as an expert report in that the "expert's" qualifications and experience are not set out therein. Neither has the "expert" filed an affidavit in support of the report or to demonstrate his field of expertise. Consequently, no reasonable person should or should have attached any weight to this report.*

545.9. *I take note of the reliance placed on IPID regulations and Standard Operating Procedure (SOP). However, once again the objective facts point to a stratagem to justify the report dated 18 March 2014 as the final report to achieve McBride's desired outcome.*

545.10. *I say this because, on Khuba's own version at the time the 22 January 2014 report was finalised the then Acting Executive Director of IPID, Mbeki, was no longer coming to the office and Khuba alleges that she only signed financial documents. As such, on McBride's version IPID*

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would be hamstrung from issuing reports in such instances. On a purposive interpretation this could never have been the intention of the legislature that when the Executive Head of IPID is, for whatever reason, unable to execute her duties, the functions of IPID "come to a grinding halt".

292. The relevant portions of Torie's affidavit are set out below:

"124. A further report, compiled by A van Staden ("Van Staden") of Precision Forensics, confirmed that Madlonga's statement was analysed by Anne-Mari Van Staden and this report is dated 17 March 2014, a day before Khuba and Sesoko signed the report.

125. I am of the respectful submission that the so-called analysis and findings of the purported expert, are irrational, suspicious and lacks the necessary details. The report of the purported expert should not be relied on at all. It is clear that prior to compiling the report, Van Staden did not take into account other relevant independent material contained in the docket and was not sensitive and did not take into account the social background of Madlongwa. It is expected of an expert to

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be objective, independent and rational. A copy of this report is attached hereto, marked as annexure "JPP38".

126. *The person who analysed Madlonga's statement also failed to take into account that English is not Madlonga's mother tongue. The conclusion by the expert that Madlonga's statement is deceptive, is based mainly on the poor grammar used by Madlonga and lack of proficiency in English. It appears that the expert is not socially sensitised to sociological dynamics that make up different persons in South Africa.*

127. *For example, the so-called expert raised concern with the use of five pronouns in one sentence or a missing pronoun. Not every person is South Africa is proficient in the use of grammar and sentence construction. Sometimes non-English speakers use direct translation in their writing. As such, more was needed to cast doubt on Madlonga's statement and not just his use of grammar."*

293. The evidence of McBride before the commission is that on 3 March 2014, which is three (3) days after his appointment, he had a meeting with Mr. Mxolisi Nxasana ("Nxasana") to discuss whether there was evidence implicating Dramat and Sibiya. McBride's evidence is also that Nxasana agreed with him that there was no evidence implicating Dramat and Sibiya in the commission of the crimes. The irregular exclusion of Van Zyl from

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the meeting when the latter was seized with the matter, it is a further indication of this element of the crime.

294. The numerous media utterances and in the affidavits filed in numerous court proceedings by McBride that Dramat and Sibiya were exonerated when no decision had been made by the prosecuting authority.

295. The questionable conduct of Nxasana in keeping the docket for an unreasonable period of eight (8) months, the failure by Nxasana to confirm or deny the media utterances made by McBride.

(c) <u>Administration of justice</u>

296. The removal of the docket under the false pretext that further investigations had to be conducted and that the docket would be returned to Van Zyl on 14 March 2014, prejudiced the administration of justice.

(d) <u>Intention</u>

297 The failure to return the docket Van Zyl despite the undertaking and the numerous requests by Van Zyl directed to Khuba enquiring when the latter would return the docket and his failure to deny the assertion made by Van Zyl that it was Khuba's intention not to return the docket to Van Zyl. I annex a copy of the memorandum prepared by Van Zyl dated 27 June 2014 marked "**GSM15**".

298. I draw the Commission's attention to annexure "**GSM15**" paragraph 7 which reads as follows:

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"7. *I phoned Mr Khuba on 23 June 2014 and asked him why he lied to me when he uplifted the docket. I told him that they never intended to return the docket. He said that he still had one thing to do. He denied lying to me, but did not deny that they never intended to return the docket to me, despite me making that statement several times. Mr Khuba stated that docket had been handed to "... the NDPP's secretary" but he could not provide any name."*

299. From the aforesaid it is clear that the intention was not to return the docket, but to remove and change information in order to exonerate Dramat and Sibiya.

J. **FRAUD**

300. Although McBride only mentions that I charged Khuba, Sesoko and him with defeating the ends of justice, it is apparent from the charge sheet that I had also charged them with the offence of fraud. I attach hereto, marked as annexure "**GSM19**", a copy of the charge sheet.

301. It is common cause that:

301.1. Khuba received instructions from the former Acting Executive Director of IPID, Ms Koekie Mbeki ("Mbeki") to conduct an investigation into the rendition of Zimbabwean Nationals by the members of the DPCI;

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301.2. Khuba conducted an in-depth investigation into the said rendition of Zimbabwean Nationals by the DPCI, with the guidance of the NPA;

301.3. Khuba prepared a report dated 22 January 2014, and filed it with the NPA;

301.4. The report dated 22 January 2014 recommended that Dramat, Sibiya, together with other persons be criminally charged with kidnapping and defeating the ends of justice;

301.5. McBride instructed Khuba and Angus to uplift the docket from the DPP: South Gauteng offices; and

301.6. Khuba and Angus uplifted the docket on 7 March 2014 from the DPP: South Gauteng offices.

302. McBride, Khuba, and Sesoko removed information implicating Dramat and Sibiya from any criminal conduct in the kidnapping of the Zimbabwean Nationals. They changed the recommendation that was set out in the report dated 22 January 2014 to the one which stated that no charges should be brought against Dramat and Sibiya as the investigation established no *prima facie* case against them.

303. McBride, Khuba, and Sesoko misrepresented in various court proceedings that there was no evidence implicating Dramat and Sesoko and that the latter two were exonerated. McBride further made the

misrepresentation in various media reports whilst he knew that they were false.

304. Hence, the aforesaid conduct prejudiced and/or had the potential to prejudice the NPA and the administration of justice. It is clear from the objective facts that there was sufficient evidence that justified the prosecution of McBride, Khuba, and Sesoko.

K. MCBRIDE'S MAIN AFFIDAVIT

305. Ad paragraph 125

305.1. McBride did not provide evidence of the matters and dockets that were brought to me for either a decision or prosecution which were investigated by IPID and I declined to prosecute. It is clear that this allegation is based on speculation or conjecture and ought to be dismissed.

305.2. In this affidavit, I have demonstrated that those who claim to be corruption fighters are themselves criminals who should be prosecuted for their unlawful activities which are dealt with in the applicable and relevant dockets.

305.3. I specifically deny that the NPA has lost any credibility as a result of my lawful and professional conduct, in that all the cases that were brought before me for either my decision or my prosecution were done so within the confines of the law.

305.4. I am advised by my legal team that Torie, Mosing, Baloyi, Mashuga, Chuaka and Mathenjwa vehemently dispute and deny the unfounded and malicious allegations levelled against them, and I align myself with the views that they expressed.

305.5. No particulars and/or details of the alleged subordinates who are experienced prosecutors whose decisions I overrode despite abundant evidence that justifies a prosecution. In this affidavit, I have extensively set out the sufficient evidence that was considered which led to the prosecution of McBride, Khuba, and Seeoko, as well as Booysen.

306. <u>Ad paragraph 128</u>

306.1. No evidence at all is set out in support of the allegations that my actions are politically driven;

306.2. I did not take the decision to charge Dramat and Sibiya, in fact, I took the decision to charge McBride, Khuba, and Seeoko for unlawfully exonerating Dramat and Sibiya in the kidnapping of the Zimbabwean Nationals. I also took a decision to charge Booysen in the activities of the Cato Manor section based at Cato Manor;

306.3. To demonstrate that I did not persecute McBride, I declined to prosecute McBride and Sibiya arising from the complaint that the latter two attempted to obstruct the members of Crime

Intelligence who had been to Sibiya's office to retrieve a Data 6 devise which was in his safe. The complaint was in respect of Hillbrow CAS 542/3/2015. I attach hereto as annexure "GSM20" my decision not to prosecute McBride in this matter.

306.4. Save as aforesaid, I deny the remainder of the contents of this paragraph.

307. Ad paragraphs 127 and 128

307.1. The allegations set out in these paragraphs are related to those set out in Rule 3.3 Notice, namely paragraphs 14, 50, 78, 87 to 116. I have already indicated above that I have never dealt with these matters, and therefore, have no knowledge of same.

308. Ad paragraph 129

308.1. As stated above, I did not take the decision to prosecute the rendition matter, instead, I took a decision to prosecute McBride, Khuba, and Sesoko with fraud and defeating the ends of justice. I have already extensively dealt with the basis upon which I took the decision to charge McBride, Khuba, and Sesoko; and

308.2. Save as aforesaid, I deny the remainder of the contents of this paragraph.

309. Ad paragraphs 132, 133 and 134

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309.1. I have already set out the basis upon which I took the decision to prosecute McBride, Khuba, and Sesoko and do not deem it necessary to repeat same;

309.2. As already demonstrated above, I have already dealt with the basis upon which I took the decision to prosecute Minister Pravin Gordhan ("Gordhan"). I specifically denied that I either worked with or took instructions from Tom Moyane ("Moyane"). I specifically deny the involvement in preventing SARS legal advisor, Vicki Symington from leaving the boardroom;

309.3. I have already extensively dealt with matters in regard to the PCLU and it is not necessary to repeat same; and

309.4. Save as aforesaid, I deny the remainder of the contents of this paragraph.

L. **THE PARAGRAPHS IN MCBRIDE'S AFFIDAVIT WHICH EXPRESSLY OR BY IMPLICATION REFER TO ME**

310. With the above background in mind, and having perused and considered the affidavit of McBride and the allegations in the Rule 3.3 notice, annexure "GSM7.1" hereto, which implicate or may implicate me. As demonstrated above, I am not implicated. I proceed to deal with paragraphs that are expressly or by implication applicable to me.

311. The paragraphs that expressly or by implication refer to me are paragraphs 125, 126, 127, 128, 129,130,132,133 and 134.

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M. BASIS OF ALLEGATIONS OF CAPTURE AS SET OUT IN THE RULE 3.3 NOTICE OF McBRIDE

312. The Rule 3.3 notice I received from the Secretary of the Commission pertaining to the evidence of McBride, it is alleged that:

> *"2.1 You improperly and or unlawfully sought to:*
>
> *2.1.1 unduly interfere in the investigative independence of the national prosecuting authority ("NPA"), the independent police investigative director 8 ("IPID") and all the Directorate for priority crime investigation ("DPCI") commonly known as the Hawks;*
>
> *2.1.2 unduly delayed and or declined recommended prosecution;*
>
> *2.1.3 participate in the undue persecution of officials of the NPA, IPID and or DPCI; and*
>
> *2.1.4 destabilized the NPA, IPID and/or all the DPCI.*
>
> *2.2 In acting as aforesaid, you allegedly sought to enable the state capture of the criminal justice system."*

313. The Rule 3.3 notice also state that the statement of McBride which implicates me or may implicate me set out the allegations that implicate me or may implicate me at paragraphs 14, 50, 78 and 87 to 118.

314. The Rule 3.3 notice further state that annexures "Q", "R" and "S" to the statement of McBride implicate or may implicate me in the above-mentioned allegations.

315. I have perused and considered the contents of paragraph 14, 50, 78, 87 to 118 and must at the outset state that these paragraphs do not in any way implicate me. Instead, there are paragraphs in the statement of McBride which makes reference to me and I will set these out later and respond thereto.

316. I now proceed to specifically deal with the paragraphs referred to in the Rule 3.3 notice *ad seriatim*.

317. <u>Ad paragraphs 13, 14 and 33</u>

317.1. There is no evidence to substantiate or corroborate McBride's version that the prosecution was politically driven or malicious. In any event, such is specifically denied and McBride is put to the proof thereof.

317.2. It is also critical to indicate that McBride did not institute any civil suit against the State based on malicious prosecution. It is denied that the prosecution referred to therein were malicious.

317.3. In paragraph 14, it is alleged that investigations and prosecutions pertaining to Toshan Panday ("Panday"), General Richard Naggie Mdluli ("Mdluli"), Phahlane and General Jan

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Ntebo Mabula ("Mabula") are prime examples of matters that would have proceeded to finality were it not for my consistent interference.

317.4. Regrettably, the statement and evidence of McBride does not specify in what respect I interfered in the investigations and prosecution of these matters.

317.5. I was never involved in any investigation and/or prosecution of any of the matters in this paragraph and have never set an eye on the dockets pertaining thereto.

317.6. As such, I deny the inference and conclusion wish to portray from this paragraph.

317.7. The withdrawal of the charges was as a result of the fact that the State witnesses were no longer prepared to testify in line with the contents of their statements.

317.8. The withdrawal was not as a result of the alleged realisation that the State did not have a watertight case against the Accused.

317.9. Save as aforesaid, the remainder of the allegations therein contained are specifically denied and McBride is put to the proof thereof.

318. <u>Ad paragraph 50</u>

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318.1. In this paragraph it is alleged that Sesoko was victimized and suspended from his post, of Chief Director of Investigations and Information Management, by Kgamanyane because Sesoko had supported McBride's application to the Constitutional Court to challenge the constitutionality of section 6(3) and 6(6) if the Independent Police Investigative Directorate Act, Act 1 of 2011 ("the IPID Act"). Further that Sesoko was instructed by Kgamanyane to go to Limpopo and North West to collect the dockets in which former DPCI Head, Mthandazo Berning Ntlemeza ("Ntlemeza") and Mabula were suspects.

318.2. No facts are set out indicating how Sesoko's support of McBride Constitutional Court application and the resultant suspension from his post relate to me or in what way I played a role in respect of same. It is also not set out in what manner the alleged retrieval of dockets pertaining to Ntlemeza and Mabula relate to me.

318.3. Despite Sesoko having testified before the Commission, it was not his case that I ever played any role in his victimization, suspension and the initiation of any disciplinary steps, nor in any of the dockets referred to in this paragraph. I have also never laid an eye on such dockets.

318.4. I therefore deny any inferences and or conclusions sought to be drawn from this paragraph.

319. **Ad paragraph 78**

319.1. In this paragraph it is alleged that that Crime Intelligence had infiltrated IPID as an official from Crime Intelligence, Brigadier Tlou Kgomo ("Kgomo") had been appointed as Director: Investigations at IPID by Kgamanyane. It is also alleged that Kgomo approached two IPID officials, the late Mandla Mahlangu ("Mahlangu") and Cedrick Nkabinde to offer them Brigadier positions in order to induce them to make false statements to implicate IPID managers in wrongdoing.

319.2. Attached to this paragraph is annexure "Q" which is alleged to be a transcript of the recording made by Mahlangu wherein he had a conversation with Kgomo. It is alleged that in the transcript Kgomo made such an offer to Mahlangu and also confirmed to Mahlangu that he (Kgomo) is working with the North West team led by Mabula investigating a concocted case that would bring McBride down along with other IPD investigators and thus torpedo the investigation against Phahlane. Lastly, the paragraph alleges that Kgomo took Mahlangu to Potchefstroom to meet Mabula.

319.3. Once again, no facts are set out to indicate what any of these allegations have to do with me and or how am I connected thereto.

319.4. Similar to the previous paragraphs, I have no knowledge of the alleged infiltration of IPID by Crime Intelligence nor do I have knowledge of the Brigadier posts which were alleged to have been offered to IPID officials and therefore deny the inference and conclusions sought to be drawn from this paragraph.

319.5. I take note of the transcription of the alleged conversation between Kgomo and Mahlangu, annexure "Q", save to state that I see no relevance thereof in so far as it may implicate me in interfering with the investigative independence of the NPA, IPID and DPCI and destabilising these institutions, delaying recommended prosecutions and participating in the persecution of the NPA, IPID and DPCI officials and thus enabling the state capture of the criminal justice system, I deny any involvement with the alleged conduct of Kgomo or any knowledge thereof.

320. **Ad paragraphs 97 to 100**

320.1. These paragraphs, *inter alia*, allege that:

320.1.1. O' Sullivan laid a complaint at IPID against Phahlane pertaining to the construction of his Sable Hills residence. The IPID under Kgamanyane did not investigate this complaint and only did so when McBride returned from suspension when the latter constitute a task team to investigate the complaint

with the assistance of O'Sullivan and Trent (see paragraph 66);

320.1.2. In response to this IPID investigation the SAPS commenced with counter investigations against IPID officials, which counter investigations resulted in a case being opened, under Kameeldrift 12/01/2017, against O'Sullivan and Trent. These charges resulted in IPID officials, Mahlangu and Binang, being joined by Molatlhwa Mashuga ("Mashuga"), the prosecutor in the matter, with O'Sullivan and Trent in the charges preferred against the latter two for contravening section 33(5) and 33(2) of the IPID Act.

320.2. Once again, no facts are set forth to explain what role I played in all these events and how such role was played out.

320.3. I was never involved in the investigation nor prosecution of this matter as is evident that it was Mashuga who is the prosecutor who dealt with this matter. As mentioned earlier in this affidavit, Mashuga has filed an extensive affidavit with the Commission explaining his involvement in this matter. Mashuga's confirmatory affidavit is attached hereto as annexure "GSM4".

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320.4. As such, I deny the inferences and conclusions sought to be drawn from these allegations.

321. **Ad paragraphs 101 to 118**

321.1. These paragraphs, *inter alia*, allege that:

321.1.1. The purpose of the SAPS' counter-investigation was to impede the IPID investigation and thus undermine its independence.

321.1.2. As a result of such counter-investigation the IPID launched an urgent interdict against Phahlane, Mabula and Brigadier Noube and later the rest of the Mabula team who were conducting counter-investigation against the IPID officials were added as respondents.

321.1.3. There is a recording in which one of the suspects admits to torturing the deceased in the Makau case which implicates Mabula. The recording which allegedly implicates Mabula was transcribed and is attached to McBride's affidavit as annexure "R". It appears that the so-called suspect admitted such allegation to Booysen who recorded the conversation.

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321.1.4. The parties to the urgent interdict reached agreement to the effect that the SAPS would stop the counter-investigation against IPID officials.

321.1.5. McBride approached the Portfolio Committee on Police ("PCP"), the Minister of Police, Bheki Cele ("Cele") and the National Police Commissioner of Police General Kehla Sitole ("Sitole") and despite such requests for assistance none bore fruit.

321.2. Once again, no facts are set forth to explain what role I played in all these events and how such role was played out.

321.3. I have no knowledge of these court proceedings nor the alleged assistance sought from the Minister, the National Commissioner and or the PCP.

322. As such, I deny the inferences and conclusions sought to be drawn from these allegations.

N. **AFFIDAVIT OF KAREN HELEN VAN RENSBURG**

323. I specifically deny the allegations pertaining to me in this affidavit. I was never involved in the Kameeldrift as already demonstrated above.

O. **AFFIDAVIT OF HELEN ELIZABETH VAN JAARSVELD**

324. I specifically deny the allegations pertaining to me in this affidavit. I was never involved in the Kameeldrift as already demonstrated above.

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P. THE ROGUE UNIT (BROOKLYN CAS 427/05/2016)

(a) Overview

325. In a nutshell, the Rogue Unit matter is about:

325.1. Whether SARS officials installed listening and monitoring devices at the offices of the Directorate of Special Operations ("*DSO*") and NPA offices of the following officials:

325.1.1. The former NDPP, Adv Vusi Pikoli ("*Pikoli*");

325.1.2. The former DNDPP, Adv Mokotedi Mpshe ("*Mpshe*");

325.1.3. The former DNDPP, Mr Willie Hofmeyer ("*Hofmeyer*");

325.1.4. Adv Kiliany Pillay ("*Pillay*");

325.1.5. Adv Gerrie Nel ("*Nel*");

325.1.6. Mr Andrew Leask ("*Leask*");

325.1.7. Ms Thanda Mgwengwe ("*Mgwengwe*").

325.2. If such devices were installed, as alleged by Helgard Lombard ("*Lombard*") and Skolie:

325.2.1. Who authorised such installations;

325.2.2. On what authority did such person rely;

325.2.3. If it was SARS management, whether SARS has the statutory authority not only to authorise, but also to carry out such surveillance.

326. I will demonstrate that SARS has no authority to authorise and/or conduct such surveillance, save for limited instances where SARS act with other law enforcement agencies, such as the Intelligence Division of the SANDF, the Intelligence Division of SAPS and the National Intelligence Agency, currently known as the State Security Agency.

327. I will also demonstrate by reference to legislative prescripts and witness statement that:

327.1. SARS is not statutorily authorised to act as it did; and

327.2. There is undisputed evidence that such surveillance equipment was installed in the offices of the officials referred to above.

(b) <u>Formation</u>

328. The High-Risk Investigation unit (commonly referred to as the Rogue Unit) owes its origin from the memo written from the office of the General Manager of the Enforcement and Risk division of SARS, Pillay dated 2 February 2007 and the then Commissioner of SARS, Gordhan directed to the former Minister of Finance, Mr Trevor Manuel ("Manuel") to seek approval for the funding of special capability within the former National

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Intelligence Agency (NIA) (currently known as the State Security Agency) to supply SARS and other law enforcement agencies with the necessary information to address the illicit economy, from where SARS was losing a lot of revenue. The Unit was called the Special Projects Unit, later it was referred to as the National Research Group and then it was called the High-Risk Investigations Unit ("HRU"). It was managed by Skolie from inception until 2008 and Van Loggerenberg from 2008 to 2009. A copy of the memorandum is attached hereto, marked as annexure "GSM21".

329. The purpose for the creation of the Unit is outlined in paragraph 1 of the Memo:

> *"To seek approval to fund a special capability within NIA to supply SARS and law enforcement with the necessary information to address the illicit economy."* (my emphasis).

330. It is clear that SARS had a huge challenge of loss of revenue within the illicit economy and that only a multi-disciplinary approach of dedicated law enforcement agencies could address the challenge effectively. The initial intentions of establishing the unit are genuine and perfectly in order. The idea was to place the unit within the NIA and it makes perfect sense, as NIA is the agency that has the legal mandate and the capability to collect covert intelligence.

331. Paragraph 2 of this memo recognises this fully that:

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> *"2.1 Collecting tactical intelligence invariably means penetrating and intercepting organised crime syndicates, an activity for which SARS does not presently have the capability (including the legislative mandate to manage clandestine activity).*
>
> *2.2 Discussions are taking place within the National Intelligence to supplement SARS intelligence capability. NIA is willing to create a ring-fenced capability, provided funds are made available to cover personnel costs. All other costs are covered by NIA. NIA is willing to formalise the above-mentioned arrangement into a Memorandum of Understanding (MOU)."*

332. It appears clearly from this portion of the memo that there was awareness that there are organised crime syndicates in operation in the field concerned, which required to be penetrated, for a breakthrough to happen and that SARS alone does not have the capability to achieve this goal. There was anticipation that SARS and NIA would have to engage to face this challenge. What is strange is that the engagement between SARS and NIA only happened at the instance of Manala Manzini ("Manzini"), the former Director General of the NIA, and already at that time (in 2007) the recruitment and training of staff was already done by SARS alone, without any engagement of NIA.

333. After consulting with Manzini, and having his statement reduced to writing, I gained the distinct impression that Manzini expected that SARS would initiate the process of interaction as their memo is clear that *"discussions*

are already taking place within NIA to supplement SARS's intelligence capability". Instead SARS had started the process of recruiting staff on its own without involving NIA. I agree with Manzini's expectation as SARS is the institution that required the assistance of NIA.

334. Gordhan signed the said memo on 8 February 2007 and the Deputy Minister, Mr Jabu Moleketi ("Moleketi") approved the request on 22 February 2007 and made hand written comments as follows: -

> *"Supported however this is a strange way of executing what I consider to be an economic mandate of NIA... it seems as an add on rather than part of NIA's mandate".*

335. Manuel approved the request on 22 February 2007 and explained that his approval was against an address by the former President Thabo Mbeki ("President Mbeki") on 9 February 2007 which hinted a process to modernise SARS and to improve inter-departmental structures in dealing with cash in transit heist, drug trafficking and poaching of game and abalone, which is commonly referred to as the illicit economy. It is clear that this capacity was being created within NIA not within SARS and that the memo seeks budget of NIA to be increased at an accelerated amount to cater for this expense. Moleketi's hand written endorsement recognises this as part of the economic mandate of NIA.

336. Manzini engaged with Pillay in respect of the establishment and location of this unit at the instance of NIA and an agreement was not reached as NIA correctly insisted that the Unit should be located within NIA in

compliance with the National Strategic Intelligence Act 39 of 1994 and the Intelligence Services Act 65 of 2002. At the time of this engagement, the recruitment and training of staff attached to this unit was already done by SARS alone without any involvement of NIA.

337. It must be noted that the Legal Enforcement Division of Customs at SARS was requested on 22 January 2007 to provide a legal opinion or advice relating to the possible amendment of the National Strategic Intelligence Act 39 of 1994 wherein the former Director General of Justice, Adv Menzi Simelane ("Simelane") was asked for support for the amendment to the Interception Act, Act 70 of 2002 the effect of which SARS would be added as a Law Enforcement Agency together with NIA, the Defence and SA Police Service. It appears that SARS was impatience with the stance adopted by NIA that this additional specialised capacity to address the illicit economy should be based with NIA to support SARS.

(c) **Contravention of Section 49(1), read with the Provisions of section 2 and Section 51(1)(b), as well as Section 1 of the Regulation of Interception of Communication and Provision of Communication – Related Information Act 70 of 2002 (RICA) – Unlawful Interception of Communication (against Pillay and Skolile)**

338. The abovementioned charge relates to the unlawful fitment of Surveillance and Listening equipment within the offices of the former DSO and NPA offices (Operation Sunday Evenings). The elements of this offence are as follows:

338.1. Unlawful and intentional;

338.2. Interception of communication; and

338.3. Without authorisation of the designated judge in terms of section 16 of the RICA Act.

I. Unlawful and intentional conduct

339. Leask was the lead investigating officer of a case in which the former National Commissioner of Police and former Head of Interpol, Mr Jackie Selebi ("Selebi") was investigated for involvement in corrupt activities for his dealings with Mr Glen Norbet Agliotti ("Agliotti") for receiving quid *pro quo* payments and benefits from Agliotti.

340. In a meeting in the office of the former NDPP, Pikoli, attended by the management of the disbanded Directorate of Special Operations ("the DSO"), an agreement was reached that steps needed to be taken to enhance the security around the Selebi investigation to protect the officials involved therein.

341. The installation of security equipment which Pikoli authorised was overt, not covert. Adv Leonard McCarthy ("McCarthy"), Nel and Mngwengwe were parties to the meeting.

342. McCarthy advised Leask to seek the assistance of Skollie for advice on what steps could be taken to enhance the security of their documents and staff. Leask remembered that Skollie used to frequent the offices of the DSO when Pete Richer ("Richer") was at the DSO.

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343. Leask contacted Johannes de Waal ("de Waal") asking him if he could get hold of Skollie, as they wanted to upgrade their security at the DSO offices. De Waal gave Leask the contact details of Skollie. Leask then contacted Skollie enquiring about a security upgrade at the NPA and DSO offices. Leask arranged a meeting with Skollie where they discussed the security equipment required. Leask and Nel informed Skollie that the equipment they required must have the capability to detect real time intrusions, remote viewing and recording.

344. Lombard stated that Skollie instructed him not to tell Leask and Nel that they were SARS employees, as they could use the business of installing the equipment as an opportunity to a make profit for the Special Projects Unit.

345. Lombard used his dormant company, Protech Security Consultants to submit a quotation to the NPA. Pieter Jonker ("Jonker") of the DSO paid Lombard two (2) separate cash amounts of R900 000 and R250 000 to purchase the equipment. The cash amounts were withdrawn from the Confidential Fund (C-Fund) of the DSO. Lombard then deposited the cash amounts into his wife's ABSA Bank account, with the permission of Skollie. I annex hereto a statement of Jonker, marked as annexure "GSM22" where the aforementioned is stated. From the aforesaid, it is clear that the manner in which the cash money was dealt with, was to avoid linking the DSO to the transactions.

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346. In his statement, Lombard stated that he enquired from Skollie about the existence of section 16 of the RICA Act authorisation ("the authorisation"). A week later, Skollie informed him that he had spoken to Pillay, who informed him that the authorisation was with the lawyers, and also that, President Mbeki had given approval of the operation. I attach hereto the statement of Lombard (A34 in the docket), marked as annexure "GSM23.1", together with annexures A to Z thereto. I attach hereto the affidavit of Lombard (A129 of the docket) dated 24 October 2016, marked as annexure "GSM23.2". I attach hereto Lombard's supplementary affidavit (A147 of the docket), marked as annexure "GSM23.3".

347. Lombard and Skollie installed the surveillance equipment in the late afternoons and evenings when there were no employees at the offices of the NPA and DSO. Some of the offices in which the surveillance equipment was installed include the following offices and boardrooms:

347.1. The office of Pikoli and his boardroom;

347.2. The office of Mpshe;

347.3. The office of Hofmeyer;

347.4. The office of K Pillay;

347.5. The office of the Director Administration of the NDPP, Danie Schmidt ("Schmidt");

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347.6. The office of the Divisional Head of Operational Support Division, John Izak Welsh ("Welsh");

347.7. The office of Nel;

347.8. The office of Mngwengwe;

347.9. The office of Leask; and

347.10. The office of the Special Investigator, Siang Mangwale ("Siang").

ii. <u>Interception of communication – The capability of the equipment fitted</u>

348. In his statement, Lombard indicated that the equipment had the capability to detect an intrusion and send a signal via cell phones to the identified NPA and DSO members who could then view it remotely and have it recorded onto a disk.

349. Lombard stated that he was able to access the equipment remotely because Leask had reported that from time to time the system would hang up and the NPA and the DSO officials would not have access thereto. Upon investigation, Leask discovered that the signal was poor and there was a bug on the 3G routers which caused the system to hang up from time to time. Lombard then asked Leask for permission to connect remotely to prevent the hanging ups. Leask gave him verbal permission to connect remotely.

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350. Lombard and de Waal indicated that they used it as an opportunity to eavesdrop on the NPA and DSO at the request of Pillay and Skollie in 2007, as Pillay was interested in the investigation which the DSO was conducting into the activities of the former Commissioner of Police, Jackie Selebi and Glen Agliotti. Skollie informed Lombard that he had been contacted by Leask to install a security system at the NPA and DSO offices, as Leask and Nel suspected that the SAPS had gained access to sensitive documents relating to the Selebi investigation. Lombard stated that Skollie informed him that Pillay and President Mbeki were also interested in knowing more about the prosecution of the Jacob Zuma ("Zuma"), which the DSO was contemplating or investigating at the time.

351. The covert equipment initially requested is listed in Annexure "B" to annexure "GSM23.1" hereto, which consisted of:

351.1. CCTV cameras, overt and concealed complete with digital video recorders and microphones;

351.2. Equipment to monitor and view remotely, ie GSM 3G routers;

351.3. Alarm systems at certain offices; and

351.4. Access control system in the Special Investigation area Boardroom protection to counter eavesdropping devices Window tint.

352. Leask and Nel later verbally added the following audio capability to be used with the CCTV cameras:

352.1. Cellular phones with remote viewing software;

352.2. Digital audio recorders & concealed microphones; and

352.3. Cell phone encryption with Military specification software, to install this service one must register with the Department of Communication as a "Cryptography service provider", which he did on 21 August 2007. A receipt of R300 of a Nedbank deposit for registration as a "Cryptography service provider" to the Department of Communications is attached to Annexure "GSM23.1" hereto as Annexure "C".

353. On 12 July 2007, Jonker called Lombard and informed him that the funds for the installation of the equipment were ready, and Lombard was given R300 705.46 in cash which he deposited into his wife's ABSA Bank account. On 17 July 2007, he received a further amount of R600 000.46 which he also collected from Jonker and deposited into the same account. The bank statements annexed to Annexure "GSM23.1" hereto as Annexure "D" confirm the deposits into his wife's bank account.

354. In order to verify the capability of the equipment that Lombard had installed in the offices of the NPA and DSO, I requested the investigating team to confirm the capability of the equipment as indicated by Lombard. Captain Freddy Sewele ("Sewele") instructed Izak Johannes Fisher

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("Fisher"), a Colonel at the Head Office of the Crime Intelligence, attached to the Technical Support Unit, who holds a Diploma in Police Administration, Electrical Engineering, and a Higher Diploma in Electrical Engineering, to inspect the equipment to verify its capability. I annex hereto a copy of Fisher's statement marked as "GSM24".

III. **Without Authorisation of the Designated Judge in terms of Section 16 of the RICA Act – The installation of the Surveillance Equipment**

355. The installation of the equipment commenced in July 2007. In the beginning, Skollie accompanied Lombard and assisted with the installation. The installation mainly took place after-hours to avoid exposure from the staff who had links with the SAPS. The Manuals of the equipment fitted at the NPA and DSO offices are attached to Annexure "GSM23.1" hereto as Annexure "F" to "J", and include the following:

355.1. Pinhole Cameras (Leask; Nel)

355.2. High resolution cameras (Leask; Nel; Pikoli; Slang)

355.3. Minidome cameras (Leask; Mgwengwe)

355.4. CMOS snake camera (Nel; Welsh)

355.5. Mobile phone video monitoring Software (Schmidt; Mgwengwe; Nel; Welsh; Leask; Slang)

355.6. Firewall pro

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355.7. Magical Security 128 Encryption

355.8. Diasonic Voice Recorder

355.9. Solid Voice recorder

355.10. PMD660

355.11. Marantz Recorder

The above brackets are the names of the officials in whose offices the equipment was installed.

356. Lombard further stated that the Digital Video Recorders ("DVR") could be accessed by any official into whose office the equipment was fitted and could only be downloaded by Leask, Nel and Lombard. The equipment was set up on basic security mode with username "administrator" and password "000000". There was no server, and hence, the dates were kept on the equipment's hard drive. Each DVR had an 80GB Hard Drive Disk ("HDD") installed and all the videos were recorded on the HDD. A notebook could be used to download data (audio or video) from the HDD of the notebook. A list of all SARS notebooks, with their serial numbers, used to download the videos and recordings is provided in Annexure "GSM23.1" hereto as Annexure "L" ("the list"). After downloading the data (Video or audio), de Waal would burn a CD of it and hand it to Skolfie.

357. On 25 May 2016 from 19:21 to 22:25, Lombard accompanied by his legal representative, Adv Fanie Schneider ("Schneider"), pointed out all the

offices where the surveillance equipment was installed to Colonel Tshabalala of East Tshwane police station in accordance with section 208 of the Criminal Procedure Act 51 of 1977.

358. It was at this pointing out session that additional surveillance equipment which was still within the offices of the NPA and DSO was removed with the assistance of the officials from Crime Intelligence Technical Support Unit.

iv. <u>Evidence of Unlawful Conduct – Listening and Transcribing of the video/audio</u>

359. In early October 2007, de Waal was requested by Skollie to transcribe audios of the videos from the offices of the NPA and DSO in which the equipment was fitted, at his house in Irene, Centurion. De Waal asked Skollie if there was an authorisation for the operation, and Skollie explained that "only the President" and Pillay were aware of the operation. Skollie added that he would show de Waal the authorisation once he obtained it, but never did. Skollie further added that Lombard would never have fitted the equipment if there was no proper authorisation. De Waal stated that, at the time, he knew that the DSO was investigating cases relating to Selebi, Shabir Schaik ("Shaik") and Zuma. Further, he stated that at the time, there were tensions between the DSO and SARS, as Pillay was refusing to release tax information of persons that the DSO was investigating.

360. De Waal downloaded the video and audio portions of the recordings every Sunday evening on Skolle's laptop. Thereafter, he transcribed the audio portions of the recordings, and subsequently handed them over to Skolle, who would then give them to Pillay. Skolle perused the documents and placed them in an envelope(s) and gave de Waal instructions to hand-deliver the envelope(s) to Pillay.

361. De Waal stated that Pillay never opened the envelope(s) in his presence and never discussed the contents of the envelope(s) with him. De Waal transcribed the first audio on 3 October 2007, and the last on 28 November 2007. Before joining SARS, de Waal was involved in numerous operations at the NIA under the management of Skolle and had always worked on verbal instructions without having seen the actual authorisation.

362. The objective facts set out above demonstrate that the charges in the Rogue Unit case were not "trumped up charges", as alleged by Booysen and McBride. As far as I am aware, none of the persons in respect of whom it is alleged that the charges were "trumped up", came before the Commission in support of Booysen and McBride's unfounded and malicious allegations.

v. <u>The Accused persons</u>

363. The abovementioned charges were preferred against Pillay in his capacity as General Manager of the Enforcement and Risk Division of SARS, Skolle, in his capacity as a Specialist Agent within the Enforcement and

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.Risk Division of SARS in charge of the Surveillance Unit and Van Loggerenberg, in his capacity as a Special Officer in the office of the General Manager of the Enforcement and Risk Division of SARS.

(d) **(Contravention of the Section 10, read with Sections 1, 2, 24, 25, and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 – Unauthorised Gratification by a Party to an Employment Relationship (against Pillay and Van Loggerenberg)**

364. The abovementioned charge relates to the unlawful and unauthorised gratification in the amount of approximately R100 000.00 for the benefit of Lombard, for acting in relation to the exercise, carrying out or performance of his powers, duties or functions within the scope of Lombard's employment with SARS. This amount was the remainder of the funds utilised for the unlawful installation of video and listening equipment within the offices of the NPA and DSO. The elements of this offence are as follows:

364.1. Employment at SARS;

364.2. Performance of duties;

364.3. Unauthorised gratification;

364.4. Benefit of themselves or another.

365. Below I discuss in detail the elements of the offence.

(e) **Employee of SARS**

386. In 2006, whilst Lombard was employed at South African Defence Force Intelligence ("DI"), Charl Fourie ("Fourie") and De Waal approached him to enquire whether he was interested in taking up a position in a Unit that SARS intended to establish. He informed them that he was interested. Whilst Lombard was at DI, he was involved in surveillance operations together with SAPS and the DSO.

387. In 2006, Lombard received a call from Skolie and he was questioned about his technical abilities, after which he was invited to participate in a psychological, integrity and IQ test. After obtaining a Top Secret Clearance, Lombard was offered a position as a Specialist Agent: Custom Border Control Unit at SARS, and commenced in that capacity on 1 March 2007. A copy of his appointment letter is annexed to Annexure "GSM23.1" hereto as Annexure A.

388. Lombard reported to Skolie, who, in turn, reported to Pillay, who reported to Gordhan. At the time of Lombard's appointment, Skolie advised him that members of the newly formed Unit would not be exposed to other SARS employees, would work from home or guest houses, and the Unit would operate on a need-to-know basis. Lombard's version is corroborated by various witnesses, whose statements are attached hereto, marked as follows:

388.1. Jappie Tshabalala ("Tshabalala") – Annexure "GSM25";

388.2. Eric Khulekani Khwela ("Khwela") – Annexure "GSM26";

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368.3. Norah Pitsi ("Pitsi") – Annexure "GSM27";

368.4. Dilo Nyapudi ("Nyapudi") – Annexure "GSM28";

368.5. Danie le Roux ("Le Roux") – annexure "GSM29";

368.6. Francois van Niekerk ("Van Niekerk") – annexure "GSM30".

(f) **Performance of duties**

369. In May 2007, Skolie enquired from Lombard whether it was possible to instal video and listening equipment at the offices of the NPA and DSO. Lombard stated that it was possible if they had the requisite authorisation in terms of Section 16 of RICA from the designated judge.

370. In June 2007, Skolie informed Lombard that Leask from the DSO had contacted him to instal video and listening equipment at the offices of the NPA and the DSO, as they expected that SAPS had gained access to sensitive documents relating to the Selebi and Agliotti investigations. Lombard and Skolie met with Leask and Nel who advised them what equipment they required and they furnished a quotation for such equipment to Leask and Nel. Jonker phoned Lombard to advise him to collect the money for the equipment.

371. In July 2007, Lombard and Skolie installed the video and listening equipment at the offices of the NPA and DSO. The equipment was removed on 2 June 2016. Photos of the equipment which were removed from the offices of the NPA and the DSO, the premises it was and the

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process of its removal, are attached as annexure "GSM31". Lombard is depicted in many of the photos, removing the equipment.

372. In Mid September 2007, Skollie requested Lombard to monitor the meetings in the offices where the video and listening equipment was installed. Lombard verbally reported to Skollie, who requested him to download the footage and recordings. Lombard did so and handed the footage and recordings over to Skollie, who, in turn, requested De Waal to transcribe the recordings.

(g) <u>Unauthorised gratification for and Benefit of themselves or others</u>

373. After all the equipment had been installed at the offices of the NPA and the DSO, and all the reconciliation of the finances on the installation had been concluded, an amount of approximately R100 000.00 was left of the amount collected by Lombard.

374. Lombard enquired from Pillay and Van Loggerenberg into which account of SARS the above amount must be paid. Both Pillay and Van Loggerenberg advised Lombard that there is no provision made for such an amount and the amount cannot be paid to SARS. They further advised Lombard that he must keep the money for himself, and should anybody ask about the money, he must tell them that it was a private installation. Lombard declared in the 2008 tax year a profit of R112 740.00 and paid an amount of R45 096.00 as 40% tax.

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375. It is clear from the above that the amount paid for the installation was not authorised through the normal process of SARS, hence the fact that no provision was made for the money left over to be paid back to SARS.

376. In 2008, in order to bring the unauthorised transaction in line with the requirements of SARS with regard to private employment by SARS employees, Van Loggerenberg signed an authorisation to Lombard in respect of the private installation, despite the fact that Van Loggerenberg was not in charge of the Unit at the time of the installation. The authorisation is attached to Annexure "GSM23.1" hereto as Annexure

(h) Alternative count – General corruption

377 This charge relates to general corruption. In the event that the Court would find that there was no employment relationship between SARS and Lombard, this alternative charge was proffered in order to demonstrate that the receipt of the approximate R100 000.00 by Lombard, amounted to general corruption.

Q. EARLY RETIREMENT OF PILLAY AND REAPPOINTMENT IN THE SAME CAPACITY

(a) Overview

378. As the investigating team and I were working on the settlement package between Skolie and SARS, which was causing uneasiness amongst some SARS employees, we came across correspondence relating to the early retirement of Pillay. Perusal of the correspondence appeared to display a possible irregular, fruitless and wasteful expenditure and

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unauthorised expenditure in respect of the early retirement of Pillay by SARS. It appeared very improper that SARS could pay a retirement penalty for an employee particularly when he takes early retirement due to purely personal reasons.

379. I illustrate below that the payment of the early retirement penalty by SARS exposed SARS to irregular expenditure and was criminal. The opinion supplied by Symington is in my view incorrect and not in line with the law and GEPF Regulations. I did not have Symington's statement in the docket when the decision to prosecute was made. I only received it after representations were submitted to Abrahams. The decision would still have been the same with the opinion as it does not provide sound legal reasons and motivation for the view expressed by Symington.

380. Booysen alleges that I am part of prosecutors who prosecuted Gordhan, McBride, van Loggerenberg, Pillay, Magashula, Sesoko and Van Rensburg maliciously. He further alleges that I acted in disregard of the Constitution and the oath of office. I will demonstrate by reference to legislative prescripts and evidence in witness statements that there were cogent justification for pursuing the charges which were preferred against the person in respect of whom the charges were preferred. Despite the fact that the charges have been withdrawn, I still hold the view that they were wrongly withdrawn. It must also be noted that it is not Gordhan, Magashula or Van Rensburg raising these issues, it is Booysen and McBride complaining on their behalf.

381. The charges against Gordhan, Pillay and Magashula were the following: -

381.1. Fraud in that a false pretence was given to SARS and National Treasury to its prejudice that SARS was liable to pay in excess of a million rands to the Government Employees Pension Fund (GEPF) on behalf of Pillay which was a penalty for taking early retirement for personal reasons.

381.2. Contravention of the Public Finance Management Act by causing SARS to incur or failing to prevent irregular, fruitless, wasteful and unauthorised expenditure.

381.3. A further fraud in that a false pretence was given out to the Human Resources of SARS to its prejudice to enter into an employment agreement with Pillay for a remuneration package for a period of five (5) years instead of three years which was in the approved memo.

381.4. A further fraud in that a false pretence was given to Human Resources of SARS to its prejudice to enter into an employment contract with Pillay for a period of four (4) years when there was no approved internal memo or letter authorising same.

382. Pillay in a memo attached to Christina Susana Visser's statement as "CSV 03" informed Magashula in his capacity as Commissioner of SARS that he has decided to take early retirement and was requiring that the

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Minister approve of his early retirement with full benefits, for family considerations and that the Minister of Finance should reappoint him in the same capacity as a contract employee for three (3) years. A further request was that the Minister should approve that the early retirement penalty imposed on his pension in terms of Rule 14.3.3 (b) of the GEPF rules, be paid by SARS to the GEPF.

(b) **Fraud**

383. In this affidavit, I only set out the elements of the offence of fraud, because the evidence pertaining to contravention of the PFMA and GEPF Rules were fully set out in the affidavit of Torie to which I make reference and quote in this affidavit for ease of reference.

384. The elements of the offence of fraud are: -

384.1. The unlawful making of a misrepresentation,

384.2. to SARS and or the Human Resources division of SARS,

384.3. to the prejudice or potential prejudice of SARS,

384.4. knowing that such representation was false when it was made,

384.5. with the intention to defraud.

385. The following evidence was at my disposal in the docket when the decision to prosecute was made: -

385.1. On 12 August 2010 the former Commissioner of SARS, Magashula requested the former Minister of Finance, Gordhan to approve the early retirement of Pillay from SARS with full retirement benefits with effect from 1 September 2010 and that SARS must pay the early retirement penalty that is payable to the GEPF as contemplated in Rule 14.3.3(b) of the GEPF Pension law read with section 19 of SARS Act and section 16 (2A) of the Public Service Act, 1994. Approval was also sought for Pillay to be retained as Deputy Commissioner on contract for three (3) years. Effectively Pillay would be enabled to pay for his children's education and continue his employment at SARS for another three (3) years, whilst SARS would suffer financial loss of in excess of a million rands;

385.2. Provision is made in the memo for the former Deputy Minster, Nhlanhla Nene to recommend the proposal but the former Minister, Gordhan approved the early retirement without any signature of Nene. Nene explained that he had no recollection of the memo being presented to him for comment. The statements of Susan Venter (A130), Nico Coetzee (A102), Estelle van Niekerk (A100) and others based at Human Resources and Finance sections of SARS are in the docket. Gerda van den Heever (A104) who also took early retirement from SARS at an age of 58 after serving SARS for twenty-seven (27) years was not accorded the same privilege as Pillay, she repaid her penalty to GEPF after SARS paid it;

385.3. After Pillay went on early retirement, Magashule entered into an employment agreement with Pillay in the same capacity for a period of five (5) years commencing 1 January 2011 knowing that the approval granted was for a period of three (3) years only;

385.4. When Gordhan was appointed a Minister of Co-operative Government in May 2014, he extended Pillay's contract for another four (4) years when there no internal memos authorising same when his employment contract was terminating in 2015. The contract still had a year to run before it expired.

(c) <u>The representations made by Pillay and Magashule, the opinion of Symington and the prosecution teams view pertaining thereto</u>

386. After, Pillay and Magashule had made representation and an application was instituted by Freedom Under Law ("FUL") against President of South Africa and NPA, Abrahams became aware of the opinion prepared by Symington. Abrahams was of the view that the prosecution could not prove intention on the part of the accused because they relied on the opinion.

387. Abrahams in line with the trite principle of seeking the views of the prosecutor seized with the matter requested that I consider the opinion prepared by Symington and furnish him with my views. In response to Abrahams request, I expressly stated that the opinion supplied by

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Symington was (and still is) in my view incorrect and not in line with the law and GEPF Regulations. As such, my decision would still have been the same (and is still the same) with the opinion as it does not provide sound legal reasons and motivation for the view expressed.

388. I expressed my views in a memorandum dated 19 October 2016, attached hereto, marked as annexure **"GSM32"** addressed to Pretorius and Abrahams where I, *inter alia*, stated as follows:

"A: INTRODUCTION

The purpose of this report is to provide the Acting Special Director of the Priority Crimes Litigation Unit with the prosecuting team's inputs having read the representations received by the office from accused 1 and 2's legal representatives.

We thank Adv Pretorius for the opportunity and hope that our inputs will be given due consideration.

B: BRIEF SUMMARY OF THE REPRESENTATIONS

Oupa Magashula

Tlhiney Incorporated rely on a note dated 18 October 2016 prepared by Adv De Jager SC. It appears therefrom that there are no factual disputes, only the interpretation of the law seems to be the points in issue. We do not agree, there are factual disputes, Mr Pillay wrote

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two(2) separate internal memos undated, one addressed to Accused 1(Magashule) and the other addressed to Accused 3 (Gordhan)

In the one addressed to Magashule he mentions the reason for his early retirement as "I was expected to perform at a very high level accompanied by accountabilities that go with the performance of such a high level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job…I have decided to take early retirement."

In the one addressed to Accused 3 (Gordhan) he states:

> *"I have reached a stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decision I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interests are the order of the day and indications are that this situation will prevail for the foreseeable future. In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirements benefits will provide me with a lump sum benefit (which will*

financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens."

Clearly the two separate reasons for early retirement are very different and mutually contradictory to each other. Section 16(6)(a) of the Public Service Act 103 of 1994 requires that the Executive Authority may authorise an employee to take early retirement if there are sufficient reasons (our underlining) to take such early retirement. In our view the reasons advanced for such early retirement, mutually contradictory to each other as they are, are purely personal and have nothing to do with his obligations towards SARS. The officials at Human Resources did warn accused 1 that implementation of the decision will amount to SARS paying for the education of Pillay's children, but they were simply ignored.

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In the accused representations, it is alleged that the accused received legal advice from Mr Viok Symington from the SARS Legal and Policy Department, with respect this advice, despite being unsigned, is in our view very vague and no reasonable person may rely on such unmotivated and baseless advice. It is non-committal, as it only states that "approached individually, all three elements are technically possible under the rules of the GEPF read together with the Employment Policies of SARS. It is not clear what he means that the Minister may "waive" the early retirement penalty as if the penalty is payable to the Minister, the penalty should be paid to the GEPF and Rule 14.3.3 requires it to be paid by the employee and not the employer. No legislation authorises the Minister to direct that the early retirement penalty should be paid by the employer and to the extent that the Minister caused SARS to incur such unnecessary expenditure, the Minister is equally liable in terms of the law.

We have asked the investigating team to approach Mr Viok Symington to verify the veracity of his opinion and we should receive his statement tomorrow.

We are of the view that there are sufficient facts to prove unlawfulness and intention to defraud SARS. The Minister did not exercise his discretion in accordance with the law, he exercised his discretion contrary to Rule 14.3.3 and the fact that some legal advisor from Legal and Policy Affairs of SARS says it is permissible without the legal basis of such an opinion does not make his conduct lawful. The Minister

acted ultra vires his powers and not in line with Rule 14.3.3 of the GEPF. It is significant that the representors do not mention this rule at all and why the accused 2 should be "exempted" from paying the early retirement penalty.

The 3 000 employees from various government departments in respect of whom early retirement with full benefits were approved, referred to as Appendix A in the memo could not be traced and if it were to be located, would differ materially with Mr Pillay's case in that they were early retirements for entirely different considerations (dispensation for affirmative action considerations, not purely personal reasons like those advanced by Pillay). The same applies to the five such requests which were allegedly approved by the Minister and or the former Minister.

Representations on behalf of Pillay

The representations on behalf of Accused 2 refer to sections of the Act that we have already dealt with and do not raise any new issues. We are not aware what public policy considerations the NDPP was addressed on and cannot comment thereon. If the public policy consideration referred to is the prevailing public criticism of the decision to charge the accused, it would then mean the NPA should succumb to pressure and thereby lose its independence and credibility.

C: RECOMMENDATION

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It is recommended that in the absence of cogent reasons why prosecution should be reconsidered, the representations must be turned down and prosecution of all three (3) accused persons must continue."

389. The views expressed in my memorandum were also confirmed by private counsel who was briefed to draft the NPA's answering affidavit in the FUL application and the contents of that affidavit are set out in detail in the affidavit of Torie's filed in the Commission. I align myself with the contents of Torie's affidavit as set out in paragraphs 241.3 to 250 as well as paragraph 250 to 306 in respect of the analysis of the employment contract of Pillay. For ease of reference, I quote these paragraph below:

"Despite the fact that the charges have been withdrawn, I still hold the view that they were wrongly withdrawn."

390. One of the complaints that McBride and Booysen have lumped into the litany of matters they rely on to try and prove a point that the NPA is captured, relates to criminal charges that were preferred against Mr Oupa Magashula ("*Magashula*"), Pillay, and the then Minister of Finance Mr Pravin Gordhan ("*Gordhan*"), relating to the pension pay out to Pillay. This prosecution came midstream in the investigation of the unlawful interception of communication at 12 NPA offices.

391. Whilst guiding the investigation pertaining to the unlawful SARS intelligence unit, certain facts came to my attention, which facts indicated a possible contravention of legal prescripts relating to the pension pay out

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of Pillay. Since the PCLU has to guide and manage the investigation of matters referred to them, and matters incidental thereto, I was obliged to guide the investigators and request them to investigate Pillay's pension pay out.

392. I have perused the affidavit of Pretorius and agree with what is stated in his affidavit pertaining to the reasons for instituting criminal proceedings against Magashula, Pillay and Gordon. In this regard I specifically refer the commission to the relevant paragraphs of Pretorius' affidavit and for ease of reference set out same herein below:

> *241.3* In this memorandum, Pillay motivated his first retirement application as follows:
>
> *"PURPOSE*
>
> *The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.*
>
> *DISCUSSION*
>
> *As you know, I have been working in the Public Sector for the past 15 years, 10 which have been*

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

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

Should you favourably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally

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part ways with SARS, should I come to such a decision. The second condition would be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the abovementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732,68. (my emphasis)

RECOMMENDATION

My recommendations are that you please:

- *take note that I intend to take early retirement*
- *consider to approve that I be appointed in a different capacity in SARS on a contract basis; and*
- *consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer."*

242. *What is clear from the above quoted memorandum is the following:*

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

242.2 *Pillay asked to be appointed in a "different capacity" where the demands of such a job will positively support "the reasons why I am in the first instance taking early retirement";*

242.3 *Pillay was fully aware that the ordinary consequences of his decision to take early retirement were, amongst others, that he himself would have to pay a penalty to the GEPF for his early retirement. It is for this reason that he then asked SARS "to pay on (his) behalf" of himself the amount of R1 292 732.68 as opposed to him paying the penalty himself from his own personal funds, by having his pension benefits reduced.*

243. *Also, in 2009 Pillay wrote directly to the Minister where he made a different request to approve his application for early retirement for different reasons ("the second retirement application").*

244. *In his undated memorandum attached as "SA10" "to Annexure "B" in the main application, motivating the first retirement application, Pillay said the following the Gordhan:*

"Dear Previn,

PURPOSE

The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve/recommend certain related matters that will flow from my decision to take early retirement.

DISCUSSION

I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day and indications are that this situation will prevail for the foreseeable future.

In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 55. As I have already reached the earliest optional retirement age of 55 years in terms of SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you could consider to approve that immediately after my early retirement, appoint me as a contract employee. No legal provision prevents you from making such an appointment.

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

In view of this it would be appreciated if you, when I take early retirement, would recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R1 064 257."

245. *In the above quoted memorandum:*

245.1 *Pillay states correctly that what "I am doing ... has nothing to do with my work at SARS";*

245.2 *Pillay appreciates that "there is a penalty payable in terms of the benefits" for the early retirement which he has decided to take and that "my pension benefits will be reduced by 14.4%";*

245.3 *Pillay is wrong in saying that section 16(6) of the Public Services Act was amended to enable government employees to pay penalties on behalf of their early retirees. The correct position is that the penalty is imposed by the Rules of the GEPF and the relevant Rule has never been amended to do that which Pillay asked the then Commissioner at the time, Gordhan, to do;*

245.4 *Pillay further says that whatever decision he has taken (to take early retirement) is intended to provide him with funds for the purpose of paying for the education of his children which funds "can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day ...". It is therefore clear from this that Pillay simply wanted*

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the taxpayers to save him from the ordinary financial hardships which he was facing and to which all taxpayers are exposed.

245.5 *The first retirement application was not approved. It is not clear why it was not approved.*

246. *The fact that Pillay was fully aware of the aforesaid financial implications of his decisions to take early retirement is also apparent from the contents of the so-called Symington memorandum. In this memorandum, which is dated the 17th of March 2009 (which is a date long before the date of Pillay's above quoted memorandum dated the 27th of November 2009) Symington said the following:*

> *"However, the financial soundness of his decision to apply for early retirement is dependent on whether the Minister approves SARS payment of the benefit penalty to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-à-vis his projected life expectancy. If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and*

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my advice then would be for him to review his application for early retirement and to possibly withdraw it.

...

... However, if the minister is unable to approve his request relating to the penalty of if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably all together be withdrawn."

247. *The following is apparent from the Symington memorandum:*

247.1 *It is dated the 17th of March 2009 and it is addressed to the Commissioner for SARS.*

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

247.3 *What Symington is saying in his memorandum is simply that Pillay's decision to take early retirement is not financially sound unless:*

247.3.1 *the Minister of Finance (at the time Trevor Manuel) approved the payment by SARS of the benefit penalty to the GEPF the payment of which would have been triggered by Pillay's early retirement; and*

247.3.2 *the Minister of Finance also approved that SARS should at the same time enter into a post-retirement contract of employment with Pillay.*

247.4 *Symington did not say that it was lawful for Gordhan and Magashule to burden the taxpayer with Pillay's penalty in excess of R1.2 million levied upon him as a result of his decision to take early retirement – which decision was clearly a ruse to enable him to access his pension benefits to fund the education of his children. At the end, SARS ended up financing a big portion of Pillay's children's education as stated in the affidavits to which I refer below.*

248. *The effect of the above is simply that in order to ensure that Pillay's early retirement did not result in financial prejudice to*

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him, SARS had to pay the benefit penalty to the GEPF. It then entered into a post-retirement employment contract with him, otherwise, according to Symington, Pillay's decision to take early retirement would not have been financially sound.

249. *It is for this reason that Symington made it clear in his memorandum that unless the Minister of Finance approved the whole package, i.e. early retirement, payment of the benefit penalty to SARS on behalf of Pillay, and post-retirement employment of Pillay by SARS (without advertising the position), Pillay would have had to forget about taking early retirement and would have had to raise finance for the education of his children differently. Symington did not take into account the total effect of the combination of the three elements, as set out above.*

250. *At the time when Meema decided to charge Pillay, Megoshula and Gordhan, approved by myself and Mzinyathi, we did not have the Symington memorandum in our possession. The Symington memorandum was provided to the NDPP when Pillay and Megoshula made Section 179(5) representation on the 14th of October 2016 for the withdrawal of the charges against them. In their representation, they provided new information in the form of the Symington memorandum."*

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393. Paragraphs 251 to 306 reads as follows:

"250. *The other document which we, the prosecutors (Maema, Mzinyathi and myself) had in our possession is a letter dated the 12th August 2010 from Magashula, (reflecting the third application from Pillay), who at the time was the Commissioner for SARS, addressed to Gordhan. In this letter, Magashula motivated the early retirement of Pillay with full retirement benefits as follows:*

"1. PURPOSE

The purpose of this memorandum is to request approval from the Minister for the early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits from the GEPF as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of SARS Act and section 16(2A)(a) of the Public Service Act, 1994 ...

In addition, approval is requested to retain Mr. Pillay as Deputy Commissioner of SARS on 3 year contract with effect from 1 September 2010.

2. BACKGROUND

...

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

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

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

3. MOTIVATION FOR RETIREMENT WITH FULL BENEFITS

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

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

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

4. MOTIVATION FOR REAPPOINTMENT ON A 3 YEAR CONTRACT

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

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

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

In this regard, advice was sought from the Acting Director-General of the Department of Public Service and Administration

... regarding the proposed early retirement of Mr. Pillay and his retention on a 3 year contract. He confirmed that there is no restriction on the appointment to the public service or to the same department of a person who has left on an Employee Initiated Severance Package (EISP) and that he was aware of previous such cases.

5. FINANCIAL IMPLICATIONS

The financial implication of early retirement with downscaled benefits for Ivan will be considerable as his lump sum benefit will decrease by R243 606 to R121 443 and his monthly pension by R47 402 to R48 583.

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

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

253. *The recommendations were approved by Gordhan on 13 October 2010. It is worth nothing that the then Deputy Minister of Finance, Mr. Nhlanhla Nene, did not approve the recommendation despite the fact that the memorandum made provision for his approval to be obtained. I understand that is also part of internal requirements in government that a Minister approve a recommendation only after the Deputy Minister has applied his mind to it. This did not happen in this case.*

254. *We also had in our possession the following documents which we considered when we made the decision to bring the charges in issue.*

Affidavit of Nico Johan Coetzee

255. *The affidavit deposed to by Nico Johan Coetzee ("Coetzee"), who was previously employed by SARS is attached as "SA11" to Annexure "B" in the main application. There are other documents attached to such affidavit and I refer to them individually below.*

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

257. *Coetzee further states that:*

"4.

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

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

"Hi Oupa

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

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

"I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicated that the reason why Mr. Pillay is requesting approval for early retirement is to provide for

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his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is sufficient reason to recommend/approve Mr. Pillay's application for early retirement. If his application is duly recommended/approved, it could technically be construed that SARS is willing to contribute from its budget an amount of ±R340 000 towards the education of his children. I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself and the Minister in a tight spot, especially because Mr. Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely to assist him to be able to provide for his children's education with a R340 000 'contribution' from SARS."

Pillay's contract of employment

260. *Pursuant to Magashula's recommendation, Gordhan approved Pillay's early retirement and re-appointment. The approved re-appointment was to be for a period of three years. Gordhan also approved that Pillay's penalty to the GEPF be paid by SARS.*

261. *Despite the fact that the Minister approved Pillay's re-appointment to be for a period of three years, on the 7th of February 2011, Magashula and Pillay concluded a five year contract, a copy of which is attached as "SA12" to Annexure "B" in the main application. This contract was clearly not approved by Gordhan and all the payments made in terms thereof were not lawfully authorised. Magashula and Pillay were fully aware of this illegality. They acted in contravention of the empowering approval given by Gordhan to conclude a three year contract (even though that approval itself was unlawful).*

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

Affidavit of Chriana Susanna Visser

263. *Visser' affidavit, which is attached as "SA13" to Annexure "B" in the main application, largely confirms that there was no business reason for SARS to pay Pillay's penalty.*

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264. *Visser deals with other things in her affidavit, amongst others, the circumstances under which Pillay concluded an employment termination agreement with Skollie. Of relevance for purposes of this application, Visser says the following:*

"8

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

...

I was presented with the signed approved memorandum by the Minister and I initiated the process of the exit of Mr. Ivan Pillay from the Pension Fund and his re-

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employment on a contract basis. Part of this process was to sign a contract of employment with Mr. Ivan Pillay. I drafted a three year contract of employment to be signed by Mr. Oupa Magashula as the Commissioner and Mr. Ivan Pillay as the employee. The contract document was however amended to five years ... Mr. Oupa Magashula requested that I sign as a witness. I queried the matter of the contract that was amended to five years. Mr. Oupa Magashula indicated that they decided that it will be five years and not three and continued to sign the contract. I signed as witness as I believed it was merely to indicate that it was Oupa Magashula who signed the contract. I advised but the advice was cast aside and not taken.

11

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

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265. *Pillay's aforesaid contract was concluded in April 2014 – the very last year of Gordhan's tenure as Minister of Finance. In view of the fact that Pillay's contract of employment signed in February 2011 was still valid and of full force and effect until February 2016, there was no lawful reason to conclude a new contract other than to unduly benefit Pillay with a further contract of employment for another period of two years after what would have been the end of his contract concluded in February 2011.*

Statement of Gordhan

266. *In his own statement attached is attached as "SA14" to Annexure "B" in the main application, which statement was not made under oath, the Minister says the following about Pillay's early retirement and his approval thereof:*

> *"15. Mr Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.*
>
> *16. The then Commissioner of SARS, Mr Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr Pillay sought in this way to gain access to his pension fund to finance the education of his children. I*

understand that Mr Magashula had established from enquiries made with the Department of Public Service and Administration that the terms of Mr Pillay's early retirement and re-appointed were lawful and not unusual. I approved Mr Magashula's proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995."

267. *Gordhan's statement creates an impression that he approved Pillay's early retirement package on the basis that Pillay needed money to finance his children's education. This, however, is not what is stated in Magashula's memorandum to Gordhan of August 2010. The issue of raising funds to provide for the education of Pillay's children is referred to in Pillay's memorandum to Gordhan in 2008, which is not the one which Gordhan approved in 2010.*

268. *What Gordhan does not say in his unsworn statement is the following:*

268.1 *The legal basis on which he approved the request that Pillay's penalty to the GEPF be paid by SARS;*

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268.2 The fact that the memorandum which he approved in 2010 does not say anything about Pillay wanting to access his pension benefits on order to provide for the education of his children;

268.3 That he became aware of Pillay's need for money to educate his children when he still worked with him whilst he was still the Commissioner for SARS;

268.4 Why he did not approve the request made to him by Pillay in 2008;

268.5 Why he considered it to be above board to approve the early retirement and re-appointment of Pillay in circumstances where he knew that upon early retirement, the position of Pillay had to be advertised to enable interested parties to apply to be considered for the position – and more so when Magashule resigned from the position of Commissioner for SARS pursuant to allegations that he offered a member of the public employment at SARS without following the prescribed recruitment procedures;

268.6 That he was, in fact, a party to the "enquiries made with the Department of Public Service and Administration" referred to in paragraph 16 of his statement. In this regard, in an e-mail dated 23 July 2010, which is attached

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as "SA15" to Annexure "B" in the main application (and which was obtained only in the review process), addressed to the then Acting Director-General of the Department of Public Service and Administration, Mogashula said:

> *"Dear Kenny,*
>
> *Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday ..."*

269. *The reference to "my Minister" in the above quoted e-mail is a reference to Gordhan. It is clear from the above quoted e-mail that Gordhan was fully involved in the process leading to Pillay's early retirement. The enquiries referred to in his statement were made at his request, yet he does not say this in his statement.*

270. *In his aforesaid e-mail, Mogashula did not enquire about the payment of Pillay's penalty to the GEPF or the legality of paying it. Of relevance, for purposes of the charges in issue, he asked the following questions:*

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- *"Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?*

- ...

- *Related to the first bullet point – do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?"*

271. *The response from the Acting Director-General of the Department of Public Service and Administration is attached as "SA16" to Annexure "B" in the main application, and it was silent on the question whether it was lawful for SARS to pay Pillay's penalty to the GEPF. This response must necessarily be silent on this issue due to the fact that the issue was not raised. In fact, the response shows that what was asked in the discussion was the so-called Employee Initiated Severance Package, which is completely different from what Pillay wanted to do.*

272. *The Employee Initiated Severance Package was introduced into the public service in terms of a ministerial determination made by the Minister of Public Service and Administration. A copy of the relevant determination is attached as "SA17" to Annexure "B" in the main application. Paragraph 1 of this determination says that it is "applicable to all employees appointed in terms of*

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the Public Service Act, 1994, as amended." Pillay was employed in terms of the South African Revenue Service Act 34 of 1997 and the determination did not apply to him. Furthermore, the determination did not apply to Pillay due to the fact that in terms of paragraph 3 thereof, its purpose is to:

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

273. *Pillay's application was in any event not made in terms of the ministerial determination referred to above.*

274. *What appears from Gordhan's statement is that he was not a party to the process which led to Pillay's application for early retirement and re-appointment and that he only became involved in that process when he was Minister of Finance. As demonstrated by the documents to which I have referred above, this is simply not true.*

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

> *"(b) If an employee is allowed to so retire, he or she shall notwithstanding anything to the contrary contained in subsection (4) be deemed to have*

retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection."

276. *Section 16(4) of the Public Service Act, 1994 provides that an officer, other than a member of the services or an educator or a member of the State Security Agency who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service. Pillay had not reached the age of 60 years provided for in this section. This being the case, section 16(4) of the Public Service Act did not apply to him.*

277. *Section 16(6)(a) of the Public Service Act, 1994 upon which Pillay also relied on his aforesaid memorandum provides that an executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient reason exists for the retirement. This provision simply authorises the executive authority, Gordhan in this case, to authorise the early retirement of an employee who has not yet reached the age of 60 years. This provision, however, is silent as far as the retirement or pension benefits are concerned.*

278. *In his letter to Gordhan referred to above, Mageshula sought Gordhan's approval in terms of section 16(2A)(a) of the Public Service Act 1994. This section provides that:*

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

279. *This section simply creates a right of a Public Service Employee to retire at the age of 55 years or after attaining that age. The executive authority's approval is not required for that purpose.*

280. *In his letter to Gordhan, Mageshula further relied on Rule 14.3.3(b) of the Rules of the GEPF. Rule 14.3.3 deals with members with 10 years and more pensionable service. Rule 14.3.3(b) provides that:*

> *"(b) A member who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) and who has at least 10 years' pensionable service to his or her credit, shall be paid the benefits referred to in Rule (a) above: Provided that such benefits shall be reduced by one third of one percent for each*

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complete month between the member's actual date of retirement and his or her pension-retirement date."

281. *It is clear from Rule 14.3.3(b) that it only applies to a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e).*

282. *Rule 14.3.1(d) deals with a member who retires before his or her pension-retirement date but not on 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 provisions of any Act which regulates his or her terms and conditions of employment. Pillay had a right to retire n terms of provisions of the Public Service Act 1994 referred to above. Accordingly, Rule 14.3.1(d) is the one which applied to him.*

283. *Rule 14.3.3(b) to which reference has already been made above, provides that a person who retires on account of a reason mentioned in Rule 14.3.1(d) or (e) shall be paid "the benefits referred to in Rule (e) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date." This Rule applied to Pillay because in terms of Rule 14.3.1(b) he was retiring "before his or her pension-retirement date in terms of the law governing*

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his or her terms and conditions or service" being the Public Service Act to which reference has been already been made above.

284. *There is no provision in the Public Service Act, 1994, in particular in section 16 thereof, in terms of which provision is made for SARS to pay what Pillay himself described in his memorandum as "the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules." Rule 14.3.3(b) of the GEPF Rules simply makes provision for the reduction of the pension benefits of a person who retires before his or her pension retirement date and does not make provision for the employer of such a person to pay the penalty which is imposed in terms thereof.*

285. *When we decided to bring charges, we clearly took into account that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement and education of his children.*

286. *In addition, we took into account that the so-called early retirement was in fact not an early retirement at all. This is so due to the fact that Pillay did not intend to retire and both Gordhan and Magoshula were fully aware that Pillay did not truly intend to retire. The fact that Pillay did not genuinely truly intend*

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

IN RE: **APPLICATION OF KHULEKANI RAYMOND MATHENJWA ("THE APPLICANT"), FOR CONDONING THE LATE FILING OF THE AFFIDAVIT AND THE APPLICATION FOR LEAVE TO CROSS-EXAMINE GENERAL JOHAN BOOYSEN ("*BOOYSEN*"), ROBERT MCBRIDE ("*MCBRIDE*"), MATTHEWS SESOKO ("*SESOKO*") and MXOLISI SANDILE OLIVER NXASANA ("*NXASANA*") IN TERMS OF RULE 11.2 READ WITH RULE 3.3.8 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

WITNESS STATEMENT IN TERMS OF RULE 3.4

I, the undersigned,

KHULEKANI RAYMOND MATHENJWA

do hereby declare under oath and state that: -

1. I am an adult male Advocate employed at the National Prosecuting Authority ("*NPA*") as a Senior Deputy Director of Public Prosecutions ("*SDDPP*") and attached to the office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg, situated at Innes Chambers Building, Cnr Pritchard & Kruis Streets, Johannesburg.

2. The facts contained in this affidavit are within my personal knowledge, save where otherwise stated, or where the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. Where I rely on facts and/or statements made by third parties, I do so based on the belief that same is true and correct and I annex to this affidavit the explanatory affidavit of Nolusindiso Gejengane ("*Gejengane*"), marked as annexure "KRM1", the explanatory affidavit of Marco Voller ("*Voller*"), marked as annexure "KRM2", the explanatory affidavit of Luyanda Kopman ("*Kopman*") marked as annexure "KRM3.1" and the confirmatory affidavit of Gladstone Sello Maema ("*Maema*") marked as annexure "KRM3.2" The annexures that solely pertain to me, are marked as "KRM". The annexures relating to the Cato Manor matter, as it pertains to both myself and Adv Sello Maema ("Maema") will be marked as "CM".

4. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept to be true and correct.

5. The Chairperson is requested to read the contents of all the annexures referred to herein as if specifically incorporated into this affidavit, to avoid prolixity.

A. **SHORT RESUMÉ**

6. My qualifications are as follows:

6.1. B.Proc degree;

6.2. LLB degree;

6.3. Masters degree in Criminal law and Procedural law;

6.4. Masters degree in Labour Law;

6.5. Diploma in Criminal Justice and Forensic Auditing;

6.6. Diploma in Project Management;

6.7. Certificate in Customer Management Services;

6.8. Certificate in Human Resource Management.

7. I am employed as a Prosecutor from 1995 to date. I was appointed as the District Court Prosecutor at Simdlangentshe Magistrate Office (Pongola) from 1995 to 1999.

8. From 1999 to 2000, I was promoted to the rank of a Specialist Regional Court Prosecutor at the Durban Magistrate's Office in the Commercial Specialist Section.

9. From 2000 to 2001, I was promoted to the rank of a Regional Court Control Prosecutor at the Durban Magistrate's Office in the Commercial Specialist Section.

10. From 2001 to 2007, I was promoted to the rank of a Senior Public Prosecutor at the Randburg Magistrate's Office.

11. From 2007 to 2011, I was promoted to the rank of Deputy Director of Public Prosecutions on Employment: Level 13: at the South Gauteng Division.

12. From 2011 to date, I was promoted to the rank of Senior Deputy Director of Public Prosecutions: Level 14: at the South Gauteng High Court Local Division.

13. From October 2015 to 30 April 2019, I was seconded to the Priority Crime Litigation Unit (***"PCLU"***) by the Minister of Justice and Correctional Services.

14. From May 2019 to date, I am back at my post as a Senior Director of Public Prosecutions at Gauteng Local Division, Johannesburg.

B. CAREER HIGHLIGHTS

15. I specialised in commercial crime matters from 1999 to 2013 in the Durban Magistrate Court, KZN; Randburg Magistrate Court, Johannesburg; and the Gauteng Local Division DPP Office.

16. Since my promotion to the rank of a Senior Prosecutor and that of Deputy Director of Public Prosecutions, I have, over and above my specialisations setout above, also handled all other criminal matters in the High and Lower Courts.

17. In between my specialisation and management responsibilities as set out above, I managed the projects below within the NPA, namely:

17.1. The piloting of the Sexual Offences Court in Alexandra Branch Court of Randburg;

17.2. Community Prosecution projects; and

17.3. Fraud and Corruption projects within the Department of Justice.

18. I successfully prosecuted high profile cases both in the lower courts and the High Court, *inter alia*, namely:

18.1. *S v Maarohanye and Another* ("the Jub Jub trial") where the accused had negligently killed school children whilst they were drag racing;

18.2. *S v Mohamed*, a son who killed both his parents who were in the process of divorcing. The father was a well-known and wealthy Dermatologist;

18.3. *S v Shabalala and Another*, robbers who killed a school principal who had family members working for the World Bank, and the said family members sought constant updates from the Office of the National Director through the Department of the International Relations and Cooperation ("DIRCO"); and

18.4. *S v Sibanda and Others*, where I guided the collaborative investigation conducted by SASSA internal investigators and the SAPS. In this case, the accused were SASSA employees who had established a scheme of recruiting members of the public to apply for disability grants and after approval of the grants, who in turn would pay the SASSA employees an agreed percentage;

19. I managed and guided the racketeering prosecution of *S v Molefe* and Others who were the Department of Justice employees who had recruited and captured certain companies into the Department's BAS payment system, and consequently paying the companies without rendering any services.

20. I also managed and guided the investigation and prosecution of *S v Mabasa*, a justice employee, who was working in the Office of the Clerk of Court at Alexandra Magistrate's Court receiving bail, admission of guilt fines and child

maintenance payments. She embezzled the funds instead of capturing them into the Department's BAS payment system.

21. I was allocated the matter of *S v Coetzee and Others* to decide whilst I was seconded to PCLU. This matter related to the murder of Nokuthula Simelane, an MK Activist who was kidnapped and killed in 1983. However, the matter remained unresolved until 2015, when I was allocated the docket and took a decision to prosecute the suspects. The case is pending before the High Court, Gauteng Division, Pretoria.

22. Further, I was also allocated the matter of *S v Malema and Others* ("On-Point"). In this matter, I have recommended the prosecution of some accused and declined to prosecute the other accused with a recommendation that the previously issued racketeering authorisation be reconsidered. The final decision is pending before the current National Director's Office.

23. I have been allocated a long outstanding racketeering matter which involves the Gauteng Department of Health; its former MEC, Mr. Hlongwa; 3P (Pty) Ltd; and others. In this matter, a recommendation for the prosecution of the accused has been placed before the Office of the NDPP for consideration and decision.

24. I was assigned to the team of prosecutors to consider the former President, Jacob Zuma ("Zuma") representations on whether to re-instate corruption and racketeering charges against him following the SCA judgment. In this matter, the decision was to reinstate the charges and I was part of the

prosecution team that arraigned Zuma and the French Company, Thales (Pty) Ltd for the corruption, fraud, and racketeering charges, answered request for further particulars and participated in the opposition of his application for the permanent stay of prosecution.

25. I am presently the head of Governance in the Gauteng Local Division in the capacity as a SDDPP. The portfolio entails the management of the DPP's administration, performance monitoring and evaluation of the Division, including the lower Courts.

C. PURPOSE OF THE AFFIDAVIT

26. The purpose of this affidavit is to demonstrate that:

26.1. the prosecution of Booysen and of members of the Cato Manor Serious Violent Crimes Section of the Durban Organised Crime Unit (***"Cato Manor SVC Section"***) was justified;

26.2. it was justifiable to recommend to the office of the Acting National Director of Public Prosecutions ***("the ANDPP")*** that the racketeering certificates be issued in respect of Booysen and others in view of the overwhelming evidence in support thereof;

26.3. the prosecution of Adv Glynnis Breytenbach (***"Breytenbach"***) was justified;

26.4. there is no merit whatsoever in the allegations that I am captured for either political or corrupt reasons, with the result that I did not, or I currently do not carry out my legal obligations and duties;

26.5. Breytenbach is not supportive or does not corroborate the unsubstantiated and unfounded allegations made against me by Booysen, McBride and Seeoko;

26.6. the contents of this affidavit support my application for leave to give evidence before the Commission; and

26.7. the allegations made by Booysen, McBride and Seeoko against me as provided for in Rule 3.4 of the Rules are unsubstantiated and malicious as evidenced by my response in this affidavit;

26.8. all prosecutorial decisions and the prosecutions I was involved in, which form the subject of investigation in this inquiry, were properly and lawfully done;

26.9. the process that was followed in arriving at the conclusion of the report that was compiled by Adv Rodney de Kock (***"De Kock"***), Adv Ivy Thenga (***"Thenga"***), Adv S Riley (***"Riley"***) and Adv E Mamabolo (***"Mamabolo"***) (hereinafter referred to as the ***"De Kock report"***) was irregular and consequently unlawful. The Commission is urged to not place any weight on the De Kock report;

28.10. Nxasana, as the then National Director of Public Prosecutions (*"NDPP"*), neither decided on the Cato Manor SVC Section matter nor instructed the prosecution team not to proceed with the charges against Booysen;

28.11. The prosecution was justified to recommend the issuing of the racketeering certificate against Booysen; and

28.12. the withdrawal of the charges against Booysen by Adv Shamila Batohi (*"Batohi"*), the current NDPP, was irrational and therefore breached the principle of legality, which is an incident of the Rule of Law.

27 Prior to responding to the unfounded and malicious allegations levelled against me by Booysen, McBride, Nxasana and Sesoko expressly or by implication, I have been advised, that I should first set out the legal and regulatory prescripts applicable to the functions of the NPA prosecutorial functionaries, to put my version before the Commission in proper context.

D. MANDATE OF THE NATIONAL PROSECUTING AUTHORITY (*"NPA"*)

28. It is important that I clarify the purpose, functioning and mandate of the NPA, to demonstrate that the averments made against me, are unsubstantiated and unfounded.

(a) Legislation

29. The NPA obtains its mandate in terms of Section 179 of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*). Section 179(1) establishes the NPA as a single prosecuting authority in the Republic of South Africa and structured in terms of an Act of Parliament. The Act of Parliament referred to is the National Prosecuting Authority Act, 1998 (Act 32 of 1998) (*"NPA Act"*).

30. In terms of Section 179(2) of the Constitution, the NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.

31. Section 179(4) of the Constitution provides that:

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

32. It is recognised that this provision was included in the Constitution to ensure that

> *"...[t]here is accordingly a Constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to Constitutional control by the courts."*[1]

33. In line with the provisions of section 179 (4) of the Constitution, the preamble, as well as Section 32(1)(a) of the NPA Act, Constitution, provides for the NPA to exercise its functions without fear, favour or prejudice.

[1] Cf Certification of the Constitution of the Republic of South Africa, 1996 at paragraph [148]

34. The NDPP is the Head of the NPA and is appointed by the President. In such capacity, the NDPP shall have the authority over the exercising of all the powers and the performance of all the duties and functions conferred, imposed or assigned to any member of the NPA by the Constitution, the NPA Act, or any other law.

35. In terms of Section 32(1)(a) of the NPA Act, a member of the NPA shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith, without fear, favour or prejudice and subject only to the Constitution and the law. The NPA has, as its core values, independence, accountability, credibility, professionalism, and service excellence.

36. Section 32(1)(b) provides that:

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

37. Section 41 provides that:

> *"41. Offences and penalties*
>
> *(1) Any person who contravenes the provisions of Section 32(1)(b) shall be guilty of an offence and liable on*

conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."

(b) **Other regulatory prescripts:**

38. In deciding whether or not to institute a prosecution, a prosecutor is guided, among others, by the Code of Conduct of Members of the National Prosecuting Authority *("the Code of Conduct")*. The pertinent sections thereof are set out below:

38.1. Article C provides:

"Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should –

(c) take into consideration the public interest as distinct from media or partisan interests or concerns, however vociferously these may be presented;

(f) act with objectivity and pay due attention to the Constitutional right to equality;

(l) assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented."

38.2. Article D provides:

> "1. *Prosecutors should perform their duties fairly, consistently and expeditiously and –*
>
> (d) *in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence."*
>
> "2. *Prosecutors should, furthermore –*
>
> (a) *preserve professional confidentiality."*

39. In terms of the Prosecution Policy of the NPA a prosecution can only be instituted where there are reasonable prospects of a successful prosecution.

40. It follows from the above that the NPA has the sole preserve in instituting criminal proceedings against any person suspected of having committed an offence. Therefore, any person, regardless of his or her profile or standing, should be prosecuted if there is a reasonable prospect of successful prosecution.

41. As I have already indicated, Booysen, McBride, Nxasana and Sesoko have presented before the Commission unsubstantiated and incorrect averments which seek to project me as an officer of the Court who abuses his position and authority regarding prosecutions, to advance purposes that are ulterior

to the mandate, functioning and purpose of the NPA. What is quite disturbing is that the averments are not only unsubstantiated, but they also have been made without giving regard to the Constitutional imperatives that define how the NPA is to be structured and operated. Also, these averments are made without giving regard to the legal and regulatory imperatives that govern the NPA prosecutorial functionaries.

42. It is important that one should guard against the NPA being hamstrung by popular sentiment canvassed, especially in the media, from executing on its Constitutional mandate. Whilst Booysen and McBride complained, among others, that part of the strategy for state capture is that the targeted persons are paraded in the media as bad and corrupt persons, or that their institutions are inefficient, they are the ones who went to the media and came to this Commission, making serious allegations against me without any substantiation whatsoever. Nothing in their submissions tells this Commission exactly in which respect my prosecutorial recommendations and prosecutions under attack, deviated from the legal and Constitutional mandate of the NPA.

43. Having regard to the past and present working environment of the witnesses that implicated me, as well as their experience, they should have a clear understanding of the operation of the law and the circumstances in which a decision to prosecute is taken and the process that leads to the prosecutorial decision.

44. In both the Cato Manor SVC Section prosecution as well as the prosecution of Booysen on the one hand and the prosecution of Breytenbach on the other, the fact that there were reasonable prospects of successful prosecution justifying the institution of criminal proceedings against the accused cannot be gainsaid, as I shall demonstrate below.

45. I have made it my duty in my career, as I am enjoined, not to institute or allow institution of any prosecution that is not in line with the Constitution, the NPA Act, the Prosecution Policy and the Code of Conduct of the Members of the NPA or based on irrelevant considerations.

E. MANDATE OF THE PRIORITY CRIMES LITIGATION UNIT ("PCLU")

46. The PCLU was established in terms of Proclamation No 46, 2003 published in the Government Gazette No 24876, of 23 May 2003. I attach hereto the Proclamation, marked as annexure "KRM4" and the relevant page of the Government Gazette, marked as annexure "KRM5".

47. The mandate reads, *inter alia*, as follows:

> *"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;" (my emphasis)

(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."

48. The emphasised portion in the quotation above is referred to as an Omnibus clause.

49. In making a determination, the NDPP is guided by, *inter alia*, the profile of the affected institution, the profile of the alleged perpetrator, the actual and potential impact that the alleged offence would have on the integrity and standing of the country. By way of demonstration, the following matters in which I was involved, have been referred to the PCLU under the Omnibus Clause:

49.1. Nokuthula Simelane matter - TRC matter given to me for prosecution;

49.2. S v Lotter and Pooe – A matter that deals with the interception and interruption of communication signals with a "grabber" in which I was allocated as the checking officer.

50. In addition to the abovementioned matters in which I was involved in the PCLU, Adv S K Abrahams (*"Abrahams"*) referred further matters to the PCLU in a memorandum dated the 18th of November 2015. I attach hereto the memorandum, marked as annexure "KR##8". The following matters were referred to the PCLU:

50.1. S v On-Point and Others;

50.2. S v McBride & Others (Defeating the ends of justice);

50.3. S v McBride;

50.4. The SARS "Rogue Unit" investigations;

50.5. The Nkandla investigation;

50.6. S v Breytenbach and Another (Deletion of information);

50.7. S v Breytenbach and Another (Corruption);

50.8. S v Booysen and Others (Cato Manor SVC Section matter);

50.9. The South African Airways (SAA) matter;

50.10. investigations into alleged impropriety by NPA officials (SARS complaint re Selebi and Papperas matters).

51. Of these matters, I was involved in the following:

51.1. S v On-Point and Others;

51.2. The Nkandla investigation (Part of the procurement portion);

51.3. S v Breytenbach and Another (Deletion of information);

51.4. S v Breytenbach and Another (Corruption);

51.5. S v Booysen and Others (Cato Manor SVC Section matter).

F. **RULE 3.3. NOTICES**

52. I received Rule 3.3 notices, notifying me that the Commission's legal team intends to present to the Commission the evidence of Booysen, McBride and Sesoko during the Commission's proceedings, which evidence may implicate me in unlawful, illegal or improper conduct. The Rule 3.3 notices were received on the following dates:

52.1. Booysen – 8 April 2019

52.2. McBride – 8 April 2019

52.3. Sesoko – 9 September 2019

53. I was further informed, through the Rule 3.3 notices, in what respect the evidence of Booysen, McBride and that of Seseko implicate me. The notices further informed me that I may attend the proceedings and that in so doing, I may be assisted by a legal representative when Booysen, McBride and Seseko give evidence.

54. I was further notified, that in terms of Rules 3.3.6.1 to 3.3.6.3 should I wish, I may give evidence or call any witness to give evidence in support of my case, or even cross-examine Booysen, McBride and Seseko.

55. Furthermore, in the event I choose to invoke the provisions of Rules 3.3.6.1 to 3.3.6.3 above, I should bring an application within 14 calendar days in writing to the Commission for leave to do so. In terms of Rule 3.4, an application in terms of Rule 3.3.6 must be accompanied by a statement from me in response to the allegations made by Booysen, McBride and Seseko against me.

G. RULE 3.4 STATEMENT

56. To demonstrate that the allegations levelled against me have no merit, it is necessary that I deal with the evidence as set out in the affidavits of Booysen, McBride and Seseko and, to the extent necessary, their oral evidence before the Commission. To the extent I do not deal with each averment contained in the affidavits or oral testimony, such failure should not be construed as an admission thereof.

H. CATO MANOR SVC SECTION INVESTIGATION AND PROSECUTION INCLUDING PROSECUTION OF BOOYSEN AND MEMBERS OF THE CATO MANOR SVC SECTION

(a) Background

57. Early March 2012, Adv KMA Chauke ("*Chauke*") the DPP of Gauteng Local Division asked me to be one of the prosecutors who were to form a team which was to guide IPID and DPCI investigators in the investigation relating to various murder dockets where members of the public were killed by police officers based at the Cato Manor Section of the Durban Organised Crime Unit, as well as to conduct prosecutions, should it be necessary (*"the prosecution team"*).

58. As advised by Chauke, the reason for forming a team of prosecutors from outside KZN was that the implicated police members had close working relationship with the prosecutors based in KZN.

59. The prosecution team consisted of:

59.1. Adv G S Maema, DDP North West Division (team leader);

59.2. Myself, DDPP South Gauteng Division (co-team leader);

59.3. Adv M Ntlakaza, Senior State Advocate based at South Gauteng Division ("Ntlakaza");

59.4. Adv J J Mlotshwa, Senior State Advocate based at South Gauteng Division ("Mlotshwa");

59.5. Adv P Futshane, Senior State Advocate based at South Gauteng Division ("Futshane") and

59.6. Adv P Moleko, Senior State Advocate, based at South Gauteng Division ("Moleko").

60. After its formation, a briefing session was held on 9 March 2012 where Chauke introduced the prosecution team to Adv N Jiba, the Acting National Director of Public Prosecutions ("ANDPP"/"Jiba"). In the briefing session we were informed that there were several murder dockets emanating from KwaZulu-Natal in which the suspects were police officers. The prosecution team was also informed that the cases were investigated by a team made up of members of both the Directorate for Priority Crime Investigation ("DPCI") and the Independent Police Investigative Directorate ("IPID") (collectively "the investigation team").

61. ANDPP and Chauke neither mentioned any corruption cases which were investigated by the suspects, nor did they exhibit any ulterior motive for assigning us to look at the murder dockets.

62. I attended the first meeting with the investigating team in Durban, the investigation team gave the prosecutors more than fifty (50) dockets for perusal, guidance and decision. From the dockets, the prosecution team identified twenty-three (23) murder dockets with twenty-eight (28) deceased, in which the police officers' killings were unjustified.

63. We directed the investigation team to obtain further evidence, trace the witnesses and call for ballistic crime scene reconstruction reports.

64. It was established that the offences were committed by members of the Durban Organised Crime Unit, Cato Manor Section. According to the organogram of the KZN Provincial Organised Crime Unit, the Durban Organised Crime Unit was under the command of Senior Superintendent Aiyer ("*Aiyer*"). A copy of the organogram of the KZN Provincial Organised Crime Unit is attached as annexure "**CM1**".

65. However, when approached by the investigation team to make a statement, Aiyer made a statement and explained that the Provincial Commander, Booysen side-lined him in the management of the Cato Manor SVC Section and liaised directly with the section commander. Aiyer contended that he was not involved in the operations of the Cato Manor SVC Section of the Durban Organised Crime Unit. A copy of Aiyer's statement dated 4 August 2012 is attached as annexure "**CM2**".

66. The prosecution team also held a consultation with Aiyer and he gave us additional information, effectively confirming his exclusion in the activities of the Cato Manor SVC Section of the Durban Organised Crime Unit, which additional information was later given in a form of a statement. A copy of this statement dated 31 August 2012 is also attached as annexure "**CM3**".

67. The investigation revealed that there was a feud between the Stanger Taxi Association ("STA") and the KwaMaphumulo Taxi Association ("KTA"), which feud was investigated by Superintendent Chonco ("Chonco"), a member of

the Taxi Violence Task Team. Chonco was killed in an ambush on 27 August 2008.

68. Thereafter, members of the Cato Manor SVC Section began to kill those who they suspected of Chonco's murder and killed six (6) people from 3 September to 18 October 2008. Five of the deceased were members of KTA and one was a bodyguard.

69. Although Chauke was the coordinator of the prosecution team, I met with Mlotshwa, the KwaZulu-Natal Acting Director of Public Prosecutions on the first visit and apprised him of the purpose and nature of our assignment in KwaZulu-Natal.

70. Throughout the period we were engaged in the assignment referred to above, we were regularly briefing Chauke on progress in our task, and he in turn would brief the ANDPP. At times, Chauke would arrange briefing sessions with the ANDPP where we would do the briefing to the ANDPP directly.

71. Having considered all the evidence that was uncovered during the investigation, we formed a view that the suspects committed the offences, and had done so in a planned, ongoing and repeating similar pattern. We thus recommended to the KwaZulu-Natal ADPP that the suspects, being members of the Cato Manor SVC Section and Booysen, ought to be prosecuted for committing offences in terms section 2(1)(e) and 2(1)(f) of POCA. Accordingly, the KZN ADPP, who at the time was Adv M Nako

("*Noko*"), made an application to the ANDPP, for authorization of racketeering charges against the suspects.

(b) **Overview**

72. On 11 December 2011 there were media reports, *inter alia* in the Sunday Times, about the killings that were alleged to have been perpetrated by members of the Cato Manor SVC Section. These media reports were severely criticised by those implicated and later on their supporters and various Non-Governmental Organisations ("NGO") to the extent that the media house that published the stories later on retracted same.

73. When all those media reports and criticism dominated the public discourse members of the prosecution team and I, in accordance with our ethics, code of conduct and the NPA Act could not make our inputs to set the record straight and inform the public what the correct position was at least in so far as the prosecution team was concerned.

74. In this affidavit I will demonstrate what the prosecution of Cato Manor SVC Section was all about. In a nutshell it is about the following:

74.1. After the killing of Choncho, the Cato Manor SVC Section went on a killing spree of both suspects in Choncho's killing and suspects in other criminal activity such as ATM bombings. Most disturbingly, in this killing spree innocent persons, including a teenager, was killed;

74.2. When the killings were reported in the Sunday Times, members of IPID and the DPCI were tasked to investigate the allegations that

members of the Cato Manor SVC Section were unlawfully killing suspects and or innocent persons;

74.3. Due to the complexity of the matter, such as the need to procure ballistic crime scene reconstruction, and the high-ranking officials implicated, the IPID sought the NPA's assistance to guide the investigation;

74.4. A prosecution team was appointed to peruse more than fifty (50) murder dockets to determine whether any of the killings were justifiable;

74.5. The prosecution team identified approximately twenty-three (23) dockets where approximately twenty-eight (28) deceased, in which the killings executed by members of the Cato Manor SVC Section were unjustified and contrary to the provisions of section 49(2) of the Criminal Procedure Act, 51 of 1977 (CPA) and the relevant portions of the Standing Order (General) 251 Part III Police Duties, Duties of the Relief and Use of Arms;

74.6. The killings were unjustified because the ballistic crime scene reconstruction found that in some cases the deceased were shot in supine positions or in instances where they did not pose danger to the police officers and or an instance where a fire-arm alleged to have been in possession of the deceased could not discharge;

74.7. In some dockets, witnesses gave statements to the effect that the deceased were unarmed and did not pose any danger to the police officers when they were killed.

75. Section 49(2)(a) and (b) of the CPA provides as follows:

> *"(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-*
>
> *(a) the suspect poses a threat of serious violence to the arrestor or any other person; or*
>
> *(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later."* (my emphasis)

75.1. It was, and it still is, the view of the prosecution team that, based on the objective evidence, the conduct of members of Cato Manor SVC Section was not justified as such conduct did not fall within the parameters of Section 49(2)(a) and (b) of the CPA.

75.2. All the deceased were shot either on the chest or the head. Some of the deceased sustained bullet injuries on the hands which is an indication that they were trying to ward off the bullets;

75.3. Having identified the killings as unjustified, the evidence further pointed to a peculiar repeated pattern of killing, namely shooting the victims and thereafter placing a fire-arm next to the deceased, which the prosecution team considered to be the *modus operandi* of the Cato Manor SVC Section;

75.4. The prosecution team considered this *modus operandi* and was satisfied that the requirements of racketeering, as envisaged in the POCA, were met;

75.5. As a result of the evidence procured through the prosecution guided investigation conducted by IPID and the DPCI, the prosecution team was duty bound, after preparing the indictment, to seek a POCA authorisation from the then ANDPP in order to enable them to prosecute not only the "foot soldiers" but also those responsible for the management and control of the enterprise;

75.6. The indictment and POCA authorisations were vociferously opposed in a review applications and other legal stratagem, which culminated in the judgment of Gorven J;

75.7. These legal battles to resist the commencement of the criminal trial bore fruit when the incumbent NDPP irrationally withdrew the POCA authorisations issued by Abrahams and Jiba, her predecessors, without consulting and soliciting the views of the prosecution team, as well as the withdrawal of the predicate offences by the KwaZulu-Natal DPP. I am unaware whether Abrahams and Jiba were consulted before such withdrawal. I am aware of instances where previous NDPPs were invited to comment on their decisions whilst they were in office, by the NPA, after they left office.

76. To further demonstrate that all the killings were unjustified, the Commission is referred to the relevant section set out below, which clearly, and in detail, analyse the *modus operandi* of the suspects.

77. Standing Order (General) 251 provides:

"251.4. *As a member is often required to act on his own initiative, it is essential that all members have a thorough knowledge of the circumstances under which fire-arms may legally be used.*

251.5. *Members may be justified in using their fire-arms under the following circumstances:*

251.5.3. *to defend themselves or any other person or persons from death or serious injury if attacked,;*

251.5.4. *when other means are ineffectual, to effect the arrest or to prevent the escape of a prisoner convicted of a serious crime or of a person who has committed or is suspected of having committed an offence included in Schedule 1 to Act No 51 of 1977. [In this connection attention is especially drawn to the provisions of Section 49(2) of Act No 51 of 1977.]*

251.6.1. *It must constantly be borne in mind that, however justified a member may consider himself to be in shooting, whether or not the results are accompanied by the loss of life, this act with all its accompanying circumstances will have to be subjected to an investigation. A member who is placed in such circumstances, shall have to prove that he acted with all reasonable care and without recklessness or negligence, but that he was compelled by circumstances to make use of his fire-arm and that the degree of force and the nature of the weapon used, were not out of proportion to the circumstances necessitating the use of it.*

251.15.5.2. *The member(s) who acted as marksmen (-men)*

251.15.5.2.1. *Full particulars of the member(s), including the station to which attached, capacity in which appointed [permanent, reserve or reservist], sex, age and years of service.*

251.15.5.2.2. *Whether the member was on duty or had placed himself on duty.*

251.15.5.2.3. *Whether he had acted on his own initiative or had reacted to an order.*

251.15.5.2.4. *Whether he had given a verbal warning before firing.*

251.15.5.2.5. *Whether he fired any warning shots, and if so, the number of shots fired.*

251.15.5.2.6. *Whether he attempted to hit the target with the minimum of violence, eg did he aim at the victim's legs, the vehicle's tires, or whatever the case may be.* (my emphasis)

251.15.5.2.7. *Number of rounds fired [excluding warning shots].*

251.15.5.2.8. *Whether his actions were legal, or not. [If doubtful, this should be specifically mentioned.]*

251.15.5.2.9. *If the incident is being investigated, the CR or Inquest reference number must be furnished.*

251.15.5.2.10. *Whether or not a member has been suspended.*

251.15.5.3. *The fire-arm(s) concerned*

251.15.5.3.1. *The type of fire-arm, stating the calibre and whether it was an official or a fire-arm belong to the member.*

251.15.5.3.2. *Mechanical condition of the fire-arm.*

251.15.5.3.3. *The number of rounds issued when reporting for duty. [If less than the capacity of the relative weapon, the reason therefor must be recorded.]*

251.15.5.3.4. *The number of shells found at the scene.*

251.15.5.4. *Target/victim*

251.15.5.4.1. *Nature and number of the target(s)/victim(s), eg, brick building, motor vehicle, person, or whatever the case may be.*

251.15.5.4.2. *Whether or not it was the original target(s)/victim(s) fired at. [If not, the relationship between the target(s)/victim(s) and the incident, eg an innocent pedestrian, part of the mob, or whatever the case may be.]*

251.15.5.4.3. *Whether or not the target(s)/victim(s) was hit, and if so, a full description of the position, eg left thigh, from the front/back/side, etc.*

251.15.5.4.4. *Surname and initials of each victim, stating the race, sex and age.*

251.15.5.4.5. *Condition of the victim/target after the incident.*

251.15.5.4.6. *Whether the victim/target was implicated in, or was sought for, any crime, other than that from which the incident arose, reporting full particulars.*

251.15.5.5. *Arrest(s) resulting from the incident Number of arrests, stating race and age.*

251.15.5.6. *The date and time at which an officer [or other member] arrived at the scene, as well as his name. [Should an officer not have visited the scene, the reasons for this must be stated.]*

251.15.6. *Should the member who fired the shot prefer to remain silent, the information as required in paragraph 15.5 must be obtained by means of witnesses and from own observations. The Commander [or other senior member] shall specify in his report the manner by which he obtained the information and, if a witness is not available, the fact that his report is based on presumptions.*

251.15.7. *If a member who was involved in a shooting incident, shows signs of shock, he must be given the necessary support, but without detracting from the applicable legal aspects.*

251.15.8. *The District Commissioner in whose District the shooting occurred, may order any officer*

under his command further to investigate the incident. If the shooting gives rise to the investigation of a case docket for an alleged crime against the member(s) concerned, the directions in SO 107(6)(c) must not be lost sight of.

251.15.9. *As other provisions apply in the case where fire-arms were used in the combating or suppression of riots, such an occurrence must not be treated in accordance with these provisions. If, however, a criminal investigation or an inquest follows as a result of a shooting incident during riots, the provisions in SO 107 and 110 must not be lost sight of.*

251.16. *If a member has handled a fire-arm recklessly or negligently, or if he was not justified in discharging it or to order it to be discharged, the designated officer shall, after the conclusion of any criminal and/or disciplinary action, give serious consideration to the question as to whether a board of inquiry should not be convened in terms of Regulation 64.*

251.17. *Since all members have been adequately trained in the handling of fire-arms, it is the bounden duty of every member, irrespective of rank, who has the good name of the Force at heart, to be safety conscious and to use fire-arms with the greatest care, prudence and competence."*

78. I attach hereto a copy of the Standing Order 251, marked as annexure "CM4.1".

79. The prosecution team's view was that a reasonable commander in the position of Booysen would have investigated the circumstances under which the killings occurred, if regard is to be had to:

79.1. the number of killings that took place from 2008 to 2011;

79.2. the manner in which the killings were committed, namely some of the victims were shot at close range in the upper body, the victims were either seated or in a supine position when shot, and many of the victims had gunshot wounds to the hands, indicating that they were trying to ward off the bullets; and

79.3. the circumstances in which the killings were committed, namely that all victims were alleged to have been in possession of firearms and/or attempted to shoot at police and/or posed danger to the police, whereas there was not a single incident where a member of

the Cato Manor SVC Section was killed and/or injured nor was there an incident where police property such as motor vehicles, were shot at or damaged.

80. Booysen ought to have suspected that something was amiss and ought to have directed that an investigation be conducted into the killings. It is on this basis, as well as Booysen's active command of the Cato Manor SVC Section, that the prosecution team was and still is of the view that Booysen managed, participated, knew or ought to have known of the commissions of the crimes as envisaged in Section 2(1)(e) and (f) of POCA.

(a) <u>Relevant legislation</u>

81. The Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA) provides as follows:

81.1. In Section 1 under the definitions, "enterprise" is defined as follows: -

> *"includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity"*

81.2. Section 2 provides:

> ***"2 Offences***
>
> *(1) Any person who-*

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c) (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise;

And

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

Or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence.

(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

(3) For purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsection (1), it shall be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other official having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other official or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such trial, and such copy shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded.

(4) A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director."

82. Section 78 provides:

"78. Liability

Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal capacity, be liable for anything done in good faith under this Act."

(d) **Bases for recommending prosecution against Booysen and members of the Cato Manor Section of Durban Organised Crime Unit**

83. I wish to indicate that I am neither appealing nor criticising the Gorven judgment. However, it is critical to state that from a careful reading and analysis of the judgment, some important annexures are not addressed in the judgment, namely, Annexures "NJ1" and "NJ6" to the Answering Affidavit deposed to by Jiba in the review application that was launched by Booysen. Annexure "NJ1" dated 14 October 2008, is attached hereto, marked as annexure "CM4.2". Annexure NJ6 is attached hereto, marked as annexure "CM6".

84. Annexure "CM4.2" is the motivation for the awards, including the monetary and non-monetary awards. In the summary of events, the following is set out:

"Summary of events

On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert

that he had information pertaining to the suspect that had organised the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.

On Tuesday 2006/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 09H30, the investigation team still consisting of the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route on the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the investigation team, the occupants being two person, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted of Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva who followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull

over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Magojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his bodyguard. The following firearm were found in the vehicle; one AK47 Rifle with loaded magazine, one Ruger Mini 14 Automatic Rifle and two magazines as well as two 9mm Norinco Pistols, both with loaded magazines.

The following cases were opened:

Howick CAS 106/08/08: Attempted Murder and possession of unlicensed firearms

Howick CAS 107/08/08: Inquest

The above members returned to the office and continued to gather further information."

85. In relation to Howick CAS 106/08/2008, which was investigated by Mr Moelapoa, a member of IPID, Booysen and Olivier arrived at the scene in a

helicopter and congratulated the members for work well done. Booysen played a key role in tracking and tracing Magojela which tracing led to his murder by the members of the Cato Manor SVC Section along N3 towards Howick. Booysen managed to track Magojela through an informer. This evidence is also confirmed in the motivation for awards, amongst others, in favour of Booysen and members of Cato Manor SVC Section.

86. Annexure "CM5" is an affidavit deposed to by Booysen in the matter of **Bongani Elphas Mkhize v Minister of Safety and Security: South Africa and Others**[2]. From a careful perusal, consideration and analysis of the content of the annexure, the only plausible inference is that Booysen was, or should have been aware of the unlawful conduct of members of the police, also taking into account that he was the Provincial Commander of Organised Crime for the Province of KwaZulu-Natal.

87. It is clear that, in the opposing affidavit, it is not Booysen's case that the entire content of the information as set out in the affidavit was gained from other members of the Cato Manor Police unit. It is also clear that the facts which Booysen relies on in the affidavit, are within his personal knowledge and belief, alternatively have been obtained by him from files and documents under or in the control of the South African Police Service.

88. In the Mkhize matter, despite opposition, the police were interdicted from unlawfully killing Mkhize. However, Mkhize was murdered by the very same Cato Manor SVC Section under the command of Booysen. It is my

[2] Case Number 13759/2008, High Court of South Africa, Durban & Coast Local Division, Durban

submission that the two annexures referred to above, clearly demonstrate that Booysen was aware or ought to reasonably have been aware, of the unlawful and criminal conduct that was perpetrated by members of the Cato Manor SVC Section.

89. In addition to the above, the following evidence, which was in the dockets, was relied on when the decision to prosecute Booysen and the members of the Cato Manor SVC Section was taken:

89.1. Statements of Mr Bhekinkosi Mthiyane "Diondlo" ("*Mthiyane*") and Alyer respectively dated 31 July 2012 and 4 August 2012. Copies of the above statements are attached as annexures "CM6" and "CM2" respectively. Mthiyane's evidence is that there was an arrangement between members of the Cato Manor SVC Section and the STA in terms of which the members of the Cato Manor SVC Section would kill members of the KTA and get paid for it by STA. On the other hand, Alyer in his statement confirms that the members of the Cato Manor SVC Section acted under the command of Booysen all the time at the relevant time.

89.2. Statement of Mr Bongani Mandla Mkhize dated 1 August 2012 whose evidence corroborates that of Mthiyane. The gist of his evidence is that there was an arrangement between members of the Cato Manor SVC Section and the STA in terms of which the members of the Cato Manor SVC Section would kill members of the KwaMaphumulo Taxi Association and get paid for it by STA. A copy

of the statement of Mr Bongani Mandla Mkhize is attached as annexure "CM7".

89.3. Statement of Mr Nkosinathi Shozi ("*Shozi*"). He is an attorney who represented KTA since 2003. In 2007 to 2008 he was approached by Bongani Mkhize (Chairman) and Bhengu (Treasurer) to assist KTA to communicate with the South African Police Service (SAPS) with a view to prevent the ongoing killings after the death of Lindelani Buthelezi ("Buthelezi") on 3 September 2008. His instructions were to tell the police that if there was any member of the association being sought for any criminal matter, including the investigation of Chonco they were prepared to hand the member over so that the law could take its course. He was never told by the police or Booysen when his clients, being members of KTA were sought. A copy of the statement of Shozi is attached as annexure "CM8".

89.4. When analysing modus operandi of the suspects the following was established:

89.4.1. <u>Counts 3 to 7: KwaDukuza CAS 39/09/2008 Lindelani Buthelezi</u>

89.4.1.1. On 3 September 2008, the deceased was found with gunshot wounds in the bedroom at the house that he was renting.

89.4.1.2. The deceased was a member of KTA and suspected of being involved in the killing of Choncho.

89.4.1.3. The police came to the house during the early hours of the morning and broke open the door. They found the deceased in the bedroom with his girlfriend, Thandeka Sokhulu.

89.4.1.4. According to Thandeka, as the police entered the bedroom, the deceased raised his hands in the air as a sign of surrender, and he was not armed.

89.4.1.5. The police took the deceased into another room.

89.4.1.6. Thandeka alleged that she was assaulted with open hands and kicked, and they covered her head with a blanket. She then heard gunshots from the room the deceased was taken into.

89.4.1.7. The police had the deceased under their control from the moment the police entered the bedroom and the deceased raised his

hands in surrender. The allegation that the deceased posed a threat to the police is improbable.

89.4.1.8. The deceased was shot in the head and in the chest. A firearm was placed next to the body on the floor.

89.4.1.9. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.1.10. I attach hereto photos of the scene, marked as annexures "CJ89.1" to "CJ89.7".

89.4.2. Counts 8 to 12: Howick CAS 106/09/2008 Mbongiseni Timson Ndimande and Sibusiso Thokozani Tembe

89.4.2.1. On 16 September 2008, the deceased were found in a Hyundai Tucson vehicle on the N3 Highway in the direction of Howick from Pietermaritzburg. Ndimande was found seated in the driver's seat, slumped over onto the passenger seat with a gunshot wound to the head and several gunshot wounds to the chest. Tembe was found on

the road surface on the left side of the vehicle with a gunshot wound to the head and severe scrape marks on his arm and hands.

89.4.2.2. Ndimande was the Vice-Chairperson of the KTA and Tembe was his bodyguard, in the employment of a security company, Taxi Violence VIP Protection Unit. Tembe was issued with a 9mm Parabellum Pistol and a Ruger 14 rifle by his employer.

89.4.2.3. Several weeks before the shooting, the owner of Taxi Violence VIP Protection Unit, Warren Julie, was approached and was told to remove his employees that were rendering protection services to the executive of KTA or risk that his employees will be killed by the police. He refused and continued to render protection services to the executive of KTA.

89.4.2.4. Two weeks before the day of the shooting incident, the deceased were arrested by SAPS, Mthunzini and taken to Cato Manor SVC Section's premises, as they were

suspects in the killing of Chonco. The Cato Manor SVC Section indicated to SAPS, Mthunzini that the deceased were not suspects and that they should be released, which they were.

89.4.2.5. On that day, the deceased pleaded with SAPS, Mthunzini to take them back to where they were arrested as they feared that Cato Manor SVC Section will murder them.

89.4.2.6. On 16 September 2008, the deceased were on their way to the Free State where they were hiding out from the Cato Manor SVC Section after collecting the monthly taxi takings in KwaZulu Natal. They have just left Pietermaritzburg and were travelling on the N3 Highway.

89.4.2.7. Mostert (Accused 4), Eva (Accused 6), Makhaya (Accused 8), Lockem (Accused 15) and Van Tonder (Accused 16) followed the deceased after receiving information from Booysen that the deceased were travelling in the Hyundai Tucson. They were travelling in two vehicles. It is clear from the

motivation for the monetary award ("CM4" hereto) that Booysen actively managed and directed the operation that led to the murder of the deceased, even though he was not present at the time of the shooting.

89.4.2.8. The two vehicles pulled up next to the Hyundai Tucson. The police opened fire on the deceased's vehicle and shot the deceased. The deceased's vehicle veered off the highway and came to a standstill at the side of the road. Whilst the deceased's vehicle was moving, Tembe fell out of the vehicle, his foot got stuck in the vehicle and he was dragged for approximately 20 meters. From the scrape marks on Tembe's body, it is clear that Tembe was already shot before he was dragged by the vehicle.

89.4.2.9. The police alleged that Tembe leaned out of the left rear passenger door of the vehicle and shot at them with an AK47.

89.4.2.10. When the vehicles came to a standstill, Mostert approached the Tucson, opened the driver's door and fired further shots at

Ndimande, who slumped over onto the front passenger seat.

89.4.2.11. Apart from the 9mm Parabellum Pistol and the Ruger 14 rifle that was issued to Tembe by his employer, a Norinco pistol and an AK47 assault rifle were placed on the scene.

89.4.2.12. The Norinco pistol was found on the front passenger seat behind Ndimande's head. The AK47 rifle was found on the back seat. The Ruger 14 rifle was found in the boot of the vehicle and the 9mm Parabellum pistol was found next to Tembe's body.

89.4.2.13. Herman Thiart, an employee of Taxi Violence VIP Protection Unit, Tembe's employer, attended at the scene and viewed Tembe's body. He also inspected the deceased's vehicle and noticed that all the bullet holes were from shots fired from outside the vehicle and there were no shots fired from inside the vehicle. He further noticed that there were no bullet holes on any of the police vehicles.

89.4.2.14. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated Norinco pistol and AK47 rifle were planted.

89.4.2.15. Booysen (Accused 1) and Olivier (Accused 9) arrived at the scene by helicopter and congratulated Mostert and the other members.

89.4.2.16. I attach hereto photos of the scene, marked as annexures "CM10.1" to "CM10.5".

89.4.2.17 I attach hereto a statement from Warren Julie, marked as annexure "CM11.1" and a statement from Herman Thiart marked as annexure "CM11.2".

89.4.3. <u>Counts 13 to 16: Mandini CAS 76/09/2009 Nzamani Ntuli (Kapolota) and Nkosinathi Mthembu</u>

89.4.3.1. On 18 September 2008, the deceased were found lying in a house at Mandini after being shot at by the accused;

89.4.3.2. It is alleged that Stoltz (Accused 3) and Mostert (Accused 4) discharged their firearms in self-defence against the purported attack with firearms, launched by the deceased;

89.4.3.3. The ballistic reconstruction indicates that they were shot whilst lying down, the firearms that were found placed close to their bodies could not match the cartridges on the scene;

89.4.3.4. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

89.4.3.5. The two deceased were members of KTA.

89.4.3.6. I attach the forensic statement of Jacobus Steyl ("Steyl"), marked as annexure "CM12".

89.4.4. <u>Count 19: Umkomaas CAS 235/10/2008 Mduduzi Mkhize</u>

89.4.4.1. On 18 October 2008, the deceased was found slumped with his body halfway out of

the vehicle in the backseat of a Mazda Etude vehicle on the N2 freeway in the direction of KwaMakhutha and the deceased was handcuffed.

89.4.4.2. The deceased was arrested in Pietermaritzburg on the day of the shooting on suspicion of involvement in the killing of Chonoho. The deceased was being transported by Nkabane (Accused 17) and Crouse (Accused 18) to Scottburgh where the deceased indicated his willingness to point out another suspect, Nathi Khumalo.

89.4.4.3. Before the vehicle left Pietermaritzburg, the deceased, who had his hands cuffed behind his back, requested that his hands be cuffed in the front as it would be uncomfortable to sit in the vehicle with his hands cuffed behind his back. Crouse acquiesced to his request.

89.4.4.4. When the vehicle left, Crouse was driving, Nkabane was seated in the front passenger seat and the deceased was seated in the back seat.

89.4.4.5. The police alleged that, whilst on route, the deceased attempted to strangle Crouse with the handcuffs by putting the handcuffs over Crouse's head from the back and pulling him against the seat with the cuffs on his throat and that the deceased tried to disarm Crouse. Nkabane then shot the deceased in the face from the side. The photos depict that he was shot whilst handcuffed.

89.4.4.6. The deceased was a member of KTA.

89.4.4.7. I attach hereto photos of the scene, marked as annexures "CM13.1" to "CM13.3".

89.4.5. <u>Counts 20 to 24: Durban Central CAS 185/02/2009 Bongani Mkhize</u>

89.4.5.1. On 3 February 2009, the deceased was found lying in the driver's seat of his black Lexus car. The Commission is referred to 5 photos from the photo album of the scene of the shooting, which prove the following:

89.4.5.1.1. Photo 1 shows:

- The position of the deceased with his hands folded;
- Glass shards which indicated that the windows of the car were closed at the time he was shot at and that the shot came from the right hand side of the car from outside;

89.4.5.1.2. Photo 2 shows:

- Amongst others, a firearm on the front left hand side;
- Spent cartridges;
- Glass shards on the seat and on the floor;
- According to ballistic crime scene reconstruction report, the spent cartridges were not fired from the firearm found in the vehicle as stated above;

- The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted;

89.4.5.1.3. Photos 3 and 5 shows that some shots were fired from the back of the vehicle through the back window into the neck of the deceased.

89.4.5.1.4. Photos 4 and 5 shows that both right hand side windows of the vehicle were closed at the time it was struck.

89.4.5.2. He was a member and the Chairperson of KTA.

89.4.5.3. According to Sergeant Tlakharae, the ballistic expert, all shots were fired from outside to the inside of the vehicle. The accused Diamuka, Mfene, Padayachee,

Rakesh Maharaj and Stoltz state that the deceased fired shots in their direction and they returned fire wounding the deceased. Sergeant Tlakharee's ballistic finding that all cartridge cases collected from the scene, including the two found inside the vehicle of the deceased, were not linked to the firearm found in the vehicle of the deceased. It is thus clear that this firearm depicted on photos 14 and 15 of Captain Mangena's statement was placed in the vehicle after the shooting to create the impression that Mkhize used it and tried to place the police's life in danger. Copies of statements of Sergeant Tlakharee and that of Captain Mangena are attached as annexures "CM14" and "CM15" respectively.

89.4.5.4. This deceased obtained an interdict against the Police from murdering him, as more fully dealt with elsewhere in this statement. Furthermore, the deceased was the target on whose head STA was to pay R1 million as per Ndlondlo's statement.

89.4.5.5. I attach hereto the photos, marked as annexures "CM16.1" to "CM16.5".

89.4.6. Counts 25 – 30: Pinetown CAS 1000/05/2009 Sibongiseni Bachumile Ndimande

89.4.6.1. On 23 May 2009, the deceased was found in his house in the bedroom slumped against the bed, on the right-hand side of the bed, with gunshot wounds to his face and body.

89.4.6.2. The police were searching for suspects who were allegedly involved in the killing of Nkosi Zondi. The police came to the deceased's house at New Germany. The deceased, whilst sleeping in the bedroom with his wife, was woken up by noises caused by the police's attempts to open the main door of the house.

89.4.6.3. According to the deceased's wife, Nokuphiwa Zanele Madaba, she handed their baby that was in the bed with her and the deceased, to the deceased and proceeded towards the main door of the house. As she opened the door, the police burst into the house. At that time, the

deceased approached the door from the direction of the bedroom, holding the baby against his bare chest.

89.4.6.4. The police instructed the deceased to hand the baby to Nokuphiwa and Olivier (Accused 9) shoved Nokuphiwa and the baby through the main door outside, whilst the other police officers took the deceased into the bedroom. As Nokuphiwa was in the doorway, she heard gunshots from the bedroom.

89.4.6.5. The police alleged that the deceased was reaching for a firearm and they opened fire on the deceased. Padiyachee (Accused 2) fired two shots with an R5 rifle, Stoltz (Accused 3) fired shots with a Z88 pistol and Van Tonder (Accused 16) fired shots with a 9 mm Beretta pistol.

89.4.6.6. The gunshot wounds on the deceased's arms indicate that the deceased raised his arms in a defensive manner in an attempt to block the bullets.

89.4.6.7. A firearm was placed on the foot of the bed. The ballistic crime scene reconstruction

report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.6.8. The deceased was a family member of Magojela Ndimande, the deceased in counts 8 to 12.

89.4.6.9. I attach hereto photos of the scene, marked as annexures "CM17.1" to "CM17.3".

89.4.6.10. I attach the statement of Nokuphiwa, marked as annexures "CM18.".

89.4.7 Counts 31 to 34: Rustenburg CAS 1098/09/2009 Siffso Ndimande

89.4.7.1. On 20 September 2009, the deceased was found in his house in the lounge with a gunshot wound next to his right eye.

89.4.7.2. The police suspected the deceased to be involved in the killing of Nkosi Zondi. The deceased was sleeping in the house where he was hiding from the Cato Manor SVC Section for fear of them murdering him.

89.4.7.3. The police took up various positions around the house. Padayachee (Accused 2) and Mostert (Accused 4) broke open the kitchen door, entered the premises and proceeded to the bedroom. On entering the bedroom, the police opened fire on the deceased, and alleged that the deceased pointed a firearm at them.

89.4.7.4. A firearm was found on the scene. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.7.5. The deceased was a family member of Magojela Ndimande, the deceased in counts 8 to 12.

89.4.7.6. I attach hereto photos of the scene, marked as annexures "CM19.1" to "CM19.7".

89.4.8. <u>Counts 35 to 38: Berea CAS 288/05/2008 Thabo Sunshine Maimane</u>

89.4.8.1. On 24 May 2008, the deceased was found on the ground in the parking area of the

block of flats where he resided. The deceased was shot several times.

89.4.8.2. The police came to the deceased's flat as he was the subject of an investigation. The police broke down the flat's door and entered the deceased's flat. The police alleges that the deceased turned and ran towards the window and shots were fired at him. The deceased then jumped out of the window of his flat on the fourth floor to the parking area below.

89.4.8.3. The police fired several shots at the deceased from the flat whilst the deceased was lying on the ground in the parking area. Further shots were fired at the deceased at closer range.

89.4.8.4. A firearm was placed next to the deceased's body on the ground. It is a physical impossibility for the firearm to be that close to the deceased's body if the firearm was in the deceased's hand when he impacted the ground, as he jumped from the fourth floor of the block of flats.

89.4.8.5. The ballistic crime scene reconstruction report dispel the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.8.6. I attach hereto photos of the scene, marked as annexures "CM20.1" to "CM20.4".

89.4.9. Counts 39 to 52: Melmoth CAS 142/11/2006 Bongani Velaphi Biyela ("Bongani") and Khayisani Biyela ("Khayisani")

89.4.9.1. On 23 November 2006, the deceased were found shot at their homestead in Melmoth. Bongani's naked body was found outside laying on top of a stone retaining wall with gunshot wounds. Khayisani's body was found lying on the floor of one of the rondavels with gunshot wounds.

89.4.9.2. Bongani was an accused in a matter in the Durban Magistrate's Court where he failed to appear in Court and a warrant of arrest was authorised but stayed against him. Before the return date of the warrant, a group of police proceeded to his homestead in

Melmoth and attacked the homestead during the night.

89.4.9.3. Bongani, who was sleeping with his wife, Bongokuhle Biyela, woke up and attempted to run away. He was naked. He was shot outside the rondavel and a firearm was placed next to his body. Bongokuhle stated that Bongani was naked, as depicted from the photo album and had no firearm in his possession.

89.4.9.4. Khayisani was shot inside the rondavel where he was sleeping. The police alleges that Khayisani shot at them through the rondavel window and one police officer returned fire whilst another kicked the door open and fired shots at Khayisani. A firearm was placed next to Khayisani's body.

89.4.9.5. The police also assaulted Bongokuhle and Richard Biyela, an older brother of Bongani.

89.4.9.6. Photo 1 depicts Bongani lying naked on top of the stone retaining wall with a firearm close to his left hand on the ground next to his body.

89.4.9.7. Photo 2 depicts Bonganí's body covered in a white sheet on top of the stone retaining wall.

89.4.9.8. Photo 3 is similar to photo 1.

89.4.9.9. Photo 4 depicts Bonganí's gunshot wound to the head.

89.4.9.10. Photo 5 depicts Khayisani's body on the floor of the rondavel with a firearm next to his body. The photo clearly shows that this firearm was placed on top of the dried blood.

89.4.9.11. Photo 6 depicts the gunshot wounds to Khayisani's body and the firearm which was placed on top of the dried blood. On the supposition that Khayisani was in possession of the firearm, the blood would have been on the firearm and/or the blood would have settled and/or circled around the firearm, being a heavy object.

89.4.9.12. Photo 7 depicts the gunshot wound to Khayisani's body.

89.4.9.13. Photos 8, 9 and 10 depicts how insensitive the police were after having killed Bongani and Khaylsani. They are shown to be celebrating their heinous conduct the morning after the killing in the presence of Bongokuhle, who was grieving for Bongani and Khaylsani, and who was forced to sit with the police.

89.4.9.14. Photo 9 depicts Mostert drinking a beer.

89.4.9.15. Photo 10 depicts Bongokuhle grieving whilst Accused 4 and 6 throws their hands up in the air in celebration, with Accused 7 looking on with a smile.

89.4.9.16. I attach hereto photos of the scene, marked as annexures "CM21.1" to "CM21.10".

89.4.9.17. These photos are the photos which were published in the Sunday Times on the 11th of December 2011, copies of which articles are attached hereto and marked as annexure "CM22.1", "CM22.2" and "CM22.3" respectively.

89.4.9.18. It is the publication of these photos that triggered the investigation against the members of the Cato Manor SVC Section.

89.4.9.19. I attach hereto the statement of Bongokuhle, marked as annexure "CI[illegible]".

89.4.9.20. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.10. Counts 53 to 57: Kwa-Mashu CAS 629/4/2009 Gladwell Thokazani Nkosha

89.4.10.1. On 27 April 2009 the deceased was found on the bed in his house. The deceased was shot in his bedroom.

89.4.10.2. The police violently knocked at the door and, after breaking down the door, stormed into the deceased's house. By then, all the family members in the house were up to see what was going on.

89.4.10.3. The deceased want to picked up his three year old son from the child's bedroom and

held his son against his chest. The police then instructed the deceased to hand the child to the deceased's elder son, Njabulo Njapha, who was 15 years old at the time. On the deceased handing over the child to his elder son, the police shoved the children out of the bedroom. Mostert (Accused 4) pulled the deceased's wife, Portia Njapha ("Portia"), from the bedroom.

89.4.10.4. If the intention of the police was to arrest the deceased, they should have done so as they had ample opportunity arrest him, as they had restrained him. This clearly demonstrates that there was premeditated intention to murder the deceased.

89.4.10.5. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.10.6. Thereafter the deceased was shot. Explosives were found in the room and a firearm was found next to the right hand of the deceased. According to Portia, the

deceased was left handed and had no firearm in his possession.

89.4.10.7. I attach hereto photos of the scene, marked as annexures "CM24.1" to "CM24.3".

89.4.10.8. I attach hereto the statements of Portia and Njabulo, marked as annexures "CM25" and "CM26" respectively.

89.4.11. Counts 58 to 61: Phoenix CAS 377/08/2009 Phillip Lindokuhle Nzuza

89.4.11.1. On 10 August 2009, the deceased was found shot dead in a Honda Ballade vehicle on Malandela Road in Phoenix.

89.4.11.2. The police were looking for the deceased in connection with armed robberies of which he was a suspect. The deceased was allegedly followed by the police and allegedly failed to heed several orders to stop the vehicle. The police fired shots at the deceased and killed him.

89.4.11.3. A silver BMW vehicle which was driven by the police, where Mostert (Accused 4) was

present, is depicted on the photos. It must be noted that in the taxi violence money collections, a silver BMW vehicle driven by Mostert, was mentioned.

89.4.11.4. A firearm was placed next to the deceased's body.

89.4.11.5. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.11.6. I attach hereto photos of the scene, marked as annexures "CM27.1" to "CM27.5".

89.4.12. Counts 62 to 65: Kwa-Mashu CAS 696/11/2009 Prince Sakhile Thabede (Mtako)

89.4.12.1. On 26 November 2009 the deceased was found lying on the bed in his house in the company of his girlfriend.

89.4.12.2. The police first secured two suspects who directed them to the deceased's house. The police were driving a Combi. On the identification of the house, the police

alighted and went into the house, and these suspects heard gunshots.

89.4.12.3. One police officer, Mostert (Accused 4), came back to the Combi to fetch his "Mbombay" (firearm). He reached under the driver's seat and took out one firearm from a bag of firearms and ran back into the house.

89.4.12.4. Adriaan Stoltz (Accused 3) said in his warning statement that the suspect drew a firearm and fired shots. Padayachee (Accused 2) says the suspect produced a firearm and pointed at them, that is when he decided to fire at the suspect. Sergeant Behari of the ballistic unit of the Forensic Science Laboratory found that the revolver was defective. Jacobus Steyl, a ballistic reconstructionist, states that the deceased was in a lying position with his head on the pillow when he was shot at. Copies of the statements of Sergeant Behari and that of Jacobus Steyl are attached as annexures "CM28" and "CM29" respectively.

89.4.12.5. I attach hereto a statement by Nqaba Mdlufi, a witness to the incident, marked as annexure "CM30".

89.4.12.6. The deceased's girlfriend, Denise Hurley ("Hurley"), who is a nurse, attempt to assist the deceased, but was prevented from doing so by the Accused. As she was pulled out of the room by the Accused, she saw a firearm being thrown onto the bed on the right side of the deceased's body. I attach hereto copies of Hurley's statement dated 3 December 2009, marked as annexure "CM31.1" and statement dated 22 March 2012, marked as "CM31.2".

89.4.12.7. The ballistic crime scene reconstruction report on the firearm found on the scene, established that the said firearm was defective and could not discharge ammunition.

89.4.12.8. There are two materially contradictory versions from police members who were on the scene. Padayachee (Accused 2), in his statement, attached hereto marked as

annexure "CM32", *inter alia*, states that the deceased pointed a fire arm at them, whilst Stoltz (Accused 3), in his statement, attached hereto marked as annexure "CM33" alleged that there was an exchange of firearm with the deceased, and consequently the deceased was fatally wounded. Both these versions cannot be true. It is not for the presiding officer to accept one of the versions above the other. These materially contradictory versions supports Hurley's version that the deceased did not have a firearm.

89.4.12.9. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.12.10. I attach hereto photos of the scene hereto, marked as annexures "CM34.1" to "CM34.9".

89.4.13. <u>Counts 66 – 69: Ekhawini CAS 3/4/2010 Kwazi Ndlovu 16 year old boy</u>

89.4.13.1. On 1 April 2010 at about 02:00 the deceased, a 16-year-old student, who had likely fallen asleep whilst watching television, was shot at whilst in a lying position on a couch with an R5 rifle, a 9mm Norinco Star pistol was placed under his left arm.

89.4.13.2. After the shooting incident, Mostert instructed the deceased's father, Sibusiso Wiseman Ndlovu ("Wiseman") to go and point out other suspects. On the way to where the pointing was supposed to be made, Mostert enquired from Wiseman as to who the person is that was sleeping in the tv room, referring to the deceased. Wiseman responded and said "that is my son" to which Mostert exclaimed and responded "Was it your son?". I attach hereto a copy of Wiseman's statement, marked as annexure "CM35".

89.4.13.3. All cartridges on the scene are 5.56mm compatible with an R5 assault rifle that was used by Padayachee (Accused 2). The 9mm Norinco Star pistol cannot be linked with any cartridges found on the scene.

89.4.13.4. The ballistic crime reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.13.5. Captain Mangena reconstructed the scene and confirmed after studying the post-mortem report, damages on the wall, the couch on which the deceased was lying and the wounds sustained, that the deceased was lying when shot at and posed no danger to the police. This firearm was clearly placed on the scene after the shooting.

89.4.13.6. This house belonged to Tlili's family, but at the time of this killing, it was rented by the deceased's family.

89.4.13.7. They murdered a wrong person as the police were looking for a prison escapee called Tlili, and were taken to this house by the informer. A copy of Captain Mangena's statement is attached as annexure "CM36".

89.4.13.8. I attach hereto photos of the deceased, marked as annexures "CM37.1" to "CM37.3".

89.4.14. Counts 70 to 79: Bheldihemba CAS 44/05/2010 Musawenkosi Aubrey Ngcobo, Xolisani Allen Ngcobo and Simphiwe Sydney Shozi

89.4.14.1. On 10 May 2010, the deceased were found dead at their homestead in their room on their beds with gunshots wounds. Firearms were found next to each body.

89.4.14.2. The police came to the deceased's homestead, looking for suspects likely involved in the killing of Capt Reddy during a hi-jacking incident. On enquiry by the police as to the whereabouts of the deceased, one of the family members pointed out the deceased's room.

89.4.14.3. According to the witness, Sibongiseni Ngcobo, the police broke down the door of the deceased's room, and immediately started firing on the deceased who were asleep on their beds.

89.4.14.4. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

89.4.14.5. I attach hereto photos of the scene, marked as annexures "CM38.1" to "CM38.4".

89.4.14.6. I attach hereto a statement of Sibongiseni, marked as annexure "CM39".

89.4.15. Count 60: Durban North CAS 67/07/2011 Jabulani Camson Bhengu

89.4.15.1. On 4 July 2011, the deceased was found with gunshots to the head next to a Golf GTI motor vehicle on the corner of Ypsallantr and AnnArbor Streets.

89.4.15.2. The police were following the deceased's vehicle as they allege that it fitted the description of the get away vehicle involved in a robbery of a doctor in Mount Edgecombe.

89.4.15.3. When the deceased saw the police, he stopped the vehicle and alighted from the vehicle. The police allege that the deceased brandished a firearm, which prompted Mostert (Accused 4) to fire shots at the deceased. After the deceased fell to the ground, Mostert fired further shots at the

deceased. Mostert remained on the scene until the paramedics arrived.

89.4.15.4. A firearm was placed on the ground near the body. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.15.5. According to the police, the crime scene in Counts 80, 81 and 82 was one moving crime scene, as they were pursuing the deceased under all three counts for the alleged robbery committed in Mount Edgecombe. The State evidence is that Mbonambi was in his house the whole day with his sons. Therefore, he could not have been on the said crime scene as alleged by the police.

89.4.15.6. Mgobhozi was called to Mbonambi's house where they had a discussion and, on Mgobhozi's departure, the police murdered Mgobhozi.

89.4.15.7. In this regard, Mbonambi, Mgobhozi and the deceased could not have been at the same

crime scene at Mount Edgecombe, as alleged by the police.

89.4.15.8. I attach hereto the photos, marked as annexures "CM40.1" to "CM40.2".

89.4.16. Count 81: Durban North CAS 69/07/2011 Dumisani Blessing Mqobhozi

89.4.16.1. On 4 July 2011, the deceased was found in the garage of Mbonambi, the deceased in Count 82.

89.4.16.2. The deceased visited Mbonambi and as he exited Mbonambi's house through the garage, the police stormed through the garage door that was opening and shot the deceased.

89.4.16.3. The ballistic reconstruction indicates that the deceased was shot whilst standing and again shot whilst lying on the ground.

89.4.16.4. One of Mbonambi's sons, Tshepiso Mbonambi, witnessed the shooting of the deceased and he alleges that, at the time the deceased was shot, he was speaking on

his cell phone and he had no firearm in his possession. Tshepiso was narrowly missed by the gun shots aimed at the deceased.

89.4.16.5. A firearm was placed next to the deceased's body.

89.4.16.6. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearms were planted.

89.4.16.7. I attach hereto the photos, marked as annexures "CM41.1" to "CM41.2".

89.4.16.8. I attach hereto the statement of Tshepiso, marked as annexure "CM42".

89.4.17. <u>Count 82: Durban North CAS 71/07/2011 Boyale Sibusiso Mbonambi</u>

89.4.17.1. On 4 July 2011 the deceased was found seated and shot dead in a closed dustbin.

89.4.17.2. Mgobhozi, the deceased in Count 81, visited the deceased. On Mgobhozi's departure, the police stormed into the deceased's garage and shot Mgobhozi. On hearing the

gunshots, the deceased ran out of the house away from the police and hid in a dustbin. The deceased opened and closed the dustbin's lid, which was seen by a witness, Goodness Soelbo ("Soelbo"), who drew the attention of the police to the deceased's hiding place.

89.4.17.3. The police shot at the deceased whilst the deceased was hiding in the dustbin. The police alleged that the deceased opened the lid of the dustbin and pointed a firearm at them, at which stage the police spontaneously reacted with an R5 rifle.

89.4.17.4. The photo album shows a firearm under the deceased's body in the dustbin. Having regard to the seated position the deceased was found in the dustbin, compared to the police's version that the deceased pointed the firearm at them, the firearm would not have been under the deceased's body.

89.4.17.5. The photo album indicated that at the time of the shooting, the dustbin lid was closed, demonstrating that the shooting must have

occurred through the closed lid of the dustbin.

89.4.17.6. The witness who pointed out the deceased's hiding place, saw the deceased climbing over the wall, dressed in shorts and a t-shirt and he had nothing in his possession.

89.4.17.7. The deceased's sons, Wandile and Tshepiso Mbonambi, aged 12 and 17 respectively, saw the deceased running from the house and he had nothing in his possession.

89.4.17.8. A firearm was placed underneath the deceased in the dustbin.

89.4.17.9. The above evidence of Wandile and Tshepiso dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.17.10. I attach hereto the photos, marked as annexures "CM43.1" to "CM43.2".

89.4.17.11. I attach hereto a statement of Soelbo, marked as annexure "CM44", a statement

of Wandile dated 28 October 2011, marked as annexure "CM45.1" and a statement dated 7 January 2012, marked as annexure "CM45.2" and a statement of Tshepiso, marked as annexure "CM42".

89.4.18. Counts 94 to 97: Esikhawini CAS 50/09/2011 Ginisani Philangenkosi Gwala

89.4.18.1. On 4 September 2011, the deceased was found in his house with gunshot wounds to his hand and his head.

89.4.18.2. The police went to the Mabuyeni Community Hall at Esikhawini where they took the deceased away to his home, under the impression that he was Phiani Ndlovu (Bha), despite the deceased and members of the community telling the police that the deceased was not Bha. The police refused to accept his identity.

89.4.18.3. The police took the deceased to his homestead and the deceased younger brother, Sandile Qaphalani Gwala ("Sandile"), followed him.

89.4.18.4. According to Sandile, when the deceased and the police arrived at the homestead, the deceased's hands were tied with cable ties. The deceased was taken into his house and Sandile was shoved into another house, where he was forced to lie down and his head was cover with a washing basin. Sandile heard gunshots from the deceased's house.

89.4.18.5. From the photo album no cable ties are seen, and the police allege that the deceased asked to be untied. The police further allege that the deceased reached for a firearm in the cupboard, as they were searching his room.

89.4.18.6. The allegation that the police was under attack from the deceased is improbable. According to the ballistic crime scene reconstruction report, the deceased was most probably in a seated position when these wounds were inflicted. The shooter could have stood in front of the deceased. The deceased, from a seated position, just fell back, as found.

89.4.18.7. The position of the deceased's body and the entry wound on his head indicates that that the deceased was facing the gunman and not facing the cupboard. According to the ballistic expert, the bullet first hit the deceased's palm of his hand and went through his hand into his head.

89.4.18.8. A firearm was placed on the ground next to the cupboard, near the deceased's body.

89.4.18.9. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.18.10. The police had control over the deceased since they took control of him at the Mabuyeni Community Hall.

89.4.18.11. I attach hereto the ballistic crime scene reconstruction report by Mangena, which includes photos, marked as annexure **"CM46"**.

89.4.18.12. I attach hereto the statement of Sandile, marked as annexure **"CM47"**.

89.4.18.13. It is clear that the deceased was in the custody of the police after being arrested at the Community Hall. There were more than four police officers present who could easily have subdued the deceased, if necessary. In fact, the deceased was already tied up with cable tie restraints when they entered the house.

89.4.18.14. Taking into account the findings of Mangena that, at the time that the deceased was shot, he was seated, facing the shooter, the version put by the police that the deceased was reacting for a firearm and resisting, is improbable.

89.4.18.15. The cable tie restraints were removed before the deceased were shot.

89.4.19. <u>Counts 98 to 101: Kwa-Mashu 116/8/2008 Mfanafuthi Armstrong Zwane</u>

89.4.19.1. On 31 July 2008, the deceased was found inside the yard of his home between his car and the boundary wall of his property, with his head resting against the rear tyre of his

car. He was shot in the chest and below the ear.

89.4.19.2. The police found the deceased sitting in his car with his girlfriend, Thandeka Pearl Mazibuko ("Mazibuko"), at his house in the yard and ordered them to get out of the car. The police separated the deceased from Mazibuko and pushed him towards the boundary wall of the property and shot and murdered him.

89.4.19.3. The deceased was not armed and had his arms raised when the police pushed him towards the wall. At the time that the deceased was shot, he was under the control of the police.

89.4.19.4. A firearm was placed next to the deceased's body.

89.4.19.5. I attach hereto the photos of the scene, marked as annexures "CM48.1" to "CM48.18".

89.4.19.6. I attach hereto the statement of Mazibuko, marked as annexure "CM49".

89.4.19.7. Mazibuko's version dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted and that the deceased was posing a danger to the police.

89.4.19.8. The police's version that the deceased was in possession of a firearm is also dispelled by the version of Mazibuko.

89.4.20. Counts 102 to 103: Estcourt CAS 34/08/2008 Muzi Sanele Maiola

89.4.20.1. On 6 August 2008, the deceased was found shot twice in the chest in the public restroom at Midway Caltex Garage in Estcourt.

89.4.20.2. The police were looking for the deceased and Mpanduto Mngomezulu as suspected escapees from Westville Prison.

89.4.20.3. The police arrested the deceased and Mngomezulu at Glencoe and transported them towards Durban. There were two separate cars with two policemen and a suspect in each car travelling in the convoy. They stopped at Midway Caltex Garage in

Estcourt for refuelling. The deceased asked to use the toilet and Naidoo (Accused 13) and Nel (Accused 5) took him to the toilet, where Naidoo uncuffed the handcuffs on one hand to enable him to use the facilities. The deceased was shot in the toilet.

89.4.20.4. Naidoo alleges that the deceased tried to grab his gun and he was forced to shoot the deceased.

89.4.20.5. After the deceased was murdered, Mostert (Accused 4) and Panday (Accused 30) brought Mngomezulu into the toilet to show him the deceased's body. After having sight of the body, Mngomezulu made a confession.

89.4.20.6. Naidoo's firearm was placed next to the deceased's body.

89.4.20.7. I attach hereto the statement of Mngomezulu, marked as annexure "CM50".

89.4.20.8. I attach hereto the photos of the scene, marked as annexures "CM51.1" to "CM51.8".

89.4.20.9. There is no independent evidence, such as fingerprints, to corroborate Naidoo's version. No reasons were advanced as to why fingerprints were not lifted from the firearm, which would either have supported or disproved the police's version.

89.4.20.10. Magistrate Geldenhuys, who presided in the inquest of Majola, found that Nel (Accused 5) was criminally responsible for the death of the deceased. It is clear that the De Kock panellists did not take into consideration such finding in their recommendation in the De Kock report and neither did the NDPP when the charges were withdrawn. I attach hereto the J56 form, marked as annexure "C[illegible]".

89.4.21. <u>Counts 104 to 108: Kwa-Mashu CAS 314/11/2008 Nhlanhla Nkuthu Masondo</u>

89.4.21.1. On 12 November 2008, the deceased was found shot in the back, lying on his side with his legs off the bed, in his bedroom.

89.4.21.2. The police entered the deceased's house, and took control of the deceased. The

police took the deceased to his bedroom and closed the bedroom door.

89.4.21.3. The deceased's mother, Jabulisiwe Gladys Masondo, pleaded with the police to enter into the bedroom with her son, but she was refused entry by the police. Jabulisiwe then heard gunshots and the deceased was shot.

89.4.21.4. A firearm was placed next to the deceased's body on the bed. The deceased was shot in the back.

89.4.21.5. Jabulisiwe's version dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.21.6. I attach hereto the photos, marked as annexures "CM53.1" to "CM53.2".

89.4.21.7. I attach hereto the statement of Jabulisiwe, marked as annexure "CM54".

89.4.22. Counts 109 to 112: Tongaat CAS 356/03/2009 Dan Chester Phiri

89.4.22.1. On 6 March 2010, the deceased was found shot at close range, seated in his car on Noordberg Road in Tongaat.

89.4.22.2. The deceased was driving on Noordberg Road in Tongaat on route to buy groceries at his friend's shop. He was accompanied by Sikhumbuzo Zakhele and Mandla Mavundla.

89.4.22.3. He was stopped by the police. The deceased and his passengers were ordered to get out of the car and to lie down next to the car. Zakhele and Mavundla immediately got out of the car and laid down next to the car. The deceased was a paraplegic and could not instantly comply with the police's instruction. Accused 5 approached the deceased at the driver's side of the car and shot the deceased, despite the fact that the deceased was crying and begging for his life.

89.4.22.4. The deceased was shot with a contact shot by Accused 5. A firearm was placed in the vehicle. This firearm matched the cartridges that were found at the scene.

89.4.22.5. It is established in the post mortem report that the deceased died as a result of a contact shot to the head whilst seated in the car. The burn marks around the entry wound and bullet shrapnel in the wound is evidence of the close contact. I attach hereto the post mortem report by Dr G Perumal, marked as annexure "CM55".

89.4.22.6. The ballistic crime scene reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted.

89.4.22.7. I attach hereto the photos, marked as annexures "CM56.1" to "CM56.12" respectively.

89.4.22.8. I attach hereto the statements of Mavundla dated 10 January 2021 marked as annexure "CM57" and 21 March 2021, marked as annexure "CM58" respectively.

89.4.23. Counts 113 to 116: KwaDukuza CAS 115/3/2010 Nhlanhla Lucky Mhlongo

89.4.23.1. On 6 March 2010 the deceased was found shot in his home.

89.4.23.2. The police went to the deceased's house in Groutville, Stanger as he was a suspect in the ATM bombings. As the deceased was opening the door for the police, the police shot and murdered him. Naidoo alleges that the deceased was reaching to his side.

89.4.23.3. A post mortem report by Dr M A Deysel is attached hereto, marked as annexure "CM59".

90. Our recommendations supporting the issuing of the section 2(4) authorisations, in respect of Booysen and members of the Cato Manor SVC Section, as already demonstrated, were based on sufficient and reasonable evidence, justifying such recommendations.

91. I submit that, if regard is had to all the above, the criticism to the effect that the recommendation for and subsequent issuing of the racketeering certificates against Booysen and others, were not based on objective evidence and/or were politically motivated, is unfounded. Further, prosecution of Booysen and the members of the Cato Manor SVC Section was far from being malicious.

(e) <u>The evidence Before the Prosecution Team</u>

92. In addition to the statements of the eye-witnesses, victims, ballistic crime scene reconstruction evidence, ballistic crime scene evidence, and post-mortem reports, the prosecution team had the following evidence:

92.1. The Provincial structure;

92.2. Statements and information to prove the management of the Cato Manor SVC Section of the Durban Organised Crime Unit;

92.3. The motive which drove the murdering of the members of KTA;

92.4. The similar pattern through which the murders were perpetrated; and

92.5. The *modus operandi*;

I. Statements and information to prove the management of the Cato Manor SVC section

93. The prosecution team obtained two sets of racketeering authorisations. The first one was issued by Jiba on 17 August 2012 and the second one was issued by Abrahams on 13 February 2016.

94. The authorisations were based on the contents of the docket and the following statements to show that there was a police management structure and under whose command responsibility the murder offences were committed:

94.1. The KZN provincial structure;

94.2. Statements from Durban Organised Crime Unit Commander, Alyer;

94.3. Statements from the KZN Provincial Head of Detectives, Assistant Commissioner Brown ("Brown");

94.4. The urgent application papers under case number 13759/2008 instituted by Bongani Mkhize ("Mkhize") wherein he successfully interdicted the Cato Manor SVC unit from unlawfully killing him.

94.5. Draft statements of Dankas, a former police reservist at the Cato Manor SVC;

94.6. Motivation for monetary and non-monetary awards which demonstrate that Booysen and members under his command, excluding Alyer, received monetary and non-monetary awards for the alleged successful arrest of people who were suspected in the killing of Superintendent Choncho;

94.7. Statement of Mathonsi which explains how the plan to eliminate members of the KTA was hatched and orchestrated;

94.8. Statement of Ndlondlo (Mthiyane) which explained the role of STA in the killing of KTA members by the members of the Cato Manor SVC Section; and

94.9. Statement of Mkhize which singles out the incident of the killing of Kopolota Ntuli and Nathi Mthembu who were members of the KTA.

95. The aforesaid is individually discussed below.

II. The KZN provincial structure

96. The provincial structure indicates Booysen as the Provincial Commander of the Organised Crime Unit. The Unit had four (4) branches, namely 1) the Durban Organised Crime Unit; 2) Pietermaritzburg Organised Crime Unit; 3) Port Shepstone Organised Crime Unit; and 4) the Richards Bay Organised Crime Unit.

97. Each Unit had a Commander with subsections, for example, Serious Violent Crimes; Fraud and Commercial Crimes; Narcotics; Vehicle Theft section, et cetera.

98. The case at hand related Serious and Violent Crimes section of the Durban Organised Crime Unit based at Cato Manor Offices under the command of Alyer. It was noticeable that Booysen was predominately involved in the operations of the Cato Manor SVC Section of the Durban Organised Crime Unit.

III. Statements of Alyer

99. The criminal offences which were investigated by both the IPID and DPCI were committed by the Cato Manor SVC Section, which according to the provincial structure was under the command of Alyer. The investigation led to Alyer deposing to three (3) statements, dated the 4th of August 2012 ("CM2"), 31st of August 2012 ("CM3"), and 31st of March 2013. I attach

hereto the statement of Alyer dated 31 March 2013, marked as annexure "CM91".

100. The essence of Alyer's statements is that he was a token Commander of the Cato Manor SVC Section. Booysen, as the provincial head excluded him in the operations and management of the Cato Manor SVC Section. Booysen was the *de facto* Commander of the Cato Manor SVC Section.

101. Alyer stated that he wanted the Cato Manor SVC Section to relocate from Cato Manor offices to the offices in town where he was based as their commander.

102. The members resisted this command and sourced support from Booysen who supported and thwarted his directives. As a result, the members did not move as directed.

103. The statements of Brown corroborate within reasons that Alyer was excluded in the management and operations of the Cato Manor SVC Section.

iv. Statements from the KZN Provincial Head of Detectives, Assistant Commissioner Brown

104. The prosecution team had a statement from Brown, who was the Head of Detectives in the province and a member of the KZN SAPS Provincial Management. The prosecution team consulted with the witness over and above the statement. During the consultation, Brown confirmed that Booysen was more operationally involved in the activities of the Cato Manor SVC Section.

105. As evident from the statement of Brown, it appeared to the prosecution team that Booysen had to manage and coordinate the operations of the Cato Manor SVC Section because Alyer and the members therein were not getting along. This was premised on Brown's statement on paragraph 6 which, amongst others, states that:

> *"...A poor relationship developed between [Alyer] and members of SVC based on [Alyer's] management style and perceived lack of knowledge in respect of investigation of violent crimes. This led to strained relationship between [Alyer] and Major Genl Booysen as the Provincial Commander of Organised Crime...".*

106. Brown also states that the conflict between the Alyer and the members culminated to a conflict between Alyer and Booysen. He tried to mediate and the parties would agree to work together, but the conflict would persist. This conflict led to Booysen active involvement in the operations of the Cato Manor SVC Section.

107. It is the prosecution team's view that Booysen was directed to depose to an opposing affidavit in the Mkhize interdict due to his intimate knowledge of the incident.

108. I attach hereto a statement of Brown dated 8 May 2013, marked as annexure **"CM82.1"** and a supplementary statement of Brown dated 9 May 2013, marked as annexure **"CM82.2"**.

v. Urgent Application of Case Number 13759/2008

109. Bongani Mkhize ("Mkhize") was the Chairperson of KTA. He had information from Moses Diamini ("Diamini"), a member of KTA, that the Cato Manor SVC Section has a list of people who were suspected of murdering Superintendent Choncho. On this list were, amongst others, Mthembu, Kopolota, Magojela, Buthelezi and himself (Mkhize).

110. According to the affidavit of Mkhize, Diamini told Mkhize that the Cato Manor SVC Section members were bragging that they were going to kill Diamini and the people on the list. Subsequently, Mthembu, Kopolota, Magojela and Buthelezi were killed by the members of the Cato Manor SVC Section, and Mkhize feared that he was next to be killed, as those that were on the list with him, were already killed. Hence the application before Court. The contents of the relevant paragraphs are set out below:

"28. <u>THE KILLINGS</u>

<u>MAGOJELA NDIMANDE AND TEMBE</u>

On Friday the 29th August 2008 Magojela Ndimande, who was a member of my Association and whose name appeared on the list mentioned by Moses Diamini, was arrested in Mtunzini area together with his body guard, Tembe, and taken to the Mtunzini police station where they were severely assaulted. They were subsequently released on the same day and Magojela returned to his homestead in or around the KwaMthethwa area in Empangeni. Several days after his release Magojela, who goes

by the surname of Ndimande, was waylaid by police in the Merrivale area. He was shot and killed. Tembe, who had also been arrested with him on the 29th August 2008 was also killed. Tembe was a security guard employed by Taxi Violence Protection Unit and was the personal body guard of Magojela. I annex hereto marked "C" a copy of the communique issued by police after the death of Magojela and Tembe.

I also wish to annex hereto marked "M" an article front page of the Daily Sun relating to the death of Magojela Ndimande.

29. *It is widely believed that the deaths of Magojela and Tembe had been in keeping with the information I had received about the elimination of prominent members of my Association under the guise of them being sought for the murder of Superintendent Chonco. We have engaged the services of various entities in order to investigate these shootings. It is also questionable to say the least that these two individuals who were sought by the Police (See Annexure "C") had been arrested by them and released shortly thereafter and within a few days of their release they are shot and killed on a quite back-road and allegedly to be "dangerous criminals" in possession of dangerous weapons.*

30. ***LINDELANI BUTHELEZI***

I must hasten to add that before the death of Magojela and Tembe, Lindelani Buthelezi whose name had also been on the

list in question had already been killed by police under spurious circumstances. Lindelani Buthelezi was known as a prominent member of my Association.

31. *On the 3rd of September 2008 Lindelani Buthelezi was confronted in his rented house at Stanger by a large group of policemen. He was killed by them during such "arrest". I annex hereto marked "D" a copy of an affidavit by Lindelani Buthelezi's common law wife who was present when he was killed in which she relates the disturbing circumstances under which he was killed. It is my belief that his death is consistent with the information I had received about the existence of a list of names and the elimination of the people mentioned herein.*

32. **KOPOLOTA NTULI AND NKOSINATHI MTHEMBU'S**

Kopolota Ntuli and Nkosinathi Mthembu, whose names were also on that list, were killed by members of the SAPS at Mandeni whilst at Kopolota's fiance's homestead, also under questionable circumstances. Prior to the killing of Kopolota and Mthembu, the attorney representing the Association had offered to surrender any member of the Association suspected of the murder of Superintendent Chonco should they be sought. I annex hereto marked "E" a letter dated 5th September 2008 and refer this Honourable Court specifically to paragraphs 18 and 19. Despite this offer, the SAPS proceeded to shoot and kill the

two individuals once again in circumstances that lead me to believe the correctness of the information referred to above. Once again the police version is that they acted in self-defence.

33. ***MDU MKHIZE***

On Saturday the 18th October 2008 Mdu Mkhize who was a member of my Association was arrested at a funeral service at KwaMaphumulo by members of the South African Police Services. He was handcuffed and led away and we later heard that he was killed. I annex hereto marked "F" a copy of the Daily Sun newspaper article wherein is death is being mentioned. Whilst Mdu Mkhize's name was not on the list mentioned by Moses Dlamini, I have been privy to information that he was also being sought for elimination by police."

111. In response to what Mkhize alleged about the killing of his members and the threat to his life, Booysen responded as follows:

"31. ***AD PARAGRAPH 28***

NDIMANDE and TEMBE were arrested and questioned. They were released. On 16 September 2008 information was received which necessitated NDIMANDE and TEMBE to be questioned again. Information was also received that the two individuals were in the process of fleeing the Province of KwaZulu-Natal, making their way to the Free State. On the busy N3 freeway between Pietermaritzburg and

Marivate an attempt was made to apprehend them. Police vehicles employing their sirens and appropriate flashing lights attempted to stop them. They resisted and shot at the Police. The Police returned fire and they were killed. Two hand guns, a Luger assault rifle and an AK47 assault rifle were recovered by the Police. To the extent that the information contained in paragraph 28 is at odds with what I say here, I deny same. I also deny the contents of the press report from the Daily Sun to the extent that it is at odds with what I say. TEMBE was an employee of the security company referred to by the applicant in paragraphs 18 and 19 of the founding affidavit. As a consequence of this incident, and when he was discovered in possession of assault weapons, and because he was involved in an incident where he was party to the Police being fired upon, the forensic investigation into the firearms referred to in paragraph 19 of the founding affidavit was commenced.

32. *AD PARAGRAPH 29*

There is simply no basis for what the Applicant contends is "widely believed". I have no knowledge of what services the Applicant has engaged and who or what the "various entities" are. I have already explained that NDIMANDE and TEMBE were again sought as a result of new information received. There is nothing untoward about that. In any event, why the Applicant refers to the N3 highway as a "quite (sic) back-road" escapes me unless it is nothing more than a thinly veiled

attempt to colour the information (whether true or not) placed before this Court.

33. ***AD PARAGRAPHS 30 AND 31***

I have already said that there was no list in existence. On 3 September 2008 an attempt was made to arrest BUTHELEZI. He resisted arrest and attempted to shoot at the members of the South African Police Services who returned fire in self-defence. BUTHELEZI was killed in that exchange of fire. His firearm, a CZ 7.65 automatic was recovered at the scene. Whether or not BUTHELEZI was a prominent member of the Applicant's association is unknown to me. I accordingly deny the allegations contained in paragraph 30 and 31 to the extent that theirs are at odds with what I say here. The Affidavit put up from SOKHULU is hearsay and must be struck out. It was not obtained or put up for the purposes of this application and she has not confirmed those facts for the purposes of this application. In any event I deny the allegations contained in that Affidavit to the extent that they are at odds with what I say herein. BUTHELEZI was killed while he resisted arrest and shot at the Police.

34. ***AD PARAGRAPH 32***

Information was received that implicated NTULI and MTHEMBU in taxi violence related incidents. On 18 September 2008, as a result of that information, members of the South African Police Service attempted to arrest NTULI and MTHEMBU. The Police were fired upon and had to

return fire. As a result both NTULI and MTEMBU were killed. Their firearms, a Z88 and a CZ75 were recovered from the scene. I accordingly deny the allegations contained in paragraph 32 to the extent that it differs from what I say herein.

35. *AD PARAGRAPH 33*

MKHIZE was arrested on 18 October 2008 in Pietermaritzburg. He was attending a funeral at the time. He was transported to Scottburgh for questioning. After questioning, during which he had agreed to effect a pointing-out, he was again transported for that purpose. This was in self-defence. I accordingly deny the allegations contained in paragraph 33 where they are at odds with what I say herein."

112. The contents of the paragraphs quoted above from Booysen's affidavit, detail the minute details which Booysen was aware of, relating to the activities of the Cato Manor SVC Section.

113. I attach hereto Mkhize's affidavit, marked as annexure "CM83" and Booysen's affidavit, marked as annexure "CM84".

114. The Court granted an Order on 14 November 2008, which reads as follows:

"IT IS ORDERED [BY CONSENT]

1. *That the respondents are interdicted from unlawfully killing, injuring, threatening, harassing or in any way unlawfully intimidating the applicant.*

2. *That the rule nisi is in all other respects discharged.*

3. *That each party to pay its costs."*

115. I attach hereto the Court Order, marked as annexure "C[illegible]".

116. The Court Order was granted on 14 November 2008 and, despite the Order, Mkhize was killed on 3 February 2009 by the very same Cato Manor SVC Section who had previously killed his colleagues in KTA.

117. In the papers received by the prosecution team, there is nowhere where it is indicated that Booysen made an attempt to restrain the members of the Cato Manor SVC Section against the killing of Mkhize, and if he did, Booysen is invited to produce proof thereof.

118. What the prosecution had, was that there was a plan to kill members of KTA and that plan came to its full realisation by the killing of Mkhize, who was the Chairperson of KTA.

119. It is a reasonable view of the prosecution team that the only reason why Booysen deposed to the opposing affidavit is that he had intimate knowledge of the facts and circumstances that led to launching of the urgent application. Booysen neither annexed a confirmatory affidavit to the opposing affidavit, nor does he allege that other members of the Cato Manor SVC Section are the source of the information as set out in the opposing affidavit.

vi. Draft statements of Dan[illegible]

120. The prosecution team had a draft statement of Danikas who was a police reservist. The essence of this draft statement was that Booysen was aware that the members of the SVC Section were, in fact, killing suspects instead of arresting them.

121. This method of operation did not only start in 2008, but it has been a standard operation as far back as in 2001.

122. I attach hereto the draft statement of Danikas, marked as annexure "CI#66".

123. The draft statement of Danikas was intended to show similar facts as it is admissible in POCA prosecution in terms of Section 2.2 and, as much as there were no charges preferred on those crimes, but evidence relating to those murders would have become relevant in the main trial to support Danikas' version.

vii. Monetary and non-monetary award

124. The awards related to the alleged cracking on the murder of Superintendent Chonco. Chonco was murdered on 27 August 2008. From 3 September 2008 to 18 September 2008, the Booysen and the members under his command, were able to trace six suspects, and those suspects were all killed on the crime scenes. None of the suspects was ever arrested and brought to Court. They were all murdered under the pretext of self-defence.

125. The monetary awards must be read together with Mkhize's urgent application where he was fearing for his life that his fellow members of KTA

are being killed by members of the Cato Manor SVC Section and he was next in line. Mkhize himself was consequently killed despite a Court Order.

126. In these awards, Booysen was a beneficiary for his own role in the operations that lead to those who were suspected of killing Chonco. I attach hereto a copy of the monetary awards dated 14 October 2014, marked as annexure "CM67".

127. The monetary awards, *inter alia*, reads as follows:

> "3. ***Apprehension of two more suspects***
>
> ***Summary of events***
>
> *On Monday 2008/09/15, Dir Booysen, the Provincial Commander, contacted Insp Mostert and informed Insp Mostert that he hade information pertaining to the suspect that had organized the hit on Supt Chonco. He was hiding in Virginia in the Orange Free State and was on route to Pietermaritzburg to collect some cash in Pietermaritzburg. During this time the informer remained in contact with Dir Booysen who continued to relay the information over to the investigation team.*
>
> *On Tuesday 2008/09/16 at 06H20, Dir Booysen contacted Insp Mostert again re the movement of the suspect who was near the Pietermaritzburg area in a Hyundai Tuscon 4X4 with registration NRB3904 and that he was armed and dangerous. The*

investigation team consisting of the above members immediately departed to Pietermaritzburg.

The same day at 08H30, the investigation team still consisting the above same members who were in the Pietermaritzburg area, continued to receive further information from Dir Booysen and at 10H10 information was received that the above vehicle was en route by the N3 towards the Orange Free State. The vehicle was spotted near the Cedara turn off by the investigation team, the occupants being two persons, a driver and a passenger seated on the back seat of the vehicle. The investigation team, which at this stage consisted in Insp Mostert, Nel and Makhanya in one vehicle while Capt Van Tonder, Lockem and Eva whom followed in a separate vehicle. Insp Mostert managed to catch up to the vehicle and in an attempt to get the suspects to pull over, the official blue light and siren was used. A shootout then took place between the passenger of the suspects' vehicle and the investigation team resulting in the driver of the vehicle being injured in the process which resulted in the vehicle stopping. The passenger in the suspects' vehicle, during the shootout, made an attempt to flee from the moving vehicle which resulted in him being flung out of the moving vehicle. Both the suspects were fatally injured in the shootout. The driver was positively identified as Timson Mgojela Ndimande and was the main brain behind the assassination of Supt Chonco, the other suspect was his body guard. This

132. According to Mathonsi, Mkhize was the last to be killed and there were payments made to the Cato Manor SVC Section for the killing of Mkhize. This allegation, under oath by Mkhize, is also corroborated by the statement of Bhekhinkosi Mthiyani Diondlo (Diondlo).

ix. Statement of Diondlo

133. Diondlo stated under oath that he was a chairperson of the disciplinary department within the STA and he had close working relations with Exco Members of STA. According to Diondlo, the STA paid members of the Cato Manor SVC Section for the killing of members of the KTA and mentions those who were killed as Lindelani Buthelezi, Kopolota Ntuli, Nathi Mthembu, Mdu Mkhize, Ndimande and Bongani Mkhize.

134. The most expensive hits were for Ndimande, valued at R750 000.00 and Mkhize, valued at R1 000 000.00. According to Diondlo, Mostert and Booysen, as members of the Organised Crime Unit, were involved in the money exchange through Bonginwe Mhlongo and Sanele Zondi. I attach hereto a statement of Diondlo, marked as annexure "CM70".

135. Mathonsi, and Diondlo's allegations, about the exchange of money and the planning to kill members of the STA, were further corroborated by Bongani Mandla Mkhize. It must be noted that Diondlo alleges that he was an informer of Mostert and Sanele Zondi was an informer of Booysen.

x. Statement by Bongani Mandla Mkhize

136. Bongani Mkhize, the body guard of STA Executive, stated under oath that when Kopolota, Ntuli and Bongani Mthembu were killed, Bonginkosi Mhlongo was sent pictures, allegedly by Mostert, of the deceased. As the body guard, he accompanied Mhlongo to meet with Mostert and another white man at Tongaat Toll Plaza, where Mhlongo handed plastic with money to Mostert and the other white man in the car.

137. I attach hereto a statement of Bongani Mandla Mkhize, marked as annexure "CM71".

xi. ***Evidential analysis***

138. The prosecution team took cognisance that Chonco was killed in the line of duty. However, those who were alleged to be involved in his murder, were killed instead of being arrested and brought to Court. The prosecution team had evidence that Buthelezi was arrested by the police. At the time of his arrest, he was unarmed.

139. The arrest took place in the presence of his girlfriend who survived him and who gave a statement on what transpired at the time of Buthelezi's murder by members of the Cato Manor SVC Section. She also stated that he was unarmed.

140. Mostert was present at this crime scene and the evidence was that the deceased was unarmed and not a threat to the police. When he was shot, the police had already secured him.

141. The prosecution team had a photo album which indicated Mdu Mkhize having been shot and killed while in handcuffs and in custody of the police in their vehicle.

142. The prosecution team had evidence that Ndimande and Tembe were arrested on 29 August 2008 by the members of the Cato Manor SVC Section for the questioning of the alleged murder of Chonco but they were released on the same day. On 16 September 2008, a hot pursuit by the very same members of the Cato Manor SVC Section of Ndimande and Tembe ensued and they were murdered.

143. On 16 September 2008, the Cato Manor SVC Section also murdered Ntuli and Mthembu.

144. On 3 February 2009, the Cato Manor SVC Section murdered Mkhize.

145. It is noticeable on the photo albums and the post mortem reports that the police aimed at the upper body of each victim, whereas if the intention was to incapacitate the suspect with a view of arresting them, it is expected of them to aim at the lower part of the body.

146. Bongani Mkhize, the Chairperson of the KTA, was shot whilst inside his vehicle and being chased by members of the Cato Manor SVC Section. The photo albums indicate that the bullets were all from outside of the vehicle and he was shot whilst the windows of the vehicle were closed.

147. Taking into account:

147.1. the objective evidence in the dockets which comprised, amongst others, the ballistic crime scene reconstruction reports and eyewitness statement:

147.1.1. the statements of persons linked to the STA who stated that there was a plan to murder members of the KTA and that rewards were paid after each murder,

the prosecution team considered the totality of the aforementioned evidence, as an indication that the killings were deliberate which occurred under the control and management of Booysen.

148. The prosecution team elected not to charge Alyer as a manager of the Cato Manor SVC Section because he features nowhere in any of the evidence, being the monetary awards, statements from the STA linked persons and crime scenes, which corroborated his version that he was excluded in the operations of the Cato Manor SVC Section. There was no evidence to suggest that Alyer knew or that he ought to have known how the criminal activities of Cato Manor SVC Section were committed. Booysen was directly involved in the operations of the Cato Manor SVC Section. Therefore he knew, or ought to have known that the members were killing people/persons other than arresting them.

149. It was noted that Cato Manor SVC Section acted in cahoots with the STA. However, it was the prosecution team's long term strategy to secure the members of the STA to become witnesses, more so because the funds to pay for the killings was from the STA.

150. The prosecution team had identified further persons within the STA which the investigation team was to approach with the view of calling them as State witnesses. At this juncture it is not in the interest of justice to divulge the whole plan and the names of the identified persons.

151. The *modus operandi* that was adopted by the Cato Manor SVC Section in the taxi violence incidents was carried over to the ATM bombings suspects and other suspects who were also killed instead of being arrested and brought before Court.

152. It is critical to bring it to the attention of the Commission that, to the best of my knowledge, since the arrest and prosecution of the members of the Cato Manor SVC Section, the trend of murdering suspects instead of arresting them, has subsided considerably.

153. The trend of component driven and centralised killing of suspects has subsided. To the extent that extracts from the dockets have been attached to my affidavit to support my averments, electronic copies of the dockets are made available for the Commission's benefit on the SanDisk Cruzer Blade 16GB memory stick affixed to the front page of this affidavit.

(f) <u>Discussion of the Racketeering Principles</u>

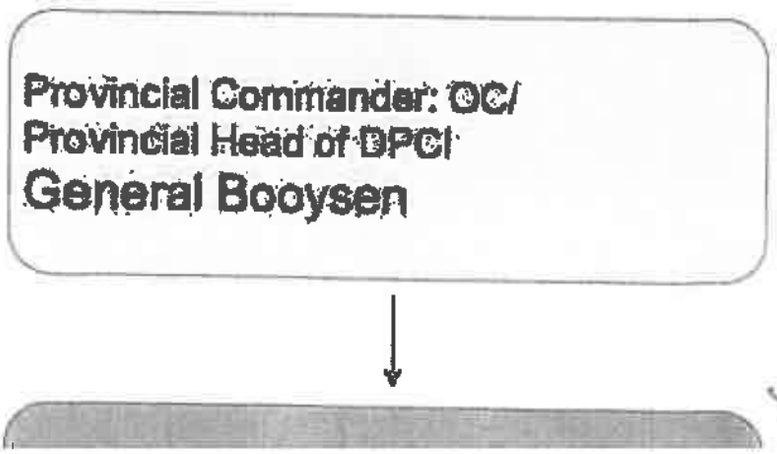
i. The enterprise

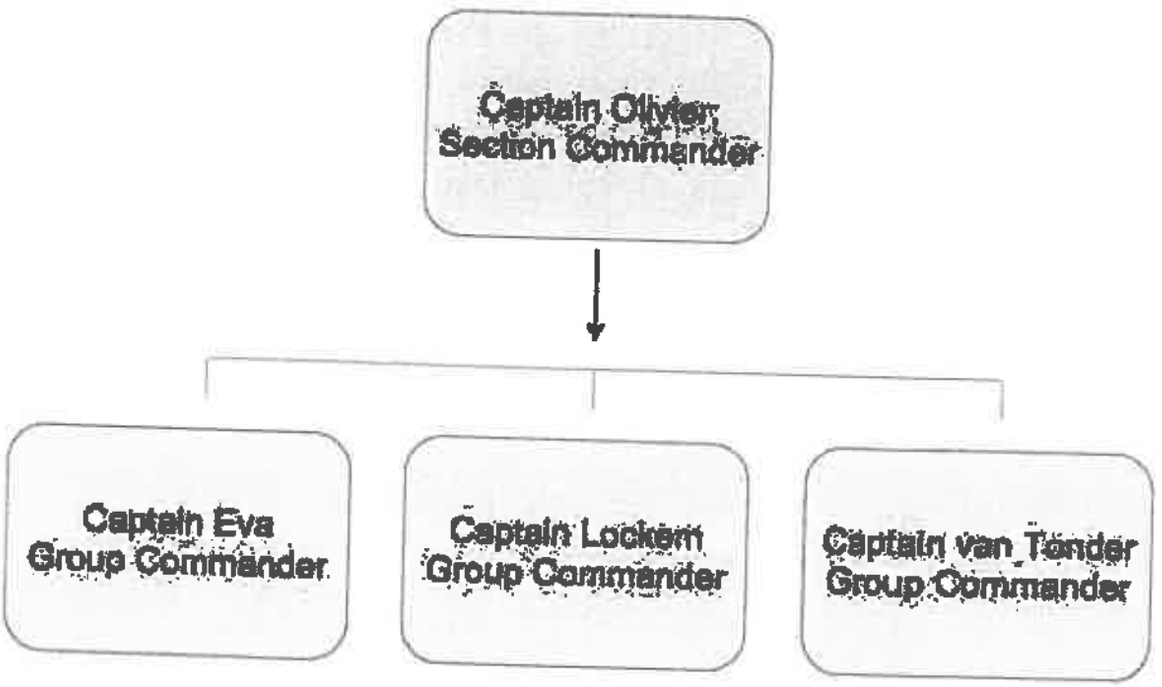
154. Cato Manor SVC Section is the enterprise as defined in the Act. The Organised Crime structures became part of the Directorate for Priority Crimes Investigations (DPCI) which was under the commandership of

General Booysen as the Provincial Head: DPCI since 2010. Accused 9 was the section commander of the Cato Manor SVC Section and was at all times in charge of all the activities of the Cato Manor SVC Section. The South SAPS is a legal entity established by legislation in terms of the South African Police Act 68 of 1995. It is comprised of a national office and provincial structures for each province. The Cato Manor SVC Section as part of the Durban Organised Crime was supposed to report to Colonel Alyer as the Commander of Durban Organised Crime Unit but did not do so as a result of differences they had with Colonel Alyer, they instead bypassed him and worked under the direct control and direction of General Booysen.

155. In *Jwara and Others v the State* 2015 (2) SACR 525 (SCA), the full bench in the SCA upheld the principle of having a section of the SAPS regarded as an enterprise in terms of POCA. In this matter, members of the Organised Crime Unit in the West Rand participated in a number of offences relating to drugs that were confiscated as exhibits at the OR Tambo Airport, Johannesburg.

156. Below, we set out a table that demonstrates the hierarchy in the Cato Manor SVC Section in terms of which Booysen was depicted as the *de facto* commander.





157. Maema and I compiled the reply to the request for further particulars and duly filed same. Maema attended to the answers relating to the racksteering charges and I refer the Commission to the affidavit of Maema, to which a copy of the relevant part of the reply to the request for further

particulars are attached. I attended to the large part of the response on the predicated offences. However, since I did not type the response to the further particulars, I am unable to obtain same in order to attach it to this affidavit.

158. The response to the request for further particulars referred to in Meema's affidavit, demonstrates:

158.1. The role of each member in the enterprise on more than one occasion;

158.2. The *modus operandi*;

158.3. The association of each member in a pattern of racketeering activities; and

158.4. How the conduct of each member accelerated or advanced the objectives of the enterprise.

159. It is not necessary for the manager of the enterprise to be present and participate in the commission of the crime. The preamble of POCA states as follows:

> *"...It is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in*

connect with the enterprises which are involved in a pattern of racketeering activities".

160. The fact that the objective facts demonstrate that Booysen participated in commission of the crime by giving members information on the whereabouts of Magojela and Tembe, counts 8 to 12 in the indictment and attended to the scene immediately after the murder of Magojela and Tembe, is an added factor to prove the requirements as set out in section 2(1)(e) of POCA.

(g) Pattern of Racketeering Activities

161. The objective evidence, as set out above in the portion dealing with the counts constitutes the pattern of racketeering that took place from 03 September 2008 to 04 September 2011.

162. In order not to burden this lengthy affidavit, I refer the Chairperson to the relevant paragraphs as set out in Maema's response to the request for further particulars in the criminal matter CCD11/2013D in the KwaZulu-Natal High Court, Durban which demonstrates the following:

162.1. The pattern is set out from paragraph 3.2 to 3.4 at pages 6 to 24;

162.2. The participation of each Manager in the activities of the enterprise is illustrated in paragraph 4 to 5 at page 24 to 33;

182.3. The knowledge and/or presumed knowledge of each Manager of the activities of the enterprise is illustrated in paragraph 7 to 8 at page 34 to 35;

182.4. Pertaining to the offence set out in section 2(1)(f) of POCA:

182.4.1. Paragraph 1 on page 36 sets out the management of the operations or activities of the enterprise by each manager;

182.4.2. Paragraph 6 sets out how each manager is associated with the activities of the enterprise;

182.4.3. Paragraph 8 sets out how each manager knew or ought to have known of the activities of the enterprise.

182.5. Pertaining to the offence set out in section 2(1)(e) of POCA:

182.5.1. Paragraph 1 outlines the enterprise.

182.5.2. The organisational structure or hierarchal structure detailing all persons in actual positions of management and authority which has been outlined on pages 3 to 5 of this submission and continues to be the same in both Count 1 and Count 2. The activities of the managers, the various incidents in which the members of the enterprise took part, the various dates and places of the activities and the specific members who took part in various

activities, have been outlined in detail in the various incidents above.

(h) **The judgment of General Council of the Bar of South Africa vs Jiba and Others 2017 (2) SA 122 (GP) as well as the judgment of Jiba and Another vs GCB and Another 2019 (1) SA 130 (SCA) and the findings thereto pertaining to the issuing of POCA authorisations on against Booysen on 17 August 2012**

163. I am advised that the Chairperson has repeatedly stated that where the issues canvassed at the Commission have been previously ventilated before a court of law, such judgments should be brought to his attention by the evidence leaders. I am advised that the chairperson specifically expressed this sentiment in the evidence of Booysen. The Chairperson's remarks are as follows:

> *"The second thing I want to say is this. Major General Booysen from the evidence that he has given has indicated that there are a number of court applications that he had to do. He had to bring to court to deal with various matters. In some of them there are judgments. I would like the legal team to secure not only the judgments in regard to those matters but I would like the full set of papers in each application so that we can have a full picture of exactly what happened in regard to each matter and how people against whom certain allegations were made how they responded in affidavits that were placed before the courts. I would also like to see the findings that were made by those courts in regard to each matter and in this regard I would like the legal team to prepare for me for later use a list of all findings that have been made by*

the courts in the various applications where there is no appeal pending. Maybe they can make them even if there is an appeal pending but a note can be made that in regard to that one specific ones there is an appeal pending.[3]

164. Before this Commission, Booyesen is complaining about me as a prosecutor who was part of the prosecution team that made recommendations, and he stated that we acted corruptly and the recommendations we made were unjustified. I wish to bring to attention of Commission that the complaint pertaining to the prosecutors acting *mala fide* and/or with ulterior motive was a subject of complaint against Jiba in the judgment of the *General Council of the Bar of South Africa vs Jiba and Others* 2017 (2) SA 122 (GP) ("the Legodi J judgment"). I attach hereto a copy of the Legodi J judgment marked as "CM72". In this matter, the GCB sought to rely on the findings of Gorven J that Jiba was mendacious and could not have considered the statements referred to in her affidavit and sought to rely on those findings in order to justify a case that she was not a fit and proper person to serve as an Advocate of the High Court of South Africa, and thus ought to be struck off the roll of Advocates. The court *a quo* dismissed the GCB's reliance on the adverse findings of Gorven J against Jiba as the basis upon which she should be struck off the roll of Advocates.

165. When Jiba appealed the finding of the court *a quo* to strike her off the roll on another basis other than the Booyesen matter, the SCA, in its judgment of *Jiba and Another vs GCB and Another* 2019 (1) SA 130 (SCA) ("the Jiba SCA judgment") also considered the finding of her having acted with ulterior

[3] Transcribed record: Day 88, 3 May 2019, p4, line 13 to p5, line 3

motive and/or *mala fide* in the Booysen matter and shared the sentiments expressed by the court *a quo*. I attach hereto a copy of Jiba SCA judgement which is marked as "CJ173".

166. I can do no better than quote the pertinent paragraphs where the court *a quo* extensively considered the Gorven J judgment, the explanation of Jiba pertaining to the findings of Gorven J and its analysis thereof, as well as its finding in respect of same.

167. Legodi J considered the findings by Gorven J that Jiba was, "*mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the docket before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision*".

168. In paragraph [49] of Legodi J's judgment, he states that:

"*Before dealing with information placed before Jiba for written authorisation in terms of s 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Gorven J were based on a correct evaluation and understanding of Jiba's answering affidavit*".

169. After reflecting as aforesaid, Legodi J states that:

" *[51] Having regard to what is quoted above, it does not seem the statement: 'Jiba says that they are all statements made under oath', is correct. Nowhere in Jiba's answering affidavit did she make such*

a statement, neither did she say any of annexures NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information was made only in paras 16 and 16.6 of the answering affidavit, without suggesting that all of the annexures referred to in para 17 of the answering affidavit in the Booysen matter were made under oath. Therefore the statement —

'(t)he document referred to as a statement by Mr Denikas, annexure NJ3, is not a sworn statement' —

as stated in para 31 of Gorven J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred, particularly reading in the context of para 16.7 of her answering affidavit in the Booysen case quoted in [50] above".

170. In considering the fact that Jiba did not file a supplementary affidavit responding to the allegations of mendacity, Legodi J states as follows:

"[52] The fact that Jiba did not avail herself of the invitation to deal with the allegation of being 'mendacious', meaning 'not telling the truth', should also be seen in context. The allegation was made in the replying affidavit. This, too, Gorven J was mindful of. For the purpose of these proceedings, the criticism by Gorven J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen had raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that a supplementary affidavit would be filed to explain the criticism against Jiba with regard to the annexures. On 19 August 2013 an email by Adv Mosing of the NPA was sent to Adv Chauke, Director of Public Prosecutions, Johannesburg, enquiring what progress had been made with regard to the filing of a further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of 'mendacious' made by Booysen. By seeking to file a further affidavit to explain the annexures after the replying affidavit was filed is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement —

> *'(d)espite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence' —*

made by Gorven J in para 34 of his judgment, ought to be seen in the context of what is explained in [53] above.

171. Having considered Jiba's attempts to place her version before the court in the review application that served before Gorven J, Legodi J goes on to consider the information that was before Jiba when she took the decision to issue the POCA authorisation on 17 August 2012, and states, amongst others, that:

> *"[56] On 17 August 2012 Jiba approved the application for authorisation in terms of s 2(4) of POCA for contraventions by Booysen of s 2(1)(e) and (f) of POCA... The information and advice that were placed before Jiba for the purpose of granting or refusing authorisation were prepared and compiled by Adv Raymond K Mthenjwe and Adv Gladstone Sello Maema, both Deputy Directors of Public Prosecutions, and Adv Anthony Mosing, a Senior Deputy Director of Public Prosecutions and the head of the Special Projects Division, who acted as the liaison between Jiba and the prosecuting team.*
>
> [57] *At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo, and annexure NJ6, being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J*

and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booyesen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Denikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booyesen. The drafted statement of Denikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booyesen. Denikas was a police reservist in the Durban Organised Crime Unit based in Cato Manor, and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Meeme asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual-legal-assistance legislation, that is, s 2 and 3 of the International Co-operation in Criminal Matters Act 75 of 1996, be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolisi Ntsaane(sic)), at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was, however, intended to corroborate the evidence in possession of the prosecution team, that Booysen was involved in the various activities giving rise to the charges against him, of similar-fact evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement that —

> *'(t)he document referred to as a statement by Mr Denikas, annexure NJ3 . . . is not a sworn statement. It is not dated. Even if it could be attributed to the named person and even if it were a sworn statement as claimed by the NDPP, the contents do not cover the period clearly [within] the indictment, except for one event which does not relate to Mr Booysen'* —

by Gorven J, ought to be seen in the context of the explanation given by Jiba in these proceedings, and the fact that Jiba never said annexure NJ3 was a sworn statement, as stated earlier in this judgment. I need to caution. I should not be understood as seeking to review or upset Gorven J's judgment. At the time, he did not have Jiba's responses, as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the authorisation was made, the explanation by Jiba in these proceedings is as follows:

> *"217.There were also two statements by Colonel Alger (reference to as annexure NJ2 and NJ4). One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interferences in the activities of a section of Durban & Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Alger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Alger at the consultation."*

[61] Therefore the statement that —

> *'(t)he second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April (August) 2012, some two weeks after the first impugned decision was taken'—*

in para 31 of Govern J's judgment, inasmuch as the GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of the explanation quoted in [60] above, I am unable to find any conduct on the part of Jiba that justifies an application contemplated in s 7 of the Admission of Advocates Act.

172. Based on the aforementioned analysis of the information that served before Jiba when she issued the POCA authorisations together with the explanation that was not placed before Gorven J, as the NPA's counsel had decided not to file a supplementary affidavit despite the prosecution team's request to do so after considering the issues raised in Booysen's replying affidavit in the review application, Legodi J goes on to find that:

"*[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislative framework, what was placed before Jiba and the core function of the prosecuting authority, is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in ss (2) of s 2 of the NPA Act, notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair. This should be seen in the context of the preamble under POCA which inter alia reads:*

'AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime . . . criminal gang

activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime . . . and criminal gang activities.

'AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in the pattern of racketeering activity;

. . .

'AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities; . . . .' [Emphasis added.]

[63] In my view the provisions of s 2(1)(e) and (f) referred to in [44] of this judgment are meant for the criminalisation of such activities. The point I am making is this: courts, for the purpose of an exercise of its discretion in terms of s 2(2) referred to in [62] of this judgment, may rely on hearsay evidence, and information and/or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jibe in Booysen's case) be entitled to rely on

hearsay and similar-fact evidence for the purpose of authorisation as contemplated in ss (4) of s 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities, and resultantly pose harm to the wellbeing of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue, however, is whether in granting authorisation in terms of s 2(4), Jiba was mala fide or had ulterior motive, in which event the requirement of 'fit and proper person' to remain on the roll of advocates becomes relevant. For this purpose, further provisions of POCA are necessary to be considered, also taking into account offences under s 2(1)(e) and (f).

[65] 'Pattern of racketeering activity' means —

> *'the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1 . . .'*

On the other hand, 'enterprise' —

'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'.

[56] The essence of the information before Jibe can be summed up as follows: In addition to what is stated in [55] – [57] and [60] of this judgment, Booysen was the head of the Cato Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of a serious nature, including murders against suspects who were sometimes framed in the commission of offences. Booysen knew, approved and/or ought to have known of the commission of these offences. As reward for the members' unlawful activities, Booysen motivated for an incentive of R10 000 for each of the 26 members of the Cato Manor Crime Unit, including Booysen himself. Booysen was also commended for outstanding services rendered, in that he —

'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.

[57] I cannot find any mala fides and/or ulterior motive in the authorisation by Jibe as contemplated in POCA. POCA is like a cry out loud for a declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most

Importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority, in the exercise of their legislative power, to investigate, through members of their investigating directorate and under the watchful eye of a Special Director so appointed, and to prosecute without fear, favour and prejudice those implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of s 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[66] One does not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an application for authorisation is made in terms of s 2(4) of POCA. An overriding factor for them to consider should be adherence to the rule of law and the Constitution. It suffices for now to conclude on the Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba."

173. The finding made by Legodi J, with Hughes J concurring, to the effect that he cannot find "*any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA*" was supported by the majority of the court when

the matter was taken on appeal to the Supreme Court of Appeal, where the court states as follows:

"[10] The first complaint dealt with by the court a quo was in connection with Booysen's case. In that case Jiba, in her capacity as Acting NDPP, issued two authorisation letters charging Major-General Johan Wessel Booysen with the contravention of s 2(1)(e) and (f) of the Prevention of Organised Crime Act 121 of 1998 (POCA). In a nutshell Booysen alleged that Jiba was 'mendacious' when she asserted that she considered statements together with other information in the docket before she took the decision to charge him. This allegation was further exacerbated by the negative remarks of Gorven J who presided in the Booysen matter when he drew an inference that none of the information upon which Jiba relied linked Booysen to the offence in question. The court a quo found that '[i]t suffices for now to conclude on [the] Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates'. I do not find it necessary to deal with the detail of the complaint in view of the finding of the court a quo. I share the sentiment expressed. Before us counsel for the GCB dealt with some of the complaints but, in my considered view did not take the matter any further. The court a quo could not find 'any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA'.

174. As a prosecutor who was part of the team that made recommendations to Jiba, who has been found by courts of law not to have acted with *mala fide* and/or ulterior motive in issuing the POCA authorisations against Booysen, I am also of the respectful view that this Commission should disregard Booysen's contention that in making the recommendation for the issuing of the racketeering authorisations to Jiba, I acted with *mala fide* and/or ulterior motive.

175. The Legodi judgment was delivered on the 18th of September 2018 and the SCA judgment on this matter was delivered on the 10th of July 2018. Booysen's affidavit to the Commission is dated 2nd of April 2019. In this regard, Booysen, McBride and Sesoko ought to have known that the court found that there was no *mala fides* and/or ulterior motive in issuing the POCA authorisation and consequently the prosecution against Booysen.

(I) Closing remarks

176. *The Supreme Court of Appeal*, in its judgment of Zuma v DA (636/2013) [2014] ZASCA 101 (28 August 2014), endorsed the finding of the High Court, Gauteng Division which held that:

> *"The first respondent* (the NPA), *as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. It has a duty to explain to the citizenry why and how it arrives at the decision to quash the criminal charges against the accused persons, particularly where the matter involves very senior state officials.*

In pursuance of its constitutional obligations it is incumbent upon the NPA to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP."

177. I request the Commission to keep in mind this sound warning when it considers my submission pertaining to my role as part of the prosecution team in the Cato Manor case. I categorically state that our guidance of the investigation and the decision to draw the indictment and therefore charge, the accused therein, as well as the respective applications to the ANDPP and NDPP to request the issuing of a POCA authorisations were driven by our duty to prosecute without fear, favour or prejudice taking into account only the Constitution, the NPA Act and policies as well as the relevant criminal law.

(i) <u>Booysen's stratagem</u>

178. The charges against Booysen have been withdrawn, which the prosecution team view as irrational. Withdrawn charges has the potential of being reinstated, more particularly since murder charges do not prescribe. Booysen has adopted the strategy of attacking the prosecution before the Commission instead of clearing his name before a criminal court, a process which he has resisted through applications.

179. The charges were withdrawn after the accused were served with the indictment, the content of the docket disclosed, further particulars furnished and application to have the criminal case struck of the roll refused by the

criminal court and the prosecution was ready to put the charges and lead evidence to prove the criminal case against Booysen. The accused were saved by the withdrawal of the charges by the current NDPP without the NDPP consulting the prosecution team, who was seized with the matter for years.

180. I want to bring to the attention of the Commission that it is not uncommon for those who are facing serious criminal charges to attack the prosecution instead of confronting the charges as set out in the indictment.

181. In the matter of **National Director of Public Prosecutions v King**[4] Harms DP held as follows:

> *[5] ... Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay.'[5] One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."*

182. I was not briefed on any case which Booysen was investigating and which could be disturbed by his prosecution. In any event, provincial commanders by practice do not carry dockets but their subordinates within respective ranks and units carry dockets and conduct investigations. To the extent that

[4] (66/09) [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) ; 2010 (7) BCLR 656 (SCA) ; [2010] 3 All SA 304 (SCA) (8 March 2010)
[5] *Regina v H and others* [2004] UKHL 3 para 22 per Lord Bingham of Cornhill.

Booysen says that there was an ulterior motive for his prosecution, I, as a prosecutor, acting in good faith, decided on the dockets that were placed before me together with the other members of the prosecution team and came to the conclusion that Booysen has a criminal case to answer. Motive, if it at all existed, is irrelevant in criminal prosecutions and only a judicial officer can pronounce on whether or not an improper motive existed after having heard evidence and accumulatively assessing same.

183. In the matter of **National Director of Public Prosecutions v Zuma**[6] Harms DP held:

> *"[37] ... A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent ...*[7]

184. It is very concerning that only Maema and myself are being crucified in the Cato Manor SVC Section matter by Booysen, McBride and Sesoko, for the recommendation and subsequent prosecution of Booysen, when the decision was a collective team effort in the execution of our constitutional and statutory mandate.

185. To the best of my knowledge, Mlotshwa, Futshane, Ntlakaza and Moleko have not been served with Notices indicating that they will be implicated by Booysen, McBride and Sesoko, and were requested to file their affidavits.

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[6] (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (12 January 2009

[7] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 376 (SCA). For Canada: *Proud v Quebec (Attorney General)* 2001 SCC 88, [2001] 3 SCR 9.

I. **SUBMISSIONS ON ALLEGATIONS REGARDING THE PROSECUTION OF G BREYTENBACH ("BREYTENBACH")**

186. It is important to bring to the attention of the Commission that:

186.1. I did not receive a notice indicating that Breytenbach will implicate me of any wrongdoing or unprofessional conduct;

186.2. To the best of my knowledge, I am not aware that Breytenbach submitted an affidavit to the Commission in which she allegedly implicates me in any wrongdoing or unprofessional conduct;

186.3. the unfounded and malicious allegations that are levelled against me in this regard are made by:

186.3.1. Booysen;

186.3.2. McBride; and

186.3.3. Seeoko.

186.4. The aforementioned persons do not have intimate knowledge of the facts relevant to this matter. They have not demonstrated to the Commission any factual evidence in support of their allegations. It is not sufficient to merely make malicious and unsubstantiated allegations to tarnish my personal and professional reputation.

187. I first set out the detail and evidence regarding the prosecution of Breytenbach before detailing the unfounded and malicious allegations that

Booysen, McBride and Seoko made against me. Thereafter I will respond *ad seriatim* to the allegations pertaining to me in their affidavits.

(a) **The Charging of Breytenbach**

188. The charging of Breytenbach was premised on the legal prescripts set out below.

(b) **AI framework**

189. The charges preferred against Breytenbach were based on legislation set out below:

189.1. Section 40A of the NPA Act, which provides:

> *"40A Unauthorised access to or modification of computer material*
>
> *(1) Without derogating from the generality of subsection (2)-*
>
> *(a) 'access to a computer' includes access by whatever means to any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the prosecuting authority;*

(b) 'contents of any computer' includes the physical components of any computer as well as any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the prosecuting authority;

(c) 'modification' includes both a modification of a temporary or permanent nature; and

(d) 'unauthorised access' includes access by a person who is authorised to use the computer but is not authorised to gain access to a certain program or to certain data held in such computer or is unauthorised, at the time when the access is gained, to gain access to such computer, program or data.

(2) Any person is guilty of an offence if he or she wilfully-

(a) gains, or allows or causes any other person to gain, unauthorised access to any computer which belongs to or is under the control of the prosecuting authority or to any program or data held in such a computer, or in a computer to which

only certain or all members of the prosecuting authority have access in their capacity as members; or

(b) causes a computer which belongs to or is under the control of the prosecuting authority or to which only certain or all members of the prosecuting authority have access in their capacity as members, to perform a function while such person is not authorised to cause such computer to perform such function; or

(c) performs any act which causes an unauthorised modification of the contents of any computer which belongs to or is under the control of the prosecuting authority or to which only certain or all members of the prosecuting authority have access in their capacity as members with the intention to-

(i) impair the operation of any computer or of any program in any computer or of the operating system of any computer or the reliability of data held in such computer; or

(ii) prevent or hinder access to any program or data held in any computer,

(3) Any act or event for which proof is required for a conviction of an offence in terms of this section and which was committed or took place outside the Republic is deemed to have been committed or to have taken place in the Republic if-

(a) the accused was in the Republic at the time when he or she performed the act or any part thereof; or

(b) the computer, by means of which the act was done, or which was affected in a manner contemplated in subsection (2) by the act, was in the Republic at the time when the accused performed the act or any part thereof; or

(c) the accused was a South African citizen or domiciled in the Republic at the time of the commission of the offence." **Emphasis added.**

190. Section 41 of the NPA Act provides as follows:

"41 Offences and penalties

(1) Any person who contravenes the provisions of section 32 (1) (b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not

exceeding 10 years or to both such fine and such imprisonment.

(2) Any person convicted of an offence referred to in section 28 (10) or 29 (12) shall be liable to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

(3) Any person who is convicted of an offence in terms of a regulation made under section 40, shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(4) Any person who is convicted of an offence referred to in section 40A (2), shall be liable to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(5) Any person who, in connection with any activity carried on by him or her, in a fraudulent manner takes, assumes, uses or publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or to infer that such activity is carried on under or by virtue of the provisions of this Act or under the patronage of the prosecuting authority, or is in any manner associated or connected with the prosecuting

authority, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

(b) the contents of any book or document or any other item in the possession of the prosecuting authority; or

(c) the record of any evidence given at an investigation as contemplated in section 28 (1),

except-

(i) for the purpose of performing his or her functions in terms of this Act or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment." **Emphasis added.**

191. NPA Policy on Internet and Email Usage dated 31 May 2006 *("the policy")*, which provides, amongst others, as follows:

> *"NPA reserves the right to examine personal file directories and other information stored on the NPA computer or IT systems at anytime without prior notice or consent by the user when required by and consistent with law, when there is substantiated reason to believe that infringement of policy or law has taken place or in exceptional circumstances when required to meet time dependent critical operational needs."* A copy of the policy is attached as annexure **"KRM7"**.

192. The referral was based on Clause (a) of Proclamation Number 46 of 2003 published in the Government Gazette No. 24876 on 23 May 2003 which is attached hereto as annexure **"KRM4"**.

193. I, as the lead prosecutor and Van Jaarsveld were allocated this matter for prosecution. To the best of my knowledge, Van Jaarsveld is not painted with

the same brush as I am in this matter. This conduct clearly demonstrates *mala fides* on the part of those who, without any reason, crucified me.

194. I, however, deem it necessary to demonstrate to the Commission that the State had reasons to charge Breytenbach. I find that Booyesen, McBride and Sesoko allege that this prosecution was unjustified without referring to any evidential material.

195. The prosecution of Breytenbach emanated from a complaint by Mr R Mendelow ("Mendelow") who, was a legal representative of a mineral resources company, Imperial Crown Trading (Pty) Ltd ("ICT"). I attach a copy of the complaint hereto and marked "KRM6". ICT was locked in a mineral allocation dispute with Kumba Iron Ore (Pty) Ltd ("Kumba").

196. Mendelow's complaint was received by the NPA in October 2011, during Adv Simelane's ("Simelane") term of office as NDPP. The decision by the NPA was to investigate the complaint. Simelane's appointment as NDPP was declared invalid and subsequently, Jiba was appointed as the Acting NDPP.

197. Breytenbach was a prosecutor guiding investigation on Kimberly CAS 263/04/2011. This was a docket opened by Kumba against ICT. The legal representative of ICT, Mr Mendelow lodged a complaint with the NDPP in October 2011 that Breytenbach had a close relationship with counsel for Kumba, advocate Michael Helens ("Helens"). ICT felt that Breytenbach was/or might be controlled by Kumba's Counsel in the decision-making process.".

198. Following the investigation, Breytenbach was served with a Notice of Intention to Suspend on the 2nd of February 2012 as per "KRM9". The author of the Notice of Intention to Suspend was Adv Karen Van Rensburg ("Van Rensburg"), who was the Acting Chief Executive of the NPA at the time.

199. Breytenbach refused to hand over the laptop to the NPA investigators, contending that the official laptop had her private information, and that surrendering the laptop with her private information would violate her right to privacy.

200. When NPA investigators insisted that the laptop be surrendered to them, Breytenbach's attorney wrote a letter to the NPA informing the organisation that they would clear all laptop contents and then handover the laptop. I attach a copy of the letter written by Gerhard Wagenaar, Breytenbach's attorneys, dated 17 February 2012, marked as annexure "KRM10".

201. NPA responded to the above letter and informed Breytenbach's attorneys that it is a criminal offence to gain unauthorised access to and modify NPA's computer material without approval. I attach a copy of the said NPA letter dated 17 February 2012, marked as annexure "KRM11".

202. On 28 February 2012 Van Rensburg submitted a recommendation to Jiba to have Breytenbach suspended. I attach herewith Van Rensburg's Memo to Jiba, marked as annexure "KRM12".

203. It is critical to indicate that the internal investigation against Breytenbach is premised on the same set of facts that formed the subject of the criminal

case. Yet Van Rensburg submitted a recommendation to Jiba, as set out above, and also testified in the criminal matter against Breytenbach. Despite this, Van Rensburg is not lumped together with the *"core group of captured advocates who persecuted corruption busters"*.

204. The investigators from Serious Economic Offences, NPA Integrity Management Unit and NPA Security and Risk Unit who investigated Breytenbach, are also not crucified as I am, for the prosecution of Breytenbach. The aforesaid is brought to the attention of the Commission, because those who implicate me, did not produce any evidence, other than broadly mentioning my involvement.

205. On 30 April 2012 Breytenbach was served with a notice of precautionary suspension. Paragraph 7 of the notice categorically stated that all laptops and other equipment must be left at the workplace. The NPA's officials who served Breytenbach with the notice of precautionary suspension requested the laptop from her. She and her attorney refused to hand-over the laptop. A copy of the statement of Mr Sicelo Xaba is attached as annexure "KRM13.1", in this regard. I also attach hereto a copy of a supplementary affidavit of Xaba dated 7 March 2016, marked as annexure "KRM13.2".

206. On 2 May 2012, Breytenbach and her Attorney hired a private forensic expert, Phillip Otto ("Otto") to shred computer contents. The computer contents which were shredded are folders as set out in the table below:

Table 4

FOLDERS_DELETED	FOLDER CREATION DATE	SUB FOLDERS_DELETED	FOLDER CREATION DATE
[illegible]	[illegible]	[illegible]	13 JULY 2011 @ 13:53
[illegible]	04 NOVEMBER 2011 @10:19:39	[illegible]	30 SEPTEMBER 2011 @ 10:44

J. SHREDDED DOCUMENTS

207. The above table shows that Breytenbach shredded the following computer contents. In this affidavit, I demonstrate that the shredding of the said computer contents was deliberate and intended to hide the contents from the NPA investigators who were assigned to investigate the complaint against Breytenbach.

208. Furthermore, the shredded computer contents had information which demonstrated that Breytenbach abused her office in her dealings with Bezuidenhout SC and Family.

209. The table set out above indicates that the following computer contents, amongst others, were shredded, namely:

209.1. Khuba/ICT folder;

209.2. Bezuidenhout folder;

209.3. Jandre Bezuidenhout folder;

209.4. The Executhitch company folder;

(a) **In Re: Contents of the Kumba/ICT Folder**

210. ICT brought a High Court application challenging the search and seizure warrant in the docket Kimberley CAS 263/04/2011. The investigating officer had to draft answering affidavits in response to the challenge. Kumba's legal representative, Mike Hellens SC ("Hellens") and Breytenbach assisted the investigating officer in drafting the answering affidavits in the application. These affidavits are the ones that were shredded by Breytenbach when the NPA wanted access to her computer in order to investigate the allegations Mendelow made. They suspected that Breytenbach, as a prosecutor was being influenced by Hellens in her prosecutorial function. I attach the shredded affidavits of the investigating officer, Sandra van Wyk, hereto and marked as "KRM14" and "KRM15" respectively.

211. Breytenbach further shredded in this folder draft responses from police officers who were responding to ICT letters in the Kimberley CAS 263/04/2011. Evidence revealed that the police responses originated from Hellens to Breytenbach requesting her to make additions on the sent correspondences. I attach the email correspondences between Hellens and Breytenbach showing the above which are marked as "KRM16". I further

ICR

attach the shredded police correspondences, marked as annexures "KRM17".

212. Kumba shredded information related to the Kimberley CAS 283/04/2011 which was the subject matter of the internal investigation that Breytenbach was being investigated on.

K. IN RE: BEZUIDENHOUT FOLDER

213. Breytenbach, as the then Head of Specialised Commercial Crimes Unit ("SCCU") had business relations with Bezuidenhout SC. This relationship culminated in her using her official position to advance the interests of Bezuidenhout SC and Family.

214. The shredded Bezuidenhout folder had a correspondence drafted by Breytenbach to the NPA wherein she was recommending that Bezuidenhout SC be kept on a retainer fee by the NPA at a value of R480,000.00 (four hundred and eighty thousand Rand) a month, in a matter where they were both involved. I attach hereto the shredded document marked as annexure "KRM18".

215. The Bezuidenhout folder had a subfolder which contained representations made on behalf of Tony Yengeni ("Yengeni"). The representations were drafted by Bezuidenhout SC and the computer apparatus shows that Breytenbach contributed in the drafting of these representations. The representations were destined for Adv Wolfaard ("Wolfaard"), Deputy Director in the Johannesburg Commercial Crime Court, whereas

Breytenbach was a Deputy Director at the Pretoria SCCU. Bezuidenhout SC was Yengeni's Counsel at the time.

216. At a later stage, the docket in Yengeni's case was routed to the SCCU's Pretoria office, which was headed by Breytenbach at the time. Breytenbach dealt with the matter and filed an admission of guilt. This was a conflict of interest, as she had previously assisted in the drafting of representations on Yengeni's behalf. I attach hereto the shredded representations made on behalf of Yengeni, marked as annexure "KRM19".

217. Breytenbach had the intention to hide the retainer recommendation and Yengeni's representations because it exposes how conflicted she was, when she dealt with matters handled by Bezuidenhout SC.

L. JANDRE BEZUIDENHOUT FOLDER

218. Jandre Bezuidenhout ("Jandre") is the son of Bezuidenhout SC. Jandre was involved in a criminal case in Cape Town and Breytenbach drafted the representations in Jandre's name destined for the DPP: Cape Town. Jandre was a member of Andre Hof Trust which held shares at Execuhitch Holding SA (Pty) Ltd ("Execuhitch"), where Breytenbach was also a shareholder. I attach a copy of the Trust Deed as annexure "KRM20" and the representations drafted in the name of Jandre by Breytenbach marked as "KRM21".

219. Breytenbach had reason to shred this folder because it exposed how conflicted she was when it came to the Bezuidenhout Family.

M. **EXECUHITCH FOLDER**

220. The Execuhitch company was established by Bezuidenhout SC and Dirk Visser ("Visser"). The two needed funding for the company, whereof according to Visser, Bezuidenhout SC came with an idea that they must approach Breytenbach to assist them in securing funding for the company. Breytenbach assisted them in securing a meeting with a potential funder, Nutty Kirsch. The funding agreement was approved, whereof the shareholding was as follows:

220.1. Visser Family 60%, and Invest Co 50%

220.2. The 50% in Invest Co was divided as follows:

220.2.1. KI Corporation Ltd ("Nutty Kirsh Consortium) 50%,

220.2.2. Andre Hof Trust 40%

220.2.3. Breytenbach 10%

221. I attach hereto a copy of the shareholder agreement, marked as annexure "KRM22".

222. Breytenbach was previously a prosecutor in a matter where Nutty Kirsh was the complainant. Their relationship developed from there and hence, it was easier for her to connect Bezuidenhout SC and Visser with Nutty Kirsh.

N. CONCLUSION REGARDING THE AFORESAID CHARGES

223. The conduct of Breytenbach and her Attorney of instructing a forensic expert to shred the aforesaid computer contents that related to the Kumba/ICT investigation was obstructive, mainly that most of the shredded documents originated from Hellens to Breytenbach. ICT's legal representatives' complaint was that Hellens was influencing Breytenbach in the case against their client.

224. The conduct of Breytenbach and her Attorney to allow Phillip Otto to gain access to the NPA official laptop and consequently, shred the computer contents was in contravention of section 40A, read with section 41 of the NPA Act.

225. Breytenbach's defence was that, in shredding the documents, she was protecting her privacy. The NPA Internet and Usage Policy dated 31 May 2006 had a privacy clause which provided that unless an encryption is used, staff should not send information over the Internet if they considered it private.

226. For the period between 17 February 2012 when Breytenbach was advised that the deletion of information from the NPA laptop would amount to a criminal offence, and 30 April 2012 when she was served with a letter of suspension, Breytenbach had ample time to encrypt all the information she purported to be private. However, on 2 May 2012 Breytenbach opted to shred the information from the laptop, contrary to the warning of 17 February 2012, thereby attracting the criminal charges preferred against her.

227. Logic dictates that had NPA insisted on gaining access to the encrypted information, NPA would have sought a court order for de-encryption.

228. The State had jurisprudence from the Constitutional Court judgment in Bernstein and Others v Bester and Another[8] that once a person who claims privacy takes the alleged private information to a business or communal domain, the right to privacy shrinks.

229. The state instituted a prosecution against Breytenbach and her Attorney for their conduct and established a *prima facie* case. They were denied a discharge in terms of section 174, which they had applied for and the court held that they had a case to answer. The two were acquitted at the end of the state's case on charges 1 and 2, which related to obstructing or defeating the ends of justice, on the basis that the investigation against Breytenbach was a labour one, not court related. The Magistrate refused to take cognisance of foreign jurisprudence that the state had presented.

230. The Presiding officer ruled at the end of the defence case that the State had proved all the other elements except for intention, and at the end, thanked the defence and the Prosecution for the manner in which the trial was conducted, stating that the parties were exemplary to the country.

231. It is malicious for Booysen, McBride, and Sesoko to come to the Commission and mislead the Commission to say the State had no *prima facie* case against Breytenbach when they were not party to the prosecution,

[8] 1996 (2) SA 751 (CC), at par 67

nor had made an effort to obtain the contents of the docket and the judgment therein.

232. By refusing to hand over the laptop in circumstances where it was believed that the laptop had information which might assist in the investigation process, Breytenbach obstructed the investigation process. In this regard she is/was guilty of obstructing the ends of justice.

233. Further, Breytenbach well knowing that the misconduct complained of against her related to Kimberly CAS 263/04/2011 which was the Kumba/ICT criminal case, she caused contents of the laptop related to the above criminal case to be shredded. In this regard Breytenbach is/was guilty of obstructing or defeating the ends of justice.

234. Breytenbach and her attorney hired services of a private technician to shred the computer contents. By allowing a private technician to gain access and shred information contained in the laptop belonging to the NPA, Breytenbach is/was guilty of contravening section 40A(2)(a) of the NPA Act.

235. Further, Breytenbach after having been served with the notice of suspension on 30 April 2012, she continued to access information in the laptop. Her act of accessing the information in the laptop at that stage was unauthorised as her authority to access the NPA official laptop ceased to exist when served with the notice of suspension. In this regard she was guilty of contravening section 40A(2)(a) of the NPA Act.

236. Further, Breytenbach impaired the operations of the official laptop and prevented or hindered access to any program or data held in the NPA computer, shredded official and private contents of the official laptop well knowing that the contents of the official laptop were the subject of investigation. Amongst others, the shredded contents of the computer included the file contents of Kumba/ICT documents which was the subject of the complaint against Breytenbach. In this regard she was guilty of contravening section 40A(2)(b) of the NPA Act. A copy of the statement of Phillip Otto, the private technician used by Breytenbach to shred the contents of the laptop, marked as annexure "KRM23" and a statement of Jaco Venter, a forensic technology specialist appointed by Nexus Forensic Services marked as annexure "KRM24". A copy of the charge sheet is attached as annexure "KRM25".

237. The court acquitted Breytenbach and pronounced that the State had proven all the elements of the offences except the intention. Accordingly, the prosecution of Breytenbach was far from being malicious. A copy of the judgment in this regard is attached as annexure "KRM26".

238. In view of all the above, I submit that charging Breytenbach for defeating or obstructing the ends of justice and for contravening section 40A of the NPA Act was justified. Any suggestion that charging Breytenbach in the circumstances is malicious, is devoid of merit.

239. I maintain that the prosecution of Breytenbach was justified even though the presiding officer did not find her guilty.

240. During the trial, it was alleged that the prosecution of Breytenbach was motivated by malice in that she insisted that Richard Mdluli ("Mdluli") be prosecuted. In order to dispel or contradict such allegations, I wrote a memorandum to the Acting Special Director of the PCLU, Torie, requesting memorandum dated 03 February 2017 requesting authorisation in terms of section 41(6) of the NPA Act to call Jiba and Mrwebi as witnesses to deal with the aforesaid allegations. I attach a copy of the memorandum hereto marked as annexure "KR27". The memorandum was forwarded to Abrahams. Subsequently, Torie sent me an internal memo dated 24 February 2017 which reads as follows:

> *"After consulting and considering all the options, my directive in this instance is to close the case and argue the matter on the existing evidence and decided cases."*

241. I attach a copy of the memo marked as annexure "KR28".

242. The non-granting of the authorisation discouraged me from appealing the acquittal.

243. I wish to bring to the attention of the Commission that Breytenbach's prosecution is mentioned by McBride, Seeoko, and Booysen yet she has not testified before the Commission as a person with intimate knowledge of the case which was preferred against her. I deal with the prosecution of Breytenbach as a result of a request by the evidence leaders and to dispel the notion that her prosecution was as a result of the State Capture which was motivated by either political or corrupt reasons.

O. MY INVOLVEMENT IN THE PROSECUTION OF BREYTENBACH

244. At the time that I recommended that Breytenbach be charged for the offences listed above, I had been seconded to the PCLU unit. I later deal with my secondment to the PCLU Unit. The matter was allocated to me as the prosecution team's workload in the Cato Manor matter had substantially reduced as we were dealing with interlocutory applications in the civil courts where the NPA had the services of State Attorney and Private Counsel. As such, the then NDPP, Abrahams allocated various matters to the prosecutors who formed the team in the Cato Manor.

P. THE SECONDMENT TO THE REFERENCE GROUP AND PERTINENT FACTS THERETO

245. On perusal of McBride's affidavit, I realised that he misleads the Commission in various instances, in relation to me. I cannot help it but conclude that he did this out of malice because he presents, as facts about me, several untruths before the Commission for no apparent reason.

246. Here below, I set the record straight in relation to what McBride alleges about me in his affidavit.

247. In 2014, Mr Nhleko ("Nhleko") the then Minister of Police established a reference group to advise him on diverse matters within his Ministry.

248. Nhleko requested me to join the reference group through the then Minister of Justice and Constitutional Development. The request was forwarded to the

National Prosecuting Authority, which cascaded the same to the Director of Public Prosecutions in Gauteng Local Division. I was then released to join the Police Ministerial reference group.

249. Nhleko convened the first meeting where the terms of reference were presented to the reference group. A copy of the terms of reference is attached to this affidavit as annexure "KR#132". The terms of reference had an item – on operations: alleged involvement of police members in illegal renditions. I must mention that McBride alleges in his affidavit that rendition was not part of the terms of reference. This is not true.

250. Mr Hadebe ("Hadebe") was nominated by Nhleko to be the convenor of the reference group. I was tasked to look into the rendition allegation documents and brief the group from which a joint report on the matter would be produced.

251. The reason I was allocated the rendition was because it related to the conduct of police members, and I had track record in dealing with labour matters in the correctional services department where Nhleko was previously a provincial commissioner.

252. I dealt with the rendition matter as set out below.

253. The documents which were copies of a docket were delivered to me by Hadebe who obtained them from the police secretariat. On perusal of the copies of the docket, I realised that the matter was being handled by IPID

and the investigation officer was Mr Khuba ("Khuba"), who I had previously met in the beginning phase of the Booysen matter in Durban.

254. The reference group requested Hadebe to arrange a meeting with the investigating officer of IPID. Hadebe later reported that a meeting had been granted and that it would be held in the presence of IPID's executive director, McBride.

255. The meeting did take place and McBride came with the rendition docket and on comparison it contained similar statements as those in our possession. McBride was in the company of Khuba and others. The reference group was given access to the docket and one member took notes whilst McBride gave a briefing on the rendition matter.

256. McBride's briefing had nothing to do with the merits of the case they were investigating but the motive behind the investigation, mainly that the members of the SAPS Crime Intelligence were investigating members of the DPCI, because DPCI members were investigating criminal offences against their boss, Mr Mdluli ("Mdluli"). He also told the reference group that Mdluli and his unit were behind his previous arrest in relation to drinking and driving case against him.

257. The meeting was adjourned and on reading the notes, I realised that the motive as presented by McBride was not part of the notes. I then contacted Khuba as he was formally introduced as the investigating officer in our meeting, so that I could look into it and see if motive run down negated the existence of the rendition on merits. Khuba advised me that I should contact

the executive director if I needed the docket. I deny that I aggressively wanted the docket and I had no reason to be aggressive given the cordial manner in which the reference group was received by IPID.

258. I approach Khuba as a person who I knew from the initial stages of the Cato Manor SVC Section investigation, unaware of any red tape.

259. As protocol dictates, I contacted the convenor to request from the executive director, further access to the docket. The convenor informed me that the docket was then with the Minister of Police. He further advised me that the Ministry would be briefing lawyers to analyse two reports in the docket which were contradictory.

260. I continued with consultations in the matter and produced a report for the other members of the reference group to peruse and approve.

261. Furthermore, regarding General Dramat and General Sibiya, McBride misled the commission in that I was part to their prosecution. Equally he misled the commission in alleging that I was part of the prosecution team which frustrated the operations of the IPID. No evidence in support of this allegation has been placed before the commission by McBride.

Allegations by Booysen

AD PARAGRAPH 83

262. I wish to bring to the attention of the Commission that I did not prosecute or decided on the prosecution of Gordhan, Dramat, McBride, Sibiya, Van

Loggerenberg, Pillay, Magashula, Seeoko and Van Rensburg. I admit to have been part of the prosecution teams which prosecuted Breytenbach, Gerhard Wagenaar, Booysen and Cato Manor detectives. The prosecutions were based on good legal and factual ground, as alluded in this affidavit. I have no knowledge of the alleged political manipulation and disruption of investigations.

263. In any event, Breytenbach was a member of Parliament and Wagenaar was a private attorney. Therefore, at the time when the prosecution was instituted, they handled no investigations which could be disrupted.

264. I was not briefed on any investigations which were handled by Booysen and the Cato Manor detectives which would involve alleged political manipulations and alleged disruptions.

AD PARAGRAPH 84

265. I was not involved in the matter of Mabuyakhulu, Nkoyeni, Mdluli, Jibe, and Panday; nor was I involved in the prosecution of Sibiya, Dramat, Gordhan and McBride.

266. I must state that in respect of Breytenbach and Wagenaar, the Court found that there was a *prima facie* case against them. In this regard, the averment by Booysen is misleading.

267. The case of Booysen and the Cato Manor detectives was withdrawn without my input. I was and am still confident that there is a *prima facie* case against them, as alluded in this affidavit.

AD PARAGRAPH 85

268. While the offences mentioned by Booysen in his paragraph, falls under the PCLU mandate, the NDPP is permitted to refer any other matter to the PCLU in terms of the Omnibus clause.

AD PARAGRAPH 86

269. In my subordinate capacity within the NPA, I was not allocated the matters of BOSASA, State Capture, the Guptas, and Steinhof, and therefore, it is unfair and unjust for Booysen to either expressly or by implication criticise me. Similarly, the matters involving Pillay, Gordhan, and McBride were not allocated to me.

AD PARAGRAPH 87

270. It was not brought to my attention at the time when I was assigned, together with the prosecuting team, that Booysen and the Cato Manor detectives were investigating any politically involved case, nor was it said that my assignment had anything to do with those cases.

271. I decided on the murder dockets in good faith and in the execution of my duties, as I was assigned by the Directorate of the NPA as their subordinate.

AD PARAGRAPH 89

272. I have stated in this affidavit that my involvement in the case of Booysen and the Cato Manor detectives was as a result of being requested by Chauke who is my direct supervisor, Head of the Division and also responsible for my performance management.

273. The Breytenbach and Wagenaar case was allocated to me within the PCLU under the supervision of Dr Pretorius SC. The decision to prosecute was taken by Pretorius in consultation with Adv Mzinyathi in terms of Section 24(3) of the NPA Act. I did not receive instructions from Jiba as to how to deal with these matters. It is absurd to align me with the bidding for Zuma whereas I was part of the prosecution team which decided to reinstate his corruption charges and he is currently standing trial for such charges.

AD PARAGRAPH 92

274. In this paragraph Booysen stated as follows:

> *"Jiba also played a major role, along with Mrwebi, to withdraw criminal charges against the then National Head of Crime Intelligence, Mdluli. This too courted criticisms from the courts as the withdrawal of charges against Mdluli was held to be irrational. Breytenbach, who insisted on prosecuting Mdluli, was suspended and charged internally by Jiba. Breytenbach was acquitted and resigned from the NPA. This did not deter Abrahams from continuing the persecution of Breytenbach once he assumed office. Raymond Mathenjwa ("Mathenjwa"), was assigned*

to prosecute her criminally on spurious charges. The court acquitted her on all charges."[9]

275. The prosecution of Breytenbach was based on objective and *prima facie* evidence. I vehemently deny the allegations that spurious charges were instituted against Breytenbach and I put Booysen to the proof thereof. In view of the fact that the Court found that the State established a prima facie case against Breytenbach for the contravention of section 40A of NPA Act. The finding by the Court resulted in the dismissal of the section 174 application of the Criminal Procedure Act 51 of 1977 (CPA).

AD PARAGRAPH 109

276. In paragraph 109, Booysen intimates that among others, my involvement in the prosecution in the Cato Manor cases is similar in pattern to the prosecution of among others Breytenbach, Dramat, Sibiya, McBride.

277. The full text of his allegation is as follows:

"The relegation of Mlotswa and the deployment of Noko to KZN, the subsequent withdrawal of cases against Panday, Madhoe, Nkoyeni and Mabuyakhulu and the subsequent deployment of Mathenjwa and Maema to spearhead our prosecution, suggests, at a minimum, a familiar pattern similar to other prosecutions such as those of Breytenbach, McBride, Sibiya, Dramat, Van Loggenberg and Pillay."[10]

[9] annexure Z (a) JWB – 028,
[10] annexure Z (A) page JWB – 033

278. The Cato Manor matter is fully dealt with in the relevant portion of this affidavit. With regard to relegation of Mlotswa and the deployment Noko, such matters are not within my knowledge. With regard to the institution of prosecutions involving Panday, Madhoe, Nkoyeni, Sibiya, McBride, Dramat, Pillay, Van Loggenberg, and Mabuyakhulu, I was not involved. I specifically deny that my involvement in any matter demonstrated the alleged familiar pattern of prosecutions.

AD PARAGRAPH 123

279. In paragraph 123, Booysen submits that he finds it extraordinary that I appeared in two (2) provinces in two separate matters in the same week. This is with reference to my appearance in the district court of Tshwane North, Pretoria North in the prosecution of Breytenbach on 15 February 2016, followed by my appearance in the Durban High Court on 19 February 2019 in relation to the Cato Manor prosecution, where Booysen was 1 of the accused police officers.

280. I respond to the allegations as set out below:

280.1. Booysen did not establish that there was any wrongdoing or unprofessional conduct on my part in appearing in court on the two different occasions and for two different matters. It is normal for a Legal Practitioner to appear in different courts for different matters

and on different dates. This is a clear demonstration that Booysen is merely clutching at straws.

280.2. It is critical to indicate that Booysen neither sets out the details of his advisors nor did he indicate the factual basis of the alleged advice. In this regard, Booysen seeks to rely on hearsay evidence without even establishing the basis on which the hearsay evidence should be admitted. I urge the Commission not to receive such hearsay evidence in this inquiry.

280.3. The allegation that I was promised the position of DPP, Nelspruit is utter lies. Booysen, once more, intentionally and deliberately omitted to fully set out the details of his source. In any event, I specifically deny such untruthful allegations, and I put Booysen to the proof thereof.

280.4. To the extent that Booysen and his informant allege that a captured group was rewarded with appointments to various positions in the NPA, I deny such allegations and I put Booysen to the proof thereof. Based on my knowledge, the then NDPP had recommended various individuals from different Units of the NPA and another from outside the NPA based on their suitability, competency and experience. The said appointments which I was part of were accepted and signed by the former President, Jacob Zuma and counter-signed by the former Minister of Justice and Correctional Services.

AD PARAGRAPH 215

281. I deny any conspiracy against Booysen. Booysen is implicated by evidence in the docket, and more particularly, it is not only Alyer's evidence that the State relied on against him.

282. Section 20(4)(a) and (b) reads as follows:

> *"(4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of-*
>
> *(a) the area of jurisdiction for which he or she has been appointed; and*
>
> *(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director."*

283. The abovementioned section of the NPA Act does permit DDPPs to conduct prosecution in another division on instruction by the NDPP. To this end, I have been doing cases outside of my division on instructions and/or delegations from the NDPP, eg. Simelane matter in North Gauteng, Zuma matter in KwaZulu-Natal and I am due to do a matter in Limpopo Province. It is therefore not correct for Booysen to make general allegations without legal and substantive facts.

McBride's Allegations as Set Out in Exhibit Y (Glen Affidavit)

AD PARAGRAPHS 125 – 131

284. McBride has deliberately and maliciously lumped my name as part of a core group of prosecutors who have enabled the State Capture, declined, and delayed decision to prosecute the suspects investigated by the IPID. I deny the allegation made by McBride. I was not allocated any matter investigated by the IPID, where I declined or delayed the decision-making process.

285. I confirm having made recommendations for the prosecution of Breytenbach to Torie Pretorius and Advocate Mzinyathi who took a decision in terms of section 24(3) of the NPA Act for the prosecution of Breytenbach. I further confirm having worked with Maema and Moeng on the prosecution of Booysen. I, however, deny having worked with them on any matter where there was a decision to decline or where decision-making process was delayed.

286. It has recently been brought to my attention that there were correspondences between McBride and Abrahams regarding the investigation of certain matters, and the copies thereof are annexed to McBride's affidavit and marked "RMB.U", "RMB.V", and "RMB.W". for ease of reference, I attach the copies of these letters and marked as "KRM29", "KRM30", and "KRM31". I categorically state that I was not involved in the matters which McBride and Abrahams exchanged letters on. It is incorrect and misleading for McBride to lump my name amongst prosecutors who he alleges to have declined to prosecute or delayed the decision-making process.

287. I was not involved in the criminal prosecution of Dramat and Sibiya and, insofar as Booysen is concerned, I have thoroughly explained my involvement in this affidavit.

288. I did not work with Adv Mashunga ("Mashunga") and Adv Baloyi ("Baloyi") on matters investigated by IPID. The IPID and the DPCI investigated the Booysen matter, and there was no delay or declining of prosecution as alleged. The IPID did not investigate the Breytenbach matter.

AD PARAGRAPHS 132 – 134

289. McBride is further not truthful in his allegation that I decided on matters which were investigated by the Crimes Against the State Unit (CATS). I did not decide on the matter of Gordhan. The matter of Breytenbach was investigated by Serious Economic Offences Unit and not CATS. This clearly demonstrates that McBride does not hesitate to make wild and untruthful allegations with the view to misleading the Commission. The Booysen matter was investigated by IPID and DPCI and not CATS.

AD PARAGRAPHS 138 – 139

290. McBride alleges that the reference group did not have a mandate to advise the Minister on the rendition. He is misleading the Commission in this respect because the rendition was part of the reference group's terms of reference. For ease of reference, I annex hereto the terms of reference as "KR/32".

291. My only involvement in the rendition matter was outside the NPA where the reference group had to advice the Minister of Police whether the members of the SAPS did repatriate the Zimbabwean Nationals without following the national legislation and SADC protocols on extradition.

292. The reference group had signed a non-disclosure clause prohibiting disclosure of information to anybody other than the group members, the Police Secretariat, and the Minister of Police. In this regard, I did not discuss the rendition matter with any prosecutors, including those who were seized with the prosecution of such matter, because doing so would be in breach of the reference group's non-disclosure clause.

293. McBride makes a bold statement that I was involved in deciding matters investigated by IPID including the rendition matter and therefore, it was undesirable as it amounted to a clear conflict of interest which compromised IPID's independence. This statement is based on McBride's untruthful allegation that I was involved as a prosecutor in deciding matters which IPID investigated at the time and the decision-making on whether there was a criminal case on the rendition matter, and hence, this allegation of a conflict of interest. I would not have agreed to give the Minister advice on the rendition if I were also seized and/or exposed to the decision on whether to institute criminal prosecution against the persons who were implicated in the rendition. It is clear that the allegations McBride made are based on conjecture and speculation. In view of the fact that I was not involved in the prosecution of these matters, I specifically deny the allegations levelled against me.

Allegations by Sesoko

AD PARAGRAPH 24

294. I admit that I was appointed to be one of the members of the ministerial reference group and submit that there is nothing untoward about it at all.

295. I also admit that I played part in the prosecutions, not targeting, of Booysen and Breytenbach and such prosecutions were based on objective evidence as already demonstrated elsewhere in this affidavit.

296. Save as stated above, I deny each allegation in this paragraph. Similarly, Sesoko makes allegations without any substantiation.

AD PARAGRAPH 25

297. I confirm that Sesoko was part of the meeting which the reference group held with the IPID management.

298. I deny that I demanded the docket and confirm that my request of the docket from Khuba was in good faith. I have already explained elsewhere in this affidavit, the circumstances in which I requested the docket from Khuba.

299. I deny any allegations herein, which are at odds with what I state above.

MY SECONDMENT TO THE PRIORITY CRIMES LITIGATION UNIT (PCLU) AND THE PERTINENT FACTS THERETO

300. As stated in the relevant portion of this affidavit, the Cato Manor SVC Section prosecution team was established in 2012 under the management of Chauke and the national guidance of Jiba. Although at that time Mlotshwa was the Acting DPP in KwaZulu-Natal, the prosecution team was advised that he requested that other prosecutors from outside KwaZulu-Natal be considered to deal with the Cato Manor prosecution as the local prosecutors had working relationships with members of the Cato Manor SVC. The prosecution team, under the management of Chauke was then appointed.

301. In August 2013, effective the 1st of October 2013, Nxasana was appointed NDPP. Nxasana held the view that since Mlotshwa was no longer acting as DPP, and Noko, who was unknown to the Cato Manor SVC, was appointed as DPP of Kwazulu-Natal, there was no longer a need for Chauke to manage the prosecution team, and he was thus removed.

302. It is apposite to mention that Nxasana was appointed as NDPP not long before the Gorven judgment was delivered, on 26 February 2014, and the prosecution team was perusing, contemplating and considering the judgment in order to decide whether to appeal the judgment.

303. When considering the judgment, the prosecution team noted that the judgment stated, amongst other reasons, that the concession by Hodes SC that the documents relied on by the NDPP did not link Booysen to the commission of the offence, and therefore the decision to issue the POCA authorisation was irrational, and on that basis, ought to be set aside and reviewed.

304. On the strength of this finding, the prosecution team held the initial view that an appeal would not be necessary and, in any event, the Court stated that the NDPP is not precluded from issuing fresh authorisations. In order to enable Chauke to brief the NDPP, the prosecution prepared a memorandum dated 6 March 2014, wherein we advised Chauke that, based on the incorrect concession made by Hodes SC, the team's view was that the judgment should not be appealed. I attach a copy of this memorandum hereto, marked as annexure "KRM33".

305. As a further part of the decision making process pertaining to an appeal, the prosecution team consulted with Hodes SC with regard to the concession referred to in the judgment. On 13 March 2014, during such consultation, Hodes SC advised that he did not make the concession referred to in the judgment. He also offered to have the recording of the hearing transcribed. The recording was transcribed and I attach hereto a copy thereof, marked as annexure "KRM34".

306. To prevent the lapsing of the *dies inducias*, the prosecution team and Chauke instructed the State Attorney and Hodes SC to prepare the application for leave to appeal and have it delivered urgently. Chauke undertook to brief the National Office of the decision to appeal the matter. The application for leave to appeal is dated 18 March 2014. I attach a copy thereof hereto, marked as annexure "KRM35".

307. On Nxasana becoming aware of the application for leave to appeal, he summoned Chauke and the prosecution team to his office. Chauke, Dr.

Ramaite ("Ramaite") and the prosecution team attended a meeting with Nxasana on 25 March 2014. At this meeting, Nxasana expressed his dissatisfaction that he was not briefed on such a high profile matter and yet, a decision to institute an application for leave to appeal was taken without his knowledge. At this meeting, the 7th of April 2014 was arranged as a date for Nxasana's full briefing of the matter. Nxasana also directed that the charges against Booysen be withdrawn. I attach hereto a copy of Maema's contemporaneous notes which he took during the meeting, marked as annexure "KR36".

308. The prosecution team was not aware that Nxasana had not been briefed by his deputies, on the Cato Manor matter when he assumed office as the NDPP, as part of the handing over process. In the meeting, Chauke informed Nxasana that he had briefed Ramaite on the prosecution team and Chauke's decision to bring an application for leave to appeal and the urgency attached thereto in order to be within the *dies induciae*.

309. In preparation for the meeting of 7 April 2014, the prosecution team prepared a PowerPoint presentation with the intention to utilise the presentation for purposes of briefing Nxasana on the matter. However, as far as my recollection goes, the prosecution team did not go into the details of the presentation as Nxasana derailed the presentation and informed us, amongst others, of the following:

309.1. Whilst practising as an attorney and representing clients who were being investigated by Cato Manor SVC, he told Peter George

(Accused 23) and Nico Crause (Accused 16) that *"the whole story would eventually catch up with them"*;

309.2. It was necessary that he disclose that Bangizwe Mhlongo ("Mhlongo"), a member of the Executive Committee of the STA, is his cousin;

309.3. We should prepare a prosecution memorandum for presentation to request the issuing of authorisations in terms of POCA, and when this prosecution memorandum is presented, he would delegate the decision making function on this matter to Ramatlo and recuse himself.

310. Nxasana also informed the prosecution team that he was of the view that it was not necessary to appeal the judgment because paras 39 and 40 of the judgment indicated that the NDPP is not prohibited from issuing fresh authorisation certificates. Paras 39 and 40 of the judgment reads as follows:

> *"[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one and two and eight to twelve. <u>That can only be decided by way of a criminal trial</u>. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions.*

[40] *Prayer (e) in paragraph 3 of this judgment seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booyesen. A final interdict is thus sought. The requisites for a final interdict are well established. A clear right must be shown, an injury actually committed or reasonably apprehended and an absence of an alternative remedy.[11] Mr Booyesen has a clear right to a lawful decision making process. He certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. A further difficulty is found in the other two requirements for an interdict. There is no evidence that Mr Booyesen has a reasonable apprehension of suffering an injury. Neither can it be said that there is no alternative remedy available to him. It is clear, therefore, that there is no basis for the interdict sought by Mr Booyesen in paragraph (e), either in the form sought or in any other form. Outside of the requisites for an interdict and if indeed I have a general discretion to grant such an order (on which I make no finding), I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the*

[11] *Setlogelo v Setlogelo* 1914 AD 221.

separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. No order shall therefore issue in terms of prayer (e)."

311. It was as a result of the above briefing and discussion with Nxasana that the Govern J judgment was not appealed.

312. Nxasana directed that a full prosecutorial memorandum be presented by the end of May 2014. It must be noted that, at the time of the briefing to Nxasana, the only person against whom the racketeering certificate was declared unlawful, was Booysen. The certificates in respect of the others remain valid at that stage. Therefore, the evidential analysis of Nxasana or of that person to whom he would have had delegated the decision making process would have been on whether to re-issue the certificate against Booysen.

313. The presentation of the prosecution memo to Nxasana was delayed due to the following reasons:

313.1. The prosecution team prepared a prosecution memorandum, a copy of which is attached, marked as annexure "KP[illegible]37". The prosecution memorandum was signed by Maema, and same was presented, together with a draft application to Noko, who, on the 4th

of June 2014, signed the application which was to be presented to Nxasana.

313.2. The application was submitted to Mosing who was to forward it to Nxasana. After a perusal and analysis of the prosecution memorandum, Mosing advised Maema that there are certain shortcomings in the application, as critical information was not set out. Because of that, he will not submit the application to Nxasana. He advised Maema that the prosecution team should supplement the application with the outstanding information. Arising from the discussion that Maema had with Mosing, Mosing prepared an internal memorandum dated the 26th of June 2014, addressed to Nxasana and Adv C T C Duma ("Duma"), Nxasana's special advisor. I attach hereto a memorandum from Mosing, dated the 26th of June 2014, marked as annexure "KRM35". The purpose of the internal memorandum was to appeal for more time to enable the prosecution team to supplement the prosecution memorandum.

313.3. The internal memorandum referred to above, contained inaccuracies insofar as the statements of Diondio and Mkhize are concerned, as such statements were obtained before the initial authorisation was granted. The other inaccuracy relates to the point that the prosecution team would not use Dankas as a witness.

313.4. The major derailment of the finalisation of the prosecution memorandum is the fact that a request for further particulars was

received by the prosecution team on the 28th of May 2014. On receipt of the request for further particulars, Maema divided it amongst the team members for the drafting of the response. As a result of the aforementioned obligations of the team members, they could not give their attention to the response and therefore, Maema and I attended to the final drafting and settling of a response to the request for further particulars on the Cato Manor SVC Section matter. This response to the request for further particulars took us approximately a year to complete. The response delivered was in excess of 2 000 pages. In order to avoid probity, I will not attach the request for further particulars. In respect of the response to the request for further particulars, I have already referred the Commission elsewhere in this affidavit to Maema's affidavit.

313.5. Mlotshwa was promoted to the rank of DDPP at the Free State DPP Office with effect from August 2014, and Futshane had been promoted to the rank of Chief Prosecutor in the Johannesburg cluster some time in 2013 under the DPP Johannesburg Office.

313.6. The prosecution team received an application to review the decision of Jiba to issue the POCA authorisation pertaining to the remaining accused and took a decision that we must actively participate in assisting Counsel to draft the answering affidavit in that matter, in order to avoid the shortcomings experienced in the Booysen application, where the prosecution team was not involved in

preparing the answering affidavit and the record of decision was not filed.

313.7. In April 2015, I was allocated a High Court roll-planning portfolio by Chauke. The portfolio of roll planner involved:

313.7.1. planning the roll of matters that will be in court daily;

313.7.2. advising advocates in DPP's offices on available dates for consideration in respect of enrolment of matters;

313.7.3. attend to the Judge President's request for roll planning for the criminal court.

313.8. This portfolio needed my undivided attention, and I could not fully prioritise work on the Cato Manor matter.

314. Ntlakaza and Molaka were allocated office work, despite the fact that they were part of the prosecution team dealing with a very voluminous project. The office work allocated to them, had deadlines that had to be met and this meant that they were unable to give the much needed attention to the Cato Manor matter.

315. My allocation to the High Court roll-planning portfolio meant that I had to divide my time between that portfolio and the Cato Manor matter.

316. The briefing that took place on the 7th of April 2014 was a PowerPoint presentation in order to inform Nxasana about the case without going into detail.

317. Due to the interrupting factors as alluded above, the prosecution memo could not be placed before Nxasana to make a decision whether to issue the racketeering certificate. Nxasana vacated office in May 2015 and the prosecution memo was later presented to Nxasana's successor, Abrahams on the 18th of August 2015.

318. Hence, Nxasana, during his tenure as NDPP, could not make a decision on the re-issuing of the racketeering authorisation certificate against Booysen. The evidence of Nxasana led on 12 June 2019 before the Commission, which is found on page 50 to 66 of his transcript, is to the effect that he informed the prosecution team that there was no case against Booysen.

319. With due respect, the evidence tendered by Nxasana in this respect is incorrect because Nxasana was in no position to express such a view without the indictment and the prosecution memorandum presented to him. In fact, Nxasana said that the decision on this matter might be delegated to Ramaite due to the relationship he has with Mhlongo, a member of STA, and his previous expression to George and Crouse that their investigative approach was criminal.

320. When Abrahams was appointed, he took a decision that Maema, Mlotshwa, and I be seconded to the PCLU so that we could give undivided attention to

the Cato Manor case other than being pre-occupied with our respective Division's operations.

321. Maema, Mlotshwa and I were seconded to the PCLU with the Cato Manor matter.

322. This is how I came to be placed at the PCLU and I was subsequently allocated the prosecution of Braytenbach and other matters.

INVESTIGATION BY IPID AND DCPI INTO CATO MANOR SVC SECTION

323. It is very interesting and critical to mention that there was a joint investigation conducted by IPID and DCPI members. In the affidavits and evidence before the Commission, Booysen, McBride and Sesoko are not making allegations that members of IPID who formed part of the investigation team, were captured for either politically or corrupt reasons. Such members are not being painted with the same brush as the prosecution team.

324. More particularly, Booysen's participation in Counts 8 to 12 was investigated by IPID. Sesoko and McBride, in their affidavits and evidence before the Commission, stated that Booysen was targed by the prosecution team.

325. On the supposition that the allegations set out above were correct or there was suspicion that the prosecution of Booysen was unlawful and unjustified, it would have been expected from McBride and Sesoko to have taken remedial steps against the IPID investigators for their unacceptable and unprofessional conduct, if any. McBride and Sesoko should have also

lodged a complaint with the Office of the NDPP and the DPP in KwaZulu-Natal. At all material time during the investigation and prosecution of Booysen, the prosecution team, IPD and DPCI investigators worked together.

328. No cogent reasons have been furnished at all by McBride and Sesoko as to why they did not call for the docket involving Booysen for them to review it.

327. It is not Booysen's case, and correctly so, that he laid a complaint with the Head of the IPID regarding any unlawful or unprofessional conduct on the part of any member of IPID relating to his investigation and prosecution. Yet Sesoko and McBride were national managers of IPID and Booysen's case received national publicity. The fact that no allegations or complaints were made against members of IPID who were involved in the investigation relating to Booysen, is a clear demonstration that the allegations levelled against the prosecution team, are malicious, vexatious and unfounded. The aim of these allegations is merely to tarnish the personal and professional integrity and reputation of the prosecution team.

DE KOCK REPORT

Overview

328. The De Kock report dated the 27th of June 2019, has, as subject heading "**RECONSIDERATION OF AUTHORISATIONS IN TERMS OF SECTION 2(1)(e) and (f) OF THE PREVENTION OF ORGANISED ACT, 121 OF 1998**". This report does not state what prompted the constitution of the

panel. However, ordinarily there will be representations made by the Accused or Complainant or any other person or party whom the National Director considers to be relevant, in terms of Section 179(5)(d) of the Constitution. In this report there is no reference to any representations which were made nor is there any reference to a consultation between the National Director and the Director of Public Prosecutions, as required by the said section of the Constitution.

329. The reconsideration will most probably be based on Section 179(2) of the Constitution where the NPA has the power to institute criminal proceedings on behalf of the State and to carry out necessary functions incidental to instituting criminal proceedings. If the reconsideration is based on this subsection of the Constitution, the panel should have:

329.1. invited the prosecution team to make presentations and clarify the processes which were followed leading to the issuing of the racketeering certificate;

329.2. invited further input from the prosecution team;

329.3. canvassed any identified shortcomings in the prosecution memo, the indictment and the docket, if any;

329.4. familiarise themselves with the strategem of the prosecution team;

329.5. appraised themselves with all the processes that have thus far unfolded before the criminal court, including:

329.5.1. disclosure of the content of the docket;

329.5.2. request for further particulars;

329.5.3. State's response to the request for further particulars;

329.5.4. The unsuccessful application by the Accused to have the matter struck off the roll in terms of section 342A of the Criminal Procedure Act, Act 51 of 1977 ("CPA");

329.5.5. The stages at which the motion applications instituted by the Accused were at.

330. The De Kock report was compiled without the panel appraising itself with any of the issues as raised directly above and consequently opted to advise the NDPP on an incomplete set of facts. In the light of the above shortcomings to the compiling of this report, the NDPP's decision is irrational and unlawful.

331. The De Kock report does not make reference to any representations made to the NDPP in terms of Section 179(5)(d) nor does it make any reference to any objective facts in terms of Section 179(2) which were before the NDPP which prompted her to constitute a panel. The De Kock report also does not make reference at whose instance and on what basis the NDPP had to reconsider the decision to issue the authorisations. In the absence of the above references, it can only be assumed that she acted in vacuum which would render her decision to constitute a panel and to make a decision based on the recommendation of a panel, irrational.

332. In this regard, the De Kock report and the decision by the NDPP does not spell out on which Section of Section 179 of the Constitution the decision and the panel's recommendation are premised on. Consequently, this borders on offending the principle of legality.

333. Although the NDPP said the De Kock report was intended for the reconsideration of the racketeering authorisations, we are informed that even the predicate offences have been withdrawn. I am of the view that the withdrawal of the predicate offences is also as a result of the De Kock Report. The prosecution team, which was long seized with the matter, was further not consulted by the DPP KZN on the withdrawal of the predicate offences. I am aware that neither the investigating officers nor the families of the deceased were invited in the decision making process for the withdrawal of the predicate offences. Maema has informed me that he has been inundated with calls from family members of the deceased, enquiring about the progress of the prosecution, after the withdrawal of the matters. Maema further informed me that investigators from IPID and DCPI, Moslapos and Kolomote, contacted him and enquired from him about the progress on the matter. Moslapos later advised Maema that they had been instructed to advise the families of the deceased that the matters were withdrawn. Moslapos indicated to Maema that they were uncomfortable with these instructions as they were not aware of the reasons for the withdrawal of the matters.

Failure to consult prosecution team

334. I have been part of the prosecution team allocated to guide the investigation and decide whether to institute prosecution on the Cato Manor SVC matter since March 2012 and my delegation to that effect has not been withdrawn. What I know is that the NDPP has withdrawn the racketeering authorisation issued by Adv Jibe on the 17th of August 2012 and a subsequent authorisation issued by Adv Abrahams on the 13th of February 2018.

335. On the 12th of April 2019 Maema, the team leader, was instructed by McAdam, the Acting Special Director at the PCLU, to hand over to him all the Cato Manor dockets. During this time there was a pending High Court application where the accused had sought to challenge the aforesaid racketeering authorisation. This process had halted the commencement of the trial.

336. On the 8th of July 2019, the NDPP, Batohi, convened a meeting where she invited the prosecution team and advised us that she had constituted a panel to look into the Cato Manor prosecutions. A report has been received from the panel which was led by Adv De Kock and the recommendation to which she is in agreement with, was that all the racketeering authorisations should be withdrawn.

337. The prosecution team, and specifically myself, took an issue as to how could the panel make such a recommendation without consulting with us as prosecutors who have been long seized with the matter. The response from the NDPP was that the recommendation is not about the work of the

prosecution team, nor the decision of the prosecution team, but it was about the decision of both Jiba and Abrahams.

338. The said report was not given to the prosecution team, as the NDPP specifically mentioned that the report was meant for her as the NDPP. She, however, made summaries of some of the issues which the panel had said in the report, eg. That the case was based on hearsay evidence, credibility of witnesses, specifically Alyer and that the decisions were blurred by public perceptions and proper procedures were not followed. Ultimately there were insufficient evidence to justify the authorisations, and therefore she was convinced that both the authorisations of Jiba and Abrahams were wrong.

339. In the meeting, Chauke who was the initial coordinator of the prosecution team, commented that since when is the issue of credibility decided outside Court. Noko refused to comment on the matter and said that she had no comment as the NDPP already took a decision.

340. The prosecution team specifically informed the NDPP that it was not in agreement with the panel's recommendation and consequently the NDPP's decision. The NDPP's response was that she was not reviewing the decision of the prosecution team but that of Jiba and Abrahams.

341. I must state that the De Kock report has to date not been furnished to the prosecution team by the NPA. Maema, as team leader, said that he received a call from a media house, Daily Maverick, who wanted his comment on the De Kock report. He responded that he cannot comment on

a report which he had not seen. The reporter then furnished him with a copy which he distributed to the rest of the prosecution team and Chauke.

342. Maema did not comment on the De Kock report in the media and advised the reporter that he will comment on the report at the appropriate time when the NPA requires his comment thereon. Maema's approach was in accordance with the provisions of Section 41(6) of the NPA Act.

Analysis of the De Kock report

343. The De Kock report was compiled by De Kock, Thenga, Riley and Mamabolo. However, it was only signed by De Kock and Mamabolo. It is not spelled out in the De Kock report as to why Thenga and Riley did not sign the report.

344. I am of the view that Thenga should have recused herself from the panel, for the reasons as set out below. Equally so, I am advised that Mamabolo should have recused himself from the panel for the reasons set out below.

345. Thenga should have recused herself from the panel, because, on the 13th of August 2015, she compiled a legal opinion in the matter of State v Jiba, Silverton CAS 622/10/2014 to Abrahams where she had to comment on the prosecution of Booysen and processes followed therein. I attach hereto the said legal opinion marked as annexure "CM76".

346. In paragraph A.3 of her opinion, Thenga correctly make reference to Section 2.2 of POCA which provides as follows:

"The court may hear evidence including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."

347. This section provides that hearsay evidence is admissible in racketeering prosecutions. Yet, the De Kock report which she took part in compiling, criticises the State's case on the fact that the case is based on hearsay.

348. In paragraph E of her opinion, Thenga states that there were various consultations and briefings made by the prosecution team and investigating team to the NDPP. She further states that all the necessary consultations with the NDPP led to the written authorisation of the racketeering certificate by the NDPP, Jiba. Yet, the De Kock report states that proper processes leading to the authorisation of the issuing of the racketeering certificate by Jiba were not followed.

349. In paragraph G of her opinion, Thenga correctly stated that the Court in the Gorven J judgment had incomplete information. The information was unfortunately sitting with the legal representative and was not properly filed as it was supposed to be and therefore was not before Court. She further stated that the NPA prevented Jiba from appealing the Gorven judgment. She, in fact, had to remove papers already filed for the purpose of an appeal because the then NDPP instructed her that the matter must never be

appealed. Yet, the De Kock report put more emphasis on the Gorven judgment and does not mention that this was an appealable matter.

350. To compound matters, there is no indication in the De Kock report that Thenga disclosed the existence of her legal opinion to the other panellists.

351. It is my considered view that it would have been professional from Thenga to disclose the above and recuse herself from the panel. Her serving on the panel as a panellist, makes the report irregular, unfair and prejudicial against the prosecution team.

352. I have been advised by my legal team that, based on what is set out in Moeing's affidavit, Mamabolo should also not have been part of the panel because of the close working relationship he had with Booyesen in the past. This working relationship had previously caused Moeing to exclude Mamabolo from the decision-making process in the Cato Manor matter.

353. In the De Kock report there is no indication that Mamabolo disclosed the fact that he was previously excluded by Moeing or that he had a previous working relationship with Booyesen. To the best of my knowledge, there is no indication that Mamabolo deposed to an affidavit dealing with his involvement as a panellist.

354. At the time of consulting with my legal team and settling these papers, I had not been provided with affidavits, if any, deposed to by De Kock, Mamabolo, Riley and Thenga, setting out the process that unfolded, which lead to the compilation of the report.

355. The failure of the panellists to consult with the prosecution team deprived itself of the opportunity or advantage to know the extent of the consultative processes and briefings between the prosecution team, the NDPP and the ANDPP, prior to the issuing of the authorisations. The prosecution team had briefings with the ANDPP on the Cato Manor matter on 15 May 2012, 23 May 2012, 12 June 2012, 9 July 2012 and 6 August 2012.

356. The briefings on 15 May, 23 May, 12 June and 9 July 2012 resulted in the prosecution team finalising a prosecution memorandum dated 10 July 2012. I attach hereto a copy of the prosecution memorandum, marked as annexure **"CM77"**, which application was in the name of Chauke.

357. This memorandum was queried and the prosecution team was directed that the application must not be in the name of Chauke but it must be in the name of Noko, the DPP of KwaZulu-Natal. The prosecution team had to draft the application now in the name of Noko, which was then delivered by Meema to Mosing on the 16th of August 2012 and was signed on the 17th of August 2012.

358. It was not for the first time for the prosecution memorandum to be before Mosing and Jiba when it was delivered on the 16th of August 2012. The panel would have been made aware of this sequence of events had they consulted with the prosecution team. Instead, the De Kock report reflects that there was no consultation prior to the authorisation dated the 17th of August 2012.

359. In compiling the report, the panellists:

359.1. did not take into account the Judgment delivered by Legodi J in the matter involving the striking of Jiba from the roll of Advocates, which was launched by the GCB, where Jiba's conduct in deciding the Booysen matter was also one of the reasons for which the applicant sought her striking off the roll. In that matter, the Court found that, on the information that was placed before Jiba, which the Court considered, she properly exercised her prosecutorial discretion, and consequently found no fault against Jiba. The panellists' conduct as described above, clearly demonstrate lack of objectivity in that they put emphasis on the Govern judgment which was not favouring the issuing of the authorisation of the racketeering certificates, and ignored the Legodi judgment which was favouring the issuing of the certificates;

359.2. did not indicate in the De Kock report whether they considered evidence as contained in the docket such as the ballistic crime reconstruction reports, photo albums, post-mortem reports, expert reports and statements of all witnesses who were present at various crime scenes. In this regard, the panellists did not objectively assess the evidential material as to whether or not there was a pattern and similar *modus operandi* by the Cato Manor SVC Section as a group of SAPS members associated in fact in killing their alleged suspects;

359.3. did not only conclude incorrectly that there are contradictions in the statements of Hurley, but also did not set out the alleged

contradictions in the De Kock report. A careful perusal and analysis of the statements of Hurley demonstrates that:

359.3.1. Hurley saw Stoltz throw a firearm on the pillow at the side of the bed.

359.3.2. Stoltz further, after taking Hurley out of the room, asked Hurley where the deceased got the firearm from.

359.3.3. Hurley responded that the deceased had no gun and she saw Stoltz throw the gun on the pillow. Hurley stated in her statement ("CM31.1") *"I swear he didn't have a gun."*;

359.3.4. In Hurley's second statement ("CM31.2"), she stated: *"Sakhile did not have any dangerous weapon or a firearm in his possession ... He was not having anything on him."*. She further in the second statement stated: *"I saw the firearm being placed next to the deceased by the white guy."*

359.4. further pointed out to a contradiction between Hurley, on the one hand, and Nqabe Mdluli and Nkanyiso Ntenza, on the other hand, in respect of the presence of the firearm. The panellists are incorrect in that conclusion as Mdluli and Ntenza were outside the car when Hurley saw the police men throwing the firearm on the pillow next to the deceased;

359.5. did not indicate whether the panellists did consult with IPID and DPCI investigators in the process of analysing the evidential material and consequently finalising the said report;

359.6. did not indicate that they conducted inspections *in loco* and consulted with witnesses *vis a vis* what the prosecution team did;

359.7. did not indicate that they consulted with various ballistic experts, in particular, Mangena and pathologists;

360. The panel criticised the State's case that it is based on hearsay evidence which is, according to them, not admissible. In this regard, the panel overlooked the fact that there is a difference insofar as hearsay is concerned in respect of the racketeering charges and in respect of the predicate offences. There is nowhere in the report where the panel has indicated that Section 2.2 of POCA has been considered. This section provides as follows:

> *"(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

361. Furthermore, the panel overlooked the Constitutional Court decision on this aspect as pronounced in the matter of Savoi and others v National Director of Public Prosecutions and others[12] where the Court found that,

[12]2014 (5) SA 317 (CC)

regarding the potential unfairness of the admissibility of hearsay evidence to an accused person, the Court drew attention to the filter in the form of the proviso appended in Section 2(2) of POCA, namely that the admissibility of such hearsay evidence should not render the trial unfair. The Court further held that the section serves a twin purpose. Firstly, it effectively does away with the hearsay rule on the charges under Section 2(2) of POCA and, indeed, other exclusionary rules. In this respect, this section differs from Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 ("LEA Act") which retains the exclusionary rule but permits the admission of hearsay evidence only under circumstances as set out in Section 3(1)(a) to (c) of the LEA Act, which provides as follows:

> *"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
>
> *(a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) The court, having regard to –*
>
> *(i) the nature of the proceedings;*

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

362. The panel failed to differentiate between the admissibility of hearsay evidence on racketeering charges, and predicated offences in the indictment which support the existence of a pattern of racketeering.

363. Section 3(1)(c) of the LEA Act is applicable only in predicated offences, and not on the racketeering charges. In this regard, the Commission is referred to the matter of **S v De Vries and others**[13]. The panel usurped the judicial powers of a court to pronounce on whether or not the admissibility of

[13] 2012 (1) SACR 186 (SCA)

hearsay evidence will render the trial on the racketeering charges unfair, a pronouncement which could only be made by a court, having considered the accumulative effect of all the available evidence.

384. The panel relied on what they say is evidence of Nxasana to the Commission to the effect that he informed the prosecution team that there was no case against Booysen. I dispute that Nxasana ever informed the prosecution team that there was no case against Booysen. In fact, in a briefing which was held on the 7th of April 2014, Nxasana requested the prosecution team to bring a prosecution memorandum on Booysen by the end of May 2014. The prosecution team prepared a memorandum signed by Maema and the application was forwarded by Noko to Nxasana on the 4th of June 2014. As per protocol, such applications go through the Organised Crime desk which was Mosing, at the time.

385. On the 26th of June 2014, Mosing drafted an internal memorandum to Nxasana, confirming that he has received the application for the issuing of the racketeering certificates, but there are shortcomings which he has discussed with the team leader and consequently he returned the documents to be amended and for additional substance to the memorandum.

386. The prosecution team became pre-occupied with the voluminous request for further particulars which had been received on the 26th of May 2014, and furthermore team members were involved in other operational responsibilities and did not get to submit the amended memorandum before

Nxasana vacated office. Nxasana did not get to decide on the application by the prosecution team due to the reasons as set out above and elsewhere in this affidavit.

367. Consequently it is incorrect that Nxasana advised the prosecution team that there was no case against Booysen, as stated in the De Kock report. There would have been no rational basis for the prosecution team to have submitted an application to Nxasana for his consideration and decision if he had informed the prosecution team that there was no case against Booysen, because he was, at the time, the repository of power to authorise racketeering certificates.

368. This further explains the shortcomings in the De Kock report caused by the lack of consultation with the prosecution team because had the panellists confronted the prosecution team with the evidence of Nxasana, the explanation as set out above would have been placed before them, before compiling the report.

369. With regard to Danikas' statement, I refer the Commission to Maema's explanation where he states as follows:

369.1. The Greek version of Danikas's statement was received through diplomatic channels which are in existence between the Republic of Greece and the Republic of South Africa in 2018. Maema received a copy of the Greek statement from Luckson Mgiba ("Mgiba") of the Extradition desk in the office of the NDPP. Knowing that Danikas is fully conversant in English, Maema was surprised that the statement

was in Greek. On realising this fact, Maema requested Mgiba to have the statement translated to English. He informed Maema that the Department of Justice will be dealing with the translation by going out on tender to secure the translators who will then deal with the translation of the statement into English.

369.2. After approximately six weeks Maema received a statement from Mgiba which was the translated version in English. The statement was translated by one Marilena E M Piperides on the 12th of October 2018. I attach a copy of the English translation, with the Greek version of the statement attached to it, marked as annexure "CM74".

369.3. Maema contacted Danikas' Greek lawyer, Spiros Spirobulous in writing. Maema furnished the lawyer with both the Greek statement and the English translation and informed him that, in terms of South African law, the statement has to be discovered and made available to the defence team, and that Maema will forthwith do so.

369.4. Danikas contacted Maema through Whatsapp and pointed out certain translation mistakes in the English translation. Maema requested Danikas to address him in a formal way through his attorneys to bring his concerns to Maema's attention.

369.5. Some weeks later, Danikas, through his attorney, brought to Maema's attention a number of translation mistakes in the English translation. Maema then, in writing, informed Mgiba of the

translation mistakes, and asked him to bring such mistakes to the attention of the translator.

369.6. A few days later, Thabisile Ngidi ("Ngidi") contacted Maema and enquired whether a new translator should be appointed or whether the translation mistakes should be referred back to the translator. Maema told Ngidi that it is the Department of Justice's decision what to do but that he would suggest that the existing translator be used.

370. The prosecution team was removed from the matter. Ngidi contacted Maema after his removal from the matter and enquired about the translation with him. Maema informed Ngidi that he has been removed from the matter and that she must enquire from the prosecutors appointed to the matter.

371. Had the panellists contacted Maema, he would have given them the explanation set out above. There are also no reasons furnished as to why Dantkas and the translator of the statement, whose details are clearly displayed on the translation certificate, were not contacted. In this regard, I am advised that Maema will obtain an explanatory affidavit from Mgiba.

Asogram Pillay (Accused 29) ("A Pillay")

372. At paragraph 158 of the De Kock report, the panellists critised the prosecution team for charging A Pillay without mentioning specifically the offences in which he participated.

373. A Pillay participated in counts 35 to 39 and he is depicted on the photos published in the Sunday Times on the 11 December 2011, relating the crime scene photos in the Melmoth docket. These photos from the docket, depicting A Pillay at the crime scene, are attached hereto as annexures "CM21.8", "CM21.9" and "CM21.10". A Pillay was also identified by Col Mngwengwe.

374. Had the panellist consulted with the prosecution team, A Pillay's involvement would have been explained and the panellists would have had clarity of A Pillay's involvement.

375. Many of the issues raised and criticism against the prosecution team and the State's case, could have been resolved by the panelists consulting with the prosecution team, witnesses and the investigation team.

376. It is trite law that a witness is not expected to state all events at the time of deposing to the affidavit at the Police Station, but other crucial issues may surface at trial.

377 It is my respectful submission that the Commission should disregard the De Kock report based on the abovementioned procedural and substantive failures. A deliberate exclusion of a prosecution team in the decision making process renders the decision invalid. Zuma v DA and Others 2018(1) SA 200 (SCA).

Conclusion

378. I have been advised by my legal team that the Commission is in possession of the De Kock report. I must therefore state that the Commission has not, in terms of the Rules, invited me to specifically comment on the De Kock report, nor is there any indication that any of the panellists will be called as witnesses. My legal team advised me that, according to Mr Hulley ("Hulley"), the evidence leader, the implicated persons are expected to comment on everything about them which is before the Commission.

379. Furthermore, the National Director had issued an internal communication, advising NPA personnel about the Commission and directed that NPA officials should assist and cooperate with the Commission, where necessary.

380. Having been informed by my legal team that the Commission is in possession of the De Kock report, I deem it prudent to comment on the De Kock report in order to assist the Commission.

CONDONATION

381. In terms of Rule 11.2 the Commission may condone non-compliance with or extend, any timeframe provided for in the Rules on good cause shown or when it is in the interest of the work of the Commission.

GOOD CAUSE

382. I received Rule 3.3 notices, notifying me that the Commission's legal team intends to present to the Commission the evidence of Booysen, McBride and Sesoko during the Commission's proceedings, which evidence may

implicate me in unlawful, illegal or improper conduct. The Rule 3.3 notices were received on the following dates:

382.1. Booysen – 8 April 2019

382.2. McBride – 8 April 2019

382.3. Sesoko – 9 September 2019

383. I was further informed, through the Rule 3.3 notices, in what respect the evidence of Booysen, McBride and that of Sesoko implicate me. The notices further informed me that I may attend the proceedings and that in so doing, I may be assisted by a legal representative when Booysen, McBride and Sesoko give evidence.

384. I was further notified, that in terms of Rules 3.3.6.1 to 3.3.6.3 should I wish, I may give evidence or call any witness to give evidence in support of my case, or even cross-examine Booysen, McBride and Sesoko.

385. Furthermore, in the event I choose to invoke the provisions of Rules 3.3.6.1 to 3.3.6.3 above, I should bring an application within 14 calendar days in writing to the Commission for leave to do so. In terms of Rule 3.4, an application in terms of Rule 3.3.6 must be accompanied by a statement from me in response to the allegations made by Booysen, McBride and Sesoko against me.

386. I wish to bring to the attention of the Commission that to the best of my knowledge, other members of the Cato Manor prosecution team, namely

Mlotawa; Moleko; Futshane; and Ntlakaza, were not served with the Rule 3.3 Notices as at the time of deposing to this affidavit. Similarly, I was not served with a Rule 3.3 Notice and an affidavit of Nxasana in as far as his testimony relates to the Cato Manor matter, in particular the briefings that occurred.

387. I forwarded the Rule 3.3 Notices to Voller of the Legal Affairs Division ("LAD") of the NPA, a division responsible for civil litigation against the NPA and its officials when executing their official duties. Voller is the appointed person to liaise with the State Attorney and Counsel appointed to present the implicated NPA officials. Voller's affidavit is attached hereto as annexure "KRM2" wherein he explains what transpired until the State Attorney was instructed and Counsel was briefed.

388. On the 20th of November 2019, I attended a consultation with the legal team during which consultation the implicated officials were requested to prepare a summary of their responses to the allegations as contained in the various affidavits and evidence led at the Commission. An undertaking was made that such summaries will be delivered to the legal team at the end of January and/or early February 2020. I was unable to deliver the requested summary for the reasons as more fully dealt with in this portion of the affidavit.

389. From the objective facts of this matter and the evidence presented so far before the Commission, it is common cause that the prosecution relating to the Cato Manor was conducted by a prosecution team. It was not practically possible for me to deal with the unfounded and malicious allegations levelled against me without the input of other members of the prosecution team, in

particular Maema and the relevant supporting documents which I had to source from different colleagues, in view of the fact that the DPP's office files and dockets were removed by the office of the NDPP from the prosecution team.

390. Maema, as the then team leader was implicated in the Cato Manor matter, but not served with the Rule 3.3 Notice. I was advised by Maema that he requested the legal team to take up the failure to serve him with the Rule 3.3 Notice with the evidence leader. Maema's shared my sentiments that we should deal with the Cato Manor allegations collectively, and for that reason, we awaited legal advice on when service would be effected on Maema and/or the approach we would take if service was not effected on Maema.

391. It appeared that Maema's Rule 3.3 Notice pertaining to the evidence of Booysen had been emailed to an incorrect email address, namely pat.maema@gmail, and for this reason the Notice never reached his attention. This issue was taken up with the evidence leaders on numerous occasions until such that the legal representatives had a meeting with Hulley on 9 September 2020 wherein Hulley advised that even if a Rule 3.3 Notice had not been served and the implicated official/s is/are aware that they are implicated, they should nonetheless deliver their statement as the Commission is running out of time and would like to have as much information as possible in order to consider the views of all the parties.

392. Maema and I were advised of the view expressed by Hulley and we were requested to start compiling our draft responses for the purpose consultation

with the legal team. At that stage, the legal team was busy with the affidavits of other implicated officials and the indication was that the affidavits of Maema and me would be the last ones to be settled. I started compiling my draft response in consultation with Maema, and also started sourcing documents from amongst others, Torie. The draft responses were submitted to our legal team on the 9th and the reasons for the non-compliance with time period as prescribed by the rules on the 20th of November 2020. I had a voluminous racketeering authorisation application in the matter of involving Brian Hlongwane ("Hlongwane"), the then MEC for Gauteng Department of Health which I finalised towards the end of November 2020. Around this period, I was part of a prosecution team that dealt with the prosecution matter involving the former President, Jacob Zuma ("Zuma") wherein he is charged with corruption pertaining to the arms deal. I was released from the prosecution team in November 2020.

393. I was made to sign a non-disclosure close when I was seconded to the Minister of Police's reference group. As a result of the non-disclosure close, I could not even discuss with my legal team as to what the reference group was all about and favour them with information and documents that would enable them to meaningfully deal with the unfounded and malicious allegations levelled against them.

394. I contacted Mr Hadebe ("Hadebe"), the reference group team leader, who was unable to assist me to deal with the confidentiality clause. Days before the then Minister of Police, Mr. Nhleko ("Nhleko") testified at the Commission on the 27th, 28th, and 29th of July 2020, Nhleko contacted and informed me

that he would be testifying, and in his testimony, he was going to talk about the work of the reference group. He informed me that he had also advised Hadebe the same, from whom he sourced my contact details.

395. In view of what Nhleko said above, I formed the view that the confidentiality clause no longer applied and that the information pertaining to the reference group was no longer confidential.

396. In light of the above, it is clear that the non-compliance with the rules of the Commission was not as a result of either intentional and/or negligent conduct on my part which was aimed at undermining the authority of the Commission.

397. During November 2020, whilst the legal team was drafting and settling the statement of Moeing, an arrangement was made with the legal team to consult with Maema and myself on 12 December 2020. I, together with Maema, attended to the Chambers of Mathibedi where the consultation was to be held. I attach hereto an confirmatory affidavit of Maema, marked as annexure "KRM3.2".

398. After waiting for two hours and Maema having made numerous telephone calls to Mathibedi's cell phone which were not answered, Maema and I decided to leave. It later transpired that Mathibedi had been admitted to hospital due to complications related to Covid-19. I am advised that Gejengane and other members of the legal team were also not aware that, at that stage, Mathibedi had been admitted to hospital.

399. Gejengane and Adv Ramalmela also attended at Mathibedi's chambers on the same day, also unaware of the fact that Mathibedi had been admitted to hospital.

400. The arrangement was that Maema's statement and mine would be attended to after the finalisation of Chauke's affidavit. I only learnt of the fact that Mathibedi was admitted to hospital after his discharge on the 16th of December 2020, on which occasion Mathibedi indicated that once he has recovered and after the finalisation of Chauke's statement, the legal team will commence with the necessary consultation, drafting, settling and finalising of Maema's statement and mine.

401. I am advised that Chauke's statement was only finalised on the 12th of February 2021.

402. An initial consultation between Maema, Gejengane, Ramalmela, Mathibedi, and me occurred on 20 February 2021, during which consultation Maema and me were advised of the approach that was to be adopted in our statements.

403. The next consultations with the legal team were held on numerous days during February, March, April and May 2021.

404. During the reading and analysis of the documents that had been provided to the legal team, certain further documents were required from Maema and me, on an ongoing basis. The Cato Manor docket and the related documentation were taken from the possession of the prosecution team at

the instruction of Chris McAdam ("McAdam"), the Acting Head of the PCLU. The Breytenbach docket had already been archived and some documents had to be obtained from some of our colleagues.

405. The legal team also had to go through:

405.1. Voluminous case dockets that related to the Cato Manor matter;

405.2. Various Prosecution Memorandums, Power Point presentations, a comprehensive and extensive indictment, a response to the request for further particulars which were in excess of 1000 pages in the Cato Manor matter;

405.3. Numerous Court applications that were instituted reviewing the POCA authorisations;

405.4. The statements of our colleagues already filed with the Commission, as there were overlaps;

405.5. Affidavits of McBride, Sesoko, and Booysen;

405.6. Transcribed records of the evidence of Booysen, McBride, Miothawa, Nxasana, Nhleko, and Mabula;

405.7. Documents relating to the Breytenbach matter.

406. The following documents only pertained to Maema, but had to be read and analysed with the abovenamed documents:

406.1. Documents relating to the Rogue Unit and the Pillay Early Retirement matter;

406.2. Documents and affidavits relating to the matter of defeating the ends of justice for McBride, Khuba and Seaoko; and

406.3. Transcribed records of the evidence of Khuba, Vlok Symington, and Gordan.

407. During the period that these consultations, perusal, and analysis of the documents were taking place, members of the legal team had professional, personal, and family commitments which they could not extricate themselves from. I also had various prosecutorial and administrative responsibilities which I could not extricate myself from.

408. During November 2020, I was advised by Mathibedi that, at that stage, the legal team was busy with consultations, drafting, settling, and finalisation of Mosing's statement which would be followed by the consultations, drafting, settling and finalisation of Chauke's statement. A consultation was arranged for 12 December 2020, at which stage it was hoped that the legal team would have finalised Chauke's statement.

409. I must bring to the attention of the Commission that as at the date of deposing to this affidavit, I have not received a Rule 3.3. Notice in respect of Nxasana.

THE INTEREST OF THE WORK OF THE COMMISSION

410. I am advised that it is in the interest of the work of the Commission that the truth be revealed, as the Chairperson has repeatedly stated during the hearings of the Commission. I respectfully submit that it will be a miscarriage of justice if people like me, who are incorrectly brushed with the same generalised brush of state capture, are not afforded an opportunity of placing the relevant information before the Commission and to cross-examine, if they want to, witnesses who accuse them without any substantiation, simply because of non-compliance with the Rules of the Commission, which non-compliance was not as a result of either negligence or intentional conduct on their part.

411. The allegations levelled against me by the witnesses, directly or impliedly, are based on speculation and conjecture. The witnesses, in their affidavits and in their oral evidence tendered before the Commission, did not produce an iota of evidence, implicating me in any wrongdoing, as they seek to portray me.

412. As already indicated above, the purpose of filing my affidavit is, *inter alia*, to appraise the Commission of the fact that I discharged my duties and obligations within the confines of the Law.

413. The allegations levelled against me are without any factual and legal basis. The Commission can only know my version which materially contradicts that of my accusers by taking into consideration my version. The purpose of urging the Commission to admit my affidavit as evidence in these proceedings is exactly aimed at achieving that.

414. It is in the interest of justice and the Commission that prior to making findings, the Commission should take into account my version. The importance thereof is properly captured in the evidence of Sesoko where the Chairperson correctly and properly remarked as follows:

> *"CHAIRPERSON: Well I have instructed the legal team and the investigation team to secure the relevant files and dockets relating to the criminal proceedings relating to you and Mr McBride and Mr Khuba was also charged.*
>
> *MR MATTHEWS SESOKO: Yes.*
>
> *CHAIRPERSON: Is it not? Yes. I have said that I want to see exactly what documents the person who made the decision that you be charged had before him or her. I will want that person to come and give evidence. Maybe they will be able to show that there were proper grounds for the decision to charge and if that is so it is important that their side of the story be heard. But if there we no proper grounds it would be to say the least most regrettable that people were put through this process without such grounds. So -- so that process is happening to obtain those dockets and files and the relevant people will be asked to come and give evidence so that I can understand properly. Because there certainly is an allegation that sometimes the police were used, sometimes*

the NPA were used, sometimes all of them were used improperly in order to deal with certain individuals who may not have been prepared to do certain things and that is a serious allegation against these very important institutions, the police and the NPA and it should not be made unless it has proper grounds. And if it is made it must be investigated properly because if it is found to be well-founded then something quite serious should be done. Because we cannot afford to have these institutions being manipulated or used for improper motives and agendas. So that is the part of the reason why I want to see all of those things."

415. Similarly, the Chairperson remarked about the importance of obtaining the version of implicated persons when Nxasana testified, where he correctly and properly remarked as follows:

"CHAIRPERSON: No I think it's important that, while you are here, we get as much evidence as you have to inquire into these things – these matters because it's quite a serious suggestion or allegation when it is said that the NPA or certain people within the NPA abused their powers to charge people who should – against whom there was no evidence and that they were motivated by certain illegitimate considerations because if there is no evidence to support those allegations against those people or against

the NPA then let us know but if there is evidence then let us know, the nation deserves to know exactly what the position is because the NPA is a very important institution in the country and in the fight against crime and the nation needs to know exactly what the position is and if there are people who did that, we must know if there is evidence that shows that that's what they did and they will come before the Commission, put their side of the story and the Commission will make decisions and findings in due course and it was important that somebody like you comes before the Commission because you were – for a certain period of time occupying this very important position of NDPP and you left under certain circumstances and in the public domain there are all kinds of things that are said but also there are judgement, Court judgements that have dealt with that. It's important that somebody like you comes and tells the Commission exactly what you know and what happened while you were NDPP so that the Commission can have as full a picture as possible before, in due course, it makes findings."

416. The admission of my affidavit as evidence in these proceedings will not prejudice any of the witnesses who have implicated me. The contrary is that in the event of the affidavit not being admitted as evidence, I will be severely prejudiced.

417. The voluminous papers together with annexures thereto were ultimately finalised on the 17th of May 2021. The filing of my papers at this stage is not as a result of any conduct on the part of myself or our legal team with the view to undermine the authority and process of the Commission.

418. From the aforesaid, I respectfully submit that I have made out good cause for the granting of condonation.

CONCLUSION

419. Mindful of the fact that this Commission was established by the President and will report its findings to the President, this Commission should not allow itself to be used to draw the president into an invidious position of pronouncing upon the prosecution of individuals, thereby interfering with the Constitutional independance of the NPA, where no legal basis and/or justification for such exist.

420. It behoves me to draw the Commission's attention to the totality of the evidence set forth in this affidavit, particularly about the impact of the allegations made against me by the witnesses. While the persistent attacks may at first blush appear to be confined to my person, the impact these attacks have on the NPA as a Constitutional institution cannot and should not be trivialised.

421. I have alluded to the fact that allegations are made that the core group of advocates, of which I am alleged to be one, have for years been on a path of destabilising persons and institutions that are corruption busters whilst they

protect and refuse to prosecute persons against whom there is evidence to sustain charges of corruption and malfeasance. The cumulative effect of these allegations is that the NPA is not to be trusted to effectively and properly to deliver on its Constitutional and legislative mandate.

422. I have shown in this affidavit that all these allegations are made without any substantive evidence to support or sustain them. On close scrutiny, it is clear that the complainants as well as those they favour should be treated differently from the rest of the citizens.

423. In the prevailing environment in the country where integrity and reputation is easily eroded through negative publicity in the media, those of us who have to take arguably difficult prosecutorial decisions may be hampered from exercising our prosecutorial decisions without fear, favour or prejudice.

424. It was not without reason that the drafters of the Constitution deemed it prudent to provide for prosecutorial independence in section 179 of the Constitution. Any threat to the independence of the prosecutors undermines the Constitutional imperative for prosecutors to act without fear, favour or prejudice. Not only that, but the persistent negative statements these witnesses publish seeking to impose upon the prosecutors' decisions that are favourable to them and those that they favour is a direct violation of section 32(1)(b) of the NPA Act.

425. In the course of my work, I acted in good faith at all times. Therefore, I urge the Commission not to make any adverse finding against me. In this regard, I refer to Section 78 of POCA which provides as follows:

"78. *Liability*

Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal capacity, be liable for anything done in good faith under this Act."

426. I further refer the Commission to Section 42 of the NPA Act, which provides as follows:

"42 *Limitation of liability*

No person shall be liable in respect of anything done in good faith under this Act ."

427. In conclusion, I have instructed my legal representatives to apply for leave to make legal submissions as envisaged in Rule 3.9.

428. I respectfully submit that a case has been made out for the relief prayed for in the notice of motion to which this affidavit is attached.

K R MATHENJWA

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge

both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this 17th day of MAY 2021 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS:

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