EXHIBIT KK 2.4

KOBUS DEMEYER ROELOFSE

REGULATORY FRAMEWORK & CASE LAW

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

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OFFICE OF THE PRESIDENT

No. 1527.
4 October 1995

NO. 68 OF 1995: SOUTH AFRICAN POLICE SERVICE ACT, 1995.

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

ACT

To provide for the establishment, organisation, regulation and control of the South African Police Service; and to provide for matters in connection therewith.

ARRANGEMENT OF SECTIONS

CHAPTER 7

COMMUNITY POLICE FORUMS AND BOARDS

CHAPTER 8

REGULATIONS

CHAPTER 9

APPOINTMENTS, TERMS AND CONDITIONS OF SERVICE AND TERMINATION OF SERVICE

CHAPTER 10

INDEPENDENT COMPLAINTS DIRECTORATE

CHAPTER 11

GENERAL PROVISIONS

PREAMBLE

WHEREAS section 214 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), requires legislation to provide for the establishment and regulation of a South African Police Service which shall be structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments;

AND WHEREAS there is a need to provide a police service throughout the national territory to-

(a) ensure the safety and security of all persons and property in the national territory;

(b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;

(c) ensure co-operation between the Service and the communities it serves in the combating of crime;

(d) reflect respect for victims of crime and an understanding of their needs; and

(e) ensure effective civilian supervision over the Service;

(Afrikaans text signed by the President.)
(Assented to 28 September 1995.)

BE IT THEREFORE enacted by the Parliament of the Republic of South Africa, as follows:-

CHAPTER 1

INTERPRETATION

Definitions

1. In this Act, unless the context otherwise indicates-

(i) "board" means the Board of Commissioners established by section 10(1); (xvi)

(ii) "certificate of appointment" means the document referred to in section 30; (i)

(iii) "commissioned officer" means a commissioned officer appointed under section 33(1); (v)

(iv) "directorate" means the Independent Complaints Directorate established by section 50(1); (iii)

(v) "employee organisation" means an organisation consisting inter alia of members or employees of the Service formally associated together and organised in a staff association, trade association or trade union, for the purpose of regulating relations between themselves and the Service; (xxx)

(vi) "equipment" includes any article supplied by the Service for use by a member in the performance of his or her duties; (xxiii)

(vii) "executive coordinating committee" means the executive co-ordinating committee established by section 4(1); (xxv)

(viii) "Executive Director" means the Executive Director appointed in terms of section 51; (xxiv)

(ix) "fixed establishment" means the posts which have been created for the normal and regular requirements of the Service; (xxvii) (x) "member" means any member of the Service referred to in section 5(2), including-

(a) except for the purposes of any provision of this Act in respect of which the National Commissioner may otherwise prescribe, any member of the Reserve while such member is on duty in the Service;

(b) any temporary member while employed in the Service;

(c) any person appointed in terms of any other law to serve in the Service and in respect of whom the Minister has prescribed that he or she be deemed to be a member of the Service for the purposes of this Act; and

(d) any person designated under section 29 as a member; (vi)

(xi) "member of the Executive Council" means the member of the Executive Council referred to in section 217(1) of the Constitution; (vii)

(xii) "metropolitan police service" means a metropolitan police service established under section 64(1)(b); (viii)

(xiii) "Minister" means the Minister for Safety and Security; (ix)

(xiv) "municipal police service" means a municipal police service established under section 64(1)(a); (x)

(xv) "National Commissioner" means the National Commissioner referred to in section 6(1); (xi)

(xvi) "National Orders and Instructions" means National Orders and Instructions issued under section 25(1) or which continue to apply in terms of section 72(4)(a); (xii)

(xvii) "national public order policing unit" means the national public order policing unit established in terms of section 17(1); (xiii)

(xviii) "Parliamentary Committees" means the Standing Committees of the National Assembly and the Senate responsible for safety and security affairs; (xiv)

(xix) "prescribe" means prescribe by regulation; (xxix)

(xx) "Provincial Commissioner" means the Provincial Commissioner of a province referred to in section 6(2); (xv)

(xxi) "Rationalisation Proclamation" means the South African Police Service Rationalisation Proclamation, 1995, published by Proclamation No. 5, 1995, dated 27 January 1995; (xvii)

(xxii) "regulation" means a regulation made under this Act or which continues to apply in terms of section 72(4)(a); (xviii)

(xxiii) "Reserve" means the Reserve Police Service referred to in section 48; (xix)

(xxiv) "secretariat" means the Secretariat for Safety and Security established under section 2(1); (xx)

(xxv) "Secretary" means the Secretary for Safety and Security appointed under section 2(2); (xxi)

(xxvi) "Service" means the South African Police Service established by section 5(1); (ii)

(xxvii) "stores" means any movable property of the State which is kept in stock for distribution in the Service; (xxviii)

(xxviii) "strike" means a strike within the meaning of the Labour Relations Act, 1956 (Act No. 28 of 1956); (xxii)

(xxix) "this Act" includes the regulations; (iv) and

(xxx) "uniform" means a uniform as prescribed. (xxvi)

CHAPTER 2

MINISTERIAL SERVICES

Secretariat

2.(1)(a) The Minister shall establish a secretariat to be called the Secretariat for Safety and Security.

(b) A provincial government may establish a provincial secretariat to be called the Provincial Secretariat for Safety and Security: Provided that the date on which a provincial secretariat will come into operation shall be determined by a provincial government in consultation with the Minister.

(2) The Minister may, subject to the laws governing the public service, appoint a person to the office of Secretary who shall be responsible for-

(a) the performance of the functions of the secretariat; and

(b) the management and administration thereof.

(3) The Secretary may, in consultation with the Minister, subject to the laws governing the public service, appoint the necessary personnel to assist the Secretary to perform, subject to his or her control and directions, any function of the secretariat.

Functions of secretariat

3. (1) The secretariat shall-

(a) advise the Minister in the exercise of his or her powers and the performance of his or her duties and functions;

(b) perform such functions as the Minister may consider necessary or expedient to ensure civilian oversight of the Service;

(c) promote democratic accountability and transparency in the Service;

(d) promote and facilitate participation by the Service in the Reconstruction and Development Programme;

(e) provide the Minister with legal services and advice on constitutional matters;

(f) provide the Minister with communication, support and administrative services;

(g) monitor the implementation of policy and directions issued by the Minister and report to the Minister thereon;

(h) conduct research into any policing matter in accordance with the instructions of the Minister and report to the Minister thereon;

(i) perform such functions as may from time to time be assigned to the secretariat by the Minister; and

(j) evaluate the functioning of the Service and report to the Minister thereon.

(2) To the extent that it is reasonably necessary for the performance of the functions of the secretariat, any member of its personnel-

(a) may request and obtain information and documents under the control of the Service;

(b) may enter any building or premises under the control of the Service; and

(c) shall be entitled to all reasonable assistance by a member.

(3) The Minister may make regulations regarding the establishing and proper

functioning of secretariats: Provided that regulations with regard to provincial secretariats shall be made in consultation with the executive coordinating committee.

(4) A document in the prescribed form, certifying that a person is a member of the personnel of the secretariat, shall serve as prima facie proof that such person is such a member.

(5) Subsections (1), (2) and (4) shall apply mutatis mutandis to a Provincial Secretariat for Safety and Security.

Executive coordinating committee

4. (1) The executive coordinating committee contemplated in section 220(1) of the Constitution is hereby established.

(2) The Minister shall convene the first meeting of the executive coordinating committee.

(3) The Minister or his or her nominee shall preside at meetings of the executive coordinating committee and the executive co-ordinating committee shall determine its own procedure.

CHAPTER 3

ESTABLISHMENT AND COMPOSITION OF SERVICE

Establishment and composition of Service

5. (1) The South African Police Service contemplated in section 214(1) of the Constitution is hereby established.

(2) The Service shall consist of-

(a) all persons who immediately before the commencement of this Act were members-

(i) of a force which, by virtue of section 236(7)(a) of the Constitution, is deemed to constitute part of the Service;

(ii) appointed under the Rationalisation Proclamation;

(iii) of the Reserve by virtue of section 12(2)(k) of the Rationalisation Proclamation;

(b) members appointed in terms of section 28(2) of this Act; and

(c) persons who become members of the Reserve under section 48(2) of this Act.

CHAPTER 4

COMMISSIONERS

Appointment of National and Provincial Commissioners

6. (1) There shall be a National Commissioner of the Service who shall be appointed in accordance with section 216(2)(a) of the Constitution.

(2) There shall be a Provincial Commissioner of the Service for each province who shall be appointed by the National Commissioner subject to section 218(1)(b) of the Constitution.

Terms of office of National and Provincial Commissioners

7. (1) Subject to this Act, the person who is appointed as National or Provincial Commissioner shall occupy that office for a period of five years from the date of his or her appointment or such shorter period as may be determined at the time of his or her appointment by-

(a) the President, in relation to the National Commissioner; or

(b) the National Commissioner in consultation with the member of the Executive Council, in relation to a Provincial Commissioner.

(2) The term of office referred to in subsection (1) may be extended at the expiry thereof for a period or successive periods not exceeding five years at a time, as may, subject to subsection (3), be determined by-

(a) the President, in relation to the National Commissioner; or

(b) the National Commissioner in consultation with the member of the Executive Council concerned, in relation to the Provincial Commissioner.

(3) The President or the National Commissioner, as the case may be, shall notify the Commissioner concerned in writing at least two calendar months before the expiry of the period contemplated in subsection (1), or any subsequent extended period contemplated in subsection (2), whether he or she intends extending his or her term of office or not and, if so, for what period.

(4) When the National or Provincial Commissioner receives notice of the extension of his or her term of office in accordance with subsection (3), he or she shall notify the President or the National Commissioner, as the case may be, in writing within one calendar month from the date of receipt of such notice of his or her acceptance or not of such extended term of office.

(5) If the National or Provincial Commissioner notifies the President or the National Commissioner, as the case may be, in accordance with subsection (4) of his or her acceptance of such extended term of office, his or her term of office shall be extended accordingly.

Loss of confidence in National or Provincial Commissioner

8. (1) If the National Commissioner has lost the confidence of the Cabinet, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson, and two other suitable persons, to-

(a) inquire into the circumstances that led to the loss of confidence;

(b) compile a report; and

(c) make recommendations.

(2)(a) If a Provincial Commissioner has lost the confidence of the Executive Council, the member of the Executive Council may notify the Minister of such occurrence and the reasons therefor.

(b) The Minister shall, if he or she deems it necessary and appropriate, refer the notice contemplated in paragraph (a) to the National Commissioner.

(c) The National Commissioner shall, upon receipt of the notice, establish a board of inquiry consisting of not more than three persons, of which the chairperson shall, subject to paragraph (d), be a person who, for at least 10 years after having qualified as an advocate or an attorney, practised as such, to-

(i) inquire into the circumstances that led to the loss of confidence;

(ii) compile a report; and

(iii) make recommendations.

(d) The National Commissioner may appoint any other person suitably qualified in law as chairperson of the board of inquiry.

(3)(a) The President or National Commissioner, as the case may be, may, after hearing the Commissioner concerned, pending the outcome of the inquiry referred to in subsection (1) or (2)(c), suspend him or her from office.

(b) A Commissioner who is suspended from office under paragraph (a), shall, during the period of such suspension, be entitled to any salary, allowance, privilege or benefit to which he or she is otherwise entitled as a member, unless the President or the National Commissioner, as the case may be, determines otherwise.

(4) If a board of inquiry is established under subsection (1) or (2)(c), the Commissioner concerned shall be notified thereof in writing, and thereupon he or she may-

(a) be assisted or represented by another person or legal representative;

(b) make written representations to the board;

(c) be present at the inquiry;

(d) give evidence thereat;

(e) cross-examine witnesses not called by him or her;

(f) be heard;

(g) call witnesses; and

(h) have access to documents relevant to the inquiry.

(5) The board of inquiry shall determine its own procedure.

(6)(a) At the conclusion of the inquiry, the board shall submit its report to-

(i) (aa) the President, in the event of an inquiry under subsection (1); or

(bb) the National Commissioner, the member of the Executive Council and the standing committee of the provincial legislature responsible for safety and security affairs, in the event of an inquiry under subsection (2);

(ii) the Commissioner concerned; and

(iii) the Parliamentary Committees.

(b) The report referred to in paragraph (a) may recommend that-

(i) no action be taken in the matter;

(ii) the Commissioner concerned be transferred to another post or be employed additional to the fixed establishment;

(iii) his or her salary or rank or both his or her salary and rank be reduced;

(iv) action be taken against him or her in accordance with subparagraphs (ii) and (iii);

(v) he or she be removed from office; or

(vi) any other appropriate steps (including the postponement of any decision by the President or the National Commissioner, as the case may be, for a period not exceeding 12 calendar months) be taken.

(7) The President or the National Commissioner, as the case may be, may, upon receipt of a recommendation contemplated in subsection (6), remove the Commissioner concerned from office, or take any other appropriate action: Provided that, if the President or the National Commissioner, as the case may be, postpones his or her decision for a period, he or she shall, at the end of such period, request the same board of inquiry, or a similar board established for that purpose, to compile a new report and to make a new recommendation after having considered the conduct of the Commissioner concerned during such period.

(8) If a Provincial Commissioner has lost the confidence of the National Commissioner, the provisions of subsections (2)(c) and (d), (3), (4), (5), (6) and (7) shall apply mutatis mutandis.

(9) In the event of a Commissioner being removed from office following on an inquiry in accordance with a finding of a loss of confidence in such a Commissioner, or in accordance with a finding of a loss of confidence referred to in section 9(3), his or her term of office shall be deemed to have expired on the date immediately preceding the date on which such removal from office takes effect.

Misconduct by or incapacity of National or Provincial Commissioner

9. (1) Subject to this section, subsections (1) to (8) of section 8 shall apply mutatis mutandis to any inquiry into allegations of misconduct by the National or Provincial Commissioner, or into his or her fitness for office or capacity for executing his or her official duties efficiently.

(2) The board of inquiry established by virtue of subsection (1) shall make a finding in respect of the alleged misconduct or alleged unfitness for office or incapacity of executing official duties efficiently, as the case may be, and make recommendations as contemplated in section 8(6)(b).

(3) If the National Commissioner has lost the confidence of the Cabinet or a Provincial Commissioner has lost the confidence of the Executive Council or the National Commissioner, as the case may be, following on an inquiry in terms of this section, the provisions of section 8(7) shall apply mutatis mutandis.

Board of Commissioners

10. (1) The Board of Commissioners consisting of the National and Provincial Commissioners is hereby established.

(2) The functions of the board shall be to promote co-operation and co-ordination in the Service.

(3) The board shall be presided over by the National Commissioner or his or her nominee and the board shall determine its own procedure.

POWERS, DUTIES AND FUNCTIONS

National Commissioner

11. (1) The National Commissioner may exercise the powers and shall perform the duties and functions necessary to give effect to section 218(1) of the Constitution.

(2) Without derogating from the generality of subsection (1), the powers, duties and functions referred to in that subsection shall include the power, duty and function to-

(a) develop a plan before the end of each financial year, setting out the priorities and objectives of policing for the following financial year;

(b) determine the fixed establishment of the Service and the number and grading of posts;

(c) determine the distribution of the numerical strength of the Service after consultation with the board;

(d) organise or reorganise the Service at national level into various components, units or groups;

(e) establish and maintain training institutions or centres for the training of students and other members;

(f) establish and maintain bureaus, depots, quarters, workshops or any other institution of any nature whatsoever, which may be expedient for the general management, control and maintenance of the Service; and

(g) perform any legal act or act in any legal capacity on behalf of the Service.

Provincial Commissioners

12. (1) Subject to this Act, a Provincial Commissioner shall have command of and control over the Service under his or her jurisdiction in the province and may exercise the powers and shall perform the duties and functions necessary to give effect to section 219 of the Constitution.

(2) A Provincial Commissioner may-

(a) subject to a determination under section 11(2)(a), delimit any area in the province and determine the boundaries thereof until the province has been divided into as many areas as may be necessary for the purposes of the organisation of the Service under his or her jurisdiction; and

(b) establish and maintain police stations and units in the province and determine the boundaries of station or unit areas.

(3) A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her jurisdiction in the province among the different areas, station areas, offices and units.

Members

13. (1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.

(2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.

(3)(a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.

(b) Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.

(4) Every member shall be competent to serve or execute any summons, warrant or other process whether directed to him or her or to any other member.

(5) Any member may in general or in any particular instance be required to act as prosecutor, or in any other respect to appear on behalf of the State in any criminal matter before any magistrate's court, any magistrate holding a preparatory examination, a court of a special justice of the peace or any other lower court in the Republic.

(6) Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized.

(7)(a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.

(b) The written authorisation referred to in paragraph (a) shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action.

(c) Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation.

(8)(a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in section 215 of the Constitution, in writing authorise a member under his or her command, to set up a roadblock or roadblocks on any public road in a particular area of to set up a checkpoint or checkpoints at any public place in a particular area.

(b) The written authorisation referred to in paragraph (a) shall specify the date, approximate duration, place and object of the proposed

action.

(c) Any member authorised under paragraph (a) may set up a roadblock or roadblocks or cause a roadblock or roadblocks to be set up on any public road in the area so specified or set up a checkpoint or checkpoints or cause a checkpoint or checkpoints to be set up at any public place in the area so specified.

(d) Notwithstanding the provisions of paragraph (a), any member who has reasonable suspicion to believe that-

(i) an offence mentioned in Schedule I to the Criminal Procedure Act, 1977, has been committed and that a person who has been involved in the commission thereof is, or is about to be, travelling in a motor vehicle in a particular area;

(ii) a person who is a witness to such an offence is absconding and is, or is about to be, travelling in a motor vehicle in a particular area and that a warrant for his or her arrest has been issued under section 184 of the Criminal Procedure Act, 1977, or that such a warrant will be issued if the information at the disposal of the member is brought to the attention of the magistrate, regional magistrate or judge referred to in that section, but that the delay in obtaining such warrant will defeat the object of the roadblock;

(iii) a person who is reasonably suspected of intending to commit an offence referred to in subparagraph (i) and who may be prevented from committing such an offence by the setting up of a roadblock is, or is about to be, travelling in a motor vehicle in a particular area;

(iv) a person who is a fugitive after having escaped from lawful custody is, or is about to be, travelling in a motor vehicle in a particular area; or

(v) any object which-

(aa) is concerned in;

(bb) may afford evidence of; or

(cc) is intended to be used in,

the commission of an offence referred to in subparagraph (i), whether within the Republic or elsewhere, and which is, or is about to be, transported in a motor vehicle in a particular area and that a search warrant will be issued to him or her under section 21(1)(a) of the Criminal Procedure Act, 1977, if he

or she had reason to believe that the object will be transported in a specific vehicle and he or she had applied for such warrant, and that the delay that will be caused by first obtaining an authorisation referred to in paragraph (a), will defeat the object of the roadblock, may set up a roadblock on any public road or roads in that area for the purpose of establishing whether a motor vehicle is carrying such a person or object.

(e) For the purposes of exercising the powers conferred by paragraph (c) or (d), a member shall display, set up or erect on or next to the road or at the public place such sign, barrier or object as is reasonable in the circumstances to bring the order to stop to the attention of the driver of a vehicle approaching the roadblock so as to ensure that the vehicle will come to a stop or to the attention of a person approaching the checkpoint.

(f) Any driver of a vehicle who approaches a roadblock or any person who approaches a checkpoint and who refuses or fails to stop in accordance with an order to stop displayed as contemplated in paragraph (e), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(g) Any member may, without warrant-

(i) in the event of a roadblock or checkpoint that is set up in accordance with paragraph (c), search any person or vehicle stopped at such roadblock or checkpoint and any receptacle or object of whatever nature in the possession of such person or in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in the possession of such person or in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation by the Commissioner concerned; and

(ii) in the event of a roadblock that is set up in accordance with paragraph (d), search any person or vehicle stopped at such roadblock and any receptacle or object of whatever nature in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, inform him or her of the reason for the setting up of the roadblock.

(h) For the purposes of this subsection "checkpoint" includes any barrier set up under an authorisation referred to in paragraph (a) in order to control the movement of persons.

(9) The provisions of sections 29 to 36 of the Criminal Procedure Act, 1977, shall apply mutatis mutandis in respect of a search conducted under subsections (6), (7) and (8) and any object seized during such a search.

(10) The National or Provincial Commissioner may, in the exercise of any power or the performance of any function referred to in section 215 of the Constitution, publish or cause to be published, or in any other manner display or cause to be displayed any information, photograph or sketch of any person.

(11)(a) A member may, for the purposes of investigating any offence or alleged offence, cordon off the scene of such offence or alleged offence and any adjacent area which is reasonable in the circumstances to cordon off in order to conduct an effective investigation at the scene of the offence or alleged offence.

(b) A member may, where it is reasonable in the circumstances in order to conduct such investigation, prevent any person from entering or leaving an area so cordoned off.

(12)(a) If the National Commissioner deems it necessary for the purposes of performing the functions of the Service, he or she may, with the approval of the Minister, direct any member to perform service at any place outside the Republic.

(b) A member in respect of whom a direction has been issued under paragraph (a), shall perform service in accordance with such direction and shall, while so performing service, remain, unless the Minister in a

particular case otherwise directs, subject to the provisions of this Act as if performing service within the Republic.

(13) Subject to the Constitution -

(a) this section shall not be construed as derogating from any power conferred upon a member by or under this Act or any other law, including the common law; and

(b) the powers conferred upon a member by this section shall not be limited by any other law, including the common law.

Employment of Service in preservation of life, health or property

14. The National or Provincial Commissioner may employ members for service in the preservation of life, health or property.

Delegation

15.(1)(a) Subject to section 15 of the Exchequer Act, 1975 (Act No. 66 of 1975), any power conferred on the National or Provincial Commissioner by this Act or any other law, excluding the power contemplated in section 13(7)(a), may be delegated in writing by any such Commissioner to any member or other person in the employment of the Service, or a board or body established by or under this Act or a law referred to in section 217(3) of the Constitution, who or which shall exercise such power subject to the directions of the Commissioner concerned.

(b) Paragraph (a) shall apply mutatis mutandis in respect of any power delegated by the National Commissioner to a Provincial Commissioner under that paragraph.

(2) The delegation of any power by the National or Provincial Commissioner under subsection (1) may be withdrawn by such a Commissioner and any decision taken by anyone under such delegated power may be withdrawn or amended by such Commissioner, and shall, until it is so withdrawn or amended, be deemed to have been taken by the National or Provincial Commissioner concerned: Provided that any such withdrawal or amendment shall not affect any right, privilege, obligation or liability acquired, accrued or incurred as a result of such decision.

CHAPTER 6

ORGANISED CRIME AND PUBLIC ORDER POLICING UNIT

National prevention and investigation of crime

16. (1) Circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof.

(2) Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto-

(a) by any enterprise or group of persons who have a common goal in committing crimes in an organised manner;

(b) (i) by a person or persons in positions of trust and making use of specialised or exclusive knowledge;

(ii) in respect of the revenue or expenditure of the national government; or

(iii) in respect of the national economy or the integrity of currencies;

(c) which takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest;

(d) in respect of unwrought precious metals or unpolished diamonds;

(e) in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed;

(f) in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest;

(g) in respect of which the prevention or investigation requires the application of specialised skills and where expedience requires that it be prevented or investigated at national level;

(h) which a Provincial Commissioner requests the National Commissioner to prevent or investigate by employing expertise and making resources available at national level and to which request the National Commissioner accedes;

(i) in respect of which the investigation in the Republic by the Service is requested by an international police agency or the police of a foreign country; and

(j) in respect of which the prevention or investigation by members under the command of a Provincial Commissioner will detrimentally affect or hamper the prevention or investigation of circumstances referred to in paragraphs (a) to (i).

(3) In the event of a dispute between the National and Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto should be regarded as organised crime, crime which requires national prevention or investigation or crime which requires specialised skills in the investigation and prevention thereof, the determination by the National Commissioner shall prevail.

(4)(a) Notwithstanding the provisions of subsections (1), (2) and (3), the Provincial Commissioner shall be responsible for the prevention and investigation of all crimes or alleged crimes committed in the province concerned.

(b) Where an investigation of a crime or alleged crime reveals that the circumstances referred to in subsection (2) are present, the Provincial Commissioner shall report the matter to the National Commissioner as soon as possible.

(c) The National Commissioner may, in consultation with the Provincial Commissioner concerned, notwithstanding the presence of the circumstances referred to in subsection (2), direct that the investigation or any part thereof, be conducted by the Provincial Commissioner.

National public order policing unit

17. (1) The National Commissioner shall, subject to section 218(1)(k) of the Constitution, establish and maintain a national public order policing unit.

(2) The National Commissioner may deploy the national public order policing unit, or any part thereof, at the request and in support of a Provincial Commissioner, taking into account-

(a) the reason for the request;

(b) the personnel and equipment available to the unit; and

(c) any other circumstances anywhere in the national territory which may have an influence on the maintenance of public order and which may require the deployment of the unit or any part thereof elsewhere.

(3) Where the national public order policing unit or any part thereof is deployed under subsection (2), the unit shall perform its functions subject to the directions of the Provincial Commissioner concerned: Provided that the mere fact of such deployment does not preclude the President from exercising his or her powers under subsection (5) in relation to the area where the unit is so deployed.

(4) The National Commissioner may withdraw the national public order policing unit or any part thereof deployed under subsection (2), taking into account-

(a) the prevailing circumstances where the unit or part thereof is so deployed;

(b) the personnel and equipment available to the unit; and

(c) any other circumstances anywhere in the national territory which may have an influence on the maintenance of public order and which may require the deployment of the unit or any part thereof elsewhere:

Provided that the National Commissioner shall, at the request of the Provincial Commissioner, withdraw the unit or any part thereof so deployed.

(5) The President may, in consultation with the Cabinet, direct the National Commissioner to deploy the national public order policing unit in circumstances where a Provincial Commissioner is unable to maintain public order and the deployment of the unit is necessary to restore public order.

(6) The National Commissioner shall, upon receiving a direction under subsection (5), deploy the national public order policing unit or such part thereof as may be necessary to restore public order to the area concerned, and may from time to time if he or she deems it necessary, deploy additional members of the unit in the area concerned or, subject to subsection (7), withdraw members of the unit from the area concerned if their continued presence is no longer required to restore or maintain public order in the area concerned or in any part thereof.

(7) Where the national public order policing unit or any part thereof is deployed under subsection (5) and public order has been restored in the area concerned, the unit or part thereof shall continue to maintain public order in such area until the President, in consultation with the Cabinet, directs the National Commissioner to withdraw the unit.

CHAPTER 7

COMMUNITY POLICE FORUMS AND BOARDS

Objects of community police forums and boards

18. (1) The Service shall, in order to achieve the objects contemplated in section 215 of the Constitution, liaise with the community through community police forums and area and provincial community police boards, in accordance

with sections 19, 20 and 21, with a view to-

(a) establishing and maintaining a partnership between the community and the Service;

(b) promoting communication between the Service and the community;

(c) promoting co-operation between the Service and the community in fulfilling the needs of the community regarding policing;

(d) improving the rendering of police services to the community at national, provincial, area and local levels;

(e) improving transparency in the Service and accountability of the Service to the community; and

(f) promoting joint problem identification and problem-solving by the Service and the community.

(2) This Chapter shall not preclude liaison by the Service with the community by means other than through community police forums and boards.

Establishment of community police forums

19. (1) A Provincial Commissioner shall, subject to the directions of the member of the Executive Council, be responsible for establishing community police forums at police stations in the province which shall, subject to subsection (3), be broadly representative of the local community.

(2) A community police forum may establish community police sub-forums.

(3) Subject to section 23(1)(b), the station commissioner and the members designated by him or her from time to time for that purpose, shall be members of the community police forum and sub-forums established at the police station concerned.

Establishment of area community police boards

20. (1) A Provincial Commissioner shall, subject to the directions of the member of the Executive Council, be responsible for establishing area community police boards in all areas within the province.

(2) An area community police board shall, subject to subsection (3), consist of representatives of community police forums in the area concerned designated for that purpose by such community police forums.

(3) Subject to section 23(1)(b), the area commissioner and the members designated by him or her from time to time for that purpose, shall be members of the area community police board concerned.

Establishment of provincial community police boards

21. (1) A Provincial Commissioner shall, subject to the directions of the member of the Executive Council, be responsible for establishing a provincial community police board.

(2) A provincial community police board shall, subject to subsection (3), consist of representatives of area community police boards designated for that purpose by the area community police boards in the province concerned.

(3) Subject to section 23(1)(b), the Provincial Commissioner and the members designated by him or her from time to time for that purpose, shall be members of the provincial community police board concerned.

Functions of community police forums and boards

22. (1) A provincial or area community police board or a community police forum or subforum shall perform the functions it deems necessary and appropriate to achieve the objects contemplated in section 18, which may include the functions contemplated in section 221(2) of the Constitution.

(2) The Minister shall, in consultation with the executive coordinating committee, make regulations to ensure the proper functioning of community police forums and sub-forums and community police boards.

Procedural matters

23. (1) Every provincial or area community police board and community police forum or sub-forum shall-

(a) elect one of its members as chairperson and another one as vice-chairperson;

(b) determine the number of members to be designated by the provincial, area or station commissioner concerned to serve as members of the board, forum or subforum concerned: Provided that that number shall not be less than one in addition to the provincial, area or station commissioner concerned;

(c) determine its own procedure and cause minutes to be kept of its proceedings; and

(d) whenever it deems it necessary, co-opt other members or experts or community leaders to the board or forum in an advisory capacity.

(2) Members of community police forums or boards shall render their services on a voluntary basis and shall have no claim to compensation solely for services rendered to such forums and boards.

(3) The majority of the members of the board, forum or sub-forum concerned shall constitute a quorum at a meeting thereof.

(4) If the chairperson of a board or forum referred to in this section is absent from a meeting, the vice-chairperson shall act as chairperson, and if both the chairperson and vice-chairperson are so absent, the members present shall elect one of their number to preside at that meeting.

CHAPTER 8

REGULATIONS

Regulations

24. (1) The Minister may make regulations regarding-

(a) the exercising of policing powers and the performance by members of their duties and functions;

(b) the recruitment, appointment, promotion and transfer of members;

(c) the training, conduct and conditions of service of members;

(d) the general management, control and maintenance of the Service;

(e) returns, registers, records, documents, forms and correspondence in the Service;

(f) labour relations, including matters regarding suspension, dismissal and

grievances;

(g) (i) the institution and conduct of disciplinary proceedings or inquiries;

(ii) conduct by members that will constitute misconduct;

(iii) the provisions, if any, of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), that shall apply mutatis mutandis to disciplinary proceedings or inquiries under this Act;

(iv) the attendance by a member or any witness, of such disciplinary proceedings or inquiries;

(v) the circumstances under which such disciplinary proceedings or inquiries may be conducted or proceeded with in the absence of the member accused of misconduct or affected by such an inquiry;

(vi) the hearing and submission of evidence at such disciplinary proceedings or inquiries;

(vii) competent findings and sanctions in respect of such disciplinary proceedings or inquiries; and

(viii) review and appeal in respect of such disciplinary proceedings or inquiries;

(h) the issue of a code of conduct for the Service and the upholding thereof;

(i) the establishment of different categories of personnel, components, ranks, designations and appointments in the Service;

(j) (i) the standards of physical and mental fitness required, and the medical examination, of members;

(ii) the medical, dental and hospital treatment of members and their families;

(k) (i) the establishment, management and control of a scheme to provide for the medical, dental and hospital treatment, the provision of medicines and other medical requirements and the transportation during their indisposition of-

(aa) members and members of their families;

(bb) members who have retired or who retire on pension, and members of their families; and

(cc) the families of deceased members;

(ii) the categories of members, or other persons who shall or may become members of such a scheme;

(iii) the portion of the costs of such treatment, medicines, medical requirements and transportation which shall be payable under such a scheme by any member or category of members of such a scheme;

(iv) the termination of membership of such a scheme;

(v) the rights, privileges and obligations of members of such a scheme;

(vi) the vesting in such a scheme of assets, rights, liabilities or obligations or the disposal in any way of the assets of such a

scheme; and

(vii) generally, all matters reasonably necessary for the regulation and operation of such a scheme;

(l) the resignation or reduction in rank of members;

(m) the grading of posts and the remuneration structure, including allowances or benefits of members;

(n) the establishment and maintenance of training institutions or centres for members and the instruction, training, discipline and control of members at such institutions or centres;

(o) the management of and access to laboratories established for the purposes of the analysis of forensic evidence as well as fees payable for services rendered in that regard;

(p) the attendance by members of instructional or training courses at institutions or centres other than those established and maintained in terms of this Act;

(q) the establishment and control of funds of clubs referred to in section 62(3);

(r) the deductions to be made from the salaries, wages or allowances of members;

(s) the provisioning of the Service, including the provision of stores and equipment required for the Service, and the care, safe custody and maintenance thereof;

(t) the design, award, use, care, loss, forfeiture and restoration of any decoration or medal instituted, constituted or created under this Act, and its bar, clasp or ribbon;

(u) the design of an official flag and coat of arms for the Service;

(v) the dress and clothing of members, and the control over or disposal of a uniform or part thereof;

(w) the utilisation by the Service of property-

(i) forfeited to the State;

(ii) abandoned, lost or taken charge of by a member; or

(iii) unclaimed and found or taken charge of by a member;

(x) the retention of rank on retirement from the Service and the award of honorary ranks;

(y) the occupation by members of quarters, whether owned or rented by the State or placed at its disposal;

(z) the participation in sport and recreational activities by members;

(aa) the fair distribution of and access to police services and resources in respect of all communities;

(w) the utilisation by the Service of property-

(i) forfeited to the State;

(ii) abandoned, lost or taken charge of by a member; or

(iii) unclaimed and found or taken charge of by a member;

(i) the procedure thereof; and

(ii) the attendance by witnesses of the proceedings thereof;

(ee) the development of the plan contemplated in sec

achievement of the objects of this Act.

(2) Different regulations may be made regarding different categories of members or personnel.

(3) Any regulation under subsection (1)(cc) shall be made in consultation with the Executive Director.

(4) Any regulation which affects State revenue or expenditure shall be made with the concurrence of the Minister of Finance.

National orders and instructions

25. (1) The National Commissioner may issue national orders and instructions regarding all matters which-

(a) fall within his or her responsibility in terms of the Constitution or this Act;

(b) are necessary or expedient to ensure the maintenance of an impartial, accountable, transparent and efficient police service; or

(c) are necessary or expedient to provide for the establishment and maintenance of uniform standards of policing at all levels required by law.

(2) National orders and instructions issued under subsection (1) shall be known and issued as National Orders and Instructions and shall be applicable to all members.

(3) The National Commissioner may issue different National Orders and Instructions in respect of different categories of members.

Provincial orders and instructions

26. (1) Provincial Commissioners may issue orders and instructions which are not inconsistent with this Act or the National Orders and Instructions.

(2) Orders and instructions issued under subsection (1) shall be known and issued as the Provincial Orders and Instructions of the province concerned and shall be applicable to members under the command of the Provincial Commissioner concerned only.

(3) If any Provincial Order or Instruction is inconsistent with a National Order or Instruction, the National Order or Instruction shall prevail.

APPOINTMENTS, TERMS AND CONDITIONS OF SERVICE AND TERMINATION OF SERVICE

Filling of posts

27. (1) Subject to subsection (2), the filling of any post in the Service, whether by appointment, promotion or transfer, shall be done in accordance with section 212(4) of the Constitution.

(2) Subsection (1) shall not preclude compliance with measures designed to achieve the objects contemplated in sections 8(3)(a) and 212(2) of the

Recruitment and appointment

28. (1) The National Commissioner shall determine a uniform recruitment procedure for the Service.

(2) Subject to section 27, the National Commissioner may appoint a person to a post in the fixed establishment of the Service.

(3) Any commissioned officer, magistrate, additional magistrate or assistant magistrate may, if sufficient permanent members are not available at a particular locality to perform a specific police duty, appoint such fit and proper persons as may be necessary as temporary members to perform such duty on such terms and conditions as may be prescribed.

Designation as member

29. (1) The Minister may by notice in the Gazette designate categories of personnel employed on a permanent basis in the Service and who are not members, as members.

(2) Personnel designated as members under subsection (1), shall be deemed to be members appointed to posts in the fixed establishment of the Service under section 28(2) with effect from a date determined by the Minister in the notice concerned: Provided that a person who is a member of a category of personnel so designated who does not, within one month of such designation, consent thereto and, if applicable, consent as required by section 212(7)(b) of the Constitution, to having the retirement age applicable to him or her on 1 October 1993 changed as a result of such designation, shall not be affected by such notice.

Proof of appointment

30. A document in the prescribed form certifying that a person has been appointed as a member, shall be prima facie proof of such appointment.

Salary and benefits

31. (1) A member shall have the right to the salary and benefits determined in his or her case by or under this Act or any other law.

(2) The salary or salary scale of a member shall not be reduced without his or her consent, except in accordance with section 8(7) or following on disciplinary proceedings under section 40 or an inquiry under section 34(1)(b).

Training

32. The National Commissioner shall determine the training that members shall undergo.

Commissioned officers

33. (1) The President may from time to time by commission appoint officers

or temporary officers of the Service.

(2) A Deed of Commission, bearing the signatures of the President and the Minister, or replicas thereof, shall be proof of appointment as commissioned officer.

(3) The commission of a commissioned officer shall terminate and be deemed to be cancelled upon-

(a) the discharge of such officer following on disciplinary proceedings under section 40 or an inquiry under section 34(1)(b), (c) or (d);

(b) the reduction in rank of such officer to a rank of non-commissioned officer following on disciplinary proceedings under section 40 or an inquiry under section 34(1)(b);

(c) a direction by the Minister in terms of subsection (5); or

(d) the transfer of such officer to another department under section 14 or 15 of the Public Service Act, 1994 (Proclamation No. R. 103 of 1994).

(4) Subject to section 49, a commissioned officer may at any time in writing and, with or without prior notice, resign from the Service.

(5) Any commissioned officer who leaves the Service because of his or her discharge, retirement or resignation, shall retain the commission and rank he or she held immediately prior to his or her discharge, retirement or resignation, unless the Minister, on the recommendation of the National Commissioner, otherwise directs.

Inquiries

34. (1) The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, inquire into-

(a) the fitness of a member to remain in the Service on account of indisposition, ill-health, disease or injury;

(b) the fitness or ability of a member to perform his or her duties or to carry them out efficiently;

(c) the fitness of a member to remain in the Service if his or her continued employment constitutes a security risk for the State;

(d) the fitness of a member to remain in the Service in the light of a misrepresentation made by such member regarding a matter in relation to his or her appointment;

(e) the absence of a member from duty without leave for more than one calendar month;

(f) an injury alleged to have been sustained by a member or other employee of the Service in an accident arising out of or in the course of his or her duty, or a disease or indisposition alleged to have been contracted in the course of his or her duty, or any subsequent incapacitation alleged to be due to the same injury, disease or indisposition, or an indisposition alleged to have resulted from vaccination in accordance with this Act;

(g) the death of a member or other employee of the Service alleged to have been caused as a result of circumstances referred to in paragraph (f);

(h) the absence from duty of a member or other employee of the Service

owing to illness, indisposition or injury alleged to have resulted from misconduct or serious and deliberate failure on his or her part to take reasonable precautions;

(i) the suitability, value and purchase of any property or equipment required for use in the Service or the suitability for further service of any part of property or equipment already in use in the Service;

(j) any deficiency in or damage to or loss of State property or any property in possession of or under the control of the State or a club referred to in section 62(3) or for which the State is responsible, or any property of a member or other employee of the Service which is alleged to have occurred in connection with the performance of his or her duties or functions in the Service, as well as the liability of any person and the desirability to hold any person liable for such deficiency, damage or loss;

(k) any deficiency, loss, damage or expense occasioned to the State or a club referred to in section 62(3) as a result of the conduct of a member or other employee of the Service and any money or unpaid debts due by such member or employee to the State or such club as well as the liability of any person and the desirability to hold any person liable for such deficiency, loss, damage or expense; or

(l) any other matter which the National Commissioner considers to be in the interest of the Service.

(2) The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, investigate or lead evidence in an inquiry contemplated in subsection (1),

(3) The Minister may prescribe-

(a) the procedure applicable to an inquiry contemplated in subsection (1); and

(b) the circumstances under which such an inquiry may be converted or deemed to have been converted into disciplinary proceedings.

Discharge of members on account of redundancy, interest of Service or appointment to public office

35. The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act No. 57 of 1973), discharge a member-

(a) because of the abolition of his or her post, or the reduction in the numerical strength, the reorganisation or the readjustment of the Service;

(b) if, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service; or

(c) if the President or a Premier appoints him or her in the public interest under any law to an office to which this Act or the Public Service Commission Act, 1984 (Act No. 65 of 1984), does not apply.

Discharge on account of sentence imposed

36. (1) A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of

such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.

(2) A person referred to in subsection (1), whose-

(a) conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;

(b) conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or

(c) sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine,

may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment without the option of a fine, apply to the National Commissioner to be reinstated as a member.

(3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2)(a), the National Commissioner shall reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged.

(4) In the event of any application by a person whose conviction has been set aside or whose sentence has been replaced as contemplated in subsection (2)(b) and (c), the National Commissioner may-

(a) reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged; or

(b) cause an inquiry to be instituted in accordance with section 34 into the suitability of reinstating such person as a member.

(5) For the purposes of this section, a sentence to imprisonment until the rising of the court shall not be deemed to be a sentence to imprisonment without the option of a fine.

(6) This section shall not be construed as precluding -any administrative action, investigation or inquiry in terms of any other provision of this Act with respect to the member concerned, and any lawful decision or action taken in consequence thereof.

Discharge of members failing to complete basic training

37. Notwithstanding the provisions of this Act, but subject to the Constitution, the National Commissioner may, in the absence of an inquiry, discharge from the Service a member who fails to complete his or her basic training successfully within a period of 24 months after his or her appointment in the Service.

Missing members and employees

38. (1) If a member or other employee of the Service is reported missing, such member or employee shall for all purposes be deemed to be still employed by the Service until-

(a) the National or Provincial Commissioner otherwise determines;

(b) he or she again reports for duty; or

(c) a competent court issues an order whereby the death of such member or employee is presumed.

(2) The salary or wages and allowances accruing to a member or employee during his or her absence contemplated in subsection (1) shall, subject to subsection (4), be paid-

(a) to his or her spouse; or

(b) if he or she has no spouse, to his or her dependants; or

(c) to any other person who, in the opinion of the Commissioner concerned, is competent to receive and administer such salary or wages and allowances on behalf of the member or employee or his or her spouse or such other dependants.

(3) Payment of any salary or wages and allowances in terms of subsection (2) shall for all purposes be deemed to be payment thereof to the member or employee concerned.

(4) Notwithstanding subsection (2), the National or Provincial Commissioner may from time to time direct that only a portion of the salary or wages and allowances of a member or employee be paid in terms of the said subsection or that no portion thereof be so paid.

Secondment of members

39. (1) The services of a member may be placed at the disposal of any other department of State or any authority established by or under any law.

(2) If a member is seconded under subsection (1), such member shall be deemed to be serving in the Service and shall retain all powers and privileges as a member, subject to such conditions as may be agreed upon by the National Commissioner and the department of State or authority concerned.

(3) A member seconded under subsection (1) shall, in the performance of his or her functions, act in terms of the laws applicable to the department of State or authority to which he or she is seconded, subject to such conditions as may be agreed upon by the National Commissioner and the department of State or authority concerned.

(4) The National Commissioner shall determine uniform standards and procedures regarding the secondment of members.

Disciplinary proceedings

40. Disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct, whether such misconduct was committed within or outside the borders of the Republic.

Strikes

41. (1) No member shall strike, induce any other member to strike or conspire with another person to strike.

(2) If the National or Provincial Commissioner has reason to believe that a member is striking or conspiring with another person to strike, the Commissioner concerned may, in a manner which is reasonable in the circumstances, issue an ultimatum to the member concerned to terminate or desist from carrying out such conduct within the period specified in such ultimatum.

(3) In the event that the member refuses or fails to comply with the ultimatum referred to in subsection (2), or if the National or Provincial Commissioner could not reasonably be expected to issue such an ultimatum to a member personally, the Commissioner concerned may, without a hearing, summarily discharge such member from the Service:

Provided that-

(a) such member shall as soon as practicable after the date of such discharge, be notified in writing of such discharge and the reasons therefor;

(b) such member may, within 30 days after the date of receipt of such notice, make written representations to the Minister regarding the revocation of the discharge; and

(c) the Minister may, after having considered any representations, reinstate such member from the date of such discharge.

(4) A discharge from the Service under subsection (3) shall not be invalid solely by reason of such member not receiving notice of the ultimatum referred to in subsection (2).

Conduct sheets

42. (1) The National or Provincial Commissioner shall cause a conduct sheet to be maintained in respect of every member under his or her command.

(2) The National Commissioner shall determine the manner and form in which conduct sheets shall be maintained and when entries recorded thereon may be deleted.

Suspension while in detention or imprisoned

43. (1) Subject to section 36, a member who is in detention or is serving a term of imprisonment shall be deemed to be suspended from the Service for the period during which he or she is so detained or is serving such term of imprisonment.

(2) A member referred to in subsection (1) shall, unless the National or Provincial Commissioner otherwise directs, not be entitled for the applicable period to any salary, wages, allowances, privileges or benefits to which he or she would otherwise be entitled as a member.

(3) Where a member-

(a) is detained pending the outcome of criminal proceedings against him or her and such member is subsequently found not guilty on all charges or is convicted but such conviction is subsequently set aside; or

(b) serves a term of imprisonment which is subsequently set aside, such member may make representations to the National or Provincial Commissioner that any salary, wages, allowances, privileges or benefits forfeited by him or her under subsection (2), be restored to him or her.

(4) The National or Provincial Commissioner may, in the circumstances contemplated in subsection (3), mero motu or after consideration of any representations received from a member, determine that any forfeited salary, wages, allowances, privileges or benefits be restored to such member,

Rewards and recognitions

44. (1) The National or Provincial Commissioner may, after consultation with the Minister or member of the Executive Council, make an appropriate award to any member or other person for meritorious service in the interest of the Service.

(2) The President may institute, constitute and create decorations and medals, as well as bars, clasps and ribbons in respect of such decorations and medals, which may be awarded by the President, the Minister or the member of the Executive Council, subject to such conditions as the President may determine, to any member or other person who has rendered exceptional service to the Service.

Retirement

45.(1)(a) Subject to subsection (7), a member may retire from the Service, and shall be so retired on the date when he or she attains the age of 60 years.

(b) If a member attains the age of 60 years after the first day of the month, he or she shall be deemed to have attained it on the first day of the following month.

(2) A member who is at least 50 years of age may, at any time before attaining the age of 60 years, give written notification to the Minister of his or her wish to retire from the Service, and shall be allowed so to retire if a sufficient reason therefor exists and the retirement will be to the advantage of the Service.

(3) (a) Subject to paragraph (b), a member who in terms of section 212(7)(b) of the Constitution or any other law has the right to retire at an earlier age than that contemplated in subsection (1)(a), shall give written notification to the National Commissioner of his or her wish to be so retired and he or she shall-

(i) if that notification is given to the National Commissioner at least three calendar months prior to the date on which he or she attains the retirement age applicable to him or her, be so retired on the date on which he or she attains that age or, if he or she attains it after the first day of the month, on the first day of the following month; or

(ii) if that notification is not given to the National Commissioner at least three calendar months prior to the date on which he or she attains the said age, be so retired on the first day of the fourth month after the month in which the notification is received.

(b)(i) Subject to subsection (4), the National or Provincial Commissioner shall give written notification of his or her wish to be retired from the Service at least six calendar months prior to the date on which he or she attains the retirement age applicable to him or her, and if he or she has so given notification, paragraph (a)(i) shall apply mutatis mutandis.

(ii) If the National or Provincial Commissioner has not given written notification at least six calendar months prior to the date on which he or she attains the said age, he or she shall be so retired on the first day of the seventh month following the month in which that notification is received.

(4) Notwithstanding the provisions of this section, the National or Provincial Commissioner may retire from the Service and he or she shall be so retired at the expiry of the term contemplated in section 7, or any extended term contemplated in that section, as the case may be, and he or she shall be deemed to have been so retired in terms of section 35(a).

(5) Subject to subsections (1) and (3)(b)-

(a) the President may at the request of the National Commissioner allow him or her to retire from the Service before the expiry of the term contemplated in section 7 or any extended term contemplated in that section if a reason exists which the President deems sufficient; and

(b) the National Commissioner may at the request of the Provincial Commissioner allow him or her to retire from the Service before the expiry of the term contemplated in section 7 or any extended term contemplated in that section if a reason exists which the National Commissioner deems sufficient.

(6) If the National or Provincial Commissioner is allowed to retire under subsection (5), he or she shall be deemed to have been retired in terms of subsection (2), and shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the Service under the latter subsection.

(7)(a) Notwithstanding the provisions of subsection (1)(a), a member may be retained, with his or her consent, in his or her post beyond the age of 60 years with the approval of the Minister or member of the Executive Council for further periods which shall not, except with the approval by resolution of Parliament, exceed the aggregate of five years.

(b) A member shall only be retained under paragraph (a) if it is-

(i) reasonable; and

(ii) in the interest of the Service; or

(iii) generally in the public interest.

(8) Pension benefits shall be paid to a retired member by the institution responsible for the administration of the pension fund to which that member was a contributor, subject to any law regulating the payment of such benefits.

(9) A benefit payable by the Service in terms of any law shall be paid to the person entitled to such benefit within a period of 90 days after the date on which the National Commissioner received the written notification of such member's termination of service, for any reason, in such a form and with such documents as the National Commissioner may determine for the purposes of this section or, if he or she receives such notification and documents 90 days before the date on which a benefit is payable to the person concerned in terms of such law, on the date on which such benefit is so payable.

(10) Nothing in this section contained shall be construed as derogating from section 212(7) of the Constitution.

Political activities of members

46. (1) No member shall-

(a) publicly display or express support for or associate himself or herself with a political party, organisation, movement or body;

(b) hold any post or office in a political party, organisation, movement or body;

(c) wear any insignia or identification mark in respect of any political party, organisation, movement or body; or

(d) in any other manner further or prejudice party-political interests.

(2) Subsection (1) shall not be construed as prohibiting a member from-

(a) joining a political party, organisation, movement or body of his or her choice;

(b) attending a meeting of a political party, organisation, movement or body:

Provided that no member shall attend such a meeting in uniform; or

(c) exercising his or her right to vote.

Obedience

47. (1) Subject to subsection (2), a member shall obey any order or instruction given to him or her by a superior or a person who is competent to do so: Provided that a member shall not obey a patently unlawful order or instruction.

(2) Where it is reasonable in the circumstances, a member may demand that an order or instruction referred to in subsection (1) be recorded in writing before obeying it.

(3) A member may, after having obeyed an order or instruction referred to in subsection (1), demand that such an order or instruction be recorded in writing.

Reserve Police Service

48. (1) The National Commissioner may determine the requirements for recruitment, resignation, training, ranks, promotion, duties and nature of service, discipline, uniform, equipment and conditions of service of members of the Reserve Police Service and any other matter which he or she deems necessary in order to establish and maintain different categories of members of the Reserve Police Service.

(2) The National Commissioner may appoint a person as a member of the Reserve in the prescribed manner.

(3) The National or Provincial Commissioner may in the prescribed manner order any member of the Reserve to report for service, and any such member who refuses or fails to comply with such order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months: Provided that the Minister may by regulation exclude categories of members of the Reserve from the application of this subsection.

(4) The National or Provincial Commissioner may, subject to the Constitution, at any time discharge a member of the Reserve from the Service.

(5) During a period contemplated in section 49, the National or Provincial Commissioner may refuse to accept the resignation of a member of the Reserve, unless he or she produces evidence that he or she has enlisted for military service in a recognised unit of the South African National Defence Force.

(6) A member of the Reserve shall be deemed to be in the employ of the Service while on duty, notwithstanding the fact that such member may not be remunerated by the Service.

Limitation on right to resign

49. (1) No member may, during a period in which a state of national defence, declared under section 82(4)(b)(i) of the Constitution, or a state of emergency, proclaimed in accordance with section 34(1) of the Constitution, is

in force, resign from the Service without the written permission of the National Commissioner .

(2) The National Commissioner may, in circumstances other than those mentioned in subsection (1), where the maintenance of public order in the Republic or any part thereof so requires, order that no member may resign from the Service without his or her written permission during a period of time specified in the order, which period may not exceed 30 days.

CHAPTER 10

INDEPENDENT COMPLAINTS DIRECTORATE

Establishment and independence

50.(1)(a) The Independent Complaints Directorate, which shall be structured at both national and provincial levels, is hereby established.

(b) The date on which the provincial structures of the directorate will come into operation, shall be determined by the Executive Director in consultation with the Minister.

(2) The directorate shall function independently from the Service.

(3)(a) No organ of state and no member or employee of an organ of state nor any other person shall interfere with the Executive Director or a member of the personnel of the directorate in the exercise and performance of his or her powers and functions.

(b) Any person who wilfully interferes with the Executive Director or a member of the personnel of the directorate in the exercise or performance of his or her powers or functions, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(4) All organs of state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the directorate in the exercise and performance of its powers and functions.

Appointment of Executive Director

51. (1) The Minister shall nominate a suitably qualified person for appointment to the office of Executive Director to head the directorate in accordance with a procedure to be determined by the Minister in consultation with the Parliamentary Committees.

(2) The Parliamentary Committees shall, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.

(3) In the event of the nomination being confirmed-

(a) such person shall be appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and

(b) such appointment shall be for a period not exceeding five years: Provided that such person shall be eligible for consecutive appointments in accordance with this section.

(4) The Executive Director may be removed from his or her office under the circumstances and in the manner prescribed by the Minister in consultation

with the Parliamentary Committees.

Personnel and expenditure

52. (1) The personnel of the directorate shall consist of persons appointed by the Executive Director in consultation with the Minister subject to the laws governing the public service and such other persons as may be seconded or transferred to the directorate.

(2) The terms and conditions of service of the personnel of the directorate shall be determined by the Minister in consultation with the Executive Director and the Public Service Commission.

(3) The functions of the directorate shall be funded by money appropriated by Parliament for that purpose.

(4) The Executive Director shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975)-

(a) be the accounting officer charged with the responsibility of accounting for all money appropriated by Parliament for the purposes of the performance of the functions of the directorate and the utilisation thereof; and

(b) cause the necessary accounting and other related records to be kept.

Functions of directorate

53.(1)(a) The principal function of the directorate shall be the achievement of the object contemplated in section 222 of the Constitution.

(b) The Executive Director shall be responsible for-

(i) the performance of the functions of the directorate; and

(ii) the management and administration of the directorate.

(2) In order to achieve its object, the directorate-

(a) may mero motu or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member, and may, where appropriate, refer such investigation to the Commissioner concerned;

(b) shall mero motu or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and

(c) may investigate any matter referred to the directorate by the Minister or the member of the Executive Council.

(3)(a) The Minister may, upon the request of and in consultation with the Executive Director, authorise those members of the personnel of the directorate identified by the Executive Director, to exercise those powers and perform those duties conferred on or assigned to any member by or under this Act or any other law.

(b) The members of the personnel referred to in paragraph (a) shall have such immunities and privileges as may be conferred by law on a member in order to ensure the independent and effective exercise and performance of their powers and duties.

(4) A document, in the prescribed form, certifying that a person is a member of the personnel of the directorate and has been authorised to exercise the powers and perform the duties of a member, shall be prima facie proof that

such member has been authorised as contemplated in subsection (3).

(5) Any member of the personnel of the directorate who wilfully discloses any information in circumstances in which he or she knows or could reasonably be expected to know that such disclosure would or may prejudicially affect the performance by the directorate or the Service of its functions, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(6) The Executive Director may-

(a) at any time withdraw any referral made under subsection (2)(a);

(b) request and obtain information from any Commissioner or police official as may be necessary for conducting any investigation;

(c)(i) monitor the progress of;

(ii) set guidelines regarding; and

(iii) request and obtain information regarding, an investigation referred to a Commissioner under subsection (2)(a);

(d) request and obtain the co-operation of any member as may be necessary to achieve the object of the directorate;

(e) commence an investigation on any matter notwithstanding the fact that an investigation regarding the same matter has been referred under subsection (2)(a), is pending or has been closed by the Service, or the docket regarding the matter has been submitted to the attorney-general for decision: Provided that in the case of a-

(i) referred or pending investigation, the directorate shall act after consultation with the member heading the investigation; or

(ii) docket regarding a matter having been submitted to the attorney-general for decision, the directorate shall act in consultation with the attorney-general;

(f) request and obtain information from the attorney-general's office in so far as it may be necessary for the directorate to conduct an investigation: Provided that the attorney-general may on reasonable grounds refuse to accede to such request;

(g) submit the results of an investigation to the attorney-general for his or her decision;

(h) in consultation with the Minister and with the concurrence of the Minister of Finance, obtain the necessary resources and logistical support or engage the services of experts, or other suitable persons, to enable the directorate to achieve its object;

(i) make recommendations to the Commissioner concerned;

(j) make any recommendation to the Minister or a member of the Executive Council which he or she deems necessary regarding any matter investigated by the directorate or relating to the performance of the directorate's functions:

Provided that in the event of a recommendation made to a member of the Executive Council, a copy thereof shall be forwarded to the Minister; and

(k) subject to the Exchequer Act, 1975 (Act No. 66 of 1975), delegate any

of his or her powers to any member of the personnel of the directorate.

(7) The Executive Director shall, in consultation with the Minister, issue instructions to be complied with by the directorate which shall inter alia include instructions regarding-

(a) the lodging, receiving and processing of complaints;

(b) recording and safe-guarding of information and evidence;

(c) disclosure of information;

(d) the making of findings and recommendations; and

(e) all matters incidental to the matters referred to in paragraphs (a) to (d).

(8) The National or Provincial Commissioner shall notify the directorate of all cases of death in police custody or as a result of police action.

(9) The Minister may prescribe procedures regarding-

(a) protecting the identity and integrity of complainants; and

(b) witness protection programmes.

Reporting

54. The Executive Director shall-

(a) within three months after the end of each financial year, submit to the Minister a written report on the activities of the directorate during that financial year, which report shall be tabled in Parliament by the Minister within 14 days after receipt thereof or, if Parliament is not then in session, within 14 days after the commencement of the next ensuing session; and

(b) at any time when requested to do so by the Minister or either the Parliamentary Committees, submit a report on the activities of the directorate to the Minister or that Committee.

CHAPTER 11

GENERAL PROVISIONS

Non-liability for acts under irregular warrant

55. (1) Any member who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were valid in law.

(2)(a) Any member who is authorised to arrest a person under a warrant of arrest and who, in the reasonable belief that he or she is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest.

(b) Any member who is called upon to assist in making an arrest as contemplated in paragraph (a) or who is required to detain a person so arrested, and who reasonably believes that the said person is the person whose arrest has been authorised by the warrant of arrest, shall likewise be exempt from liability in respect of such assistance or

detention.

Limitation of liability of State and members

56. Whenever any person is conveyed in or makes use of any vehicle, aircraft or vessel, being the property or under the control of the State in the Service, the State or any member shall not be liable to such person or his or her spouse, parent, child or other dependant for any loss or damage resulting from any bodily injury, loss of life or loss of or damage to property caused by or arising out of or in any way connected with the conveyance in or the use of such vehicle, aircraft or vessel, unless such person is so conveyed or makes use thereof in or in the interest of the performance of the functions of the State: Provided that the provisions of this section shall not affect the liability of a member who wilfully causes the said loss or damage.

Actions against Service

57. (1) No legal proceedings shall be instituted against the Service or any body or person in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.

(2) No legal proceedings contemplated in subsection (1) shall be instituted before the expiry of at least one calendar month after written notification of the intention to institute such proceedings, has been served on the defendant, wherein particulars of the alleged act or omission are contained.

(3) If any notice contemplated in subsection (2) is given to the National Commissioner or to the Provincial Commissioner of the province in which the cause of action arose, it shall be deemed to be notification to the defendant concerned.

(4) Any process by which any proceedings contemplated in subsection (1) is instituted and in which the Minister is the defendant or respondent, may be served on the National or Provincial Commissioner referred to in subsection (3).

(5) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those subsections where the interests of justice so require.

Salary or allowance not to be assigned or attached

58. No member shall, without the approval of the National or Provincial Commissioner, assign the whole or any part of any salary, wages or allowance payable to him or her under this Act, nor shall the whole or any part of any such salary, wages or allowance be capable of being seized or attached under or in consequence of any judgment or order of any court of law, other than a garnishee order.

Prohibition on certain dealings

59. (1) No member shall, without the permission of the person under whose command he or she serves, lend any means of transport or equipment which he or she is required to keep and possess, or sell, pledge or otherwise dispose of any such property, irrespective of whether it is the property of the State or his or her own property.

(2) Every sale, pledge, loan or other disposition of any property contrary to

subsection (1), shall be null and void.

Property of Service not liable to seizure or attachment

60. Property which in terms of this Act may not be sold, pledged, lent or otherwise disposed of, shall not be capable of being seized or attached, under or in consequence of any judgment or order of any court of law.

Exemption from tolls, fees and fees of office

61. (1) Subject to subsection (3), any member who, in the exercise of his or her powers or the performance of his or her duties or functions finds it necessary to enter, pass through or go over any wharf, landing place, ferry, bridge, toll-bar, gate or door at or in respect of which any toll, fee or fee of office may be lawfully demanded, shall be exempted from the payment of such toll, fee or fee of office in respect of himself or herself, every person under his or her arrest and any animal, means of transport or property which he or she may require in the exercise of such powers or the performance of such duties or functions: Provided that if such member is not in uniform, he or she shall, upon a request by any person who may demand such toll, fee or fee of office, disclose his or her identity by exhibiting to such person his or her certificate of appointment.

(2) Any person who may demand any such toll, fee or fee of office, and who subjects any such member, person, animal, means of transport or property to unreasonable delay or detention in respect of the entry to, passage through or going over any such wharf, landing place, ferry, bridge, toll-bar, gate or door, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

(3) The National or Provincial Commissioner may, if he or she deems it necessary, with regard to the nature of the powers, duties or functions of a member, order that subsection (1) is not applicable to such member, in which event any toll, fee or fee of office contemplated in subsection (1), shall be payable.

Police clubs exempt from licence duties and other fees

62. (1) No licence money, tax, duty or fee (other than customs, excise or value-added tax) shall be payable by any person under any law or by-law in respect of a certified club of the Service or in respect of any article on sale at such a club.

(2) The production of an official document bearing the signature of the Minister or member of the Executive Council or any person authorised by the Minister or member of the Executive Council to sign such document, and indicating that he or she has certified the club as a club of the Service, shall, for the purposes of this section, be conclusive proof that it is such a club.

(3) For the purposes of this section "club" includes any mess or institution of the Service or any premises temporarily or permanently used for providing recreation, refreshment or articles of necessity mainly for members or retired members or other persons employed by the Service or for the families of such members, retired members or employees or such other persons employed in any work in or in connection with any such mess, institution or premises.

Payment by public for police services

63. (1) The National Commissioner shall, with due regard to sections 215, 218 and 219 of the Constitution, determine whether a particular function, duty or service falls within the scope of the normal and generally accepted responsibilities of the Service and, if such function, duty or service does not fall within such scope, it shall, subject to subsection (2), be performed

only on such conditions as may be prescribed in consultation with the Treasury.

(2) Notwithstanding the provisions of subsection (1), the National Commissioner may authorise that any function, duty or service be performed free of charge on behalf of any deserving charity or in any case considered to be of general, cultural or educational interest.

CHAPTER 12

MUNICIPAL AND METROPOLITAN POLICE SERVICES

Municipal and metropolitan police services

64. (1) Any local government may, subject to the Constitution and this Act, establish-

(a) a municipal police service; or

(b) a metropolitan police service.

(2)(a) The Minister shall prescribe which provisions of this Act shall apply mutatis mutandis to any municipal or metropolitan police service.

(b) The Minister may make regulations regarding the establishment of municipal and metropolitan police services, including which categories of local governments may establish municipal police services and which categories of local governments may establish metropolitan police services.

(3) The National Commissioner shall determine the minimum standards of training that members of municipal and metropolitan police services shall undergo.

(4) Legal proceedings in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, by any member of a municipal or metropolitan police service, shall be instituted against the local government concerned and section 57 shall not be applicable to such legal proceedings.

(5) The establishment of a municipal or metropolitan police service shall not derogate from the functions of the Service or the powers, duties or functions of a member in terms of any law.

(6) Where a municipal or metropolitan police service has been established, such service shall be represented by at least one of its members designated by such service for that purpose on every community police forum or sub-forum established in terms of section 19 in its area of jurisdiction.

CHAPTER 13

OFFENCES

Receipt or possession of certain property

65. Any person who receives or has in his or her possession any property which in terms of this Act may not be sold, pledged, lent or otherwise disposed of, knowing the same to have been sold, pledged, lent or otherwise disposed of in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

Wearing and use of uniforms, badges, etc. of Service

66. (1) Any person who wears any uniform or distinctive badge or button of the Service or wears anything materially resembling any such uniform, badge or button or wears anything with the intention that it should be regarded as such uniform, badge or button, shall, unless-

(a) he or she is a member entitled by reason of his or her appointment, rank or designation to wear such uniform, badge or button; or

(b) he or she has been granted permission by the National or Provincial Commissioner to wear such uniform, badge or button,

be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(2) Any person who wears, or without the written permission of the National Commissioner, makes use of any decoration or medal instituted, constituted or created under this Act, or its bar, clasp or ribbon, or anything so closely resembling any such decoration, medal, bar, clasp or ribbon as to be calculated to deceive, shall, unless he or she is the person to whom such decoration or medal was awarded, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Interference with members

67. (1) Any person who-

(a) resists or wilfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member wilfully interferes with such member or his or her uniform or equipment or any part thereof; or

(b) in order to compel a member to perform or to abstain from performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependants, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

(2) Any person who-

(a) conspires with or induces or attempts to induce any member not to perform his or her duty or any act in conflict with his or her duty; or

(b) is a party to, assists or incites the commission of any act whereby any lawful order given to a member may be evaded,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(3) Any person who induces or attempts to induce a member to commit misconduct shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(4) In the event of a criminal prosecution of any member or a representative of an employee organisation on account of a contravention of subsection (2) or (3), it shall constitute a defence if the sole purpose of such person's

conduct was to-

(a) further or cause a strike by members-, or

(b) further the activities of a bona fide employee organisation.

False representations

68. (1) Any person who pretends that he or she is a member shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(2) Any person who by means of a false certificate or any false representation obtains an appointment in the Service, or, having been dismissed from the Service, receives, by concealing the dismissal, any salary, wages, allowance, gratuity or pension, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(3) Any person who, in connection with any activity carried on by him or her takes, assumes, uses or in any manner publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or is calculated or is likely to lead other persons to believe or infer that such activity is carried on under or in terms of the provisions of this Act or under the patronage of the Service, or is in any manner associated or connected with the Service, without the approval of the National Commissioner, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Prohibition on making of sketches or taking of photographs of certain persons and publication thereof

69. (1) For the purposes of this section-

"photograph" includes any picture, visually perceptible image, depiction or any other similar representation of the person concerned;

"publish", in relation to a photograph, includes to exhibit, show, televise, represent or reproduce; and

"take", in relation to a photograph, includes the performance of any act which by itself or as part of a process or as one of a sequence of acts renders possible the production of a photograph.

(2)(a) A member who has reason to believe that the taking of a photograph or the making of a sketch of any person who is, in relation to criminal proceedings, detained in custody, will prejudicially affect an ongoing investigation into an offence or alleged offence, may prohibit any person from taking such photograph or making such sketch.

(b) Any person who takes a photograph or makes a sketch in contravention of a prohibition under paragraph (a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

(3)(a) No person may, without the written permission of the National or Provincial Commissioner, publish a photograph or sketch of a person-

(i) who is suspected of having committed an offence and who is-

(aa) fleeing;

(bb) in custody pending a decision to institute criminal proceedings against him or her; or

(cc) in custody pending the completion of criminal proceedings in which such person is an accused; or

(ii) who is or may reasonably be expected to be a witness in criminal proceedings and who is in custody pending such proceedings.

(b) Any person who publishes a photograph or sketch in contravention of paragraph (a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

Unauthorised disclosure of information

70. Any member who wilfully discloses information in circumstances in which he or she knows, or could reasonably be expected to know, that such a disclosure will or may prejudicially affect the exercise or the performance by the Service of the powers or the functions referred to in section 215 of the Constitution, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

Unauthorised access to or modification of computer material

71. (1) Without derogating from the generality of subsection (2)-

"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 Service;

"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 Service;

"modification" includes both a modification of a temporary or permanent nature; and

"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 who wilfully gains unauthorised access to any computer which belongs to or is under the control of the Service or to any program or data held in such a computer, or in a computer to which only certain or all members have restricted or unrestricted access in their capacity as members, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(3) Any person who wilfully causes a computer which belongs to or is under the control of the Service or to which only certain or all members have restricted or unrestricted access in their capacity as members, to perform a function while such person is not authorised to cause such computer to perform such function, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(4) Any person who wilfully performs an act which causes an unauthorised modification of the contents of any computer which belongs to or is under the control of the Service or to which only certain or all members have restricted or unrestricted access in their capacity as members with the intention to-

(a) 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

(b) prevent or hinder access to any program or data held in any computer,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

(5) Any act or event for which proof is required for a conviction of an offence in terms of this section which was committed or took place outside the Republic shall be deemed to have been committed or have taken place in the Republic: Provided that-

(a) the accused was in the Republic at the time he or she performed the act or any part thereof by means of which he or she gained or attempted to gain unauthorised access to the computer, caused the computer to perform a function or modified or attempted to modify its contents-,

(b) the computer, by means of or with regard to which the offence was committed, was in the Republic at the time the accused performed the act or any part thereof by means of which he or she gained or attempted to gain unauthorised access to it, caused it to perform a function or modified or attempted to modify its contents; or

(c) the accused was a South African citizen at the time of the commission of the offence.

CHAPTER 14

REPEAL AND TRANSITIONAL PROVISIONS

Repeal and transitional provisions

72.(1)(a) Subject to this section, the Rationalisation Proclamation is hereby repealed, excluding-

(i) sections 8(1), 9(1) to (8) , 10, 12(1) and (2)(a) to (j), 13 and 14 thereof; and

(ii) any other provision of that Proclamation in so far as it relates to the interpretation or execution of a provision mentioned in subparagraph (i).

(b) Sections 11, 12 and 15 of this Act shall, where applicable, be subject to section 9(1) to (8) of the Rationalisation Proclamation until the National Commissioner has certified that the assignment of the functions referred to in section 219 of the Constitution by the National Commissioner to all Provincial Commissioners as contemplated in section 9(4)(a) of the Rationalisation Proclamation, has been completed, whereupon sections 11, 12 and 15 of this Act shall be applicable to the National and Provincial Commissioner in relation to the Province concerned.

(c) The Minister may make regulations regarding all matters which are necessary or expedient for the purposes of this subsection.

(d) Any person who, immediately before the commencement of this Act, was a member of a force contemplated in section 5(2)(a)(i), and who has not been appointed to a post in or additional to the fixed establishment or otherwise dealt with in accordance with section 14 of the Rationalisation Proclamation, shall serve in a pre-rationalised post until he or she is appointed to a post in or additional to the fixed

establishment or is otherwise dealt with in accordance with that section.

(e) Any person referred to in paragraph (d) who has been or is appointed to a post in or additional to the fixed establishment or is otherwise dealt with in terms of the Rationalisation Proclamation, shall be deemed to have been so appointed or dealt with under the corresponding provision of this Act.

(2) In the application of the provisions mentioned in subsection (1)(a), and unless the context otherwise indicates or if clearly inappropriate, any reference therein to the Rationalisation Proclamation or to the Police Act, 1958 (Act No. 7 of 1958), or to any repealed provision thereof, shall be construed as a reference to this Act, or to the corresponding provision thereof, as the case may be.

(3) Any reference in any law to a Commissioner of a police force shall, except where such post has not yet been abolished, and unless clearly inappropriate, be construed as a reference to the National Commissioner or, in regard to any matter in respect of which a Provincial Commissioner is lawfully responsible, and subject to section 219 of the Constitution, to the Provincial Commissioner concerned.

(4)(a) Anything done, including any regulation made or standing order or instruction issued or other administrative measure taken or any contract entered into or any obligation incurred under the Rationalisation Proclamation or any law repealed by this Act or the Rationalisation Proclamation which could be done under this Act and in force immediately before the commencement of this Act, shall be deemed to have been so done, made, issued, taken, entered into or incurred, as the case may be, under this Act until amended, abolished, withdrawn or repealed under this Act.

(b) Any reference in any regulation, standing order or administrative measure to a regional commissioner or a district commissioner shall, unless clearly inappropriate, be construed as a reference to a Provincial Commissioner or an area commissioner, respectively.

(5) Every existing statutory institution or other body performing policing functions of whatever nature under the control of a local government (hereinafter in this section referred to as a "service") shall cease to exist six months from the date of the promulgation of the regulations contemplated in section 64(2) unless-

(a) the local authority concerned has by resolution decided that such service would continue to exist under its control; and

(b) the member of the Executive Council concerned has approved the continued existence of such service.

(6) If the provisions of subsection (5)(a) and (b) are complied with, the service referred to in that subsection shall be deemed to have been established in terms of section 64(1) on the date upon which the member of the Executive Council has approved its continued existence: Provided that the powers of the members of such service shall be limited as contemplated by section 221(3)(b) and (c) of the Constitution.

CHAPTER 15

SHORT TITLE AND COMMENCEMENT

Short title and commencement

73. This Act shall be called the South African Police Service Act, 1995, and

shall come into operation on a date fixed by the President by proclamation in the Gazette.

PUBLIC FINANCE MANAGEMENT ACT
NO. 1 OF 1999

[View Regulation]

[ASSENTED TO 2 MARCH, 1999]
[DATE OF COMMENCEMENT: 1 APRIL, 2000]

(Unless otherwise indicated)

(English text signed by the President)

This Act has been updated to *Government Gazette* 41534 dated 29 March, 2018.

as amended by

Public Finance Management Amendment Act, No. 29 of 1999

Local Government: Municipal Systems Act, No. 32 of 2000

Judicial Officers (Amendment of Conditions of Service) Act, No. 28 of 2003
[with effect from 1 November, 2003]

Public Audit Act, No. 25 of 2004

South African Airways Act, No. 5 of 2007
[with effect from 13 July, 2009]

Public Service Amendment Act, No. 30 of 2007
[with effect from 1 April, 2008]

Broadband Infraco Act, No. 33 of 2007

South African Express Act, No. 34 of 2007

Financial Management of Parliament Act, No. 10 of 2009

National Health Amendment Act, No. 12 of 2013
[with effect from 2 September, 2013, unless otherwise indicated]

GENERAL NOTE

Please note that the Preferential Procurement Policy Framework Act, No. 5 of 2000 and its Regulations shall apply to all public entities listed in Schedules 2 and 3 of this Act, under GNR.501 published in *Government Gazette* No. 34350 dated 8 June, 2011, with effect from 7 December, 2011.

EDITORIAL NOTE

1. **Please note that the wording and section numbering in this Act correctly reflects the Act and the amending Act as published in *Government Gazette* Nos. 19814 of 2 March, 1999, and 19978 of 30 April, 1999 respectively. In addition, we draw your attention to the fact that there are inconsistencies between the English and Afrikaans versions of the Act despite the amendments.**
2. **Please note that details of Notices published in the *Government Gazettes* that amend the Schedules to the Act are annotated at the beginning of the Schedules.**

ACT

To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.

[Long title substituted by s. 47 of Act No. 29 of 1999.]

ARRANGEMENT OF SECTIONS

[Arrangement of sections amended by s. 48 of Act No. 29 of 1999.]

CHAPTER 10
FINANCIAL MISCONDUCT

Part 1: Disciplinary Proceedings

Part 2: Criminal Proceedings

CHAPTER 11
ACCOUNTING STANDARDS BOARD

CHAPTER 12
MISCELLANEOUS

CHAPTER 1
INTERPRETATION, OBJECT, APPLICATION AND AMENDMENT OF THIS ACT

1. Definitions.—In this Act, unless the context otherwise indicates—

"accounting officer" means a person mentioned in section 36;

"accounting authority" means a body or person mentioned in section 49;

"Accounting Standards Board" means the board established in terms of section 87;

"annual Division of Revenue Act" means the Act of Parliament which must annually be enacted in terms of section 214 (1) of the Constitution;

"constitutional institution" means an institution listed in Schedule 1;

"department" means a national or provincial department or a national or provincial government component;
[Definition of "department" substituted by s. 1 (a) of Act No. 29 of 1999 and by s. 43 of Act No. 30 of 2007.]

"executive authority"—

(*a*) in relation to a national department, means the Cabinet member who is accountable to Parliament for that department;

(*b*) in relation to a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department;

(*c*) in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls; and

(*d*) in relation to a provincial public entity, means the member of the provincial Executive Council who is accountable to the provincial legislature for that public entity or in whose portfolio it falls;
[Definition of "executive authority" substituted by s. 1 (b) of Act No. 29 of 1999.]

"financial year"—

(*a*) means a year ending 31 March; or

(*b*) in relation to a public entity that existed when this Act took effect and that has a different financial year in terms of other legislation, means that financial year, provided the National Treasury has approved that other financial year;

[Para. (b) amended by s. 1 (c) of Act No. 29 of 1999.]

"financial statements" means statements consisting of at least—

(*a*) a balance sheet;

(*b*) an income statement;

(*c*) a cash-flow statement;

(*d*) any other statements that may be prescribed; and

(*e*) any notes to these statements;

"fruitless and wasteful expenditure" means expenditure which was made in vain and would have been avoided had reasonable care been exercised;

"generally recognised accounting practice" means an accounting practice complying in material respects with standards issued by the Accounting Standards Board;

"irregular expenditure" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including—

(*a*) this Act; or

(*b*) the State Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or

(*c*) any provincial legislation providing for procurement procedures in that provincial government;

[Definition of "irregular expenditure" amended by s. 1 (d) of Act No. 29 of 1999.]

"main division within a vote" means one of the main segments into which a vote is divided and which—

(*a*) specifies the total amount which is appropriated for the items under that segment; and

(*b*) is approved by Parliament or a provincial legislature, as may be appropriate, as part of the vote;

[Definition of "main division within a vote" amended by s. 1 (e) of Act No. 29 of 1999.]

"MEC for finance" means the member of an Executive Council of a province responsible for finance in the province;

[Definition of "MEC for finance" inserted by s. 1 (f) of Act No. 29 of 1999.]

"Minister" means the Minister of Finance;

"national department" means a department listed in Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), but excluding the Office of a Premier;

[Definition of "national department" substituted by s. 43 of Act No. 30 of 2007.]

 "national government business enterprise" means an entity which—

(*a*) is a juristic person under the ownership control of the national executive;

(*b*) has been assigned financial and operational authority to carry on a business activity;

(*c*) as its principal business, provides goods or services in accordance with ordinary business principles; and

(*d*) is financed fully or substantially from sources other than—

(i) the National Revenue Fund; or

(ii) by way of a tax, levy or other statutory money;

"national government component" means a national government component listed in Part A of Schedule 3 to the Public Service Act, 1994;

[Definition of "national government component" added by s. 43 of Act No. 30 of 2007.]

"national public entity" means—

(*a*) a national government business enterprise; or

(*b*) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is—

(i) established in terms of national legislation;

(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

(iii) accountable to Parliament;

"National Treasury" means the National Treasury established by section 5;

"overspending"—

(*a*) in relation to a vote, means when expenditure under the vote exceeds the amount appropriated for that vote; or

(*b*) in relation to a main division within a vote, means when expenditure under the main division exceeds the amount appropriated for that main division, subject to section 43;

"ownership control", in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities:

(*a*) To appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body;

(*b*) to appoint or remove that entity's chief executive officer;

(*c*) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or

(*d*) to control all, or the majority of, the voting rights at a general meeting of that entity;

"prescribe" means prescribe by regulation or instruction in terms of section 76;

"provincial department" means—

(*a*) the Office of a Premier listed in Schedule 1 to the Public Service Act, 1994;

(*b*) a provincial department listed in Schedule 2 to the Public Service Act, 1994;

[Definition of "provincial department" inserted by s. 1 (g) of Act No. 29 of 1999 and substituted by s. 43 of Act No. 30 of 2007.]

"provincial government business enterprise" means an entity which—

(*a*) is a juristic person under the ownership control of a provincial executive;

(*b*) has been assigned financial and operational authority to carry on a business activity;

(*c*) as its principal business, provides goods or services in accordance with ordinary business principles; and

(*d*) is financed fully or substantially from sources other than—

(i) a Provincial Revenue Fund; or

(ii) by way of a tax, levy or other statutory money;

[Definition of "provincial government business enterprise" inserted by s. 1 (g) of Act No. 29 of 1999.]

"provincial government component" means a provincial government component listed in Part B of Schedule 3 to the Public Service Act, 1994;

[Definition of "provincial government component" added by s. 43 of Act No. 30 of 2007.]

"provincial public entity" means—

(*a*) a provincial government business enterprise; or

(*b*) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is—

(i) established in terms of legislation or a provincial constitution;

(ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and

(iii) accountable to a provincial legislature;

[Definition of "provincial public entity" inserted by s. 1 (g) of Act No. 29 of 1999.]

"provincial treasury" means a treasury established in terms of section 17;

[Definition of "provincial treasury" inserted by s. 1 (g) of Act No. 29 of 1999.]

"public entity" means a national or provincial public entity;

[Definition of "public entity" substituted by s. 1 (h) of Act No. 29 of 1999.]

"Revenue Fund" means—

(*a*) the National Revenue Fund mentioned in section 213 of the Constitution; or

(*b*) a Provincial Revenue Fund mentioned in section 226 of the Constitution;

[Definition of "Revenue Fund" amended by s. 1 (i) of Act No. 29 of 1999.]

"this Act" includes any regulations and instructions in terms of section 69, 76, 85 or 91;

"trading entity" means an entity operating within the administration of a department for the provision or sale of goods or services, and established—

(*a*) in the case of a national department, with the approval of the National Treasury; or

(*b*) in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework;

[Definition of "trading entity" amended by s. 1 (j) of Act No. 29 of 1999.]

"treasury" means the National Treasury or a provincial treasury, as may be appropriate in the circumstances;

[Definition of "treasury" substituted by s. 1 (k) of Act No. 29 of 1999.]

"unauthorised expenditure" means—

(*a*) overspending of a vote or a main division within a vote;

(*b*) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division;

"vote" means one of the main segments into which an appropriation Act is divided and which—

(*a*) specifies the total amount which is usually appropriated per department in an appropriation Act; and

(*b*) is separately approved by Parliament or a provincial legislature, as may be appropriate, before it approves the relevant draft appropriation Act as such.

[Definition of "vote" amended by s. 1 (l) of Act No. 29 of 1999.]

2. Object of this Act.—The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.

3. Institutions to which this Act applies.—(1) This Act, to the extent indicated in the Act, applies to—

(*a*) departments;

(*b*) public entities listed in Schedule 2 or 3;

(*c*) constitutional institutions; and

(*d*) the provincial legislatures, subject to subsection (2).

[Para. (d) substituted by s. 2 (a) of Act No. 29 of 1999 and amended by s. 72 (b) (i) of Act No. 10 of 2009.]

(2) To the extent that a provision of this Act applies to—

(*a*) . . . . . .

[Para. (a) repealed by s. 72 (b) (ii) of Act No. 10 of 2009.]

(*b*) a provincial legislature, any controlling and supervisory functions of the National Treasury and a provincial treasury in terms of that provision are performed by the Speaker of the provincial legislature.

[Para. (b) added by s. 2 (b) of Act No. 29 of 1999.]

(3) In the event of any inconsistency between this Act and any other legislation, this Act prevails.

4. Amendments to this Act.—Draft legislation directly or indirectly amending this Act, or providing for the enactment of subordinate legislation that may conflict with this Act, may be introduced in Parliament—

(*a*) by the Minister only; or

(*b*) only after the Minister has been consulted on the contents of the draft legislation.

CHAPTER 2
NATIONAL TREASURY AND NATIONAL REVENUE FUND

Part 1: National Treasury

5. Establishment.—(1) A National Treasury is hereby established, consisting of—

(*a*) the Minister, who is the head of the Treasury; and

(*b*) the national department or departments responsible for financial and fiscal matters.

(2) The Minister, as the head of the National Treasury, takes the policy and other decisions of the Treasury, except those decisions taken as a result of a delegation or instruction in terms of section 10.

6. Functions and powers.—(1) The National Treasury must—

(*a*) promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;

(*b*) co-ordinate inter-governmental financial and fiscal relations;

(*c*) manage the budget preparation process;

(*d*) exercise control over the implementation of the annual national budget, including any adjustments budgets;

(*e*) facilitate the implementation of the annual Division of Revenue Act;

(*f*) monitor the implementation of provincial budgets;

(*g*) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions; and

(*h*) perform the other functions assigned to the National Treasury in terms of this Act.

(2) To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury—

(*a*) must prescribe uniform treasury norms and standards;

(*b*) must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;

(*c*) must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;

[Para. (c) substituted by s. 3 of Act No. 29 of 1999.]

(*d*) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;

(*e*) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;

(*f*) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and

(*g*) may do anything further that is necessary to fulfil its responsibilities effectively.

(3) Subsections (1) (g) and (2) apply to public entities listed in Schedule 2 only to the extent provided for in this Act.

7. Banking, cash management and investment framework.—(1) The National Treasury must prescribe a framework within which departments, public entities listed in Schedule 3 and constitutional institutions must conduct their cash management.

(2) A department authorised to open a bank account in terms of the prescribed framework, a public entity or a constitutional institution may open a bank account only—

(*a*) with a bank registered in South Africa and approved in writing by the National Treasury; and

(*b*) after any prescribed tendering procedures have been complied with.

(3) A department, public entity listed in Schedule 3 or constitutional institution may not open a bank account abroad or with a foreign bank except with the written approval of the National Treasury.

(4) The National Treasury may prescribe an investment policy for public entities, constitutional institutions and those departments authorised to open a bank or other account in terms of the prescribed framework.

(5) A bank which has opened a bank account for a department, a public entity listed in Schedule 3 or a constitutional institution, or any other institution that holds money for a department, a public entity listed in Schedule 3 or a constitutional institution, must promptly disclose information regarding the account when so requested by the National Treasury or the Auditor-General, or, in the case of a provincial department or provincial public entity, by the National Treasury, the Auditor-General or the relevant provincial treasury.

[Sub-s. (5) substituted by s. 4 of Act No. 29 of 1999.]

8. Annual consolidated financial statements.—(1) The National Treasury must—

(*a*) prepare consolidated financial statements in accordance with generally recognised accounting practice for each financial year in respect of—

(i) national departments;

(ii) public entities under the ownership control of the national executive;

(iii) constitutional institutions;

(iv) the South African Reserve Bank;

(v) the Auditor-General; and

(vi) Parliament; and

(*b*) submit those statements for audit to the Auditor-General within three months after the end of that financial year.

(2) The Auditor-General must audit the consolidated financial statements and submit an audit report on the statements to the National Treasury within three months of receipt of the statements.

(3) The Minister must submit the consolidated financial statements and the audit report on those statements within one month of receiving the report from the Auditor-General, to Parliament for tabling in both Houses.

(4) The consolidated financial statements must be made public when submitted to Parliament.

(5) If the Minister fails to submit the consolidated financial statements and the Auditor-General's audit report on those statements to Parliament within seven months after the end of the financial year to which those statements relate—

(*a*) the Minister must submit to Parliament a written explanation setting out the reasons why they were not submitted; and

(*b*) the Auditor-General may issue a special report on the delay.

(Date of commencement of s. 8: 1 April, 2003.)

9. Financial statistics and aggregations.—The National Treasury may annually compile in accordance with international standards, and publish in the national *Government Gazette*, financial statistics and aggregations concerning all spheres of government.

10. Delegations by National Treasury.—(1) The Minister may—

(*a*) in writing delegate any of the powers entrusted to the National Treasury in terms of this Act, to the head of a department forming part of the National Treasury, or instruct that head of department to perform any of the duties assigned to the National Treasury in terms of this Act; and

(*b*) in relation to a provincial department or provincial public entity, in writing delegate any of the powers entrusted to the National Treasury in terms of this Act to a provincial treasury, or request that treasury to perform any of the duties assigned to the National Treasury in terms of this Act, as the Minister and the relevant MEC for finance may agree.

[Para. (b) added by s. 5 (a) of Act No. 29 of 1999.]

(2) A delegation, instruction or request in terms of subsection (1) to the head of a department forming part of the National Treasury, or to a provincial treasury—

(*a*) is subject to any limitations or conditions that the Minister may impose;

(*b*) may authorise that head, in the case of subsection (1) (a)—

(i) to sub-delegate, in writing, the delegated power to another National Treasury official, or to the holder of a specific post in the National Treasury, or to the accounting officer of a constitutional institution or a department, or to the accounting authority for a public entity; or

(ii) to instruct another National Treasury official, or the holder of a specific post in the National Treasury, or the accounting officer for a constitutional institution or a department, or the accounting authority for a public entity, to perform the assigned duty;

(*c*) may authorise a provincial treasury, in the case of subsection (1) (b)—

(i) to sub-delegate, in writing, the delegated power to an official in that provincial treasury, or to the holder of a specific post in that provincial treasury, or to the accounting officer for a provincial department, or to the accounting authority for a provincial public entity; or

(ii) to instruct an official in that provincial treasury, or the holder of a specific post in that provincial treasury, or the accounting officer for a provincial department, or the accounting authority for a provincial public entity, to perform the assigned duty; and

[Para. (c) inserted by s. 5 (d) of Act No. 29 of 1999.]

(*d*) does not divest the Minister of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

[Sub-s. (2) amended by s. 5 (b) of Act No. 29 of 1999.]

(3) The Minister may confirm, vary or revoke any decision taken by the head of a department forming part of the National Treasury, or by a provincial treasury, as a result of a delegation, instruction or request in terms of subsection (1) (a) or (b), or by a treasury official or accounting officer or accounting authority as a result of an authorisation in terms of subsection (2) (b) or (c), subject to any rights that may have become vested as a consequence of the decision.

[Sub-s. (3) substituted by s. 5 (e) of Act No. 29 of 1999.]

Part 2: National Revenue Fund

11. Control of National Revenue Fund.—(1) The National Treasury is in charge of the National Revenue Fund and must enforce compliance with the provisions of section 213 of the Constitution, namely that—

(*a*) all money received by the national government must be paid into the Fund, except money reasonably excluded by this Act or another Act of Parliament; and

(*b*) no money may be withdrawn from the Fund except—

(i) in terms of an appropriation by an Act of Parliament; or

(ii) as a direct charge against the Fund, subject to section 15 (1) (a) (ii).

(2) Draft legislation that provides for a withdrawal from the National Revenue Fund as a direct charge against the Fund, may be introduced in Parliament only after the Minister has been consulted and has consented to the direct charge.

(3) Money that must be paid into the National Revenue Fund is paid into the Fund by depositing it into a bank account of the Fund in accordance with any requirements that may be prescribed.

(4) The National Treasury must establish appropriate and effective cash management and banking arrangements for the National Revenue Fund.

(5) The National Treasury must ensure that there is at all times sufficient money in the National Revenue Fund.

12. Deposits and withdrawals by South African Revenue Services in Revenue Funds.—(1) The South African Revenue Services must promptly deposit into a Revenue Fund all taxes, levies, duties, fees and other moneys collected by it for that Revenue Fund, in accordance with a framework determined by the National Treasury.

(2) The South African Revenue Services may, despite section 15 (1), withdraw money from the National Revenue Fund—

(*a*) to refund any tax, levy or duty credits or any other charges in connection with taxes, levies or duties;

(*b*) to make other refunds approved by the National Treasury; or

(*c*) to transfer to a member of the South African Customs Union any money collected on its behalf.

(3) The National Treasury must promptly transfer all taxes, levies, duties, fees and other moneys collected by the South African Revenue Services for a province and deposited into the National Revenue Fund, to that province's Provincial Revenue Fund.

(4) Withdrawals in terms of subsection (2) or (3) are direct charges against the National Revenue Fund.

13. Deposits into National Revenue Fund.—(1) All money received by the national government must be paid into the National Revenue Fund, except money received by—

(*a*) . . . . . .

[Para. (a) repealed by s. 72 (b) (iii) of Act No. 10 of 2009.]

(*b*) a national public entity;

(*c*) the South African Reserve Bank;

(*d*) the Auditor-General;

(*e*) the national government from donor agencies which in terms of legislation or the agreement with the donor, must be paid to the Reconstruction and Development Programme Fund;

(*f*) a national department—

(i) operating a trading entity, if the money is received in the ordinary course of operating the trading entity;

(ii) in trust for a specific person or category of persons or for a specific purpose;

(iii) from another department to render an agency service for that department; or

(iv) if the money is of a kind described in Schedule 4; or

(*g*) a constitutional institution—

(i) in trust for a specific person or category of persons or for a specific purpose; or

(ii) if the money is of a kind described in Schedule 4.

(2) The exclusion in subsection (1) (b) does not apply to a national public entity which is not listed in Schedule 2 or 3 but which in terms of section 47 is required to be listed.

(Date of commencement of sub-s. (2): 1 April, 2001.)

(3) Draft legislation that excludes money from payment into the National Revenue Fund may be introduced in Parliament only after the Minister has been consulted on the reasonableness of the exclusion and has consented to the exclusion.

(4) Any legislation inconsistent with subsection (1) is of no force and effect to the extent of the inconsistency.

(5) Money received by a national public entity listed in Schedule 2 or 3, the South African Reserve Bank or the Auditor-General must be paid into a bank account opened by the institution concerned.

[Sub-s. (5) amended by s. 72 (b) (iv) of Act No. 10 of 2009.]

14. Withdrawal of exclusions.—(1) The National Treasury may withdraw, from a date determined by it, any exclusion granted to a national department, a constitutional institution or a national public entity in terms of section 13 (1), either with regard to all money or with regard to money of a specific kind received by that department, constitutional institution or public entity, if—

(*a*) the exclusion is not reasonable within the context of section 213 of the Constitution; or

(*b*) the National Treasury regards the withdrawal of the exclusion to be necessary for transparency or more effective and accountable financial management.

(2) The exclusion in terms of section 13 (1) of the following public entities may not be withdrawn:

(*a*) A national government business enterprise which is a company and in which the state is not the sole shareholder; and

(*b*) the national public entities listed in Schedule 2.

(3) From the date on which the withdrawal of an exclusion in terms of subsection (1) takes effect until the end of the relevant financial year, the National Treasury may transfer money from the National Revenue Fund, as a direct charge against the Fund, to the national department or public entity affected by the withdrawal, provided that the amount of the transfer does not exceed the amount that would otherwise have been excluded from payment into the Fund.

(4) The Minister must promptly inform Parliament of any withdrawal of an exclusion in terms of subsection (1).

15. Withdrawals and investments from National Revenue Fund.—(1) Only the National Treasury may withdraw money from the National Revenue Fund, and may do so only—

(*a*) to provide funds that have been authorised—

(i) in terms of an appropriation by an Act of Parliament; or

(ii) as a direct charge against the National Revenue Fund provided for in the Constitution or this Act, or in any other Act of Parliament provided the direct charge in such a case is listed in Schedule 5;

(Date of commencement of proviso: 31 August, 2001.)

(*b*) to refund money invested by a province in the National Revenue Fund; or

(*c*) to refund money incorrectly paid into, or which is not due to, the National Revenue Fund.

(2) A payment in terms of subsection (1) (b) or (c) is a direct charge against the National Revenue Fund.

(3) (*a*) The National Treasury may invest temporarily, in the Republic or elsewhere, money in the National Revenue Fund that is not immediately needed.

(*b*) When money in the National Revenue Fund is invested, the investment, including interest earned, is regarded as part of the National Revenue Fund.

16. Use of funds in emergency situations.—(1) The Minister may authorise the use of funds from the National Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds.

(2) The combined amount of any authorisations in terms of subsection (1), may not exceed two per cent of

the total amount appropriated in the annual national budget for the current financial year.

(3) An amount authorised in terms of subsection (1) is a direct charge against the National Revenue Fund.

(4) An amount authorised in terms of subsection (1) must—

(*a*) be reported to Parliament and the Auditor-General within 14 days, or if the funds are authorised for the deployment of the security services, within a period determined by the President; and

(*b*) be attributed to a vote.

(5) A report to Parliament in terms of subsection (4) (a) must be submitted to the National Assembly for tabling in the Assembly and made public.

(6) Expenditure in terms of subsection (1) must be included either in the next adjustments budget for the financial year in which the expenditure is authorised or in other appropriation legislation tabled in the National Assembly within 120 days of the Minister authorising the expenditure, whichever is the sooner.

CHAPTER 3
PROVINCIAL TREASURIES AND PROVINCIAL REVENUE FUNDS
[Chapter 3 inserted by s. 6 of Act No. 29 of 1999.]

Part 1: Provincial Treasuries

17. Establishment.—(1) There is a provincial treasury for each province, consisting of—

(*a*) the MEC for finance in the province, who is the head of the provincial treasury; and

(*b*) the provincial department responsible for financial matters in the province.

(2) The MEC for finance as the head of a provincial treasury takes the policy and other decisions of the treasury, except those decisions taken as a result of a delegation or instruction in terms of section 20.

[S. 17 inserted by s. 6 of Act No. 29 of 1999.]

18. Functions and powers.—(1) A provincial treasury must—

(*a*) prepare the provincial budget;

(*b*) exercise control over the implementation of the provincial budget;

(*c*) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities; and

(*d*) ensure that its fiscal policies do not materially and unreasonably prejudice national economic policies.

(2) A provincial treasury—

(*a*) must issue provincial treasury instructions not inconsistent with this Act;

(Date of commencement of para. (a): 31 August, 2001.)

(*b*) must enforce this Act and any prescribed national and provincial norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in provincial departments;

(*c*) must comply with the annual Division of Revenue Act, and monitor and assess the implementation of that Act in provincial public entities;

(*d*) must monitor and assess the implementation in provincial public entities of national and provincial norms and standards;

(*e*) may assist provincial departments and provincial public entities in building their capacity for efficient, effective and transparent financial management;

(*f*) may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity;

(*g*) must intervene by taking appropriate steps, which may include the withholding of funds, to address a serious or persistent material breach of this Act by a provincial department or a provincial public entity;

(*h*) must promptly provide any information required by the National Treasury in terms of this Act; and

(*i*) may do anything further that is necessary to fulfil its responsibilities effectively.

[S. 18 inserted by s. 6 of Act No. 29 of 1999.]

19. Annual consolidated financial statements.—(1) A provincial treasury must—

(*a*) prepare consolidated financial statements, in accordance with generally recognised accounting practice, for each financial year in respect of—

(i) provincial departments in the province;

(ii) public entities under the ownership control of the provincial executive of the province; and

(iii) the provincial legislature in the province; and

(*b*) submit those statements to the Auditor-General within three months after the end of that financial year.

(2) The Auditor-General must audit the consolidated financial statements and submit an audit report on the statements to the provincial treasury of the province concerned within three months of receipt of the statements.

(3) The MEC for finance in a province must submit the consolidated financial statements and the audit report, within one month of receiving the report from the Auditor-General, to the provincial legislature for tabling in the legislature.

(4) The consolidated financial statements must be made public when submitted to the provincial legislature.

(5) If the MEC for finance fails to submit the consolidated financial statements and the Auditor-General's audit report on those statements to the provincial legislature within seven months after the end of the financial year to which those statements relate—

(*a*) the MEC must submit to the legislature a written explanation setting out the reasons why they were not submitted; and

(*b*) the Auditor-General may issue a special report on the delay.

[S. 19 inserted by s. 6 of Act No. 29 of 1999.]

(Date of commencement of s. 19: 1 April, 2003.)

20. Delegations by provincial treasuries.—(1) The MEC for finance in a province may, in writing, delegate any of the powers entrusted or delegated to the provincial treasury in terms of this Act to the head of the department referred to in section 17 (1) (b), or instruct that head of department to perform any of the duties assigned to the provincial treasury in terms of this Act.

(2) A delegation or instruction in terms of subsection (1) to the head of the department referred to in section 17 (1) (b)—

(*a*) is subject to any limitations or conditions that the MEC for finance may impose;

(*b*) may authorise that head—

(i) to, in writing, sub-delegate the delegated power to another treasury official or the holder of a specific post in that treasury, or to the accounting officer for a provincial department, or to the accounting authority for a provincial public entity in the province; or

(ii) to instruct another provincial treasury official or the holder of a specific post in that treasury, or the accounting officer for a provincial department, or the accounting authority for a provincial public entity in the province, to perform the assigned duty; and

(*c*) does not divest the MEC for finance of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The MEC for finance may confirm, vary or revoke any decision taken by the head of the department referred to in section 17 (1) (b), as a result of a delegation or instruction in terms of subsection (1), or by a treasury official or accounting officer or accounting authority as a result of an authorisation in terms of subsection (2) (b), subject to any rights that may have become vested as a consequence of the decision.

[S. 20 inserted by s. 6 of Act No. 29 of 1999.]

Part 2: Provincial Revenue Funds

21. Control of Provincial Revenue Funds.—(1) The provincial treasury of a province is in charge of that province's Provincial Revenue Fund and must enforce compliance with the provisions of section 226 of the Constitution, namely that—

(*a*) all money received by the provincial government must promptly be paid into the Fund, except money reasonably excluded by this Act or another Act of Parliament; and

(*b*) no money may be withdrawn from the Fund except—

(i) in terms of an appropriation by a provincial Act; or

(ii) as a direct charge against the Fund when it is provided for in the Constitution or a provincial Act.

(2) Money that must be paid into the Provincial Revenue Fund is paid into the Fund by depositing it into a bank account of the Fund in accordance with any requirements that may be prescribed.

(3) A provincial treasury must establish appropriate and effective cash management and banking

arrangements for its Provincial Revenue Fund in accordance with the framework that must be prescribed in terms of section 7.

[S. 21 inserted by s. 6 of Act No. 29 of 1999.]

22. Deposits into Provincial Revenue Funds.—(1) All money received by a provincial government, including the province's equitable share, and grants made to it, in terms of the annual Division of Revenue Act, must be paid into the province's Provincial Revenue Fund, except money received by—

(*a*) the provincial legislature in the province;

(*b*) a provincial public entity in the province;

(*c*) the provincial government from donor agencies which in terms of legislation or the agreement with the donor, must be paid to the Reconstruction and Development Programme Fund;

(*d*) a provincial department in the province—

(i) operating a trading entity, if the money is received in the ordinary course of operating the trading entity;

(ii) in trust for a specific person or category of persons or for a specific purpose;

(iii) from another department to render an agency service on behalf of that department;

(iv) in terms of the annual Division of Revenue Act, if the money is exempted by that Act from payment into the Revenue Fund; or

(v) if the money is of a kind described in Schedule 4.

(2) The exclusion in subsection (1) (b) does not apply to a provincial public entity in the province which is not listed in Schedule 3 but which, in terms of section 47, is required to be listed.

(Date of commencement of sub-s. (2): 1 April, 2001.)

(3) Draft legislation that excludes money from payment into a Provincial Revenue Fund may be introduced in Parliament only after the Minister has been consulted on the reasonableness of the exclusion and has consented to the exclusion.

(4) Any legislation inconsistent with subsection (1) is of no force and effect to the extent of the inconsistency.

(5) Money received by a provincial legislature or a provincial public entity listed in Schedule 3 must be paid into a bank account opened by the entity concerned.

[S. 22 inserted by s. 6 of Act No. 29 of 1999.]

23. Withdrawal of exclusions from Provincial Revenue Funds.—(1) The National Treasury, after having consulted the relevant provincial treasury, may withdraw, from a date determined by it, any exclusion granted to a provincial department or provincial public entity in terms of section 22 (1), either with regard to all money or with regard to money of a specific kind received by that department or public entity, if—

(*a*) the exclusion is not reasonable within the context of section 226 of the Constitution; or

(*b*) the National Treasury regards the withdrawal of the exclusion to be necessary for transparency or more effective and accountable financial management.

(2) The exclusion in terms of section 22 (1) of a provincial government business enterprise which is a company and in which the relevant province is not the sole shareholder, may not be withdrawn, provided the National Treasury has given its prior written approval to the province to participate in a company that is not wholly owned by the province.

(3) From the date on which the withdrawal of an exclusion in terms of subsection (1) takes effect until the end of the relevant financial year, a provincial treasury may transfer money from the Provincial Revenue Fund, as a direct charge against the Fund, to the provincial department or provincial public entity affected by the withdrawal of the exclusion—

(*a*) if a provincial Act provides for the transfer to be a direct charge; and

(*b*) provided that the amount of the transfer does not exceed the amount that would otherwise have been excluded from payment into the Fund.

(4) The Minister must promptly inform Parliament of any withdrawal of an exclusion in terms of subsection (1).

[S. 23 inserted by s. 6 of Act No. 29 of 1999.]

24. Withdrawals and investments from Provincial Revenue Funds.—(1) Only a provincial treasury may withdraw money from a Provincial Revenue Fund, and may do so only—

(*a*) to provide funds that have been authorised—

(i) in terms of an appropriation by a provincial Act; or

(ii) as a direct charge against the Provincial Revenue Fund provided for in the Constitution or a provincial Act;

(*b*) to refund money incorrectly paid into, or which is not due to, the Provincial Revenue Fund; or

(*c*) to deposit into or invest money in the National Revenue Fund.

(2) A payment in terms of subsection (1) (b) or (c) is a direct charge against a Provincial Revenue Fund if a provincial Act so provides.

(3) (*a*) A provincial treasury, in accordance with a prescribed framework, may invest temporarily in the Republic money in the province's Provincial Revenue Fund that is not immediately needed.

(*b*) When money in a Provincial Revenue Fund is invested, the investment, including interest earned, is regarded as part of that Fund.

[S. 24 inserted by s. 6 of Act No. 29 of 1999.]

25. Use of funds in emergency situations.—(1) The MEC for finance in a province may authorise the use of funds from that province's Provincial Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest in the province, be postponed to a future appropriation by the provincial legislature.

(2) The combined amount of any authorisations in terms of subsection (1) may not exceed two per cent of the total amount appropriated in the annual provincial budget for the current financial year.

(3) An amount authorised in terms of subsection (1) is a direct charge against the Provincial Revenue Fund if a provincial Act so provides.

(4) An amount authorised in terms of subsection (1) must—

(*a*) be reported to the provincial legislature and the Auditor-General within 14 days; and

(*b*) be attributed to a vote.

(5) A report to a provincial legislature in terms of subsection (4) (a) must be submitted to the provincial legislature for tabling in the legislature and made public.

(6) Expenditure in terms of subsection (1) must be included either in the next provincial adjustments budget for the financial year in which the expenditure is authorised, or in other appropriation legislation tabled in the provincial legislature within 120 days of the MEC for finance in the province authorising the expenditure, whichever is the sooner.

[S. 25 inserted by s. 6 of Act No. 29 of 1999.]

CHAPTER 4
NATIONAL AND PROVINCIAL BUDGETS

[Heading substituted by s. 8 of Act No. 29 of 1999.]

26. Annual appropriations.—Parliament and each provincial legislature must appropriate money for each financial year for the requirements of the state and the province, respectively.

[S. 26 substituted by s. 9 of Act No. 29 of 1999.]

27. National annual budgets.—(1) The Minister must table the annual budget for a financial year in the National Assembly before the start of that financial year or, in exceptional circumstances, on a date as soon as possible after the start of that financial year, as the Minister may determine.

(2) The MEC for finance in a province must table the provincial annual budget for a financial year in the provincial legislature not later than two weeks after the tabling of the national annual budget, but the Minister may approve an extension of time for the tabling of a provincial budget.

[Sub-s. (2) inserted by s. 10 (a) of Act No. 29 of 1999.]

(3) An annual budget must be in accordance with a format as may be prescribed, and must at least contain—

(*a*) estimates of all revenue expected to be raised during the financial year to which the budget relates;

(*b*) estimates of current expenditure for that financial year per vote and per main division within the vote;

(*c*) estimates of interest and debt servicing charges, and any repayments on loans;

(*d*) estimates of capital expenditure per vote and per main division within a vote for that financial year and the projected financial implications of that expenditure for future financial years;

(*e*) estimates of revenue excluded in terms of section 13 (1) or 22 (1) from the relevant Revenue Fund for that financial year;

[Para. (e) substituted by s. 10 (b) of Act No. 29 of 1999.]

(Date of commencement of para. (e): 31 August, 2001.)

(*f*) estimates of all direct charges against the relevant Revenue Fund and standing appropriations for that financial year;

[Para. (f) substituted by s. 10 (c) of Act No. 29 of 1999.]

(*g*) proposals for financing any anticipated deficit for that financial year;

(*h*) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during that financial year and future financial years;

(*i*) the projected—

(i) revenue for the previous financial year;

(ii) expenditure per vote, and per main division within the vote, for the previous financial year; and

(iii) borrowing for the previous financial year; and

(*j*) any other information as may be prescribed, including any multi-year budget information.

(4) When the annual budget is introduced in the National Assembly or a provincial legislature, the accounting officer for each department must submit to Parliament or the provincial legislature, as may be appropriate, measurable objectives for each main division within the department's vote. The relevant treasury may co-ordinate these submissions and consolidate them in one document.

[Sub-s. (4) substituted by s. 10 (d) of Act No. 29 of 1999.]

(Date of commencement of sub-s. (4): 1 August, 2002.)

28. Multi-year budget projections.—(1) The Minister and the MEC for finance in a province must annually table in the National Assembly and in that province's provincial legislature, respectively, a multi-year budget projection of—

(*a*) the estimated revenue expected to be raised during each year of the multi-year period; and

(*b*) the estimated expenditure expected to be incurred per vote during each year of the multi-year period, differentiating between capital and current expenditure.

[Sub-s. (1) amended by s. 11 of Act No. 29 of 1999.]

(2) A multi-year budget projection tabled by the Minister must contain the Minister's key macro-economic projections.

29. Expenditure before annual budget is passed.—(1) If an annual budget is not passed before the start of the financial year to which it relates, funds may be withdrawn in accordance with this section from the relevant Revenue Fund for the services of the state or the province concerned during that financial year as direct charges against the Fund until the budget is passed.

[Sub-s. (1) substituted by s. 12 (a) of Act No. 29 of 1999.]

(2) Funds withdrawn from a Revenue Fund in terms of subsection (1)—

(*a*) may be utilised only for services for which funds were appropriated in the previous annual budget or adjustments budget; and

(*b*) may not—

(i) during the first four months of that financial year, exceed 45 per cent of the total amount appropriated in the previous annual budget;

(ii) during each of the following months, exceed 10 per cent of the total amount appropriated in the previous annual budget; and

(iii) in aggregate, exceed the total amount appropriated in the previous annual budget.

(3) The funds provided for in subsection (1) are not additional to funds appropriated for the relevant financial year, and any funds withdrawn in terms of that subsection must be regarded as forming part of the funds appropriated in the relevant annual budget for that financial year.

[Sub-s. (3) substituted by s. 12 (b) of Act No. 29 of 1999.]

(4) This section does not apply in respect of a province unless a provincial Act provides that the withdrawal of funds in terms of this section is a direct charge against that province's Revenue Fund.

[Sub-s. (4) added by s. 12 (c) of Act No. 29 of 1999.]

30. National adjustments budgets.—(1) The Minister may table an adjustments budget in the National Assembly as and when necessary.

(2) A national adjustments budget may only provide for—

(*a*) adjustments required due to significant and unforeseeable economic and financial events affecting

the fiscal targets set by the annual budget;

(*b*) unforeseeable and unavoidable expenditure recommended by the national executive or any committee of Cabinet members to whom this task has been assigned;

(*c*) any expenditure in terms of section 16;

(*d*) money to be appropriated for expenditure already announced by the Minister during the tabling of the annual budget;

(*e*) the shifting of funds between and within votes or to follow the transfer of functions in terms of section 42;

(*f*) the utilisation of savings under a main division of a vote for the defrayment of excess expenditure under another main division of the same vote in terms of section 43; and

(*g*) the roll-over of unspent funds from the preceding financial year.

31. Provincial adjustments budgets.—(1) The MEC for finance in a province may table an adjustments budget in the provincial legislature, subject to subsection (3).

(2) An adjustments budget of a province may only provide for—

(*a*) the appropriation of funds that have become available to the province;

(*b*) unforeseeable and unavoidable expenditure recommended by the provincial Executive Council of the province within a framework determined by the Minister;

(*c*) any expenditure in terms of section 25;

(*d*) money to be appropriated for expenditure already announced by the MEC for finance during the tabling of the annual budget;

(*e*) the shifting of funds between and within votes or to follow the transfer of functions in terms of section 42;

(*f*) the utilisation of savings under a main division within a vote for the defrayment of excess expenditure under another main division within the same vote in terms of section 43; and

(*g*) the roll-over of unspent funds from the preceding financial year.

(3) The Minister may determine the time when an adjustments budget may be tabled in a provincial legislature, as well as the format for such budgets.

[S. 31 inserted by s. 13 of Act No. 29 of 1999.]

32. Publishing of reports on state of budget.—(1) Within 30 days after the end of each month, the National Treasury must publish in the national *Government Gazette* a statement of actual revenue and expenditure with regard to the National Revenue Fund.

(2) After the end of a prescribed period, but at least quarterly, every provincial treasury must submit to the National Treasury a statement of revenue and expenditure with regard to the Revenue Fund for which that treasury is responsible, for publication in the national *Government Gazette* within 30 days after the end of each prescribed period.

[Sub-s. (2) inserted by s. 14 of Act No. 29 of 1999.]

(3) The statement must specify the following amounts and compare those amounts in each instance with the corresponding budgeted amounts for the relevant financial year:

(*a*) The actual revenue for the relevant period, and for the financial year up to the end of that period;

(*b*) the actual expenditure per vote (distinguishing between capital and current expenditure) for that period, and for the financial year up to the end of that period; and

(*c*) actual borrowings for that period, and for the financial year up to the end of that period.

(4) The National Treasury may determine—

(*a*) the format of the statement of revenue and expenditure; and

(*b*) any other detail the statement must contain.

33. Withholding of appropriated funds.—The relevant treasury—

(*a*) may withhold from a department any remaining funds appropriated for a specific function if that function is transferred to another department or any other institution; and

(*b*) must allocate those remaining funds to that other department or institution.

[S. 33 amended by s. 15 of Act No. 29 of 1999.]

34. Unauthorised expenditure.—(1) Unauthorised expenditure does not become a charge against a Revenue Fund except when—

(*a*) the expenditure is an overspending of a vote and Parliament or a provincial legislature, as may be appropriate, approves, as a direct charge against the relevant Revenue Fund, an additional amount for that vote which covers the overspending; or

(*b*) the expenditure is unauthorised for another reason and Parliament or a provincial legislature, as may be appropriate, authorises the expenditure as a direct charge against the relevant Revenue Fund.

(2) If Parliament or a provincial legislature does not approve in terms of subsection (1) (a) an additional amount for the amount of any overspending, that amount becomes a charge against the funds allocated for the next or future financial years under the relevant vote.

[S. 34 substituted by s. 16 of Act No. 29 of 1999.]

35. Unfunded mandates.—Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.

[S. 35 inserted by s. 17 of Act No. 29 of 1999.]

CHAPTER 5
DEPARTMENTS AND CONSTITUTIONAL INSTITUTIONS

Part 1: Appointment of Accounting Officers

36. Accounting officers.—(1) Every department and every constitutional institution must have an accounting officer.

(2) Subject to subsection (3)—

(*a*) the head of a department must be the accounting officer for the department; and

(*b*) the chief executive officer of a constitutional institution must be the accounting officer for that institution.

(3) The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for—

(*a*) a department or a constitutional institution; or

(*b*) a trading entity within a department.

[Sub-s. (3) amended by s. 18 (a) of Act No. 29 of 1999.]

(4) The relevant treasury may at any time withdraw in writing an approval or instruction in terms of subsection (3).

[Sub-s. (4) substituted by s. 18 (b) of Act No. 29 of 1999.]

(5) The employment contract of an accounting officer for a department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of sections 38 to 42, as may be appropriate, are regarded as forming part of each such contract.

37. Acting accounting officers.—When an accounting officer is absent or otherwise unable to perform the functions of accounting officer, or during a vacancy, the functions of accounting officer must be performed by the official acting in the place of that accounting officer.

Part 2: Responsibilities of Accounting Officers

38. General responsibilities of accounting officers.—(1) The accounting officer for a department, trading entity or constitutional institution—

(*a*) must ensure that that department, trading entity or constitutional institution has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(*b*) is responsible for the effective, efficient, economical and transparent use of the resources of the

department, trading entity or constitutional institution;

(*c*) must take effective and appropriate steps to—

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(*d*) is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(*e*) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(*f*) must settle all contractual obligations and pay all money owing, including inter-governmental claims, within the prescribed or agreed period;

(*g*) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

[Para. (g) substituted by s. 19 of Act No. 29 of 1999.]

(*h*) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(*i*) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(*j*) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(*k*) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(*l*) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(*m*) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(*n*) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.

(Date of commencement of sub-s. (2): 31 August, 2001.)

39. Accounting officers' responsibilities relating to budgetary control.—(1) The accounting officer for a department is responsible for ensuring that—

(*a*) expenditure of that department is in accordance with the vote of the department and the main divisions within the vote; and

(*b*) effective and appropriate steps are taken to prevent unauthorised expenditure.

(2) An accounting officer, for the purposes of subsection (1), must—

(*a*) take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote;

(*b*) report to the executive authority and the relevant treasury any impending—

(i) under collection of revenue due;

(ii) shortfalls in budgeted revenue; and

(iii) overspending of the department's vote or a main division within the vote; and

[Para. (b) amended by s. 20 (a) of Act No. 29 of 1999.]

(*c*) comply with any remedial measures imposed by the relevant treasury in terms of this Act to prevent overspending of the vote or a main division within the vote.

[Para. (c) substituted by s. 20 (b) of Act No. 29 of 1999.]

40. Accounting officers' reporting responsibilities.—(1) The accounting officer for a department, trading entity or constitutional institution—

(*a*) must keep full and proper records of the financial affairs of the department, trading entity or constitutional institution in accordance with any prescribed norms and standards;

(*b*) must prepare financial statements for each financial year in accordance with generally recognized accounting practice;

(*c*) must submit those financial statements within two months after the end of the financial year to—

(i) the Auditor-General for auditing; and

(ii) the relevant treasury to enable that treasury to prepare consolidated financial statements in terms of section 8 or 19;

[Sub-para. (ii) substituted by s. 21 (a) of Act No. 29 of 1999.]

(*d*) must submit within five months of the end of a financial year to the relevant treasury and, in the case of a department or trading entity, also to the executive authority responsible for that department or trading entity—

(i) an annual report on the activities of that department, trading entity or constitutional institution during that financial year;

(ii) the financial statements for that financial year after those statements have been audited; and

(iii) the Auditor-General's report on those statements;

[Para. (d) amended by s. 21 (b) of Act No. 29 of 1999.]

(*e*) must, in the case of a constitutional institution, submit to Parliament that institution's annual report and financial statements referred to in paragraph (d), and the Auditor-General's report on those statements, within one month after the accounting officer received the Auditor-General's audit report; and

(*f*) is responsible for the submission by the department or constitutional institution of all reports, returns, notices and other information to Parliament, the relevant provincial legislature, an executive authority, the relevant treasury or the Auditor-General, as may be required by this Act.

[Para. (f) substituted by s. 21 (c) of Act No. 29 of 1999.]

(2) The Auditor-General must audit the financial statements referred to in subsection (1) (b) and submit an audit report on those statements to the accounting officer within two months of receipt of the statements.

(3) The annual report and audited financial statements referred to in subsection (1) (d) must—

(*a*) fairly present the state of affairs of the department, trading entity or constitutional institution, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned; and

(*b*) include particulars of—

(i) any material losses through criminal conduct, and any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure, that occurred during the financial year;

(ii) any criminal or disciplinary steps taken as a result of such losses, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure;

(iii) any material losses recovered or written off; and

(iv) any other matters that may be prescribed.

(4) The accounting officer of a department must—

(*a*) each year before the beginning of a financial year provide the relevant treasury in the prescribed format with a breakdown per month of the anticipated revenue and expenditure of that department for that financial year;

[Para. (a) substituted by s. 21 (d) of Act No. 29 of 1999.]

(*b*) each month submit information in the prescribed format on actual revenue and expenditure for the preceding month and the amounts anticipated for that month in terms of paragraph (a); and

(*c*) within 15 days of the end of each month submit to the relevant treasury and the executive authority responsible for that department—

(i) the information for that month;

(ii) a projection of expected expenditure and revenue collection for the remainder of the current financial year; and

(iii) when necessary, an explanation of any material variances and a summary of the steps that are taken to ensure that the projected expenditure and revenue remain within budget.

[Para. (c) amended by s. 21 (e) of Act No. 29 of 1999.]

(5) If an accounting officer is unable to comply with any of the responsibilities determined for accounting officers in this Part, the accounting officer must promptly report the inability, together with reasons, to the relevant executive authority and treasury.

41. Information to be submitted by accounting officers.—An accounting officer for a department, trading entity or constitutional institution must submit to the relevant treasury or the Auditor-General, such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury or the Auditor-General may require.

[S. 41 substituted by s. 22 of Act No. 29 of 1999.]

42. Accounting officers' responsibilities when assets and liabilities are transferred.—(1) When assets or liabilities of a department are transferred to another department or other institution in terms of legislation or following a reorganisation of functions, the accounting officer for the transferring department must—

(*a*) draw up an inventory of such assets and liabilities; and

(*b*) provide the accounting officer for the receiving department or other institution with substantiating records, including personnel records of staff to be transferred.

(2) Both the accounting officer for the transferring department and the accounting officer for the receiving department or other institution must sign the inventory when the transfer takes place.

(3) The accounting officer for the transferring department must file a copy of the signed inventory with the relevant treasury and the Auditor-General within 14 days of the transfer.

[Sub-s. (3) substituted by s. 23 of Act No. 29 of 1999.]

43. Virement between main divisions within votes.—(1) An accounting officer for a department may utilise a saving in the amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote, unless the relevant treasury directs otherwise.

[Sub-s. (1) substituted by s. 24 (a) of Act No. 29 of 1999.]

(2) The amount of a saving under a main division of a vote that may be utilised in terms of subsection (1), may not exceed eight per cent of the amount appropriated under that main division.

(3) An accounting officer must within seven days submit a report containing the prescribed particulars concerning the utilisation of a saving in terms of subsection (1), to the executive authority responsible for the department and to the relevant treasury.

[Sub-s. (3) substituted by s. 24 (b) of Act No. 29 of 1999.]

(4) This section does not authorise the utilisation of a saving in—

(*a*) an amount specifically and exclusively appropriated for a purpose mentioned under a main division within a vote;

(*b*) an amount appropriated for transfer to another institution; and

(*c*) an amount appropriated for capital expenditure in order to defray current expenditure.

(5) A utilisation of a saving in terms of subsection (1) is a direct charge against the relevant Revenue Fund provided that, in the case of a province, that province enacts such utilisation as a direct charge.

[Sub-s. (5) substituted by s. 24 (c) of Act No. 29 of 1999.]

(6) The National Treasury may by regulation or instruction in terms of section 76 regulate the application of this section.

Part 3: Other Officials of Departments and Constitutional Institutions

44. Assignment of powers and duties by accounting officers.—(1) The accounting officer for a department, trading entity or constitutional institution may—

(*a*) in writing delegate any of the powers entrusted or delegated to the accounting officer in terms of this Act, to an official in that department, trading entity or constitutional institution; or

(*b*) instruct any official in that department, trading entity or constitutional institution to perform any of the duties assigned to the accounting officer in terms of this Act.

(2) A delegation or instruction to an official in terms of subsection (1)—

(*a*) is subject to any limitations and conditions prescribed in terms of this Act or as the relevant treasury may impose;

[Para. (a) substituted by s. 25 of Act No. 29 of 1999.]

(*b*) is subject to any limitations and conditions the accounting officer may impose;

(*c*) may either be to a specific individual or to the holder of a specific post in the relevant department, trading entity or constitutional institution; and

(*d*) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The accounting officer may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.

45. Responsibilities of other officials.—An official in a department, trading entity or constitutional institution—

(*a*) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;

(*b*) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(*c*) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(*d*) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and

(*e*) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.

CHAPTER 6
PUBLIC ENTITIES

Part 1: Application of this Chapter

46. Application.—The provisions of this Chapter apply, to the extent indicated, to all public entities listed in Schedule 2 or 3.

47. Unlisted public entities.—(1) The Minister, by notice in the national *Government Gazette*—

(*a*) must amend Schedule 3 to include in the list all public entities that are not listed; and

(*b*) may make technical changes to the list.

[General Note: Amended list of public entities has been published under General Notice No. 3366 in *Government Gazette* 25778 of 5 December, 2003.]

(2) The accounting authority for a public entity that is not listed in either Schedule 2 or 3 must, without delay, notify the National Treasury, in writing, that the public entity is not listed.

(3) Subsection (2) does not apply to an unlisted public entity that is a subsidiary of a public entity, whether the latter entity is listed or not.

(4) The Minister may not list the following institutions in Schedule 3:

(*a*) A constitutional institution, the South African Reserve Bank and the Auditor-General;

(*b*) any public institution which functions outside the sphere of national or provincial government; and

[Para. (b) substituted by s. 26 of Act No. 29 of 1999.]

(*c*) any institution of higher education.

48. Classification of public entities.—(1) The Minister may by notice in the national *Government Gazette* classify public entities listed in Schedule 3 in accordance with the relevant definitions set out in section 1, as—

(*a*) national government business enterprises;

(*b*) provincial government business enterprises;

(*c*) national public entities; and

(*d*) provincial public entities.

[Sub-s. (1) substituted by s. 27 of Act No. 29 of 1999.]

(2) A public entity is for the purposes of this Act regarded as belonging to the class in which it is classified in terms of subsection (1).

[General Note: Re-classification of public entities has been published under General Notice No. 504 in *Government Gazette* 22337 of 8 June, 2001.]

Part 2: Accounting Authorities for Public Entities

49. Accounting authorities.—(1) Every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity—

(*a*) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or

(*b*) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

(3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity.

[Sub-s. (3) substituted by s. 28 (a) of Act No. 29 of 1999.]

(4) The relevant treasury may at any time withdraw an approval or instruction in terms of subsection (3).

[Sub-s. (4) substituted by s. 28 (b) of Act No. 29 of 1999.]

(5) A public entity must inform the Auditor-General promptly and in writing of any approval or instruction in terms of subsection (3) and any withdrawal of an approval or instruction in terms of subsection (4).

50. Fiduciary duties of accounting authorities.—(1) The accounting authority for a public entity must—

(*a*) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(*b*) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(*c*) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(*d*) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—

(*a*) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(*b*) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(3) A member of an accounting authority must—

(*a*) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(*b*) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

51. General responsibilities of accounting authorities.—(1) An accounting authority for a public entity—

(*a*) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(*b*) must take effective and appropriate steps to—

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(*c*) is responsible for the management, including the safe-guarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

(*d*) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(*e*) must take effective and appropriate disciplinary steps against any employee of the public entity who —

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the public entity; or

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;

(*f*) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;

[Para. (f) substituted by s. 29 of Act No. 29 of 1999.]

(*g*) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and

(*h*) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.

(2) If an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority in this Part, the accounting authority must promptly report the inability, together with reasons, to the relevant executive authority and treasury.

52. Annual budget and corporate plan by Schedule 2 **public entities and government business enterprises.**—The accounting authority for a public entity listed in Schedule 2 or a government business enterprise listed in Schedule 3 must submit to the accounting officer for a department designated by the executive authority responsible for that public entity or government business enterprise, and to the relevant treasury, at least one month, or another period agreed with the National Treasury, before the start of its financial year—

(*a*) a projection of revenue, expenditure and borrowings for that financial year in the prescribed format; and

(*b*) a corporate plan in the prescribed format covering the affairs of that public entity or business enterprise for the following three financial years, and, if it has subsidiaries, also the affairs of the subsidiaries.

[S. 52 amended by s. 30 of Act No. 29 of 1999.]

(Date of commencement of s. 52: 1 April, 2001.)

53. Annual budgets by non-business Schedule 3 **public entities.**—(1) The accounting authority for a public entity listed in Schedule 3 which is not a government business enterprise must submit to the executive authority responsible for that public entity, at least six months before the start of the financial year of the department designated in terms of subsection (2) or another period agreed to between the executive authority and the public entity, a budget of estimated revenue and expenditure for that financial year, for approval by the executive authority.

(2) The budget must be submitted to the executive authority through the accounting officer for a department designated by the executive authority, who may make recommendations to the executive authority with regard to the approval or amendment of the budget.

(3) A public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and

may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained.

(4) The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget.

(5) The National Treasury may regulate the application of this section by regulation or instruction in terms of section 76.

54. Information to be submitted by accounting authorities.—(1) The accounting authority for a public entity must submit to the relevant treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury or the Auditor-General may require.

[Sub-s. (1) substituted by s. 31 (a) of Act No. 29 of 1999.]

(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

(*a*) establishment or participation in the establishment of a company;

(*b*) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;

(*c*) acquisition or disposal of a significant shareholding in a company;

(*d*) acquisition or disposal of a significant asset;

(*e*) commencement or cessation of a significant business activity; and

(*f*) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.

[Sub-s. (2) amended by s. 31 (b) of Act No. 29 of 1999.]

(3) A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.

(4) The executive authority may exempt a public entity listed in Schedule 2 or 3 from subsection (2).

55. Annual report and financial statements.—(1) The accounting authority for a public entity—

(*a*) must keep full and proper records of the financial affairs of the public entity;

(*b*) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognised accounting practice for that public entity;

(*c*) must submit those financial statements within two months after the end of the financial year—

(i) to the auditors of the public entity for auditing; and

(ii) if it is a business enterprise or other public entity under the ownership control of the national or a provincial government, to the relevant treasury; and

[Sub-para. (ii) substituted by s. 32 (a) of Act No. 29 of 1999.]

(*d*) must submit within five months of the end of a financial year to the relevant treasury, to the executive authority responsible for that public entity and, if the Auditor-General did not perform the audit of the financial statements, to the Auditor-General—

(i) an annual report on the activities of that public entity during that financial year;

(ii) the financial statements for that financial year after the statements have been audited; and

(iii) the report of the auditors on those statements.

[Para. (d) amended by s. 32 (b) of Act No. 29 of 1999.]

(2) The annual report and financial statements referred to in subsection (1) (d) must—

(*a*) fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned;

(*b*) include particulars of—

(i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year:

(ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;

(iii) any losses recovered or written off;

(iv) any financial assistance received from the state and commitments made by the state on its behalf; and

(v) any other matters that may be prescribed; and

(*c*) include the financial statements of any subsidiaries.

(3) An accounting authority must submit the report and statements referred to in subsection (1) (d), for tabling in Parliament or the provincial legislature, to the relevant executive authority through the accounting officer of a department designated by the executive authority.

[Sub-s. (3) substituted by s. 32 (c) of Act No. 29 of 1999.]

(4) The relevant treasury may direct that, instead of a separate report, the audited financial statements of a Schedule 3 public entity which is not a government business enterprise must be incorporated in those of a department designated by that treasury.

[Sub-s. (4) substituted by s. 32 (d) of Act No. 29 of 1999.]

Part 3: Other Officials of Public Entities

56. Assignment of powers and duties by accounting authorities.—(1) The accounting authority for a public entity may—

(*a*) in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of this Act, to an official in that public entity; or

(*b*) instruct an official in that public entity to perform any of the duties assigned to the accounting authority in terms of this Act.

(2) A delegation or instruction to an official in terms of subsection (1)—

(*a*) is subject to any limitations and conditions the accounting authority may impose;

(*b*) may either be to a specific individual or to the holder of a specific post in the relevant public entity; and

(*c*) does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The accounting authority may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.

57. Responsibilities of other officials.—An official in a public entity—

(*a*) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(*b*) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(*c*) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(*d*) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(*e*) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.

Part 4: External Auditors

58. . . . . . .

[S. 58 repealed by s. 53 of Act No. 25 of 2004.]

59. . . . . . .

[S. 59 repealed by s. 53 of Act No. 25 of 2004.]

60. . . . . . .

[S. 60 repealed by s. 53 of Act No. 25 of 2004.]

61. . . . . . .

[S. 61 repealed by s. 53 of Act No. 25 of 2004.]

62. . . . . . .

CHAPTER 7
EXECUTIVE AUTHORITIES

63. Financial responsibilities of executive authorities.—(1) (*a*) Executive authorities of departments must perform their statutory functions within the limits of the funds authorised for the relevant vote.

(*b*) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39 (2) (b) and 40 (4) (c).

(2) The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive.

[Sub-s. (2) substituted by s. 34 of Act No. 29 of 1999.]

64. Executive directives having financial implications.—(1) Any directive by an executive authority of a department to the accounting officer of the department having financial implications for the department must be in writing.

(2) If implementation of the directive is likely to result in unauthorised expenditure, the accounting officer will be responsible for any resulting unauthorised expenditure unless the accounting officer has informed the executive authority in writing of the likelihood of that unauthorised expenditure.

(3) Any decision of the executive authority to proceed with the implementation of the directive, and the reasons for the decision, must be in writing, and the accounting officer must promptly file a copy of this document with the National Treasury and the Auditor-General, and if a provincial department is involved, also with the relevant provincial treasury.

[Sub-s. (3) substituted by s. 35 of Act No. 29 of 1999.]

65. Tabling in legislatures.—(1) The executive authority responsible for a department or public entity must table in the National Assembly or a provincial legislature, as may be appropriate—

(*a*) the annual report and financial statements referred to in section 40 (1) (d) or 55 (1) (d) and the audit report on those statements, within one month after the accounting officer for the department or the accounting authority for the public entity received the audit report; and

(*b*) the findings of a disciplinary board, and any sanctions imposed by such a board, which heard a case of financial misconduct against an accounting officer or accounting authority in terms of section 81 or 83.

[Sub-s. (1) amended by s. 36 of Act No. 29 of 1999.]

(2) If an executive authority fails to table, in accordance with subsection (1) (a), the annual report and financial statements of the department or the public entity, and the audit report on those statements, in the relevant legislature within six months after the end of the financial year to which those statements relate—

(*a*) the executive authority must table a written explanation in the legislature setting out the reasons why they were not tabled; and

(*b*) the Auditor-General may issue a special report on the delay.

CHAPTER 8
LOANS, GUARANTEES AND OTHER COMMITMENTS

Part 1: General principles

66. Restrictions on borrowing, guarantees and other commitments.—(1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction—

(*a*) is authorised by this Act; and

(*b*) in the case of public entities, is also authorised by other legislation not in conflict with this Act; and

(*c*) in the case of loans by a province or a provincial government business enterprise under the ownership control of a provincial executive, is within the limits as set in terms of the Borrowing Powers of Provincial Governments Act, 1996 (Act No. 48 of 1996).

[Para. (c) added by s. 37 (a) of Act No. 29 of 1999.]

(2) A government may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind a Revenue Fund to any future financial

commitment:

(*a*) The National Revenue Fund: The Minister or, in the case of the issue of a guarantee, indemnity or security, the responsible Cabinet member acting with the concurrence of the Minister in terms of section 70.

(*b*) A Provincial Revenue Fund: The MEC for finance in the province, acting in accordance with the Borrowing Powers of Provincial Governments Act, 1996.

[Sub-s. (2) substituted by s. 37 (b) of Act No. 29 of 1999.]

(3) Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:

(*a*) A public entity listed in Schedule 2: The accounting authority for that Schedule 2 public entity.

(*b*) A national government business enterprise listed in Schedule 3 and authorised by notice in the national *Government Gazette* by the Minister: The accounting authority for that government business enterprise, subject to any conditions the Minister may impose.

[General Note: Approval published under General Notice No. 972 in *Government Gazette* 29033 of 21 July, 2006 with effect from 21 July, 2006 and subject to Rand Water not exceeding their debt limit as provided in the *Government Gazette* Notice 23450 of 31 May, 2002.]

(*c*) Any other national public entity: The Minister or, in the case of the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70.

(*d*) A provincial government business enterprise listed in Schedule 3 and authorised by notice in the national *Government Gazette* by the Minister: The MEC for finance in the province, acting with the concurrence of the Minister, subject to any conditions that the Minister may impose.

[Para. (d) added by s. 37 (c) of Act No. 29 of 1999.]

(Date of commencement of sub-s. (3): 1 April, 2001.)

(4) Constitutional institutions and provincial public entities not mentioned in subsection (3) (d) may not borrow money, nor issue a guarantee, indemnity or security, nor enter into any other transaction that binds or may bind the institution or entity to any future financial commitment.

[Sub-s. (4) substituted by s. 37 (d) of Act No. 29 of 1999.]

(5) Despite subsection (4), the Minister may in writing permit a public entity mentioned in subsection (3) (c) or (d) or a constitutional institution to borrow money for bridging purposes up to a prescribed limit, including a temporary bank overdraft, subject to such conditions as the Minister may impose.

[Sub-s. (5) substituted by s. 37 (e) of Act No. 29 of 1999.]

(6) A person mentioned in subsection (2) or (3) may not delegate a power conferred in terms of that subsection, except with the prior written approval of the Minister.

(7) A public entity authorised to borrow money—

(*a*) must annually submit to the Minister a borrowing Programme for the year; and

(*b*) may not borrow money in a foreign currency above a prescribed limit, except when that public entity is a company in which the state is not the only shareholder.

(Date of commencement of para. (b): 1 April, 2001.)

67. No provincial foreign commitments.—A provincial government, including any provincial public entity, may not borrow money or issue a guarantee, indemnity or security or enter into any other transaction that binds itself to any future financial commitment, denominated in a foreign currency or concluded on a foreign financial market.

[S. 67 inserted by s. 38 of Act No. 29 of 1999.]

68. Consequences of unauthorised transactions.—If a person, otherwise than in accordance with section 66, lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution to any future financial commitment, the state and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction.

69. Regulations on borrowing by public entities.—The Minister may regulate by regulation in terms of section 76 the borrowing of money by or for or on behalf of public entities referred to in section 66 (3) (b), (c) and (d).

[S. 69 substituted by s. 39 of Act No. 29 of 1999.]

70. Guarantees, indemnities and securities by Cabinet members.—(1) A Cabinet member, with the written concurrence of the Minister (given either specifically in each case or generally with regard to a category of cases and subject to any conditions approved by the Minister), may issue a guarantee, indemnity or security which binds—

(*a*) the National Revenue Fund in respect of a financial commitment incurred or to be incurred by the national executive; or

(*b*) a national public entity referred to in section 66 (3) (c) in respect of a financial commitment incurred or to be incurred by that public entity.

(Date of commencement of para. (b): 1 April, 2001.)

(2) Any payment under a guarantee, indemnity or security issued in terms of—

(*a*) subsection (1) (a), is a direct charge against the National Revenue Fund, and any such payment must in the first instance be defrayed from the funds budgeted for the department that is concerned with the issue of the guarantee, indemnity or security in question; and

(*b*) subsection (1) (b), is a charge against the national public entity concerned.

(3) A Cabinet member who seeks the Minister's concurrence for the issue of a guarantee, indemnity or security in terms of subsection (1) (a) or (b), must provide the Minister with all relevant information as the Minister may require regarding the issue of such guarantee, indemnity or security and the relevant financial commitment.

(4) The responsible Cabinet member must at least annually report the circumstances relating to any payments under a guarantee, indemnity or security issued in terms of subsection (1) (a) or (b), to the National Assembly for tabling in the National Assembly.

Part 2: Loans by National Government

71. Purposes for which Minister may borrow money.—The Minister may borrow money in terms of section 66 (2) (a) for the following purposes only:

(*a*) To finance national budget deficits;

(*b*) to refinance maturing debt or a loan paid before the redemption date;

(*c*) to obtain foreign currency;

(*d*) to maintain credit balances on a bank account of the National Revenue Fund;

(*e*) to regulate internal monetary conditions should the necessity arise; or

(*f*) any other purpose approved by the National Assembly by special resolution.

72. Signing of loan agreements.—The Minister, on conditions determined by the Minister, may authorise another person to sign a loan agreement when the Minister borrows money in terms of section 66 (2) (a).

73. Interest and repayments of loans to be direct charges.—The following payments in connection with loans are direct charges against the National Revenue Fund:

(*a*) the repayment of money borrowed by the Minister in terms of section 66 (2) (a) or repaid in terms of section 74;

(*b*) the interest payable on money borrowed; and

(*c*) any costs associated with such borrowing and approved by the National Treasury.

74. Repayment, conversion and consolidation of loans.—The Minister may, on such terms and conditions as the Minister may determine, and, when necessary, with the concurrence of the lender—

(*a*) repay any loan prior to the redemption date of that loan;

(*b*) convert the loan into any other loan, or

(*c*) consolidate two or more loans into an existing or new loan.

75. Obligations from lien over securities.—Neither the Minister, nor the National Treasury is responsible for the fulfilment of any obligation resulting from any lien, whether expressed, implied or construed, held over any security issued in terms of this Act, despite the fact that the Minister or the National Treasury was notified of the lien.

CHAPTER 9
GENERAL TREASURY MATTERS

76. Treasury regulations and instructions.—(1) The National Treasury must make regulations or issue instructions applicable to departments, concerning—

(*a*) any matter that must be prescribed for departments in terms of this Act;

(*b*) the recovery of losses and damages;

(*c*) the handling of, and control over, trust money and property;

(*d*) the rendering of free services;

(*e*) the writing off of losses of state money or other state assets or amounts owed to the state;

(*f*) liability for losses and damages and procedures for recovery;

(*g*) the cancellation or variation of contracts to the detriment of the state;

(*h*) the settlement of claims by or against the state;

(*i*) the waiver of claims by the state;

(*j*) the remission of money due to the Revenue Fund, refunds of revenue and payments from the Revenue Fund, as an act of grace;

(*k*) the alienation, letting or other disposal of state assets; and

(*l*) gifts or donations by or to the state.

(2) The National Treasury may make regulations or issue instructions applicable to departments, concerning —

(*a*) any matter that may be prescribed for departments in terms of this Act;

(*b*) the charging of expenditure against particular votes;

(*c*) the establishment of and control over trading entities;

(*d*) the improvement and maintenance of immovable state assets;

(*e*) fruitless and wasteful, unauthorised and irregular expenditure;

(*f*) the determination of any scales of fees, other charges or rates relating to revenue accruing to, or expenditure from, a Revenue Fund;

(*g*) the treatment of any specific expenditure;

(*h*) vouchers or other proofs of receipts or payments, which are defective or have been lost or damaged;

(*i*) assets which accrue to the state by operation of any law; or

(*j*) any other matter that may facilitate the application of this Act.

(3) Regulations in terms of subsection (1) or (2) may prescribe matters for which the prior approval of a treasury must be obtained.

(4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning—

(*a*) any matter that may be prescribed for all institutions in terms of this Act;

(*b*) financial management and internal control;

(*c*) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(*d*) audit committees, their appointment and their functioning;

(*e*) internal audit components and their functioning;

(*f*) the administration of this Act; and

(*g*) any other matter that may facilitate the application of this Act.

(5) A treasury regulation or instruction in terms of this section may—

(*a*) differentiate between different categories of—

(i) institutions to which this Act applies;

(ii) accounting officers; or

(iii) accounting authorities; or

(*b*) be limited in its application to a specific category of—

(i) institutions to which this Act applies;

(ii) accounting officers; or

(iii) accounting authorities.

77. Audit committees.—An audit committee—

(*a*) must consist of at least three persons of whom, in the case of a department—

(i) one must be from outside the public service;

(ii) the majority may not be persons in the employ of the department, except with the approval of the relevant treasury; and

[Sub-para. (ii) substituted by s. 40 (a) of Act No. 29 of 1999.]

(iii) the chairperson may not be in the employ of the department;

(*b*) must meet at least twice a year; and

(*c*) may be established for two or more departments or institutions if the relevant treasury considers it to be more economical.

[Para. (c) substituted by s. 40 (b) of Act No. 29 of 1999.]

78. Publishing of draft treasury regulations for public comment.—Draft regulations in terms of section 76 must be published for public comment in the national *Government Gazette* before their enactment.

79. Departures from treasury regulations, instructions or conditions.—The National Treasury may on good grounds approve a departure from a treasury regulation or instruction or any condition imposed in terms of this Act and must promptly inform the Auditor-General in writing when it does so.

80. Determination of interest rates for debt owing to state.—(1) The Minister, by notice in the national *Government Gazette*, must determine—

(*a*) a uniform interest rate applicable to loans granted out of a Revenue Fund; and

(*b*) a uniform interest rate applicable to all other debts which must be paid into a Revenue Fund.

[Sub-s. (1) substituted by s. 41 of Act No. 29 of 1999.]

(2) An interest rate determined in terms of subsection (1) (b) may differentiate between different categories of debt.

CHAPTER 10
FINANCIAL MISCONDUCT

Part 1: Disciplinary proceedings

81. Financial misconduct by officials in departments and constitutional institutions.—(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer wilfully or negligently—

(*a*) fails to comply with a requirement of section 38, 39, 40, 41 or 42; or

(*b*) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.

(2) An official of a department, a trading entity or a constitutional institution to whom a power or duty is assigned in terms of section 44 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

82. Financial misconduct by treasury officials.—An official of a treasury to whom a power or duty is assigned in terms of section 10 or 20 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

[S. 82 substituted by s. 42 of Act No. 29 of 1999.]

83. Financial misconduct by accounting authorities and officials of public entities.—(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently —

(*a*) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or

(*b*) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

(2) If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.

(3) An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

(4) Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation.

84. Applicable legal regime for disciplinary proceedings.—A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

85. Regulations on financial misconduct procedures.—(1) The Minister must make regulations prescribing—

(*a*) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General, including—

(i) particulars of the alleged financial misconduct; and

(ii) the steps taken in connection with such financial misconduct;

[Para. (a) amended by s. 43 (a) of Act No. 29 of 1999.]

(*b*) matters relating to the investigation of allegations of financial misconduct;

(*c*) the circumstances in which the National Treasury or a provincial treasury may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;

[Para. (c) substituted by s. 43 (b) of Act No. 29 of 1999.]

(*d*) the circumstances in which a disciplinary board which hears a charge of financial misconduct must include a person whose name appears on a list of persons with expertise in state finances or public accounting compiled by the National Treasury;

(*e*) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General; and

[Para. (e) substituted by s. 43 (c) of Act No. 29 of 1999.]

(*f*) any other matters to the extent necessary to facilitate the object of this Chapter.

(2) A regulation in terms of subsection (1) may—

(*a*) differentiate between different categories of—

(i) accounting officers;

(ii) accounting authorities;

(iii) officials; and

(iv) institutions to which this Act applies; and

(*b*) be limited in its application to a particular category of accounting officers, accounting authorities, officials or institutions only.

Part 2: Criminal proceedings

86. Offences and penalties.—(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.

(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

(3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

CHAPTER 11
ACCOUNTING STANDARDS BOARD

87. Establishment.—(1) The Minister by regulation in terms of section 91 must establish a board to be known as the Accounting Standards Board.

(2) The Accounting Standards Board is a juristic person.

(Date of commencement of s. 87: 2 March, 1999.)

88. Composition.—(1) The Accounting Standards Board consists of no more than 10 members as the Minister

may determine.

(2) The Minister, after consulting the Auditor-General, appoints the members of the Board.

(3) The Board may establish its own operating procedures.

(Date of commencement of s. 88: 2 March, 1999.)

89. Functions of Board.—(1) The Accounting Standards Board must—

(*a*) set standards of generally recognised accounting practice as required by section 216 (1) (a) of the Constitution, for the annual financial statements of—

(i) departments;

(ii) public entities;

(iii) constitutional institutions;

(iv) municipalities and boards, commissions, companies, corporations, funds or other entities under the ownership control of a municipality; and

(v) Parliament and the provincial legislatures;

[Sub-para. (v) substituted by s. 44 of Act No. 29 of 1999.]

(*b*) prepare and publish directives and guidelines concerning the standards set in terms of paragraph (a);

(*c*) recommend to the Minister effective dates of implementation of these standards for the different categories of institutions to which these standards apply; and

(*d*) perform any other function incidental to advancing financial reporting in the public sector.

(2) In setting standards the Board must take into account all relevant factors, including—

(*a*) best accounting practices, both locally and internationally; and

(*b*) the capacity of the relevant institutions to comply with the standards.

(3) The Board may set different standards for different categories of institutions to which these standards apply.

(4) The standards set by the Board must promote transparency in and effective management of revenue, expenditure, assets and liabilities of the institutions to which these standards apply.

(Date of commencement of s. 89: 2 March, 1999.)

90. Powers of Board.—The Accounting Standards Board may do all that is necessary or expedient to perform its functions effectively, which includes the power to—

(*a*) determine its own staff establishment and appoint employees to posts on its staff establishment;

(*b*) obtain the services of any person or entity to perform any specific act or function;

(*c*) confer with any person or entity;

(*d*) acquire or dispose of any right in or to property, but ownership in immovable property may be acquired or disposed of only with the consent of the Minister;

(*e*) insure itself against any loss, damage, risk or liability;

(*f*) perform legal acts, or institute or defend any legal action in its own name;

(*g*) do research and publish reports; and

(*h*) do anything that is incidental to the exercise of any of its powers.

(Date of commencement of s. 90: 2 March, 1999.)

91. Regulations on accounting standards of Board.—(1) The Minister, after consulting the Auditor-General, may make regulations—

(*a*) concerning the qualifications, remuneration, term of office and removal of members of the Accounting Standards Board, the filling of vacancies, the chairperson of the Board, and the finances and administration of the Board;

(*b*) prescribing the standards set by the Board in terms of section 89; and

(*c*) concerning any other matter that may facilitate the proper functioning of the Board or the implementation of those standards.

(2) The Minister must consult the Board on the implementation date of a regulation made in terms of subsection (1) (b).

(3) Different regulations may be made in terms of subsection (1) (b) for different categories of institutions to which the standards set in terms of section 89 apply.

(4) Draft regulations prescribing standards in terms of subsection (1) (b) must be published for public comment in the national *Government Gazette* before their enactment.

(Date of commencement of s. 91: 2 March, 1999.)

CHAPTER 12
MISCELLANEOUS

92. Exemptions.—The Minister, by notice in the national *Government Gazette*, may exempt any institution to which this Act applies, or any category of those institutions, from any specific provisions of this Act for a period determined in the notice.

[General Note: Exemption of public entities has been published under General Notices No. 502 and No. 503 in *Government Gazette* 22337 of 8 June, 2001. Exemption of an institution has been published under Government Notice No. 1097 in *Government Gazette* 22801 of 9 November, 2001, Government Notice No. 886 in *Government Gazette* 26602 of 30 July, 2004, Government Notice No. 822 in *Government Gazette* 40129 of 8 July, 2016, Government Notice No. 824 in *Government Gazette* 40132 of 11 July, 2016, Government Notice No. 886 in *Government Gazette* 40183 of 2 August, 2016 and Government Notice No. 46 in *Government Gazette* 40574 of 26 January, 2017.]

93. Transitional provisions.—(1) Anything done in terms of a provision of the Exchequer Act, 1975 (Act No. 66 of 1975), which can be done in terms of a provision of this Act, must be regarded as having been done in terms of this Act.

(2) All treasury regulations and instructions made or issued in terms of the Exchequer Act, 1975, remain in force until repealed in terms of section 76 of this Act.

(3) Until the Accounting Standards Board is established, the National Treasury may perform the functions of the Board.

(4) The provisions of the Revenue Funds Interim Arrangements Act, 1997 (Act No. 95 of 1997), despite the fact that they have lapsed, must be regarded as forming part of this Act until 1 April 2000.

(Date of commencement of sub-s. (4): 2 March, 1999.)

94. Repeal of legislation.—The legislation mentioned in Schedule 6 is repealed to the extent specified in the third column.

95. Short title and commencement.—This Act is called the Public Finance Management Act, 1999, and takes effect on 1 April 2000 except—

(*a*) Chapter 11 and section 93 (4), which take effect on the date of publication of this Act; and

(*b*) those provisions determined by the Minister by notice in the national *Government Gazette*, which will take effect on a date determined in the notice, but which may not be a date later than 1 April 2003.

Schedule 1
CONSTITUTIONAL INSTITUTIONS

[General Note: Amended public entities have been published under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001; and under Government Notice No. 1396 in *Government Gazette* 24042 of 15 November, 2002 with effect from 15 November, 2002.]

The Commission for Gender Equality

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

. . . . . .

["The Commission on the Remuneration of Persons Holding Public Office" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

The Financial and Fiscal Commission

The Human Rights Commission

. . . . . .

["The Independent Broadcasting Authority" deleted by GN 2302 in GG 22860 of 30 November, 2001.]

Independent Communications Authority of South Africa

["Independent Communications Authority of South Africa" previously "Independent Communications Authority" amended by GN 1863 in GG 22577 of 24 August, 2001.]

The Independent Electoral Commission

The Municipal Demarcation Board

The Pan South African Language Board

The Public Protector

Schedule 2
MAJOR PUBLIC ENTITIES

[General Note: Please note that the Preferential Procurement Policy Framework Act, No. 5 of 2000 and its Regulations shall apply to all public entities listed in Schedules 2 and 3 of this Act, under GNR.501 published in *Government Gazette* 34350 dated 8 June, 2011, with effect from 7 December, 2011. Amended public entities have been published under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001; under General Notice No. 683 in *Government Gazette* 23407 of 17 May, 2002, with effect from 17 May, 2002; under General Notice No. 1283 in *Government Gazette* 23619 of 19 July, 2002 with effect from 19 July, 2002; under General Notice No. 1261 in *Government Gazette* 24731 of 17 April, 2003 with effect from 17 April, 2003, under General Notice No. 765 in *Government Gazette* 27599 of 27 May, 2005 with effect from 27 May, 2005, under Act No. 5 of 2007 with effect from the transfer date (the date on which the transfer of shares and claims is finalised under an agreement between Transnet and the State) and the conversion date, (the date on which the conversion of South African Airways (Pty.) Ltd. into a public company is registered in terms of section 4 (3), under Act No. 33 of 2007 with effect from the transfer date, (the date on which the transfer of shares and claims is finalised under an agreement between Eskom and the State), and the conversion date (the date determined by the Minister in terms of section 8 (1)) and under Act No. 34 of 2007 with effect from the transfer date, (the date on which the transfer of shares and claims is finalised under an agreement between Transnet and the State), and the conversion date (the date on which the conversion of South African Express (Propriety) Limited into a public company is registered in terms of section 6 (1).]

Air Traffic and Navigation Services Company

Airports Company

Alexkor Limited

["Alexander Bay Development Corporation Limited" previously "Alexander Bay Development Corporation" amended by GN 683 in *Government Gazette* 23407 of 17 May, 2002.]

["Alexkor Limited" previously "Alexander Bay Development Corporation Limited" amended by GN 1283 in *Government Gazette* 23619 of 19 July, 2002.]

Armaments Corporation of South Africa

Broadband Infraco (Proprietary) Limited

["Broadband Infraco (Proprietary) Limited" inserted by s. 11 (a) of Act No. 33 of 2007 with effect from the transfer date, (the date on which the transfer of shares and claims is finalised under an agreement between Eskom and the State).]

Broadband Infraco Limited

["Broadband Infraco Limited" previously "Broadband Infraco (Proprietary) Limited" substituted by s. 11 (b) of Act No. 33 of 2007 with effect from the conversion date, (the date determined by the Minister in terms of section 8 (1)).]

CEF (Pty) Ltd

["Central Energy Fund (Pty) Ltd" previously "Central Energy Fund" amended by GN 1863 in GG 22577 of 24 August, 2001 and by GN 765 in *Government Gazette* 27599 of 27 May, 2005.]

DENEL

Development Bank of Southern Africa

ESKOM

Independent Development Trust

Industrial Development Corporation of South Africa Limited

Land and Agricultural Bank of South Africa

. . . . . .

["SA Abbattoir Corporation" deleted by GN 1863 in *Government Gazette* 22577 of 24 August, 2001.]

SA Broadcasting Corporation Limited

["SA Broadcasting Corporation" previously "SA Broadcasting Commission" amended by GN 1863 in GG 22577 of 24 August, 2001.]

["SA Broadcasting Corporation Limited" previously "SA Broadcasting Corporation" amended by GN 2302 in GG 22860 of 30 November, 2001.]

South African Express (Proprietary) Limited

["South African Express (Proprietary) Limited" inserted by s. 9 (a) of Act No. 34 of 2007 with effect from the transfer date, (the date on which the transfer of shares and claims is finalised under an agreement between Transnet and the State) and substituted by s. 9 (b) of Act No. 34 of 2007 with effect from the conversion date, (the date on which the conversion of South African Express (Propriety) Limited into a public company is registered in terms of section 6 (1)).]

SA Forestry Company Limited

SA Nuclear Energy Corporation

["SA Nuclear Energy Corporation" previously "Atomic Energy Corporation of South Africa Limited" amended by GN 1261 in GG 24731 of 17 April, 2003.]

SA Post Office Limited

South African Airways Limited

["South African Airways Limited" previously known as "South African Airways (Proprietary) Limited" inserted by s. 9 (a) of Act No. 5 of 2007 with effect from the transfer date, (the date on which the transfer of shares and claims is finalised under an agreement between South African Airways (Proprietary) Limited and the State) and substituted by s. 9 (b) of Act No. 5 of 2007 with effect from the conversion date, (the date on which the conversion of South African Airways (Proprietary) Limited into a public company is registered in terms of section 6 (1)).]

(Editorial Note: S. 9 of Act No. 5 of 2007 inserts number 16A for "South African Airways (Proprietary) Limited" and "South African Airways Limited". Since numbering has not been effected in a prior *Gazette*, we will abide by the original format with no numbering.)

Telkom SA Limited

Trans-Caledon Tunnel Authority

Transnet Limited

Any subsidiary or entity under the ownership control of the above public entities

Schedule 3
OTHER PUBLIC ENTITIES

[General Note: Please note that the Preferential Procurement Policy Framework Act, No. 5 of 2000 and its Regulations shall apply to all public entities listed in Schedules 2 and 3 of this Act, under GNR.501 published in *Government Gazette* 34350 dated 8 June, 2011, with effect from 7 December, 2011.]

Part A: National Public Entities

[General Note: Amended public entities have been published under General Notice No. 402 in *Government Gazette* 22047 of 16 February, 2001 with effect from 1 April, 2001; under General Notice No. 1397 in *Government Gazette* 22321 of 1 June, 2001 with effect from 1 June, 2001; under Government Notice No. 504 in *Government Gazette* 22337 of 8 June, 2001 with effect from 8 June, 2001; under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001; under General Notice No. 683 in *Government Gazette* 23407 of 17 May, 2002 with effect from 17 May, 2002; under General Notice No. 1283 in *Government Gazette* 23619 of 19 July, 2002 with effect from 19 July, 2002; under Government Notice No. 1396 in *Government Gazette* 24042 of 15 November, 2002 with effect from 15 November, 2002; under General Notice No. 1261 in *Government Gazette* 24731 of 17 April, 2003 with effect from 17 April, 2003; under General Notice No. 3366 in *Government Gazette* 25778 of 5 December, 2003 with effect from 5 December, 2003; under General Notice No. 1139 in *Government Gazette* 26477 of 25 June, 2004 with effect from 25 June, 2004; under General Notice No. 765 in *Government Gazette* 27599 of 27 May, 2005 with effect from 27 May, 2005; under General Notice No. 1114 in *Government Gazette* 27773 of 15 July, 2005 with effect from 15 July, 2005; under General Notices Nos. 1263, 1264, 1265, 1268, 1269 and 1271 in *Government Gazette* 28237 of 25 November, 2005 with effect from 25 November, 2005, under General Notice No. 230 in *Government Gazette* 28519 of 24 February, 2006 with effect from 24 February, 2006, under General Notice No. 396 in *Government Gazette* No. 28605 of 17 March, 2006 with effect from 17 March, 2006, under General Notices Nos. 436 and 441 in *Government Gazette* 28651 of 31 March, 2006 with effect from 31 March, 2006, under General Notice No. 602 in *Government Gazette* 28798 of 12 May, 2006 with effect from 12 May, 2006, under General Notice No. 667 in *Government Gazette* 28847 of 26 May, 2006 with effect from 26 May, 2006, under General Notice No. 972 in *Government Gazette* 29033 of 21 July, 2006 with effect from 21 July, 2006 and subject to Rand Water not exceeding their debt limit, as provided in the *Government Gazette* Notice 23450 of 31 May, 2002, under General Notice Nos. 1010 and 1011 in *Government Gazette* 29050 of 28 July, 2006 with effect from 28 July, 2006, under General Notices Nos. 1476 and 1477 in *Government Gazette* 29293 of 20 October, 2006 with effect from 20 October, 2006, under Government Notice No. 187 in *Government Gazette* 29669 of 9 March, 2007 with effect from 9 March, 2007, under Government Notice No. 1000 in *Government Gazette* 31417 of 19 September, 2008 with effect from 19 September, 2008, under Government Notice No. 1003 in *Government Gazette* 31417 of 19 September, 2008 with effect from 19 September, 2008; under Government Notice No. 311 in *Government Gazette* 32013 of 20 March, 2009 with effect from 20 March, 2009, under Government Notice No. 240 in *Government Gazette* 33059 of 1 April, 2010

with effect retrospectively from 1 July, 2005, under Government Notices Nos. 241 and 242 in *Government Gazette* 33059 of 1 April, 2010 with effect from 1 April, 2010, under Government Notice No. 1250 in *Government Gazette* 33900 of 31 December, 2010, under Government Notices Nos. 1253 and 1254 in *Government Gazette* 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010, under Government Notice No. 363 in *Government Gazette* 34233 of 29 April, 2011, with effect retrospectively from 1 April, 2011, under Government Notice Nos. 796, 797 (with effect retrospectively from 1 April, 2011) and 800 in *Government Gazette* 34631 of 30 September, 2011, under Government Notice No. 821 in *Government Gazette* 35759 of 12 October, 2012, with effect from 1 April, 2012, under Government Notice No. 824 in *Government Gazette* 35759 of 12 October, 2012, with effect from 1 April, 2011, under Government Notice No. 187 in *Government Gazette* 36225 of 15 March, 2013, with effect retrospectively from 16 February, 2001, under Government Notice No. 190 in *Government Gazette* 36225 of 15 March, 2013 with effect from 15 March, 2013, under Government Notice No. 392 in *Government Gazette* 37653 of 23 May, 2014, under Government Notice No. 393 in *Government Gazette* 37653 of 23 May, 2014 and s. 8 of Act No. 12 of 2013with effect from 1 April, 2014, under Government Notice No. 353 in *Government Gazette* 38735 of 30 April 2015 with effect from 30 April 2015, under Government Notice No. 354 in *Government Gazette* 38735 of 30 April, 2015 with effect from 1 April, 2015, under Government Notice No. 358 in *Government Gazette* 38735 of 30 April, 2015 w.e.f 31 March, 2015, under Government Notice Nos. 159 and 161 in *Government Gazette* 40637 of 24 February, 2017 w.e.f 24 February, 2017 and under Government Notice No. 388 in *Government Gazette* 41534 of 29 March, 2018 w.e.f. 29 March, 2018.]

Accounting Standards Board

. . . . . .

["Africa Institute of South Africa, Pretoria" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

African Renaissance and International Cooperation Fund

["African Renaissance and International Cooperation Fund" added by GN 1139 in GG 26477 of 25 June, 2004.]

Afrikaanse Taalmuseum, Paarl

["Afrikaanse Taalmuseum, Paarl" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Agricultural Credit Board" deleted by GN 1863 in GG 22577 of 24 August, 2001.]

Agrément South Africa

["Agrément South Africa" added and classified by GN 159 in GG 40637 of 24 February, 2017.]

Agricultural Research Council

AGRISETA

["AGRISETA" added by GN 1010 in GG 29050 of 28 July, 2006.]

. . . . . .

["Air Services Licensing Council" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

Artscape

["Cape Performing Arts Board (CAPAB), Cape Town" added by GN 402 in GG 22047 of 16 February, 2001.]

["Artscape" previously "Cape Performing Arts Board (CAPAB), Cape Town" amended by GN 1283 in GG 23619 of 19 July, 2002.]

Banking Sector Education and Training Authority

["Banking Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Board on Tariffs and Trade" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Boxing South Africa

["Boxing South Africa" added by GN 3366 in GG 25778 of 5 December, 2003.]

Brand SA

["South African International Marketing Council Trust/Brand South Africa" previously "International Marketing Council" added by GN 1476 in GG 29293 of 20 October, 2006 and amended by GN 800 in GG 34631 of 30 September, 2011.]

["Brand SA" previously "South African International Marketing Council Trust/Brand South Africa" amended by GN 190 in GG 36225 of 15 March, 2013 with effect from 15 March, 2013.]

Breede-Gouritz Catchment Management Agency

["Breede-Gouritz Catchment Management Agency", previously "Breede River Catchment Management Agency", added and classified by GN 1000 in GG 31417 of 19 September, 2008 and amended by GN 353 in GG 38735 of 30 April, 2015.]

. . . . . .

["Business and Arts South Africa (BASA)" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 441 in GG 28651 of 31 March, 2006.]

Castle Control Board

["Castle Control Board" previously "Castle Management Board" added by GN 1397 in GG 22321 of 1 June, 2001 and amended by GN 1863 in GG 22577 of 24 August, 2001 and by GN 2302 in GG 22860 of 30 November, 2001.]

. . . . . .

["Certification Council for Technikon Education" deleted by GN 683 in GG 23407 of 17 May, 2002.]

Chemical Industries Education and Training Authority

["Chemical Industries Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Clothing, Textiles, Footwear and Leather Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 797 in GG 34631 of 30 September, 2011.]

Commission for Conciliation, Mediation & Arbitration

Community Schemes Ombud Service

["Community Schemes Ombud Service" added by GN 821 in GG 35759 of 12 October, 2012 with effect from 1 April, 2012.]

Companies and Intellectual Property Commission

["Companies and Intellectual Property Commission" added by GN 1254 in GG 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010.]

Companies Tribunal

["Companies Tribunal" added by GN 363 in GG 34233 of 29 April, 2011 with effect retrospectively from 1 April, 2011.]

. . . . . .

["Compensation Board" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Compensation Fund, including Reserve Fund

["Compensation Fund, including Reserve Fund" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Competition Board" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Competition Commission

["Competition Commission" added by GN 402 in GG 22047 of 16 February, 2001.]

Competition Tribunal

["Competition Tribunal" added by GN 402 in GG 22047 of 16 February, 2001.]

Construction Education and Training Authority

["Construction Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

Construction Industry Development Board

["Construction Industry Development Board" added by GN 2302 in GG 22860 of 30 November, 2001.]

Council for Built Environment (CBE)

["Council for Built Environment (CBE)" added by GN 765 in GG 27599 of 27 May, 2005.]

Council for Geoscience

Council for Medical Schemes

["Council for Medical Schemes" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Council for Mineral Technology (Mintek)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001.]

. . . . . .

["Council for Nuclear Safety" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["Council for Scientific and Industrial Research (CSIR)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001.]

Council on Higher Education

["Council on Higher Education" added by GN 402 in GG 22047 of 16 February, 2001.]

Cross-Border Road Transport Agency

["Cross-Border Road Transport Agency" added by GN 1397 in GG 22321 of 1 June, 2001.]

Culture, Arts, Tourism, Hospitality and Sports Education and Training Authority (CATHSSETA)

["Culture, Arts, Tourism, Hospitality and Sports Education and Training Authority (CATHSSETA)" added and classified by GN 796 in GG 34631 of 30 September, 2011.]

. . . . . .

["Diplomacy, Intelligence, Defence and Trade & Industry Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

. . . . . .

["Education and Labour Relations Council" added by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 358 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015 (Editorial Note: GN 358 in GG 38735 made reference to "Education Labour Relations Council (ELRC)". We suggest "Education and Labour Relations Council" was intended).]

Education, Training and Development Practices SETA (ETDP)

["Education, Training and Development Practices SETA (ETDP)" previously "Education, Training and Development Practices Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

Electricity Distribution Industry Holdings (Pty) Ltd

["Electricity Distribution Industry Holdings (Pty) Ltd" added by GN 3366 in GG 25778 of 5 December, 2003.]

Electronic Communications Security (Pty) Ltd

["Electronic Communications Security (Pty) Ltd" added and classified by GN 311 in GG 32013 of 20 March, 2009.]

. . . . . .

["Employment's Condition Commission" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 765 in GG 27599 of 27 May, 2005.]

Energy and Water Sector Education and Training Authority (EWSETA)

["Energy and Water Sector Education and Training Authority (EWSETA)" previously "Energy Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

. . . . . .

["Engelenburg House Art Collection, Pretoria" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["English Dictionary Unit of South Africa, Grahamstown" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Estate Agency Affairs Board

["Estate Agency Affairs Board" added by GN 1397 in GG 22321 of 1 June, 2001.]

. . . . . .

["Export Credit Reinsurance Fund" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 683 in GG 23407 of 17 May, 2002.]

Fibre Processing Manufacturing Sector Education and Training Authority (FPMSETA)

["Fibre Processing Manufacturing Sector Education and Training Authority (FPMSETA)" added and classified by GN 796 in GG 34631 of 30 September, 2011.]

Film and Publication Board

["Film and Publication Board" added by GN 1397 in GG 22321 of 1 June, 2001.]

. . . . . .

["Film & Publications Review Board" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Financial and Accounting Services SETA (FASSET)

["Financial and Accounting Services SETA (FASSET)" previously "Financial and Accounting Services Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

Financial Intelligence Centre

["Financial Intelligence Centre" added by GN 3366 in GG 25778 of 5 December, 2003.]

Financial Services Board

Food and Beverages Manufacturing Industry (FOODBEV)

["Food and Beverages Manufacturing Industry (FOODBEV)" previously "Food and Beverages Manufacturing Industry Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

. . . . . .

["Forest Industries Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 797 in GG 34631 of 30 September, 2011.]

. . . . . .

["Foundation for Education, Science and Technology, Pretoria" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1139 in GG 26477 of 25 June, 2004.]

. . . . . .

["Foundation for Research and Development" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Freedom Park Trust

["Freedom Park Trust" added by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Godisa Trust" added by GN 1139 in GG 26477 of 25 June, 2004 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

Health and Welfare Sector Education and Training Authority

["Health and Welfare Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

Housing Development Agency

["Housing Development Agency" added and classified by GN 311 in GG 32013 of 20 March, 2009.]

Human Sciences Research Council

. . . . . .

["Immigrants Selection Board" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Independent Communications Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1863 in GG 22577 of 24 August, 2001.]

Independent Regulatory Board for Auditors

["Independent Regulatory Board for Auditors" added by GN 1011 in GG 29050 of 28 July, 2006.]

Information Systems, Electronics and Telecommunications Technologies Training Authority

["Information Systems, Electronics and Telecommunications Technologies Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

Ingonyama Trust Board

["Ingonyama Trust Board" added by GN 402 in GG 22047 of 16 February, 2001.]

Inkomati-Usuthu Catchment Management Agency

["Inkomati-Usuthu Catchment Management Agency", previously "Inkomati Catchment Management Agency", added by GN 396 in GG 28605 of 17 March, 2006 and amended by GN 353 in GG 38735 of 30 April, 2015.]

Insurance Sector Education and Training Authority

["Insurance Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

International Trade Administration Commission

["International Trade Administration" added by GN 1139 in GG 26477 of 25 June, 2004 and amended by GN 765 in GG 27599 of 27 May, 2005.]

. . . . . .

["Investment South Africa" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1863 in GG 22577 of 24 August, 2001.]

iSimangaliso Wetland Park

["iSimangaliso Wetland Park" previously "Greater St. Lucia Wetland Park Authority" added by GN 1283 in GG 23619 of 19 July, 2002 and amended by GN 1003 in GG 31417 of 19 September, 2008.]

Iziko Museums of South Africa

["Iziko Museums of South Africa" previously "Iziko Museums of Cape Town" previously "Southern Flagship Institution, Cape Town" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1283 in GG 23619 of 19 July, 2002 and by GN 392 of GG 37653 of 23 May, 2014.]

. . . . . .

["JLB Institute of Itchyology" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the word "Itchyology" is intended to be "Ichthyology".)

. . . . . .

["Johannesburg World Summit" previously "Johannesburg Earth Summit" added by GN 1397 in GG 22321 of 1 June, 2001 and amended by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 1139 in GG 26477 of 25 June, 2004.]

. . . . . .

["Judicial Services Commission" deleted by GN 683 in GG 23407 of 17 May, 2002.]

KwaZulu-Natal Museum

["KwaZulu-Natal Museum" previously "Natal Museum, Pietermaritzburg" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

. . . . . .

["KwaZulu Ingonyama Trust" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Legal Aid South Africa

["Legal Aid South Africa" previously "Legal Aid Board" amended by GN 1250 in GG 33900 of 31 December, 2010.]

Local Government Education and Training Authority (LGSETA)

["Local Government Education and Training Authority (LGSETA)" previously "Local Government, Water and Related Services Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 800 in GG 34631 of 30 September, 2011.]

Luthuli Museum

["Luthuli Museum" added by GN 1269 in GG 28237 of 25 November, 2005.]

. . . . . .

["Manufacturing Advisory Council" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

. . . . . .

["Manufacturing Development Board" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Manufacturing, Engineering and Related Services Education and Training Authority

["Manufacturing, Engineering and Related Services Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

Marine Living Resources Fund

["Marine Living Resources Fund" added by GN 402 in GG 22047 of 16 February, 2001.]

Market Theatre Foundation

["Market Theatre Foundation" added by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Market Theatre, Johannesburg" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Media, Advertising, Publishing, Printing and Packaging Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 797 in GG 34631 of 30 September, 2011.]

Media Development and Diversity Agency

["Media Development and Diversity Agency" added by GN 1261 in GG 24731 of 17 April, 2003.]

Media, Information and Communication Technologies Sector Education and Training Authority (MICTS)

["Media, Information and Communication Technologies Sector Education and Training Authority (MICTS)" added and classified by GN 796 in GG 34631 of 30 September, 2011.]

Mine Health & Safety Council

["Mine Health & Safety Council" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Mines and Works Compensation Fund" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Mining Qualifications Authority

["Mining Qualifications Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Municipal Infrastructure Investment Unit" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

National Agricultural Marketing Council

["National Agricultural Marketing Council" previously "National Agriculture Marketing Council" amended by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["National Archives Commission" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

National Arts Council

["National Arts Council" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["National Botanical Institute" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 765 in GG 27599 of 27 May, 2005.]

National Consumer Commission

["National Consumer Commission" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

National Consumer Tribunal

["National Consumer Tribunal" added by GN 602 in GG 28798 of 12 May, 2006.]

. . . . . .

["National Coordination Office of the Manufacturing Advisory Centre Programme—NAMAC" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GNs 1263, 1264 and 1265 in GG 28237 of 25 November, 2005.]

National Credit Regulator

["National Credit Regulator" added by GN 602 in GG 28798 of 12 May, 2006.]

National Development Agency

["National Development Agency" added by GN 402 in GG 22047 of 16 February, 2001.]

National Economic, Development and Labour Council

. . . . . .

["National Electricity Regulator" deleted by GN 1271 in GG 28237 of 25 November, 2005.]

National Electronic Media Institute of SA

["National Electronic Media Institute of SA" added by GN 1397 in GG 22321 of 1 June, 2001.]

National Empowerment Fund
["National Empowerment Fund" added by GN 402 in GG 22047 of 16 February, 2001.]

National Energy Regulator of South Africa
["National Energy Regulator of South Africa" added by GN 1271 in GG 28237 of 25 November, 2005.]

National Film and Video Foundation
["National Film and Video Foundation" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .
["National Film Board" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

National Gambling Board of SA
["National Gambling Board of SA" added by GN 402 in GG 22047 of 16 February, 2001.]

National Health Laboratory Service
["National Health Laboratory Service" added by GN 683 in GG 23407 of 17 May, 2002.]

National Heritage Council (NHC)
["National Heritage Council (NHC)" added by GN 765 in GG 27599 of 27 May, 2005.]

National Home Builders Registration Council—NHBRC
["National Home Builders Registration Council—NHBRC" added by GN 402 in GG 22047 of 16 February, 2001.]

National Housing Finance Corporation

National Library, Pretoria/Cape Town
["National Library, Pretoria/Cape Town" added by GN 402 in GG 22047 of 16 February, 2001.]

National Lotteries Commission
["National Lotteries Commission", previously "National Lotteries Board", added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 353 in GG 38735 of 30 April, 2015.]

National Metrology Institute of South Africa
["National Metrology Institute of South Africa" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

. . . . . .
["National Monuments Council" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

National Museum, Bloemfontein
["National Museum, Bloemfontein" added by GN 402 in GG 22047 of 16 February, 2001.]

National Nuclear Regulator
["National Nuclear Regulator" added by GN 402 in GG 22047 of 16 February, 2001.]

National Regulator for Compulsory Specifications
["National Regulator for Compulsory Specifications" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

National Research Foundation
["National Research Foundation" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .
["National Small Business Council" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

National Student Financial Aid Scheme
["National Student Financial Aid Scheme" added by GN 402 in GG 22047 of 16 February, 2001.]

National Urban Reconstruction and Housing Agency-NURCHA
["National Urban Reconstruction and Housing Agency-NURCHA" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .
["National Year 2000 Decision Support Centre" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["National Youth Commission" deleted by GN 1253 in GG 33900 of 31 December, 2010 with effect from 1 April, 2010.]

National Youth Development Agency

["National Youth Development Agency' added and classified by GN 311 in GG 32013 of 20 March, 2009.]

. . . . . .

["National Zoological Gardens of SA" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1477 in GG 29293 of 20 October, 2006 (Editorial Note: GN 1477 in GG 29293 made reference to "National Zoological Gardens". We suggest "National Zoological Gardens of SA" was intended).]

Nelson Mandela Museum, Umtata

["Nelson Mandela Museum, Umtata" added by GN 402 in GG 22047 of 16 February, 2001.]

Ditsong: Museums of South Africa

["Ditsong: Museums of South Africa" previously "Northern Flagship Institution, Pretoria" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1250 in GG 33900 of 31 December, 2010.]

Office of Health Standards Compliance

["Office of Health Standards Compliance" added and classified by GN 393 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014 and by s. 8 of Act No. 12 of 2013.]

(Editorial Note: Please note that both GN 393 in GG 37653 of 23 May, 2014 and section 8 of the National Health Amendment Act, No. 12 of 2013 add/insert the expression "Office of Health Standards Compliance" in Schedule 3, Part A with effect from 1 April, 2014.)

Office of the Ombudsman for Financial Services Providers

["Office of the Ombudsman for Financial Services Providers" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

Office of the Pension Funds Adjudicator

["Office of the Pension Funds Adjudicator" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

Performing Arts Council of the Free State

["Performing Arts Council Orange Free State (PACOFS), Bloemfontein" added by GN 402 in GG 22047 of 16 February, 2001.]

["Performing Arts Council of the Free State" previously "Performing Arts Council Orange Free State (PACOFS), Bloemfontein" amended by GN 1283 in GG 23619 of 19 July, 2002.]

Perishable Products Export Control Board

["Perishable Products Export Control Board" added by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Police, Private Security, Legal and Correctional Services" added by GN 402 in GG 22047 of 16 February, 2001.]

["Police, Private Security, Legal and Correctional Services Training Authority" previously "Police, Private Security, Legal and Correctional Services" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

Ports Regulator of South Africa

["Ports Regulator of South Africa" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

. . . . . .

["Primary Agricultural Education and Training Authority (PAETA)" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1010 in GG 29050 of 28 July, 2006.]

Private Security Industry Regulatory Authority

["Private Security Industry Regulatory Authority" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

Productivity SA

["Productivity SA" previously "National Productivity Institute" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1003 in GG 31417 of 19 September, 2008.]

. . . . . .

["Public Investment Commissioners" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 1114 in GG 27773 of 15 July, 2005.]

. . . . . .

["Public Protector" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1863 in GG 22577 of 24 August, 2001.]

Public Service Sector Education and Training Authority (PSETA)

["Public Service Sector Education and Training Authority (PSETA)" previously "Public Sector Education and Training Authority" added by GN 667 in GG 28847 of 26 May, 2006 and amended by GN 800 in GG 34631 of 30 September, 2011.]

. . . . . .

["Public Services Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 2302 in GG 22860 of 30 November, 2001.]

Quality Council for Trades and Occupations (QCTO)

["Quality Council for Trades and Occupations (QCTO)" added by GN 1254 in GG 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010.]

Railway Safety Regulator

["Railway Safety Regulator" added by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["Rent Control Board" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 765 in GG 27599 of 27 May, 2005.]

Road Accident Fund

Road Traffic Infringement Agency (RTIA)

["Road Traffic Infringement Agency (RTIA)" added by GN 1254 in GG 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010.]

Road Traffic Management Corporation

["Road Traffic Management Corporation" added by GN 1396 in GG 24042 of 15 November, 2002.]

Robben Island Museum, Cape Town

["Robben Island Museum, Cape Town" added by GN 402 in GG 22047 of 16 February, 2001.]

Rural Housing Loan Fund

["Rural Housing Loan Fund" added by GN 3366 in GG 25778 of 5 December, 2003.]

Safety and Security Sector Education and Training Authority (SASSETA)

["Safety and Security Sector Education and Training Authority (SASSETA)" previously "Safety and Security Sector Education and Training" added by GN 240 in GG 33059 of 1 April, 2010 with effect retrospectively from 1 July, 2005 and amended by GN 800 in GG 34631 of 30 September, 2011.]

. . . . . .

["South African Blind Workers Organization (SABWO)" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 441 in GG 28651 of 31 March, 2006 (Editorial Note: GN 441 in GG 28651 made reference to "South African Blind Workers Association (SABWO)". We suggest "South African Blind Workers Organization (SABWO)" was intended).]

. . . . . .

["SA Bureau of Standards (SABS)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001.]

SA Civil Aviation Authority

. . . . . .

["SA Communications Regulatory Authority" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["SA Council for Architects" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 1139 in GG 26477 of 25 June, 2004.]

SA Council for Educators

["SA Council for Educators" added by GN 402 in GG 22047 of 16 February, 2001.]

South African Diamond and Precious Metals Regulator

["SA Diamond and Precious Metals Regulator" added by GN 187 in GG 29669 of 9 March, 2007.]

. . . . . .

["SA Diamond Board" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 187 in GG 29669 of 9 March, 2007.]

. . . . . .

["SA Excellence Foundation" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1268 in GG 28237 of 25 November, 2005.]

. . . . . .

["SA Geographical Names Commission" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

SA Heritage Resources Agency

["SA Heritage Resources Agency" previously "National Heritage Council" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 683 in GG 23407 of 17 May, 2002.]

. . . . . .

["SA Housing Development Board" previously "National Housing Board" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["SA Housing Fund" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["SA Housing Trust Limited" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

SA Institute for Drug-free Sport

["SA Institute for Drug-free Sport" added by GN 402 in GG 22047 of 16 February, 2001.]

SA Library for the Blind, Grahamstown

["SA Library for the Blind, Grahamstown" added by GN 402 in GG 22047 of 16 February, 2001.]

SA Local Government Association

["SA Local Government Association" added by GN 1283 in GG 23619 of 19 July, 2002.]

SA Maritime Safety Authority

["SA Maritime Safety Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

SA Medical Research Council

SA National Accreditation System

["SA National Accreditation System" added by GN 402 in GG 22047 of 16 February, 2001.]

South African Health Products Regulatory Authority (SAHPRA)

["South African Health Products Regulatory Authority (SAHPRA)" added and classified by GN 159 in GG 40637 of 24 February, 2017.]

South African National Biodiversity Institute (SANBI)

["South African National Biodiversity Institute (SANBI)" added by GN 765 in GG 27599 of 27 May, 2005.]

South African National Energy Development Institute (SANEDI)

["South African National Energy Development Institute (SANEDI)" added by GN 1254 in GG 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010.]

South African National Parks

["South African National Parks" previously "National Parks Board" amended by GN 683 in GG 23407 of 17 May, 2002.]

SA National Roads Agency

["SA National Roads Agency" previously "National Road Fund" amended by GN 1863 in GG 22577 of 24 August, 2001.]

South African National Space Agency

["South African National Space Agency" added and classified by GN 311 in GG 32013 of 20 March, 2009.]

. . . . . .

["SA Nuclear Energy Corporation" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 187 in GG36225 of 15 March, 2013 with effect retrospectively from 16 February, 2001.]

SA Qualifications Authority

. . . . . .

["SA Quality Institute" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

SA Revenue Service

. . . . . .

["SA Road Board" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["SA Road Safety Council" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

South African Social Security Agency

["South African Social Assistance Agency" inserted by GN 230 in GG 28519 of 24 February, 2006 and corrected to read "South African Social Security Agency" by GN 436 in GG 28651 of 31 March, 2006.]

. . . . . .

["SA Sport Commission" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 1000 in GG 31417 of 19 September, 2008.]

. . . . . .

["SA Telecommunications Regulatory Authority" deleted by GN 1863 in GG 22577 of 24 August, 2001.]

SA Tourism Board

South African Weather Service

["South African Weather Service" added by GN 2302 in GG 22860 of 30 November, 2001.]

. . . . . .

["Secondary Agricultural Sector Education and Training Authority (SETSA)" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1010 in GG 29050 of 28 July, 2006.]

Servcon

["Servcon" added by GN 402 in GG 22047 of 16 February, 2001.]

Services Sector Education and Training Authority

["Services Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

Small Enterprise Development Agency (SEDA)

["Small Enterprise Development Agency (SEDA)" added by GNs 1263, 1264 and 1265 in GG 28237 of 25 November, 2005.]

. . . . . .

["Social Housing Foundation" added by GN 1397 in GG 22321 of 1 June, 2001 and deleted by GN 161 in GG 40637 of 24 February, 2017.]

Special Investigation Unit

["Special Investigation Unit" added by GN 402 in GG 22047 of 16 February, 2001.]

State Information Technology Agency

State Theatre, Pretoria

["State Theatre, Pretoria" added by GN 402 in GG 22047 of 16 February, 2001.]

Technology Innovation Agency

['Technology Innovation Agency' added and classified by GN 311 in GG 32013 of 20 March, 2009.]

The Co-Operative Banks Development Agency

["The Co-Operative Banks Development Agency" added and classified by GN 1000 in GG 31417 of 19 September, 2008.]

The National English Literary Museum, Grahamstown

["The National English Literary Museum, Grahamstown" added by GN 402 in GG 22047 of 16 February, 2001.]

The National Radioactive Waste Disposal Institute (NRWDI)

["The National Radioactive Waste Disposal Institute (NRWDI)" added and classified by GN 796 in GG 34631 of 30

September, 2011.]

The National Skills Fund (NSF)

["The National Skills Fund (NSF)" added by GN 821 in GG 35759 of 12 October, 2012 with effect from 1 April, 2012.]

The Playhouse Company, Durban

["The Playhouse Company, Durban" added by GN 402 in GG 22047 of 16 February, 2001.]

The Social Housing Regulatory Authority (SHRA)

["The Social Housing Regulatory Authority (SHRA)" added by GN 1254 in GG 33900 of 31 December, 2010 with effect retrospectively from 1 April, 2010.]

Thubelisha Homes

["Thubelisha Homes" added by GN 402 in GG 22047 of 16 February, 2001.]

Tourism and Hospitality Education and Training Authority

["Tourism and Hospitality Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Tourism, Hospitality & Sport Education and Training Authority" deleted by GN 824 in GG 35759 of 12 October, 2012 with effect retrospectively from 1 April, 2011.]

. . . . . .

["Investment South Africa" added by GN 402 in GG 22047 of 16 February, 2001.]

["Trade and Investment South Africa" previously "Investment South Africa" amended by GN 1863 in GG 22577 of 24 August, 2001.]

["Trade and Investment South Africa" moved from Schedule 3B to Schedule 3A by GN 2302 in GG 22860 of 30 November, 2001.]

["Trade and Investment South Africa" deleted by GN 1000 in GG 31417 of 19 September, 2008.]

Transport Education and Training Authority

["Transport Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

uMalusi Council for Quality Assurance in General and Further Education and Training

["Umalusi Council for Quality Assurance in General and Further Education and Training" previously "SA Certification Council" amended by GN 1396 in GG 24042 of 15 November, 2002.]

uMsunduzi Museum

["Voortrekker Museum, Pietermaritzburg" added by GN 402 in GG 22047 of 16 February, 2001.]

["uMsunduzi Museum" previously "Voortrekker Museum, Pietermaritzburg" amended by GN 190 in GG 36225 of 15 March, 2013 with effect from 15 March, 2013.]

Unemployment Insurance Fund

Universal Service and Access Agency of South Africa

["Universal Services Agency" added by GN 402 in GG 22047 of 16 February, 2001.]

["Universal Service Agency" previously "Universal Services Agency" amended by GN 1863 in GG 22577 of 24 August, 2001.]

["Universal Service and Access Agency of South Africa" previously "Universal Service Agency" amended by GN 1003 in GG 31417 of 19 September, 2008.]

Universal Service and Access Fund

["Universal Services Fund" added by GN 402 in GG 22047 of 16 February, 2001.]

["Universal Service Fund" previously "Universal Services Fund" amended by GN 2302 in GG 22860 of 30 November, 2001.]

["Universal Service and Access Fund" previously "Universal Service Fund" amended by GN 1003 in GG 31417 of 19 September, 2008.]

Urban Transport Fund

["Urban Transport Fund" added by GN 1397 in GG 22321 of 1 June, 2001.]

Valuer-General, Office of the

["Valuer-General, Office of the" added by GN 388 in GG 41534 of 29 March, 2018.]

Vredefort Dome World Heritage Site

["Vredefort Dome World Heritage Site" added and classified by GN 354 in GG 38735 of 30 April, 2015 w.e.f. 1 April, 2015.]

. . . . . .

["Wage Board" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

War Museum of the Boer Republics, Bloemfontein

["War Museum of the Boer Republics, Bloemfontein" added by GN 402 in GG 22047 of 16 February, 2001.]

Water Research Commission

Wholesale and Retail Sector Education and Training Authority

["Wholesale and Retail Sector Education and Training Authority" added by GN 402 in GG 22047 of 16 February, 2001.]

William Humphreys Art Gallery

["William Humphreys Art Gallery" added by GN 402 in GG 22047 of 16 February, 2001 and by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Windybrow Centre" added by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 161 in GG 40637 of 24 February, 2017.]

. . . . . .

["Woordeboek van die Afrikaanse Taal (WAT), Paarl" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Any subsidiary or entity under the ownership control of the above public entities

Part B: National Government Business Enterprises

[General Note: Amended public entities have been published under General Notice No. 402 in *Government Gazette* 22047 of 16 February, 2001 with effect from 1 April, 2001; under Government Notice No. 504 in *Government Gazette* 22337 of 8 June, 2001 with effect from 8 June, 2001; under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001; under General Notice No. 1283 in *Government Gazette* 23619 of 19 July, 2002 with effect from 19 July, 2002; under General Notice No. 1261 in *Government Gazette* 24731 of 17 April, 2003 with effect from 17 April, 2003; under General Notice No. 3366 in *Government Gazette* 25778 of 5 December, 2003 with effect from 5 December, 2003; under General Notice No. 1114 in *Government Gazette* 27773 of 15 July, 2005 with effect from 15 July, 2005 and under General Notices Nos. 1263, 1264 and 1265 in *Government Gazette* 28237 of 25 November, 2005 with effect from 25 November, 2005, under General Notice No. 431 in *Government Gazette* 28630 of 24 March, 2006, under Government Notice No. 647 in *Government Gazette* 30074 of 20 July, 2007 with effect from 20 July, 2007, under Government Notice No. 242 in *Government Gazette* 33059 of 1 April, 2010 with effect from 1 April, 2010, under Government Notice No. 1251 in *Government Gazette* 33900 of 31 December, 2010, under Government Notice No. 1252 in *Government Gazette* 33900 of 31 December, 2010 with effect from 1 April, 2010, under Government Notice No. 352 in *Government Gazette* 38735 of 30 April, 2015 with effect from 30 April, 2015, under Government Notice No. 357 in *Government Gazette* 38735 of 30 April, 2015 with effect from 31 March, 2015 and under Government Notice No. 164 in *Government Gazette* 40637 of 24 February, 2017 with effect from 24 February, 2017.]

. . . . . .

["Albany Coast Water Board" previously "Albaniekus Waterraad" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by by GN 1252 in GG 33900 of 31 December, 2010 with effect from 1 April, 2010.]

Amatola Water Board

["Amatola Water Board" previously "Amatola Water" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1863 in GG 22577 of 24 August, 2001.]

Aventura

["Aventura" added by GN 402 in GG 22047 of 16 February, 2001.]

. . . . . .

["Bala Farms (Pty) Ltd" previously "Bala-Bala Farms (Pty) Ltd" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 431 in GG 28630 of 24 March, 2006.]

Bloem Water

. . . . . .

["Bosveld Waterraad" substituted by "Lepelle Northern Water"]

. . . . . .

["Botshelo Water" previously "North West Water Supply Authority Board" added by GN 1863 in GG 22577 of 24 August, 2001, amended by GN 3366 in GG 25778 of 5 December, 2003 and deleted by GN 357 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015 (Editorial Note: GN 357 in GG 38735 made reference to "Botshelo Water Board". We suggest "Botshelo Water" was intended).]

. . . . . .

["Bushbuckridge Water Board" previously "Bushbuckridge Water" added by GN 402 in GG 22047 of 16 February, 2001, amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 357 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015.]

Council for Scientific and Industrial Research (CSIR)

["Council for Scientific and Industrial Research (CSIR)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001.]

Export Credit Insurance Corporation of South Africa Limited

["Export Credit Insurance Corporation of South Africa Limited" added by GN 2302 in GG 22860 of 30 November, 2001 and " amended by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Ikangala Water" added by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 1252 in GG 33900 of 31 December, 2010 with effect from 1 April, 2010.]

Inala Farms (Pty) Ltd

["Inala Farms (Pty) Ltd" previously "Iniala Farms (Pty) Ltd" amended by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Kalahari East Water Board" previously "Kalahari-Oos Waterraad" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["Kalahari West Water Board" previously "Kalahari-Wes Waterraad" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["Karos-Geelkoppen Waterraad" deleted by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Khula Enterprises" deleted by GN 164 in GG 40637 of 24 February, 2017.]

Lepelle Northern Water

["Lepelle Northern Water" inserted by GN 1863 in GG 22577 of 24 August, 2001.]

Magalies Water

Mhlathuze Water

Mintek

["Mintek", previously "Council for Mineral Technology (Mintek)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001 and amended by GN 352 in GG 38735 of 30 April, 2015.]

. . . . . .

["Mjindi Farming (Pty) Ltd" deleted from Schedule 3B and moved to Schedule 3D by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Mpendle-Ntambanana Agricultural Company (Pty) Ltd" deleted from Schedule 3B and moved to Schedule 3D by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Namakwa Water" deleted by GN 357 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015 (Editorial Note: GN 357 in GG 38735 made reference to "Namakwa Water Board". We suggest "Namakwa Water" was intended).]

Ncera Farms (Pty) Ltd

. . . . . .

["Noord Transvaal Water/Meetse" substituted by "Lepelle Northern Water".]

. . . . . .

["Ntsika Enterprises" deleted by GNs 1263, 1264 and 1265 in GG 28237 of 25 November, 2005.]

Onderstepoort Biological Products

["Onderstepoort Biological Products" added by GN 402 in GG 22047 of 16 February, 2001.]

Overberg Water

Passenger Rail Agency of South Africa

["Passenger Rail Agency of South Africa" previously "SA Rail Commuter Corporation Limited" amended by GN 242 in GG 33059 of 1 April, 2010.]

. . . . . .

["Pelladrift Water Board" previously "Pelladrift Water" amended by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 357 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015.]

. . . . . .

["Phalaborwa Water" substituted by "Lepelle Northern Water".]

Public Investment Corporation Limited

["Public Investment Corporation Limited" added by GN 1114 in GG 27773 of 15 July, 2005.]

Rand Water

["Rand Water" previously "Rand Water Board" amended by GN 1863 in GG 22577 of 24 August, 2001.]

SA Bureau of Standards (SABS)

["SA Bureau of Standards (SABS)" moved from Schedule 3A to Schedule 3B by GN 504 in GG 22337 of 8 June, 2001.]

Sasria Limited

["Sasria Limited" previously "Sasria" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1251 in GG 33900 of 31 December, 2010.]

Sedibeng Water

["Sedibeng Water" previously "Goudveld Water" amended by GN 1863 in GG 22577 of 24 August, 2001.]

Sentech

["Sentech" added by GN 402 in GG 22047 of 16 February, 2001.]

State Diamond Trader

["State Diamond Trader" included by GN 647 in GG 30074 of 20 July, 2007.]

. . . . . .

["Trade and Investment South Africa" previously "Investment South Africa" amended by GN 1863 in GG 22577 of 24 August, 2001 and moved from Schedule 3B to Schedule 3A by GN 2302 in GG 22860 of 30 November, 2001.]

Umgeni Water

["Umgeni Water" previously "Umgeni Water Board" amended by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Umsobomvu Youth Fund" previously "Umsombomvu Fund" added by GN 1261 in GG 24731 of 17 April, 2003, amended by GN 3366 in GG 25778 of 5 December, 2003 and deleted by GN 1252 in GG 33900 of 31 December, 2010 with effect from 1 April, 2010.]

Any subsidiary or entity under the ownership control of the above public entities

Part C**: Provincial Public Entities**

[Part C added by s. 45 of Act No. 29 of 1999.]

[General Note: Amended public entities have been published under General Notice No. 402 in *Government Gazette* 22047 of 16 February, 2001 with effect from 1 April, 2001; under General Notice No. 1397 in *Government Gazette* 22321 of 1 June, 2001 with effect from 1 June, 2001; under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001; under General Notice No. 683 in *Government Gazette* 23407 of 17 May, 2002 with effect from 17 May, 2002; under General Notice No. 1283 in *Government Gazette* 23619 of 19 July, 2002 with effect from 19 July, 2002; under Government Notice No.1396 in *Government Gazette* 24042 of 15 November, 2002 with effect from 15 November, 2002; under General Notice No. 1261 in *Government Gazette* 24731 of 17 April, 2003 with effect from 17 April, 2003; under General Notice No. 3366 in *Government Gazette* 25778 of 5 December, 2003 with effect from 5 December, 2003; under General Notice No. 1139 in *Government Gazette* 26477 of 25 June, 2004 with effect from 25 June, 2004; under General Notice No. 765 in *Government Gazette* 27599 of 27 May, 2005 with effect from 27 May, 2005, under General Notices Nos. 1266, 1267 and 1270 in *Government*

Gazette 28237 of 25 November, 2005 with effect from 25 November, 2005, under General Notices Nos. 462 and 476 in *Government Gazette* 28679 of 7 April, 2006 with effect from 7 April, 2006, under General Notice No. 1290 in *Government Gazette* 28937 of 23 June, 2006 with effect from 23 June, 2006, under General Notice No. 1475 in *Government Gazette* 29293 of 20 October, 2006 with effect from 20 October, 2006, under Government Notice No. 7 in *Government Gazette* 30637 of 4 January, 2008 with effect from 4 January, 2008, under Government Notice No. 1001 in *Government Gazette* 31417 of 19 September, 2008 with effect from 19 September, 2008, under Government Notice No. 1003 in *Government Gazette* 31417 of 19 September, 2008 with effect from 19 September, 2008, under Government Notice Nos. 309 and 310 in *Government Gazette* 32013 of 20 March, 2009 with effect from 20 March 2009, under Government Notice No. 241 in *Government Gazette* 33059 of 1 April, 2010 with effect from 1 April, 2010, under Government Notices Nos. 1247, 1248 and 1249 in *Government Gazette* 33900 of 31 December, 2010, with effect from 1 April, 2004, 1 July 2010 and 8 June 2010 respectively, under Government Notice No. 364 in *Government Gazette* 34233 of 29 April, 2011 with effect retrospectively from 1 April, 2010, under Government Notice No. 798 in *Government Gazette* 34631 of 30 September, 2011, under Government Notice No. 822 in *Government Gazette* 35759 of 12 October, 2012, with effect from 14 November, 2007, under Government Notice No. 188 in *Government Gazette* 36225 of 15 March, 2013 with effect retrospectively from 1 December, 2012, under Government Notice Nos. 189 and 191 in *Government Gazette* 36225 of 15 March, 2013 with effect from 15 March, 2013, under Government Notice No. 391 in *Government Gazette* 37653 of 23 May, 2014, under Government Notice Nos. 394 and 395 in *Government Gazette* 37653 of 23 May, 2014 with effect from 1 April, 2014, under Government Notice No. 355 in *Government Gazette* 38735 of 30 April, 2015 with effect from 1 April, 2013, under Government Notice No. 356 in *Government Gazette* 38735 of 30 April, 2015 with effect from 31 March, 2015, under Government Notice No. 523 in *Government Gazette* 39985 of 13 May, 2016 with effect from 13 May, 2016, under Government Notice Nos. 160 and 162 in *Government Gazette* 40637 of 24 February, 2017 with effect from 24 February, 2017, under Government Notice No. 165 in *Government Gazette* 40637 of 24 February, 2017 with effect from 7 April, 2006 and under Government Notice No. 388 in *Government Gazette* 41534 of 29 March, 2018 w.e.f. 29 March, 2018.]

Commissioner for the Environment

["Commissioner for the Environment" added by GN 765 in GG 27599 of 27 May, 2005 (Editorial Note: No Province indicated).]

. . . . . .

["Destination Marketing Organisation" previously "Destinations Marketing Organisation" added by GN 7 in GG 30637 of 4 January, 2008, amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014 (Editorial Note: No Province indicated).]

Dube TradePort Corporation (DTPC)

["Dube TradePort Corporation (DTPC)" added and classified by GN 798 in GG 34631 of 30 September, 2011 w.e.f from 1 April 2011 (Editorial Note: No Province indicated).]

Royal Household Trust

["Royal Household Trust" added and classified by GN 822 in GG 35759 of 12 October, 2012 w.e.f 14 November, 2007 (Editorial Note: No Province indicated).]

XHASA ATC Agency

["XHASA ATC Agency" added and classified by GN 1001 in GG 31417 of 19 September, 2008 (Editorial Note: No Province indicated).]

Eastern Cape:

. . . . . .

["Centre for Investment and Marketing in the Eastern Cape" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Eastern Cape Appropriate Technology Unit" deleted by GN 356 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015 (Editorial Note: GN 356 in GG 38735 made reference to "Eastern Cape Appropriate Technology Unit (ECATU)". We suggest "Eastern Cape Appropriate Technology Unit" was intended).]

Eastern Cape Provincial Arts and Culture Council

["Eastern Cape Provincial Arts and Culture Council", previously "Eastern Cape Arts Council" amended by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Eastern Cape Consumer Affairs Court" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Eastern Cape Development Corporation" moved from Schedule 3C to Schedule 3D.]

. . . . . .

["Eastern Cape Development Tribunal" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

Eastern Cape Gambling and Betting Board

Eastern Cape Liquor Board

. . . . . .

["Eastern Cape Local Road Transport Board" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Eastern Cape Museums" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Eastern Cape Parks and Tourism Agency (ECPTA)

["Eastern Cape Parks and Tourism Agency (ECPTA)" added by GN 1248 in GG 33900 of 31 December, 2010 with effect from 1 July, 2010.]

. . . . . .

["Eastern Cape Parks Board" added by GN 1270 in GG 28237 of 25 November, 2005 and deleted by GN 1249 in GG 33900 of 31 December, 2010.]

. . . . . .

["Eastern Cape Provincial Housing Board" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Eastern Cape Provincially Aided Libraries

. . . . . .

["Eastern Cape Regional Authorities" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Eastern Cape Rural Development Agency

["Eastern Cape Rural Finance Corporation Limited" previously "Eastern Cape Agricultural Bank" amended by GN 1283 in GG 23619 of 19 July, 2002.]

["Eastern Cape Rural Development Agency" previously "Eastern Cape Rural Finance Corporation Limited" amended by GN 191 in GG 36225 of 15 March, 2013 with effect from 15 March, 2013.]

Eastern Cape Socio-Economic Consultative Council

. . . . . .

["Eastern Cape Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Eastern Cape Tourism Board" deleted by GN 1249 in GG 33900 of 31 December, 2010.]

. . . . . .

["Eastern Cape Township Board" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Eastern Cape Youth Commission" added by GN 1261 in GG 24731 of 17 April, 2003 and deleted by GN 523 in GG 39985 of 13 May, 2016.]

. . . . . .

["East London Industrial Development Zone Corporation" added by GN 3366 in GG 25778 of 5 December, 2003 moved from Schedule 3C to Schedule 3D by GN 1267 in GG 28237 of 25 November, 2005.]

Free State:

. . . . . .

["Free State Consumer Affairs" added by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 462 in GG 28679 of 7 April, 2006.]

. . . . . .

["Free State Council for Citizenship, Education and Conflict Resolution" added by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Free State Gambling, Liquor and Tourism Authority

["Free State Gambling, Liquor and Tourism Authority", previosuly "Free State Gambling and Liquor Authority (FSGLA)" added by GN 1248 in GG 33900 of 31 December, 2010 with effect from 8 June, 2010 and amended by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Free State Gambling and Racing Board" previously "Free State Gambling and Gaming Board" amended by GN 765 in GG 27599 of 27 May, 2005 and deleted by GN 1249 in GG 33900 of 31 December, 2010.]

. . . . . .

["Free State Investment Agency" added by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 462 in GG 28679 of 7 April, 2006.]

. . . . . .

["Free State Investment Promotion Agency" added and classified by GN 310 in GG 32013 of 20 March, 2009 and deleted by GN 356 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015.]

. . . . . .

["Free State Liquor Board" deleted by GN 462 in GG 28679 of 7 April, 2006.]

. . . . . .

["Free State Mangaung Nursing College" added by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 462 in GG 28679 of 7 April, 2006.]

. . . . . .

["Free State Rural Foundation" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Free State Rural Strategy Unit" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Free State Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Free State Tourism Authority" added by GN 797 in GG 28937 of 23 June, 2006 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Free State Tourism Board" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

. . . . . .

["Free State Youth Commission" deleted by GN 241 in GG 33059 of 1 April, 2010.]

. . . . . .

["Phakisa Major Sport and Development Corporation" added by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 356 in GG 38735 of 30 April, 2015 w.e.f 31 March, 2015.]

Gauteng:

. . . . . .

["Gauteng Agriculture and Farming Development Trust" added by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 1475 in GG 29293 of 20 October, 2006 (Editorial Note: GN 1475 in GG 29293 made reference to "Gauteng Agriculture and Farming Trust". We suggest "Gauteng Agriculture and Farming Development Trust" was intended).]

. . . . . .

["Gauteng Consumer Affairs Court" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Gauteng Development Tribunal" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Gauteng Economic Development Agency" deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014.]

. . . . . .

["Gauteng Education and Training Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Gauteng Enterprise Propeller

["Gauteng Enterprise Propeller" added and classified by GN 1001 in GG 31417 of 19 September, 2008.]

Gauteng Gambling Board

. . . . . .

["Gauteng Housing Fund" previously "Gauteng Provincial Housing Board" amended by GN 2302 in GG 22860 of 30 November, 2001 and deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Gauteng Growth and Development Agency (GGDA)

["Gauteng Growth and Development Agency (GGDA)" previously "Blue IQ Investment Holdings (Pty) Ltd" added by

GN 1139 in GG 26477 of 25 June, 2004 and amended by GN 391 in GG 37653 of 23 May, 2014.]

. . . . . .

["Gauteng Municipal Demarcation Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Gauteng Partnership Fund (GPF)

["Gauteng Partnership Fund (GPF)" added by GN 1266 in GG 28237 of 25 November, 2005.]

. . . . . .

["Gauteng Rental Housing Tribunal" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["Gauteng Services Appeal Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Gauteng Tourism Authority

. . . . . .

["Gauteng Townships Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Gautrain Management Agency

["Gautrain Management Agency" added by GN 1001 in GG 31417 of 19 September, 2008.]

KwaZulu-Natal:

Amafa Akwazulu Natali

["Amafa Akwazulu Natali" previously "KwaZulu-Natal Monuments Council" amended by GN 1261 in GG 24731 of 17 April, 2003.]

Ezemvelo KwaZulu-Natal Wildlife

["Ezemvelo KwaZulu-Natal Wildlife" previously "KwaZulu-Natal Conservation Services" amended by GN 1261 in GG 24731 of 17 April, 2003.]

Agri-Business Development Agency

["Agri-Business Development Agency" previously "KwaZulu-Natal Agricultural Development Trust" added by GN 1139 in GG 26477 of 25 June, 2004 and amended by GN 1247 in GG 33900 of 31 December, 2010.]

. . . . . .

["KwaZulu-Natal Appeals Tribunal" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Development Tribunal" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Economic Council" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

KwaZulu-Natal Film Commission

["KwaZulu-Natal Film Commission" added and classified by GN 355 in GG 38735 of 30 April, 2015 w.e.f 1 April, 2013.]

. . . . . .

["KwaZulu-Natal Gambling Board" deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014.]

KwaZulu-Natal Gaming and Betting Board

["KwaZulu-Natal Gaming and Betting Board" added and classified by GN 798 in GG 34631 of 30 September, 2011 w.e.f 1 April, 2011.]

KwaZulu-Natal House of Traditional Leaders

. . . . . .

["KwaZulu-Natal International Airport Development Initiative" deleted by GN 1261 in GG 24731 of 17 April 2003.]

KwaZulu-Natal Liquor Authority

["KwaZulu-Natal Liquor Authority" added and classified by GN 189 in GG 36225 of 15 March, 2013 w.e.f 15 March, 2013.]

. . . . . .

["KwaZulu-Natal Liquor Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Local Roads Transportation Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["KwaZulu-Natal Marketing Initiative" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Private Townships Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Provincial Peace Committee" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

KwaZulu-Natal Provincial Planning and Development Commission

["KwaZulu-Natal Provincial Planning and Development Commission" previously "KwaZulu-Natal Town and Regional Planning Commission" amended by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Kwazulu-Natal Taxi Council" re-listed by GN 1396 in GG 24042 of 15 November, 2002 and deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["KwaZulu-Natal Taxi Task Team" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["KwaZulu-Natal Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

KwaZulu-Natal Tourism Authority

. . . . . .

["KwaZulu-Natal Townships Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["KwaZulu-Natal Youth Commission" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Natal Arts Trust" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

Natal Sharks Board

. . . . . .

["Natal Trust Fund" deleted by GN 3366 in GG 25778 of 5 December, 2003.]

. . . . . .

["S.A. Life Saving" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Trade and Investment KwaZulu-Natal

["Trade and Investment KwaZulu-Natal" added and classified by GN 798 in GG 34631 of 30 September, 2011 w.e.f 1 April, 2011.]

. . . . . .

["uMsekeli Municipal Support Services" previously "KwaZulu-Natal Development & Services Board" amended by GN 2302 in GG 22860 of 30 November, 2001 and deleted by GN 160 in GG 40637 of 24 February, 2017.]

Mpumalanga:

. . . . . .

(Editorial Note: "Mpumalanga Agricultural Development Corporation" deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014. Please note that this entity did not previously exist in Schedule 3, Part C, instead it was added to Schedule 3, Part D by GN 1283 in GG 23619 of 19 July, 2002.)

Mpumalanga Economic Empowerment Corporation

["Mpumalanga Economic Empowerment Corporation" added by GN 683 in GG 23407 of 17 May, 2002.]

. . . . . .

[Mpumalanga Gaming Board previously "Mpumalanga Gambing Board" added by GN 683 in GG 23407 of 17 May, 2002, amended by GN 1283 in GG 23619 of 19 July, 2002.]

["Mpumalanga Gambling Board" previously "Mpumalanga Gaming Board" deleted by GN 1001 in GG 31417 of 19

(Editorial Note: Please note that GN 1001 in GG 31417 of 19 September, 2008 removes the entity "Mpumalanga Gambling Board" from this list. However, the name of this entity prior to removal is "Mpumalanga Gaming Board". This entity is later corrected, after removal from the list, to "Mpumalanga Gambling Board" by GN 309 in GG 32013 of 20 March, 2009.)

. . . . . .

["Mpumalanga Housing Board" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

(Editorial Note: "Mpumalanga Housing Finance Company" deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014. Please note that this entity did not previously exist in Schedule 3, Part C, instead it was added to Schedule 3, Part D by GN 1283 in GG 23619 of 19 July, 2002.)

. . . . . .

["Mpumalanga Investment Initiative" added by GN 1397 in GG 22321 of 1 June, 2001 and by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Mpumalanga Liquor Authority" added and classified by GN 355 in GG 38735 of 30 April, 2015 w.e.f 1 April, 2012 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Mpumalanga Parks Board" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Mpumalanga Regional Training Trust

["Mpumalanga Regional Training Trust" added by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Mpumalanga Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Mpumalanga Tourism and Parks Board

["Mpumalanga Tourism and Parks Board" added and classified by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Mpumalanga Tourism Authority" added by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 1001 in GG 31417 of 19 September, 2008.]

Northern Cape:

Kalahari Kid Corporation (KKC)

["Kalahari Kid Corporation (KKC)" added by GN 1248 in GG 33900 of 31 December, 2010 with effect from 1 April, 2004.]

McGregor Museum (Kimberley)

["McGregor Museum (Kimberley)" added and classified by GN 394 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014.]

Northern Cape Economic Development, Trade and Investment Promotion Agency (NCEDA)

["Northern Cape Economic Development, Trade and Investment Promotion Agency (NCEDA)" added by GN 364 in GG 34233 of 29 April, 2011 with effect retrospectively from 1 April, 2010.]

. . . . . .

["Northern Cape Economic Development Unit" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Northern Cape Gambling and Racing Board" previously "Northern Cape Gambling Board" amended by GN 683 in GG 23407 of 17 May, 2002 and deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Northern Cape Gambling Board

["Northern Cape Gambling Board" added and classified by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["Northern Cape Housing Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Northern Cape Liquor Board

["Northern Cape Liquor Board" deleted by GN 1261 in GG 24731 of 17 April, 2003 and re-added and classified by

. . . . . .

["Northern Cape Local Transportation Board" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

. . . . . .

["Northern Cape Provincial Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Northern Cape Tourism Authority

. . . . . .

["Northern Cape Youth Commission" deleted by GN 1139 in GG 26477 of 25 June, 2004.]

Northern Province:

. . . . . .

["Gateway International Airport" deleted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Limpopo Agribusiness Development Corporation" added and classified by GN 798 in GG 34631 of 30 September, 2011 w.e.f 1 April, 2009 and deleted by GN 188 in GG 36225 of 15 March, 2013 with effect retrospectively from 1 December, 2012.]

. . . . . .

["Limpopo Appeal Tribunals" previously "Northern Province Appeal Tribunals" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Limpopo Development Enterprise" inserted by GN 476 in GG 28679 of 7 April, 2006 and deleted by GN 165 in GG 40637 of 24 February, 2017 with effect from 7 April, 2006.]

. . . . . .

["Limpopo Development Tribunals" previously "Northern Province Development Tribunals" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

(Editorial Note: We have been instructed by GN 191 in GG 36225, to change the entity "Limpopo Economic Development Enterprise (LimDev)" to "Limpopo Economic Development Agency (Leda)", however this entity does not exist in the Act.)

Limpopo Gambling Board

["Limpopo Gambling Board" inserted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Limpopo Housing Board" previously "Northern Province Housing Board" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

Limpopo Liquor Board

["Limpopo Liquor Board" previously "Northern Province Liquor Board" amended by GN 1003 in GG 31417 of 19 September, 2008.]

. . . . . .

["Limpopo Local Business Centres" previously "Northern Province Local Business Centres" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Limpopo Panel of Mediators" previously "Northern Province Panel of Mediators" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

. . . . . .

["Limpopo Planning Commission" previously "Northern Province Planning Commission" amended by GN 1003 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

Limpopo Roads Agency

["Limpopo Roads Agency" previously "Northern Province Roads Agency" added by GN 402 in GG 22047 of 16 February, 2001 and amended by GN 1003 in GG 31417 of 19 September, 2008.]

Limpopo Tourism and Parks Board

["Limpopo Tourism and Parks Board" inserted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Northern Province Agricultural and Rural Development Corporation" deleted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Northern Province Gaming Board" deleted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Northern Province Investment Initiative" deleted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Northern Province Provincial Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["Northern Province Tourism Board" deleted by GN 476 in GG 28679 of 7 April, 2006.]

. . . . . .

["Trade and Investment Limpopo" inserted by GN 476 in GG 28679 of 7 April, 2006 and deleted by GN 188 in GG 36225 of 15 March, 2013 with effect retrospectively from 1 December, 2012.]

North West:

. . . . . .

["Eastern Region Entrepreneurial Support Centre" added by GN 1283 in GG 23619 of 19 July, 2002, deleted by GN 1001 in GG 31417 of 19 September, 2008 and by GN 160 in GG 40637 of 24 February, 2017.]

. . . . . .

["Invest North West" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 160 in GG 40637 of 24 February, 2017.]

Mmabana Arts, Culture and Sport Foundation

["Mmabana Arts, Culture and Sport Foundation" previously "NW Arts Council" and "NW Mmabana Cultural Foundation" amended by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["NW Agricultural Services Corporation" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

. . . . . .

["NW Arts Council" renamed by GN 1283 in GG 23619 of 19 July, 2002.]

NW Parks Board

["NW Parks Board" added and classified by GN 162 in GG 40637 of 24 February, 2017.]

. . . . . .

["NW Communication Service" deleted by GN 1001 in GG 31417 of 19 September, 2008.]

NW Gambling Board

NW Housing Corporation

. . . . . .

["NW Mmabana Cultural Foundation" renamed by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["NW Ombudsman" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["NW Parks and Tourism Board" deleted by GN 160 in GG 40637 of 24 February, 2017.]

. . . . . .

["NW Provincial Aids Council" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 160 in GG 40637 of 24 February, 2017.]

. . . . . .

["North West Provincial Heritage Resources Authority" added and classified by GN 1001 in GG 31417 of 19 September, 2008 and deleted by GN 388 in GG 41534 of 29 March, 2018.]

NW Tourism Board

["NW Tourism Board" added and classified by GN 162 in GG 40637 of 24 February, 2017.]

Provincial Arts and Culture Council

["Provincial Arts and Culture Council" added by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["NW Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

. . . . . .

["NW Youth Development Trust" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 160 in GG 40637 of 24 February, 2017.]

Western Cape:

Western Cape Cultural Commission

["Western Cape Cultural Commission" added by GN 1397 in GG 22321 of 1 June, 2001.]

WC Gambling and Racing Board

. . . . . .

["WC Housing Development Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Western Cape Language Committee

["Western Cape Language Committee" added by GN 1397 in GG 22321 of 1 June, 2001.]

Western Cape Nature Conservation Board

["Western Cape Nature Conservation Board" added by GN 402 in GG 22047 of 16 February, 2001.]

Western Cape Liquor Authority

["Western Cape Liquor Authority" previously "WC Liquor Board" amended by GN 191 in GG 36225 of 15 March, 2013 with effect from 15 March, 2013.]

. . . . . .

["WC Provincial Development Council" deleted by GN 523 in GG 39985 of 13 May, 2016.]

. . . . . .

["WC Provincial Tender Board" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Western Cape Tourism, Trade and Investment Promotion Agency

["Western Cape Tourism, Trade and Investment Promotion Agency", previously "WC Investment and Trade Promotion Agency", amended by GN 391 in GG 37653 of 23 May, 2014.]

. . . . . .

["WC Tourism Board" deleted by GN 7 in GG 30637 of 4 January, 2008.]

. . . . . .

["Western Cape Provincial Youth Commission" added by GN 765 in GG 27599 of 27 May, 2005 and deleted by GN 241 in GG 33059 of 1 April, 2010.]

Any subsidiary or entity under the ownership control of the above public entities

Part D: Provincial Government Business Enterprises

[Part D added by s. 45 of Act No. 29 of 1999.]

[General Note: Amended public entities have been published under General Notice No. 402 in *Government Gazette* 22047 of 16 February, 2001 with effect from 1 April, 2001; under General Notice No. 1863 in *Government Gazette* 22577 of 24 August, 2001 with effect from 24 August, 2001; under General Notice No. 2302 in *Government Gazette* 22860 of 30 November, 2001 with effect from 30 November, 2001. Authorisation of public entities have been published under General Notice No. 318 in *Government Gazette* 23204 of 7 March, 2002. Amended public entities have been published under General Notice No. 1283 in *Government Gazette* 23619 of 19 July, 2002 with effect from 19 July, 2002; under General Notice No. 1315 in *Government Gazette* 23661 of 2 August, 2002 with effect from 2 August, 2002; under Government Notice No.1396 in *Government Gazette* 24042 of 15 November, 2002 with effect from 15 November, 2002; under General Notice No. 1261 in *Government Gazette* 24731 of 17 April, 2003 with effect from 17 April, 2003; under General Notice No. 1139 in *Government Gazette* 26477 of 25 June, 2004 with effect from 25 June, 2004, under General Notice No. 1267 in *Government Gazette* 28237 of 25 November, 2005 with effect from 25 November, 2005, under General Notice No. 476 in *Government Gazette* 28679 of 7 April, 2006, under General Notice No. 1002 in *Government Gazette* 31417 of 19 September, 2008 with effect from 19 September, 2008, under General Notice No. 799 in *Government Gazette* 34631 of 30 September, 2011 with effect retrospectively from 1 April,

2000, under Government Notice No. 823 in *Government Gazette* 35759 of 12 October, 2012, with effect from 1 April 2012, under General Notice No. 395 in *Government Gazette* 37653 of 23 May, 2014 with effect from 1 April, 2014, under Government Notice No. 524 in *Government Gazette* 39985 of 13 May, 2016 with effect from 13 May, 2016, under Government Notice No. 163 in *Government Gazette* 40637 of 24 February, 2017 with effect from 24 February, 2017, under Government Notice No. 165 in *Government Gazette* 40637 of 24 February, 2017 with effect from 15 March, 2013 and under Government Notice No. 388 in *Government Gazette* 41534 of 29 March, 2018 w.e.f. 29 March, 2018.]

Entity:

. . . . . .

["Algoa Bus Company" deleted by GN 1283 in GG 23619 of 19 July, 2002.]

Casidra (Pty) Ltd

["Casidra (Pty) Ltd" previously "Lanok (Pty) Ltd" amended by GN 1261 in GG 24731 of 17 April, 2003.]

Cowslip Investments (Pty) Ltd

["Cowslip Investment (Pty) Ltd" previously "Cowslip (Pty) Ltd" amended by GN 1315 in GG 23661 of 2 August, 2002.]

["Cowslip Investments (Pty) Ltd" previously "Cowslip Investment (Pty) Ltd" amended by GN 1396 in GG 24042 of 15 November, 2002.]

Eastern Cape Development Corporation

["Eastern Cape Development Corporation" moved from Schedule 3C to Schedule 3D.]

East London Industrial Development Zone

["East London Industrial Development Zone " previously "East London Industrial Development Zone Corporation" added by GN 1267 in GG 28237 of 25 November, 2005 and amended by GN 524 in GG 39985 of 13 May, 2016.]

. . . . . .

["Free State Agri-Eco (Pty) Ltd" deleted by GN 1396 in GG 24042 of 15 November, 2002.]

Free State Development Corporation

Gateway Airport Authority Limited

["Gateway Airport Authority Limited" inserted by GN 476 in GG 28679 of 7 April, 2006.]

Ithala Development Finance Corporation

["Ithala Finance Corporation" previously "KwaZulu-Natal Finance & Investment Corporation" amended by GN 1863 in GG 22577 of 24 August, 2001.]

["Ithala Development Finance Corporation" previously "Ithala Finance Corporation" amended by GN 2302 in GG 22860 of 30 November, 2001.]

. . . . . .

["KwaZulu Transport Corporation Ltd" added by GN 402 in GG 22047 of 16 February, 2001 and deleted by GN 1139 in GG 26477 of 25 June, 2004.]

. . . . . .

["Mafikeng Industrial Development Zone (Pty) Ltd" added and classified by GN 1002 in GG 31417 of 19 September, 2008 and deleted by GN 160 in GG 40637 of 24 February, 2017.]

Mayibuye Transport Corporation

Mjindi Farming (Pty) Ltd

["Mjindi Farming (Pty) Ltd" deleted from Schedule 3B and moved to Schedule 3D by GN 1863 in GG 22577 of 24 August, 2001.]

Mpendle Ntambanana Agricultural Company (Pty) Ltd

["Mpendle Ntambanana Agricultural Company (Pty) Ltd" deleted from Schedule 3B and moved to Schedule 3D by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Mpumalanga Agricultural Development Corporation" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014 (Editorial Note: Please note that GN 395 of 23 May, 2014 instructs that this entity be removed from Schedule 3, Part C. It is suggested that Schedule 3, Part D was in fact meant).]

. . . . . .

["Mpumalanga Development Corporation" deleted by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Mpumalanga Economic Empowerment Corporation" previously "Mpumalanga Finance Corporation" and "Mpumalanga Development Corporation" re-listed by GN 1863 in GG 22577 of 24 August, 2001 and deleted by GN 1002 in GG 31417 of 19 September, 2008.]

Mpumalanga Economic Growth Agency

["Mpumalanga Economic Growth Agency" added and classified by GN 1002 in GG 31417 of 19 September, 2008.]

Mpumalanga Economic Regulator

["Mpumalanga Economic Regulator" added by GN 388 in GG 41534 of 29 March, 2018. (Ediorial note: The instruction in GN 388 of 2018 states that "Mpumalanga Economic Regulator" should be inserted under "Mpumalanga Economic Growth Agency" in Part C, however, we suggest that the instruction was intended to be read as Part D.)]

. . . . . .

["Mpumalanga Finance Corporation" deleted by GN 1863 in GG 22577 of 24 August, 2001.]

. . . . . .

["Mpumalanga Housing Finance Company" added by GN 1283 in GG 23619 of 19 July, 2002 and deleted by GN 395 in GG 37653 of 23 May, 2014 w.e.f 1 April, 2014 (Editorial Note: Please note that GN 395 of 23 May, 2014 instructs that this entity be removed from Schedule 3, Part C. It is suggested that Schedule 3, Part D was in fact meant).]

. . . . . .

["Natal Trust Farms (Pty) Ltd" deleted by GN 1261 in GG 24731 of 17 April, 2003.]

Limpopo Economic Development Agency

["Limpopo Economic Development Agency" previously "Northern Province Development Corporation" and "Limpopo Development Enterprise" replaced by GN 165 in GG 40637 of 24 February, 2017 with effect from 7 April, 2006 and by GN 165 in GG 40637 of 24 February, 2017 with effect from 15 March, 2013.]

Northwest Transport Investments (Pty) Ltd

["Northwest Transport Investments (Pty) Ltd" added and classified by GN 799 in GG 34631 of 30 September, 2011.]

North West Youth Entrepreneurship Services Fund

["North West Youth Entrepreneurship Services Fund" added by GN 388 in GG 41534 of 29 March, 2018. (Ediorial note: The instruction in GN 388 of 2018 states that "North West Youth Entrepreneurship Services Fund" should be inserted under "Northwest Transport Investments (Pty) Ltd" in Part C, however, we suggest that the instruction was intended to be read as Part D.)]

NW Development Corporation

Richards Bay Industrial Development Zone Company

["Richards Bay Industrial Development Zone Company", previously "Richards Bay Industrial Development Zone" added and classified by GN 823 in GG 35759 of 12 October, 2012 with effect from 1 April, 2012 and amended by GN 388 in GG 41534 of 29 March, 2018.]

Saldanha Bay IDZ Licencing Company SOC Ltd

["Saldanha Bay IDZ Licencing Company SOC Ltd" added and classified by GN 163 in GG 40637 of 24 February, 2017.]

Any subsidiary or entity under the ownership control of the above public entities

Schedule 4

EXCLUSIONS FROM REVENUE FUNDS

(In terms of section 13 (1) or 22 (1))

[Heading substituted by s. 46 of Act No. 29 of 1999.]

1. SA Schools Act (covering school fees)
2. Fines and estreated bails paid in respect of offences and alleged offences in terms of—
   (*a*) by-laws enacted by municipalities; or
   (*b*) national or provincial legislation, the administration of which is assigned to municipalities.

[Item 2 added by s. 121 of Act No. 32 of 2000.]

Schedule 5

DIRECT CHARGES AGAINST NATIONAL REVENUE FUND

Payments in terms of the following Acts:

1. Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998) (Covering the President's salary and the salaries of members of Parliament sections 2 (7) and 3 (7));

2. Remuneration and Allowances of Deputy Presidents, Ministers and Deputy Ministers Act, 1994 (Act 53 of 1994) (Covering the salary of the Deputy President section 4 (a));

3. Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989) (Covering salaries and allowances of Judges and Judges seconded to governments of other countries in terms of section 2).

4. Magistrates Act, 1993 (Act No. 90 of 1993) (covering remuneration of magistrates in terms of section 12).
[Item 4 added by s. 13 of Act No. 28 of 2003.]

Schedule 6
REPEAL OF LEGISLATION

(Section 94)

No. and year of Act	*Short title*	*Extent of repeal*
(*a*) Act No. 66 of 1975	Exchequer Act, 1975	The whole, except sections 28, 29, 30
 Act No. 106 of 1976	Financial Arrangements with the Transkei Act, 1976	The whole
Act No. 93 of 1977	Financial Arrangements with Bophuthatswana Act, 1977	The whole
Act No. 105 of 1979	Financial Arrangements with Venda Act, 1979	The whole
Proclamation No. R.85 of 1968	South West Africa Constitution Act, 1968 (Act No. 39 of 1968)	Part 3
Act No. 67 of 1980	Railways and Harbours Acts Amendment Act, 1980	Section 19
Act No. 29 of 1981	Railways and Harbours Acts Amendment Act 1981	Section 21
Act No. 118 of 1981	Financial Arrangements with Ciskei Act, 1981	The whole
Act No. 100 of 1984	Exchequer and Audit Amendment Act, 1984	The whole
Act No. 9 of 1989	Legal Succession of the South African Transport Services Act, 1989	Schedule 2 Part 6 of the Act insofar as it relates to the Exchequer Act, 1975
Act No. 120 of 1991	Finance Act, 1991	Sections 14, 15 and 16
 Act No. 96 of 1992	Part Appropriation Acts Abolition Act, 1992	The whole
Act No. 69 of 1993	Exchequer Amendment Act, 1993	The whole
Act No. 123 of 1993	Finance Act, 1993	The whole
Act No. 142 of 1993	Exchequer Second Amendment Act, 1993	The whole
Act No. 182 of 1993	Exchequer Third Amendment Act, 1993	The whole
Act No. 41 of 1994	Finance Act, 1994	Sections 17 and 18
(*b*) Act No. 93 of 1992	Reporting by Public Entities Act, 1992	The whole
(*c*) Act No. 66 of 1975	Exchequer and Audit Act, 1975	The whole insofar as it is in force in the area of the former Republic of Transkei
Act No. 102 of 1976	Finance Act, 1976	Sections 23, 24 and 25 insofar as it is in force in the area of the former Republic of Transkei
(*d*) Act No. 29 of 1992 (Bophuthatswana)	Exchequer Act, 1992	The whole
Act No. 16 of 1993 (Bophuthatswana)	Exchequer Amendment Act, 1993	The whole

(*e*) Act No. 66 of 1975	Exchequer and Audit Act, 1975	The whole insofar as it is in force in the area of the former Republic of Venda
Act No. 111 of 1977	Finance Act, 1977	Sections 9, 10 and 11 insofar as it is in force in the area of the former Republic of Venda
Act No. 94 of 1978	Finance Act, 1978	Sections 12, 13 and 14 insofar as it is in force in the area of the former Republic of Venda
Proclamation No. R.85 of 1979	Exchequer and Audit Proclamation	Sections 16 and 17 insofar as it is in force in the area of the former Republic of Venda
Act No. 21 of 1983 (Venda)	Exchequer and Audit Amendment Act, 1983	The whole
Act No. 18 of 1987 (Venda)	Exchequer and Audit Amendment Act, 1987	The whole
Act No. 28 of 1989 (Venda)	Exchequer and Audit Amendment Act, 1989	The whole
Proclamation No. 25 of 1993 (Venda)	Exchequer and Audit Amendment Act, 1993	The whole
(*f*) Act No. 28 of 1985 (Ciskei)	Exchequer and Audit Act, 1985	The whole

SECRET SERVICES ACT 56 OF 1978

(Previous short title, 'Secret Services Account Act', substituted by s. 5 of Act 142 of 1992)

[ASSENTED TO 26 APRIL 1978] [DATE OF COMMENCEMENT: 1 APRIL 1978]

(Afrikaans text signed by the State President)

as amended by

Finance Act 101 of 1979
Information Service of South Africa Special Account Act 108 of 1979
South African Police Special Account Act 74 of 1985
Secret Services Account Amendment Act 142 of 1992
Secret Services Amendment Act 5 of 1993
Intelligence Services Act 38 of 1994

ACT

To provide for the establishment of an account for secret services, for the evaluation of and control over secret services and for matters connected therewith.

[Long title substituted by s. 6 of Act 142 of 1992.]

1 Definitions

In this Act, unless the context otherwise indicates-

'account' means the Secret Services Account established by section 1A;

'chairman' means the chairman of the committee designated in terms of section 3A (1) or 5 *(b)*;

'committee' means the Secret Services Evaluation Committee established by section 3A (1);

'member' means a member of the committee appointed in terms of section 3A (1) or 5 *(a)*;

'recommendation' means a recommendation referred to in section 3A (6) by the committee;

'responsible Executive Deputy President or Minister', in relation to any matter referred to in this Act, means the Executive Deputy President or Minister responsible for the Department of State under which that matter falls;

[Definition of 'responsible Executive Deputy President or Minister', formerly definition of 'responsible Minister', substituted by s. 32 (1) of Act 38 of 1994.]

'secret service' means that part of the functions of a Department of State which, in the opinion of the President or the responsible Executive Deputy President or Minister, is of such a nature that it is in the national interest that the performance thereof is not directly or indirectly made known, and which is funded from the account under section 2 (3).

[Definition of 'secret service' amended by s. 32 (1) of Act 38 of 1994.]

[S. 1 substituted by s. 1 of Act 142 of 1992.]

1A Establishment of Secret Services Account

There is hereby established an account to be known as the Secret Services Account, which shall be credited with the moneys appropriated by Parliament for the account.

[S. 1A inserted by s. 1 of Act 142 of 1992.]

2 Administration of, and utilization of moneys in, account

(1) The Director-General: State Expenditure shall, subject to the provisions of this Act, be responsible for the administration of the account: Provided that the accounting officer of a Department of State to which any moneys have been made available under subsection (3), shall be accountable for the moneys so made available.

(2) *(a)* The Minister of State Expenditure may at the request of the President or the responsible Executive Deputy President or Minister transfer so much money as may be agreed upon between them from the account to the Security Services Special Account established by section 1 of the Security Services Special Account Act, 1969 (Act 81 of 1969).

[Para. *(a)* amended by s. 32 (1) of Act 38 of 1994.]

(b) Any moneys so transferred shall be deemed to have been appropriated by Parliament for the account in question and shall be utilized as contemplated in section 2 of the Security Services Special Account Act, 1969.

(3) *(a)* The Minister of State Expenditure may, at the request of any other Minister, and in such manner and subject to such conditions as he may after consultation with such other Minister determine, make available to a Department of State for which such other Minister is responsible, moneys in the account for utilization for secret services.

(b) Subject to the provisions of sections 3A (8) or (9) and 3B, any moneys so made available shall be utilized for secret services and for expenses in connection therewith.

[S. 2 amended by s. 10 of Act 108 of 1979 and by s. 6 of Act 74 of 1985 and substituted by s. 2 of Act 142 of 1992.]

2A Transfer of unexpended balances in account

Notwithstanding anything to the contrary in any law contained, unexpended balances in the account at the end of a financial year shall be transferred as a credit in the account to the following financial year.

[S. 2A inserted by s. 3 of Act 142 of 1992.]

3 Audit

The account as well as the accounts kept in respect of moneys transferred to a Department of State in terms of section 2 (3), shall be audited by the Auditor-General.

[S. 3 substituted by s. 20 of Act 101 of 1979.]

3A Establishment and functions of Secret Services Evaluation Committee

(1) There is hereby established a committee to be known as the Secret Services Evaluation Committee consisting of not less than three but not more than five persons appointed by the State President, of whom one shall be designated by him as the chairman, and of whom at least one shall not be a holder of office in the Executive Authority of the Republic and shall be appointed after consultation with the leaders of the opposition parties in Parliament.

[Sub-s. (1) substituted by s. 1 of Act 5 of 1993.]

(2) A member of the committee-

(a) shall remain in office at the State President's pleasure, but may resign by notice in writing to the State President; and

(b) may receive such remuneration and allowances (if any) as the State President may determine.

(3) The committee shall-

(a) meet at such time and place; and

(b) follow such procedure,

as the chairman may determine.

(4) The work associated with the functions of the committee shall be performed by an officer or officers in the Public Service designated by the State President for that purpose.

(5) The State President may-

(a) appoint a person to act in the place of a member of the committee; or

(b) designate a member to act in the place of the chairman,

for such period as the State President may determine.

(6) The committee shall-

(a) evaluate all intended secret services in order to determine whether the object thereof and the *modus operandi* to achieve it are in the national interest; and

(b) review all secret services annually with the said object in order to determine whether they may be continued,

and make a recommendation that an intended secret service may be carried out or a secret service may be continued if the committee unanimously so decides.

(7) In evaluating an intended secret service or a secret service, the committee may request from the Department of State in question such documents and information as it may deem fit in order to properly perform its functions.

(8) *(a)* No intended secret service shall be carried out or secret service be continued after a year unless a recommendation by the committee has been made therefor: Provided that the President or the responsible Executive Deputy President or Minister may, with the concurrence of the State President, approve that an intended secret service or a secret service which cannot be delayed or suspended without serious prejudice to the national interest, may be carried out or be continued on condition that the matter in question is submitted to the committee for its recommendation at its next ensuing meeting: Provided further that an intended secret service may be carried out or a secret service be continued notwithstanding the fact that the committee has withheld its recommendation in respect thereof, if the State President approves the carrying out or continuation thereof.

[Para. *(a)* amended by s. 32 (1) of Act 38 of 1994.]

(b) If the committee withholds its recommendation in respect of a secret service referred to in the first proviso to paragraph *(a)* after the matter has been submitted to it, such service shall be discontinued as soon as practicable, unless and in so far as the State President approves the continuation thereof.

(9) If the committee cannot reach unanimity in relation to a recommendation, it shall submit the matter in question to the State President as soon as practicable for consideration, and his decision shall be final.

[S. 3A inserted by s. 4 of Act 142 of 1992.]

3B Approval for and directions regarding secret services

(1) Notwithstanding anything to the contrary contained in this Act, no intended secret service shall be carried out unless the President or the responsible Executive Deputy President or Minister has granted his prior approval therefor and indicated to which conditions or instructions (if any) such carrying out shall be subject.

[Sub-s. (1) amended by s. 32 (1) of Act 38 of 1994.]

(2) The Director-General: State Expenditure shall, after consultation with the Auditor-General, issue directions regarding the application of financial control over the handling and utilization of moneys made available from the account.

[S. 3B inserted by s. 4 of Act 142 of 1992.]

4 Short title and commencement

This Act shall be called the Secret Services Act, 1978, and shall come into operation on 1 April 1978.

[S. 4 substituted by s. 5 of Act 142 of 1992.]

NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998

[ASSENTED TO 24 JUNE 1998] [DATE OF COMMENCEMENT: 16 OCTOBER 1998]
(Unless otherwise indicated)

(English text signed by the President)

as amended by

Judicial Matters Second Amendment Act 122 of 1998
National Prosecuting Authority Amendment Act 61 of 2000
Judicial Matters Amendment Act 42 of 2001
Criminal Law (Sentencing) Amendment Act 38 of 2007
National Prosecuting Authority Amendment Act 56 of 2008

Regulations under this Act

DETERMINATION OF FIXED DATE REFERRED TO IN SECTION 43A(1) *(b)* OF THE ACT (Proc 46 in *GG* 32380 of 3 July 2009)

NATIONAL PROSECUTING AUTHORITY REGULATIONS (GN R1583 in *GG* 14021 of 12 June 1992)

REGULATIONS FOR CONDITIONS OF SERVICE OF SPECIAL INVESTIGATORS IN THE DIRECTORATE OF SPECIAL OPERATIONS (GN R108 in *GG* 22027 of 2 February 2001)

REGULATIONS ON THE LEGAL QUALIFICATIONS FOR PROSECUTORS, 2001 (GN R423 in *GG* 22284 of 18 May 2001)

ACT

To regulate matters incidental to the establishment by the Constitution of the Republic of South Africa, 1996, of a single national prosecuting authority; and to provide for matters connected therewith.

Preamble

WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;

AND WHEREAS the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority;

AND WHEREAS the Constitution provides that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions;

AND WHEREAS the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not

being complied with, and may review a decision to prosecute or not to prosecute;

AND WHEREAS the Constitution provides that 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;

AND WHEREAS the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation;

.....
[Preamble substituted by s. 1 of Act 61 of 2000 and amended by s. 14 of Act 56 of 2008.]

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

INDEX

[Index inserted by s. 21 of Act 61 of 2000.]

[Ss. 19A to 19C inclusive inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

[Ss. 30 and 31 substituted by s. 14 of Act 61 of 2000 and repealed by s. 9 of Act 56 of 2008.]

[S. 43A substituted by s. 13 of Act 56 of 2008.]

CHAPTER 1
INTRODUCTORY PROVISIONS (s 1)

1 Definitions

In this Act, unless the context otherwise indicates-

'Constitution' means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

'Deputy Director' means a Deputy Director of Public Prosecutions appointed under section 15 (1);

'Deputy National Director' means a Deputy National Director of Public Prosecutions appointed under section 11 (1);

'Director' means a Director of Public Prosecutions appointed under section 13 (1);

'Directorate of Special Operations' .....
[Definition of 'Directorate of Special Operations' inserted by s. 2 *(a)* of Act 61 of 2000 and deleted by s. 1 *(a)* of Act 56 of 2008.]

'head of an Investigating Directorate' means an Investigating Director referred to in section 7 (3) *(b)* ;
[Definition of 'head of an Investigating Directorate' inserted by s. 2 *(a)* of Act 61 of 2000 and substituted by s. 1 *(b)* of Act 56 of 2008.]

'Investigating Director' -

(a) means a Director of Public Prosecutions appointed under section 13 (1) *(b)* as the head of an Investigating Directorate established in terms of section 7 (1); and

(b) in Chapter 5, includes any Director referred to in section 13 (1), designated by the National Director to conduct an investigation in terms of section 28 in response to a request in terms of section 17D (3) of the South African Police Service Act, 1995 (Act 68 of 1995), by the Head of the Directorate for Priority Crime Investigation;

[Definition of 'Investigating Director' substituted by s. 2 *(b)* of Act 61 of 2000 and by s. 1 *(c)* of Act 56 of 2008.]

'Investigating Directorate' means an Investigating Directorate established by or in terms of section 7;
[Definition of 'Investigating Directorate' substituted by s. 2 *(b)* of Act 61 of 2000.]

'investigation' in Chapter 5, means an investigation contemplated in section 28 (1);
[Definition of 'investigation' inserted by s. 2 *(c)* of Act 61 of 2000.]

'Minister' means the Cabinet member responsible for the administration of justice;

'National Director' means the National Director of Public Prosecutions appointed in terms of section 179 (1) *(a)* of the Constitution;

'Office of the National Director' means the Office of the National Director of Public Prosecutions established by section 5;

'prescribed' means prescribed by regulation made under section 40;

'prosecuting authority' means the single national prosecuting authority referred to in section 2;

'prosecutor' means a prosecutor referred to in section 16 (1);

'Public Service Act' means the Public Service Act, 1994 (Proclamation 103 of 1994);

'Republic' means the Republic of South Africa, referred to in section 1 of the *Constitution* ;

'Special Director' means a Director of Public Prosecutions appointed under section 13 (1) *(c)* ;

'special investigator' .....
[Definition of 'special investigator' inserted by s. 2 *(d)* of Act 61 of 2000 and deleted by s. 1 *(d)* of Act 56 of 2008.]

'specified offence' means any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in section 7 (1), and any reference to the commission of a specified offence has a corresponding meaning;
[Definition of 'specified offence' inserted by s. 2 *(d)* of Act 61 of 2000 and substituted by s. 1 *(e)* of Act 56 of 2008.]

'this Act' includes the regulations.

CHAPTER 2
STRUCTURE AND COMPOSITION OF SINGLE NATIONAL PROSECUTING AUTHORITY (ss 2-7)

2 Single national prosecuting authority

There is a single national prosecuting authority established in terms of section 179 of the *Constitution* , as determined in *this Act* .

3 Structure of prosecuting authority

The structure of the single *prosecuting authority* consists of-

(a) the *Office of the National Director* ;

(b) the offices of the *prosecuting authority* at the High Courts, established by section 6 (1).

4 Composition of national prosecuting authority

The *prosecuting authority* comprises the **-**

(a) *National Director* ;

(b) *Deputy National Directors* ;

(c) *Directors* ;

(d) *Deputy Directors* ; and

(e) *prosecutors* .

5 Office of National Director of Public Prosecutions

(1) There is hereby established the National Office of the *prosecuting authority* , to be known as the Office of the National Director of Public Prosecutions.

(2) The *Office of the National Director* shall consist of the-

(a) *National Director* , who shall be the head of the Office and control the Office;

(b) *Deputy National Directors* ;

(c) *Investigating Directors* and *Special Directors* ;

(d) other members of the *prosecuting authority* appointed at or assigned to the Office; and

(d A) .....

[Para. *(d A)* inserted by s. 3 of Act 61 of 2000 and deleted by s. 2 of Act 56 of 2008.]

(e) members of the administrative staff of the Office.

(3) The seat of the *Office of the National Director* shall be determined by the President.

6 Offices of prosecuting authority at seats of High Courts

(1) There is hereby established an Office for the *prosecuting authority* at the seat of each High Court in the *Republic* .

(2) An Office established by this section shall consist of-

(a) the head of the Office, who shall be either a *Director* or a *Deputy Director* , and who shall control the Office;

(b) *Deputy Directors* ;

(c) *prosecutors* ;

(d) persons contemplated in section 38 (1); and

(e) the administrative staff of the Office.

(3) If a *Deputy Director* is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a *Director* designated in writing by the *National Director* .

7 Investigating Directorates

(1) The President may, by proclamation in the *Gazette* , establish one or more Investigating Directorates in the *Office of the National Director* , in respect of such offences or criminal or unlawful activities as set out in the proclamation.

(2) Any proclamation issued in terms of this section-

(a) shall be issued on the recommendation of the *Minister* , the Cabinet member responsible for policing and the *National Director* ;

(b) may at any time be amended or rescinded by the President on the recommendation of the *Minister* , the Cabinet member responsible for policing and the *National Director* ; and

(c) must be submitted to Parliament before publication in the *Gazette* .

(3) The head of an Investigating Directorate, shall be an *Investigating Director* , and shall perform the powers, duties and functions of the *Investigating Directorate* concerned subject to the control and directions of the *National Director* .

(4) *(a)* The *head of an Investigating Directorate* shall be assisted in the exercise of his or her powers and the performance of his or her functions by-

(i) one or more *Deputy Directors* ;

(ii) *prosecutors* ;

(iii) officers of any Department of State seconded to the service of the *Investigating Directorate* in terms of the laws governing the public service;

(iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the *Investigating Directorate* ; and

(v) any other person whose services are obtained by the *head of the Investigating Directorate* ,

and the persons referred to in subparagraphs (i) to (v) shall perform their powers, duties and functions subject to the control and direction of the head of the *Investigating Directorate* concerned.

(b) For the purposes of subparagraphs (iv) and (v) of paragraph *(a)* -

(i) any person or body requested by the *head of an Investigating Directorate* in writing to do so, shall from time to time, after consultation with the *head of an Investigating Directorate* , furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the head of that *Investigating Directorate* as contemplated in the said subparagraph (iv) or (v), as the case may be; and

(ii) such a person or body shall, at the request of, and after consultation with, the *head of the Investigating Directorate* concerned, designate a person or persons mentioned in the list concerned so to assist the head of the *Investigating Directorate* .

[S. 7 substituted by s. 4 of Act 61 of 2000 and by s. 3 of Act 56 of 2008.]

CHAPTER 3
APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 8-19)

8 Prosecuting authority to be representative

The need for the *prosecuting authority* to reflect broadly the racial and gender composition of South Africa must be considered when members of the *prosecuting authority* are appointed.

9 Qualifications for appointment as National Director, Deputy National Director or Director

(1) Any person to be appointed as *National Director*, *Deputy National Director* or *Director* must-

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

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

(2) Any person to be appointed as the *National Director* must be a South African citizen.

[Date of commencement of s. 9: 1 August 1998.]

10 Appointment of National Director

The President must, in accordance with section 179 of the *Constitution* , appoint the National Director.

[Date of commencement of s. 10: 1 August 1998.]

11 Appointment of Deputy National Directors

(1) The President may, after consultation with the *Minister* and the National Director, appoint not more than four persons, as Deputy National Directors of Public Prosecutions.

[Sub-s. (1) substituted by s. 5 of Act 61 of 2000.]

(2) *(a)* Whenever the *National Director* is absent or unable to perform his or her functions, the *National Director* may appoint any *Deputy National Director* as acting *National Director* .

(b) Whenever the office of *National Director* is vacant, or the *National Director* is for any reason unable to make the appointment contemplated in paragraph *(a)* , the President may, after consultation with the *Minister* , appoint any *Deputy National Director* as acting *National Director* .

(3) Whenever a *Deputy National Director* is absent or unable to perform his or her functions, or an office of *Deputy National Director* is vacant, the *National Director* may, in consultation with the *Minister,* designate any other *Deputy National Director* or any *Director* to act as such *Deputy National Director* .

12 Term of office of National Director and Deputy National Directors

(1) The *National Director* shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.

(2) A *Deputy National Director* shall vacate his or her office at the age of 65.

(3) If the *National Director* or a *Deputy National Director* attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4) If the President is of the opinion that it is in the public interest to retain a *National Director* or a *Deputy National Director* in his or her office beyond the age of 65 years, and-

(a) the *National Director* or *Deputy National Director* wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue,

the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a *National Director'* s term of office shall not exceed 10 years.

(5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6) *(a)* The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the *National Director* or a *Deputy National Director* , the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph *(b)* has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.

(d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.

(e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) *(a)* , is presented to the President.

(8) *(a)* The President may allow the *National Director* or a *Deputy National Director* at his or her request, to vacate his or her office-

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph *(a)* (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the *National Director* or a *Deputy National Director* -

(i) vacates his or her office in terms of paragraph *(a)* (i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or

(ii) vacates his or her office in terms of paragraph *(a)* (ii), he or she shall

be deemed to have been retired in terms of section 16 (4) of the *Public Service Act* , and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.

(9) If the *National Director* or a *Deputy National Director* , immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of *this Act* or the *Public Service Act* do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the *National Director* , or a *Deputy National Director* and if at that date he or she has not reached the age at which he or she would in terms of the *Public Service Act* have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post.

[Date of commencement of s. 12: 1 August 1998.]

13 Appointment of Directors and Acting Directors

(1) The President, after consultation with the *Minister* and the *National Director* -

(a) may, subject to section 6 (2), appoint a Director of Public Prosecutions in respect of an Office of the *prosecuting authority* established by section 6 (1);

(a A *)* .....

[Para. *(a* A *)* inserted by s. 6 *(a)* of Act 61 of 2000 and deleted by s. 4 of Act 56 of 2008.]

(b) shall, in respect of any Investigating Directorate established in terms of section 7 (1A), appoint a Director of Public Prosecutions as the head of such an *Investigating Directorate* ; and

[Para. *(b)* substituted by s. 6 *(b)* of Act 61 of 2000.]

(c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the *Gazette* .

(2) If a vacancy occurs in the office of a *Director* the President shall, subject to section 9, as soon as possible, appoint another person to that office.

(3) The *Minister* may from time to time, but subject to the laws governing the public service and after consultation with the *National Director* , from the ranks of the *Deputy Directors* or persons who qualify to be appointed as *Deputy Director* as contemplated in section 15 (2), appoint an acting *Director* to discharge the duties of a *Director* whenever the *Director* concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the office of *Director* is pending.

14 Term of office of Director

(1) Subject to subsection (2), a *Director* shall vacate his or her office on attaining the age of 65 years.

(2) A *Special Director* may be appointed for such fixed term as the President may determine at the time of such appointment, and the President may from time to time extend such term.

(3) The provisions of section 12 (3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the *National Director* , shall apply, with the necessary changes, with regard to the vacation of office and discharge of a *Director* .

15 Appointment of Deputy Directors

(1) The *Minister* may, subject to the laws governing the public service and section 16 (4) and after consultation with the National Director-

(a) in respect of an Office referred to in section 6 (1), appoint a Deputy Director of Public Prosecutions as the head of such Office;

(b) in respect of each office for which a Director has been appointed, appoint Deputy Directors of Public Prosecutions; and

(c) in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director.

[Sub-s. (1) substituted by s. 7 of Act 61 of 2000.]

(2) A person shall only be appointed as a *Deputy Director* if he or she-

(a) has the right to appear in a High Court as contemplated in sections 2 and 3 (4) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995); and

(b) possesses such experience as, in the opinion of the *Minister* , renders him or her suitable for appointment as a *Deputy Director* .

(3) If a vacancy occurs in the office of a *Deputy Director* , the *Minister* shall, after consultation with the *National Director* , as soon as possible appoint another person to that office.

16 Appointment of prosecutors

(1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director* , and subject to the laws governing the public service.

(2) *Prosecutors* may be appointed to-

(a) the *Office of the National Director* ;

(b) Offices established by section 6 (1);

(c) *Investigating Directorates* ; and

(d) lower courts in the *Republic* .

(3) The *Minister* may from time to time, in consultation with the *National Director* and after consultation with the *Directors* , prescribe the appropriate legal qualifications for the appointment of a person as *prosecutor* in a lower court.

(4) In so far as any law governing the public service pertaining to *Deputy Directors* and *prosecutors* may be inconsistent with *this Act* , the provisions of *this Act* shall apply.

17 Conditions of service of National Director, Deputy National Directors and Directors

(1) The remuneration, allowances and other terms and conditions of service and service benefits of the *National Director* , a *Deputy National Director* and a *Director* shall be determined by the President: Provided that-

(a) the salary of the *National Director* shall not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989);

(b) the salary of a *Deputy National Director* shall not be less than 85 per cent of the salary of the *National Director* ; and

(c) the salary of a *Director* shall not be less than 80 per cent of the salary of the *National Director* .

(2) If an officer or employee in the public service is appointed as the *National Director* , a *Deputy National Director* or a *Director* , the period of his or her service as *National Director*, *Deputy National Director* or *Director* shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply.

(3) The *National Director* is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.

(4) The President may, whenever in his or her opinion it is necessary and after consultation with the *Minister* and the *National Director* , transfer and appoint any *Director* to any Office contemplated in section 6 (1) or *Investigating Directorate* , or as a *Special Director* .

[Date of commencement of s. 17: 1 August 1998.]

18 Remuneration of Deputy Directors and prosecutors

(1) Subject to the provisions of this section, any *Deputy Director* or *prosecutor* shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the *Minister* after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette* .

(2) Different categories of salaries and salary scales may be determined in respect of different categories of *Deputy Directors* and *prosecutors* .

(3) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of publication thereof.

(4) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of *this Act* , and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of the *National Director* and magistrates since the latest revision and adjustment of salaries of *Deputy Directors* or *prosecutors* , so justify.

(5) *(a)* A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved.

(c) The lapsing of such a notice or provision shall not affect-

(i) the validity of anything done under the notice or provision up to the date on which it so lapsed; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that date under or by virtue of the notice or provision.

(6) The salary payable to a *Deputy Director* or a *prosecutor* shall not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection (5) *(b)* shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

19 Conditions of service of Deputy Directors and prosecutors, except remuneration

Subject to the provisions of *this Act* , the other conditions of service of a *Deputy Director* or a *prosecutor* shall be determined in terms of the provisions of the *Public Service Act* .

CHAPTER 3A

[Chapter 3A (ss 19A-19C) inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

19A to 19C inclusive .....

[Ss. 19A to 19C inclusive inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

CHAPTER 4
POWERS, DUTIES AND FUNCTIONS OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 20-25)

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* .

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

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

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

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

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

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

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

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

(6) A written authorisation referred to in subsection (5) shall set out-

(a) the area of jurisdiction;

(b) the offences; and

(c) the court or courts,

in respect of which such powers may be exercised.

(7) No member of the *prosecuting authority* who has been suspended from his or her office under *this Act* or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension.

21 Prosecution policy and issuing of policy directives

(1) The *National Director* shall, in accordance with section 179 (5) *(a)* and *(b)* and any other relevant section of the *Constitution* -

(a) with the concurrence of the *Minister* and after consulting the *Directors* , determine prosecution policy; and

(b) issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35 (2) *(a)* : Provided that the first prosecution policy issued under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director* .

(3) The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997).

[Sub-s. (3) added by s. 7 of Act 38 of 2007.]

(4) The National Director must issue policy directives pursuant to the policy contemplated in subsection (3), regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997.

[Sub-s. (4) added by s. 7 of Act 38 of 2007.]

(5) The prosecution policy and the policy directives contemplated in subsections (3) and (4) above, must be issued within three months of the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007.

[Sub-s. (5) added by s. 7 of Act 38 of 2007.]

22 Powers, duties and functions of National Director

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

(2) In accordance with section 179 of the *Constitution* , the *National Director* -

(a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may 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 to be relevant.

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director* , he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director* .

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution* , *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 subsection (2), may-

(i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act* , or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines;

(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;

(b) shall maintain close liaison with the *Deputy National Directors* , the *Directors*, the *prosecutors* , the legal professions and legal institutions in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority* ;

(c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source;

(d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;

(e) shall assist the *Deputy National Directors*, *Directors* and *prosecutors* in

representing their professional interests;

(f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;

(g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority* , which shall include reporting on-

(i) the activities of the *National Director*, *Deputy National Directors* , *Directors* and the *prosecuting authority* as a whole;

(ii) the personnel position of the *prosecuting authority* ;

(iii) the financial implications in respect of the administration and operation of the *prosecuting authority* ;

(iv) any recommendations or suggestions in respect of the *prosecuting authority* ;

(v) information relating to training programmes for *prosecutors* ; and

(vi) any other information which the *National Director* deems necessary;

(h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act* ; and

(i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors* , advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority* , and determining the powers and functions of such structure.

(6) *(a)* The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Directors* , frame a code of conduct which shall be complied with by members of the *prosecuting authority* .

(b) The code of conduct may from time to time be amended, and must be published in the ***Gazette*** for general information.

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister* , and the *Directors* , training programmes for *prosecutors* .

(8) The *National Director* or a person designated by him or her in writing may-

(a) if no other member of the *prosecuting authority* is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases;

(b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as

the *National Director* , in consultation with the *Minister* , may determine.

(9) The *National Director* or any *Deputy National Director* designated by the *National Director* shall have the power to institute and conduct a prosecution in any court in the *Republic* in person.

23 Powers, duties and functions of Deputy National Directors

(1) Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.

(2) .....
[Sub-s. (2) added by s. 9 of Act 61 of 2000 and deleted by s. 6 of Act 56 of 2008.]

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) In addition to the powers, duties and functions conferred or imposed on or assigned to an *Investigating Director* , such an *Investigating Director* or any person authorized thereto by him or her in writing may, for the purposes of criminal prosecution-

(a) institute an action in any court in the *Republic* ; and

(b) prosecute an appeal in any court in the *Republic* emanating from criminal proceedings instituted by the *Investigating Director* or the person authorized thereto by him or her:

Provided that an *Investigating Director* or the person authorized thereto by him or her shall exercise the powers referred to in this subsection only after consultation with the *Director* of the area of jurisdiction concerned.

(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 *Directo* r 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.

25 Powers, duties and functions of prosecutors

(1) A *prosecuto* r shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-

(a) under *this Act* and any other law of the *Republic* ; and

(b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or

(c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director* .

(2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), or any other law, any *prosecutor* who-

(a) has obtained such legal qualifications as the *Minister* after consultation with the *National Director* may prescribe; and

(b) has at least three years' experience as a *prosecutor* of a magistrates' court of a regional division,

shall, subject to section 20 (6), have the right to appear in any court in the *Republic* .

CHAPTER 5
POWERS, DUTIES AND FUNCTIONS RELATING TO INVESTIGATING DIRECTORATES (ss 26-29)

26 Application

(1) This Chapter only relates to *Investigating Directorates* .

(2) Nothing in this Chapter or section 7, derogates from any power or duty which relates to the prevention, combating or investigation of any offences and which is bestowed upon the South African Police Service in terms of any law.

[Sub-s. (2) substituted by s. 7 of Act 56 of 2008.]

[S. 26 substituted by s. 10 of Act 61 of 2000.]

27 Reporting of matters to Investigating Director

If any person has reasonable grounds to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may report the matter in question to the *head of an Investigating Directorate* by means of an affidavit or affirmed declaration specifying-

(a) the nature of the suspicion;

(b) the grounds on which the suspicion is based; and

(c) all other relevant information known to the declarant.

[S. 27 substituted by s. 11 of Act 61 of 2000.]

28 Inquiries by Investigating Director

(1) *(a)* If the *Investigating Director* has reason to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an *investigation* on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a *specified offence* to the *Investigating Director* , the *Investigating Director* shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the *Investigating Director* , at any time during the conducting of an investigation on a matter referred to in paragraph *(a)* or *(b)* , considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the *investigation* so as to include any offence, whether or not it is a *specified offence* , which he or she suspects to be connected with the subject of the *investigation* .

(d) If the *Investigating Director* , at any time during the conducting of an *investigation* , is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the *Investigating Directorate* concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

[Sub-s. (1) substituted by s. 12 *(a)* of Act 61 of 2000.]

(2) *(a)* The *Investigating Director* may, if he or she decides to conduct an *investigation* , at any time prior to or during the conducting of the *investigation* designate any person referred to in section 7 (4) *(a)* or, in the case of an investigation requested by the Head of the Directorate for Priority Crime Investigation in terms of section 17D (3) of the South African Police Service Act, 1995 (Act 68 of 1995), any member of the *prosecuting authority* or a member of that Directorate, to conduct the *investigation* , or any part thereof, on his or her behalf and to report to him or her.

[Para. *(a)* substituted by s. 8 of Act 56 of 2008.]

(b) A person so designated shall for the purpose of the *investigation* concerned have the same powers as those which the *Investigating Director* has in terms of this section and section 29 of this Act, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

[Sub-s. (2) substituted by s. 12 *(a)* of Act 61 of 2000.]

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place *in camera* .

[Sub-s. (3) substituted by s. 12 *(a)* of Act 61 of 2000.]

(4) The procedure to be followed in conducting an *investigation* shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.

[Sub-s. (4) substituted by s. 12 *(a)* of Act 61 of 2000.]

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the *Investigating Director* may deem fit.

[Sub-s. (5) substituted by s. 12 *(a)* of Act 61 of 2000.]

(6) For the purposes of an *investigation* -

(a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the *investigation* or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director* , and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director* , at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director* , to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (6) substituted by s. 12 *(a)* of Act 61 of 2000.]

(7) A summons referred to in subsection (6) shall-

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the *Investigating Director* ;

(c) be signed by the *Investigating Director* or a person authorized by him or her; and

(d) be served in the prescribed manner.

(8) *(a)* The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph *(a)* shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10) *(b)* or *(c)* , or in section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

(9) A person appearing before the *Investigating Director* by virtue of subsection (6)-

(a) may be assisted at his or her examination by an advocate or an attorney;

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who-

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;

(b) at his or her appearance before the *Investigating Director* -

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;

(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;

(c) having been sworn or having made an affirmation-

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence.

(11) and (12) .....

[Sub-ss. (11) and (12) deleted by s. 12 *(b)* of Act 61 of 2000.]

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) *(a)* , the *Investigating Director* may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13).

[Sub-s. (14) substituted by s. 12 *(c)* of Act 61 of 2000.]

29 Entering upon premises by Investigating Director

(1) The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an *investigation* at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that *investigation* is or is suspected to be, and may-

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the *investigation* in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director* , at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director* , to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (1) substituted by s. 13 *(a)* of Act 61 of 2000.]

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including-

(a) a person's right to, respect for and the protection of his or her dignity;

(b) the right of a person to freedom and security; and

(c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be

entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating-

(a) the nature of the *investigation* in terms of section 28;

(b) that there exists a reasonable suspicion that an offence, which might be a *specified offence* , has been or is being committed, or that an attempt was or had been made to commit such an offence; and

(c) the need, in regard to the *investigation* , for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

[Sub-s. (5) substituted by s. 13 *(b)* of Act 61 of 2000.]

(6) A warrant issued in terms of this section may be issued on any day and shall be of force until-

(a) it has been executed;

(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

(c) the expiry of three months from the day of its issue,

whichever may occur first.

(7) *(a)* Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph *(a)* shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(8) A warrant issued in terms of this section shall be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution-

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) *(a)* The *Investigating Director* or any person referred to in section 7 (4) *(a)* may

without a warrant enter upon any premises and perform the acts referred to in subsection (1)-

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that-

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph *(a)* shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the *investigation* and that such information is necessary for the *investigation* , request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

[Sub-s. (11) substituted by s. 13 *(c)* of Act 61 of 2000.]

(12) Any person who-

(a) obstructs or hinders the *Investigating Director* or any other person in the performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence.

30 and 31 .....

[Ss. 30 and 31 substituted by s. 14 of Act 61 of 2000 and repealed by s. 9 of Act 56 of 2008.]

CHAPTER 6
GENERAL PROVISIONS (ss 32-42)

32 Impartiality of, and oath or affirmation by members of prosecuting authority

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

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

(2) *(a)* A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of *this Act* , take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely-

'I .....
(full name)
do hereby swear/solemnly affirm that I will in my capacity as *National Director/Deputy National Director* of Public Prosecutions/ *Director/Deputy Director* of Public Prosecutions/ *prosecutor* , uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)'.

(b) Such an oath or affirmation shall-

(i) in the case of the *National Director* , or a *Deputy National Director, Director* or *Deputy Director* , be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director* , *Director* or *Deputy Director* , as the case may be, is situated; or

(ii) in the case of a *prosecutor* , be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

33 Minister's final responsibility over prosecuting authority

(1) The *Minister* shall, for purposes of section 179 of the *Constitution, this Act* or any other law concerning the *prosecuting authority* , exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act* .

(2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority* , as contemplated in section 179 of the *Constitution* , the *National Director* shall, at the request of the *Minister* -

(a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21 (1) *(a)* ;

(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21 (1) *(b)* ;

(e) submit the reports contemplated in section 34 to the *Minister* ; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority* .

34 Reports by Directors

(1) A *Director* must annually, not later than the first day of March, submit to the *National Director* a report on all his or her activities during the previous year.

(2) The *National Director* may at any time request a *Director* to submit a report with regard to a specific activity relating to his or her powers, duties or functions.

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority* , if he or she deems it necessary.

35 Accountability to Parliament

(1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act* , including decisions regarding the institution of prosecutions.

(2) *(a)* The *National Director* must submit annually, not later than the first day of June, to the *Minister* a report referred to in section 22 (4) *(g)* , which report must be tabled in Parliament by the *Minister* within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) The *National Director* may, at any time, submit a report to the *Minister* or Parliament with regard to any matter relating to the *prosecuting authority* , if he or she deems it necessary.

36 Expenditure of prosecuting authority

(1) The expenses incurred in connection with-

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the *prosecuting authority* ; and

(b) the remuneration and other conditions of service of members of the *prosecuting authority* ,

shall be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the *National Director* , prepare the necessary estimate of revenue and expenditure of the *prosecuting authority* .

(3) The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)-

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority* ; and

(b) cause the necessary accounting and other related records to be kept.

[Sub-s. (3) substituted by s. 15 of Act 61 of 2000 and by s. 10 *(a)* of Act 56 of 2008.]

(3A) .....

[Sub-s. (3A) inserted by s. 15 of Act 61 of 2000 and deleted by s. 10 *(b)* of Act 56 of 2008.]

(4) The records referred to in subsection (3) *(b)* shall be audited by the Auditor-General.

[Sub-s. (4) substituted by s. 15 of Act 61 of 2000 and by s. 10 *(c)* of Act 56 of 2008.]

(5) The Director-General: Justice may, on the recommendation of the *National Director*

and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an *investigation* contemplated in section 28 (1) be paid from State funds to that person.

[Sub-s. (5) added by s. 15 of Act 61 of 2000 and substituted by s. 10 *(d)* of Act 56 of 2008.]

37 Administrative staff

The administrative staff of-

(a) the *Office of the National Director* ;

(b) the Offices of the *Directors* , including *Investigating Directorates* ; and

(c) the Offices of *prosecutors* as determined by the *National Director* , in consultation with the *Director* concerned,

shall be persons appointed or employed under the *Public Service Act* .

38 Engagement of persons to perform services in specific cases

(1) The *National Director* may in consultation with the *Minister* , and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director* , on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the *National Director* , a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the *Minister* in concurrence with the Minister of Finance.

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State-

(a) the *National Director* ; or

(b) a *Deputy National Director* or a Director, in consultation with the National Director,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the *Minister* as contemplated in that subsection.

[Sub-s. (3) added by s. 16 of Act 61 of 2000.]

(4) For purposes of this section, 'services' include the conducting of a prosecution under the control and direction of the *National Director* , a *Deputy National Director* or a *Director* , as the case may be.

[Sub-s. (4) added by s. 16 of Act 61 of 2000.]

[Date of commencement of s. 38: 23 April 1999.]

39 Disclosure of interest and non-performance of other paid work

(1) The *National Director* , a *Deputy National Director* and a *Director* shall give written notice to the *Minister* of all direct or indirect pecuniary interests that they have or acquire in any business whether in the *Republic* or elsewhere or in any body corporate carrying on any such business.

(2) The *National Director* , a *Deputy National Director* and a *Director* shall not, without the consent of the President, perform any paid work outside his or her duties of office.

40 Regulations

(1) The *Minister* may make regulations prescribing-

(a) matters required or permitted by *this Act* to be prescribed;

(b) the steps to be taken to ensure compliance with the code of conduct referred to in section 22 (6); or

(c) matters necessary or convenient to be prescribed for carrying out or giving effect to *this Act* .

[Sub-s. (1) amended by s. 11 *(a)* of Act 56 of 2008.]

(2) .....

[Sub-s. (2) amended by s. 17 of Act 42 of 2001 and deleted by s. 11 *(b)* of Act 56 of 2008.]

(3) Any regulation made in terms of this section-

(a) which may result in the expenditure of State monies shall be made in consultation with the Minister of Finance;

(b) may provide that a contravention thereof shall be an offence; and

(c) must be submitted to Parliament before publication in the *Gazette* .

[S. 40 substituted by s. 17 of Act 61 of 2000.]

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.

[S. 40A inserted by s. 18 of Act 61 of 2000.]

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.

[S. 41 substituted by s. 19 of Act 61 of 2000.]

42 Limitation of liability

No person shall be liable in respect of anything done in good faith under *this Act* .

CHAPTER 7
TRANSITIONAL ARRANGEMENTS (ss 43-46)

43 Transitional arrangements

(1) *(a)* Anyone holding office as an attorney-general in terms of the Attorney-General Act, 1992 (Act 92 of 1992), shall, subject to paragraph *(b)* , be deemed to have been appointed as a *Director* in terms of *this Act* , and shall continue to function in terms of the laws applicable to his or her Office.

(b) The President shall, as soon as reasonably possible after the commencement of this section, appoint each attorney-general referred to in paragraph *(a)* as a *Director* at the Office that, and for such term as the President, after consultation with the attorney-general concerned, may determine, but such term shall not extend beyond the date on which the attorney-general concerned will attain the age of 65 years.

(c) The provisions of section 12 (4) shall apply with the necessary changes in respect of a *Director* referred to in paragraph *(b)* : Provided that the reference in section 12 (4) to the age of 65 years shall be construed as a reference to the date on which the *Director* 's term of office as contemplated in paragraph *(b)* expires.

(d) If the term of office of a *Director* appointed under paragraph *(b)* expires before he or she has attained the age of 65 years, he or she shall be entitled to pension benefits determined and calculated under all circumstances as if he or she was employed as a Director-General in the public service, who served as a Director-General for five years.

(2) Anyone holding office as an attorney-general in terms of a law other than the Attorney-General Act, 1992, or holding an appointment as acting attorney-general, shall be deemed to have been appointed as an acting *Director* under *this Act* at the office where he or she holds such office or appointment, and shall continue to function in that capacity until otherwise determined under *this Act* or any other law.

(3) *(a)* Any person who immediately before the commencement of this section was

employed by the State as a deputy attorney-general shall continue in such employment and shall be deemed to have been appointed as a *Deputy Director* in terms of section 15 (1).

(b) Any person who immediately before the commencement of this section was employed by the State as a state advocate or prosecutor and who has been delegated in terms of any law to institute criminal proceedings and to conduct any prosecution in criminal proceedings on behalf of the State-

(i) shall continue in such employment as a *prosecutor* ; and

(ii) shall be deemed to have been authorised to exercise the powers referred to in section 20 (1): Provided that no *prosecutor* shall, by virtue of this section, have more powers than he or she would have had under the delegation concerned.

(4) Criminal proceedings which have been instituted before the commencement of *this Act* , must be disposed of as if the decision to institute and prosecute in such criminal proceedings had been taken by a member of the *prosecuting authority* appointed in terms of *this Act* .

(5) Any attorney-general, deputy attorney-general, state advocate or prosecutor who continues in office in terms of this section must, within three months after the commencement of *this Act* , take the oath or make the affirmation referred to in section 32 (2).

(6) As from the date of the commencement of this section, all offices of attorneys-general at the High Courts contemplated in item 16 (4) *(a)* of Schedule 6 to the *Constitution* , shall become offices of the *prosecuting authority* as referred to in section 6 (1) of *this Act* .

(7) .....

[Sub-s. (7) deleted by s. 12 of Act 56 of 2008.]

(8) Subject to the *Constitution* and *this Act* , all measures which immediately before the commencement of this section were in operation and applied to attorneys-general, deputy attorneys-general, state advocates and prosecutors, including measures regarding remuneration, pension and pension benefits, leave gratuity and any other term and condition of service, shall continue in operation and to apply to the said attorneys-general, deputy attorneys-general, state advocates and prosecutors until amended or repealed by *this Act* : Provided that no such measure shall, except in accordance with an applicable law or agreement, be changed in a manner which affects such attorneys-general, deputy attorneys-general, state advocates and prosecutors to their detriment.

(9) Notwithstanding the commencement of *this Act* , all measures regulating the institution and conducting of prosecutions in any court shall remain in force until repealed or amended under *this Act* or by any competent authority.

43A Transitional arrangements relating to Directorate of Special Operations

(1) In this section-

(a) any word or expression in respect of which a specific meaning has been assigned by the South African Police Service Act, 1995 (Act 68 of 1995), has the same meaning; and

(b) **'fixed date'** means a date [*] to be determined by the President by proclamation.

(2) Prior to a date determined by the *National Director* , any person employed by the *Directorate of Special Operations* must inform the *National Director* whether they consent to be transferred to the South African Police Service.

(3) As from the fixed date-

(a) any person, who immediately before the fixed date held the office of *special investigator* and who has consented to the transfer, is transferred to the South African Police Service and becomes a member of the South African Police Service; and

(b) such administrative and support personnel employed by the *Directorate of Special Operations* as may be agreed upon between the *National Director* and the National Commissioner, may be transferred to the South African Police Service.

(4) *(a)* An employee contemplated in subsection (3) may be transferred to the South African Police Service only with his or her consent.

(b) The remuneration and other terms and conditions of employment of employees transferred in terms of subsection (3) may not be less favourable than those that applied immediately before their transfer.

(c) The transfer contemplated in subsection (3) does not interrupt the employees' continuity of employment and the employees remain entitled to all rights and benefits, including pension benefits and privileges to which they were entitled to immediately before transfer.

(5) *(a)* An employee referred to in subsection (3) who does not consent to be transferred to the South African Police Service must, prior to the date referred to in subsection (2), notify the *National Director* thereof in writing.

(b) In respect of such an employee, the *National Director* may-

(i) after consultation with the *Minister* and the Cabinet members responsible for the public service and for finance, offer to transfer the employee to a reasonable alternative post or position in any government department or state institution in accordance with subsection (4) *(b)* and *(c)* and section 14 of the Public Service Act, 1994 (Proclamation 103 of 1994), shall, unless the context indicates otherwise, apply to such a transfer; or

(ii) after consultation with the *Minister* , offer to transfer the employee to a reasonable alternative post or position in the *prosecuting authority* , other than any post of *special investigator* , in accordance with subsection (4) *(b)* and *(c)* .

(c) If the employee does not accept the offer made in paragraph *(b)* within 30 days of it being made, the employee's employment automatically terminates on the fixed date.

(d) An employee whose employment is terminated in terms of paragraph *(c)* is entitled to a severance package determined by the *Minister* in consultation with the Cabinet members for the public service and for finance.

(e) The severance package provided for in paragraph *(d)* may not be less favourable than the severance package provided for in the Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service determined in terms section 3 of the Public Service Act, 1994.

(f) Any dispute arising from the interpretation or application of this section in so far as employees are concerned must be referred to the Labour Court for determination.

(6) Any decisions made, directions issued and any proceedings instituted by the employer immediately before the fixed date in respect of an employee referred to in subsection (3), remains [sic] applicable to him or her and must be implemented or finalised as if the National Prosecuting Authority Amendment Act, 2008, has not been passed.

(7) Any member of the *prosecuting authority* who was employed in the *Directorate of Special Operations* immediately before the fixed date, shall continue to be employed in the *Office of the National Director* , and shall exercise, carry out and perform his or her powers, duties and functions as conferred, imposed or assigned to him or her by the *National Director* and subject to the control and directions of the *National Director* or a person authorised thereto by the *National Director* .

(8) The National Prosecuting Authority Amendment Act, 2008, does not affect the validity of any *investigation* performed by the *Directorate of Special Operations* before the fixed date, including any functions incidental to such *investigations* or the institution of any criminal proceedings.

(9) *(a) Investigations* by the *Directorate of Special Operations* that are pending immediately before the fixed date must, on that date, be transferred to and continued by the Directorate for Priority Crime Investigation in accordance with a mechanism to ensure that the *investigations* are not prejudiced by the transfer.

(b) The *Minister* , in consultation with the Cabinet member for police and after consultation with the *National Director* and the National Commissioner, must determine the mechanism referred to in paragraph *(a)* .

(10) As from the fixed date any liability incurred by the *Directorate of Special Operations* as a result of any *investigation* by that Directorate, shall pass to the *prosecuting authority* , unless the *Minister* in consultation with the Cabinet member for police, in a specific instance determines otherwise.

(11) *(a)* Any *investigation* that has been instituted under section 28 by the *Directorate for Special Operations* , and all steps taken as a result of such an *investigation* , shall be deemed to have been instituted or taken in consequence of the application of section 17D (3) of the South African Police Service Act, 1995.

(b) The Head of the Directorate for Priority Crime Investigation may, at any time after the fixed date, withdraw such a request.

(c) The *National Director* must designate a *Director* in respect of each *investigation* referred to in paragraph *(a)* , who must assist the Directorate of Priority Crime Investigation in carrying out such an *investigation* .

[S. 43A added by s. 20 of Act 61 of 2000 and substituted by s. 13 of Act 56 of 2008.]

44 Amendment or repeal of laws

The laws mentioned in the Schedule are hereby amended or repealed to the extent indicated in the third column thereof.

45 Interpretation of certain references in laws

Any reference in any law to-

(a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the *National Director* ; and

(b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act* , for the

area of jurisdiction of that Court.

[S. 45 substituted by s. 13 of Act 122 of 1998.]

46 Short title and commencement

This Act shall be called the National Prosecuting Authority Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette* .

Schedule
LAWS AMENDED OR REPEALED BY SECTION 44

Number and year of law	Title	Extent of amendment or repeal
Act 51 of 1977	Criminal Procedure Act, 1977	*(a)* Repeal of sections 2 and 5. *(b)* Amendment of section 111 by the deletion of subsection (1) and the substitution for subsections (2), (3) and (4) of the following subsections: '(1) *(a)* The direction of the National Director of Public Prosecutions contemplated in section 179 (1) *(a)* of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced. *(b)* A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence. (2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court. (3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall- *(a)* cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial

		of the accused or to which the proceedings pending against the accused are adjourned; *(b)* forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.'.
Act 117 of 1991	Investigation of Serious Economic Offences Act, 1991	The whole
Act 92 of 1992	Attorney-General Act, 1992	The whole

NATIONAL PROSECUTING AUTHORITY AMENDMENT ACT 61 OF 2000

[ASSENTED TO 5 DECEMBER 2000] [DATE OF COMMENCEMENT: 12 JANUARY 2001]

(English text signed by the President)

ACT

To amend the National Prosecuting Authority Act, 1998, so as to make provision for the establishment of the Directorate of Special Operations; to make provision for the existing Investigating Directorates to become part of the Directorate of Special Operations; to amend the Interception and Monitoring Prohibition Act, 1992, so as to make provision for applications for directions in terms of that Act by the head of the Directorate of Special Operations; and to provide for matters connected therewith.

1 Substitutes the Preamble to the National Prosecuting Authority Act 32 of 1998 .

2 Amends section 1 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* inserts the definitions of 'Directorate of Special Operations' and 'head of an Investigating Directorate'; paragraph *(b)* substitutes the definitions of 'Investigating Director' and 'Investigating Directorate'; paragraph *(c)* inserts the definition of 'investigation'; and paragraph *(d)* inserts the definitions of 'special investigator' and 'specified offence'.

3 Amends section 5 (2) of the National Prosecuting Authority Act 32 of 1998 by inserting paragraph *(d* A *)* .

4 Substitutes section 7 of the National Prosecuting Authority Act 32 of 1998 .

5 Amends section 11 of the National Prosecuting Authority Act 32 of 1998 by substituting subsection (1).

6 Amends section 13 (1) of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* inserts paragraph *(a* A *)* ; and paragraph *(b)* substitutes paragraph *(b)* .

7 Amends section 15 of the National Prosecuting Authority Act 32 of 1998 by

substituting subsection (1).

8 Inserts Chapter 3A (sections 19A to 19C) in the National Prosecuting Authority Act 32 of 1998 .

9 Amends section 23 of the National Prosecuting Authority Act 32 of 1998 by adding subsection (2), the existing section becoming subsection (1).

10 and 11 Substitute respectively sections 26 and 27 of the National Prosecuting Authority Act 32 of 1998 .

12 Amends section 28 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsections (1) to (6); paragraph *(b)* deletes subsections (11) and (12); and paragraph *(c)* substitutes subsection (14).

13 Amends section 29 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsection (1); paragraph *(b)* substitutes subsection (5); and paragraph *(c)* substitutes subsection (11).

14 Substitutes sections 30 and 31 of the National Prosecuting Authority Act 32 of 1998 .

15 Amends section 36 of the National Prosecuting Authority Act 32 of 1998 by substituting subsections (3), (3A), (4) and (5) for subsections (3) and (4).

16 Amends section 38 of the National Prosecuting Authority Act 32 of 1998 by adding subsections (3) and (4).

17 Substitutes section 40 of the National Prosecuting Authority Act 32 of 1998 .

18 Inserts section 40A in the National Prosecuting Authority Act 32 of 1998 .

19 Substitutes section 41 of the National Prosecuting Authority Act 32 of 1998 .

20 Inserts section 43A in the National Prosecuting Authority Act 32 of 1998 .

21 Inserts the index in the National Prosecuting Authority Act 32 of 1998 .

22 Amends section 1 of the Interception and Monitoring Prohibition Act 127 of 1992 , as follows: paragraph *(a)* inserts the definition of 'Directorate'; and paragraph *(b)* adds paragraph *(c)* to the definition of 'serious offence'.

23 Amends section 3 (2) of the Interception and Monitoring Prohibition Act 127 of 1992 by adding paragraph *(d)* .

24 Amends section 4 of the Interception and Monitoring Prohibition Act 127 of 1992 , as follows: paragraph *(a)* substitutes subsection (1); and paragraph *(b)* adds subsection (2) *(b)* (iv).

25 Amends section 5 of the Interception and Monitoring Prohibition Act 127 of 1992 by substituting subsection (2).

26 Short title and commencement

This is the National Prosecuting Authority Amendment Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette* .

(Unless otherwise indicated)

(English text signed by the President)

ACT

To amend the National Prosecuting Authority Act, 1998, so as to repeal the provisions relating to the Directorate of Special Operations; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:-

1 Amends section 1 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* deletes the definition of 'Directorate of Special Operations'; paragraph *(b)* substitutes the definition of 'head of an Investigating Directorate'; paragraph *(c)* substitutes the definition of 'Investigating Director'; paragraph *(d)* deletes the definition of 'special investigator'; and paragraph *(e)* substitutes the definition of 'specified offence'.

2 Amends section 5 (2) of the National Prosecuting Authority Act 32 of 1998 by deleting paragraph *(d* A *)* .

3 Substitutes section 7 of the National Prosecuting Authority Act 32 of 1998 .

4 Amends section 13 (1) of the National Prosecuting Authority Act 32 of 1998 by deleting paragraph *(a* A *)* .

5 Repeals Chapter 3A (ss 19A to 19C inclusive) of the National Prosecuting Authority Act 32 of 1998 .

6 Amends section 23 of the National Prosecuting Authority Act 32 of 1998 by deleting subsection (2).

7 Amends section 26 of the National Prosecuting Authority Act 32 of 1998 by substituting subsection (2).

8 Amends section 28 (2) of the National Prosecuting Authority Act 32 of 1998 by substituting paragraph *(a)* .

9 Repeals sections 30 and 31 of the National Prosecuting Authority Act 32 of 1998 .

10 Amends section 36 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsection (3); paragraph *(b)* deletes subsection (3A); paragraph *(c)* substitutes subsection (4); and paragraph *(d)* substitutes subsection (5).

11 Amends section 40 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes the words in subsection (1) preceding paragraph *(a)* ; and paragraph *(b)* deletes subsection (2).

12 Amends section 43 of the National Prosecuting Authority Act 32 of 1998 by deleting subsection (7).

13 Substitutes section 43A of the National Prosecuting Authority Act 32 of 1998 .
[Date of commencement of s. 13: 20 February 2009.]

14 Amends the Preamble to the National Prosecuting Authority Act 32 of 1998 by deleting the ninth, tenth and eleventh paragraphs.

15 Short title and commencement

This Act is called the National Prosecuting Authority Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette* .

205. Judge, regional court magistrate or magistrate may take evidence as to alleged offence.—(1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

[Sub-s. (1) substituted by s. 59 of Act No. 70 of 2002.]

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[S. 205 substituted by s. 11 of Act No. 204 of 1993.]

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THE PRESIDENCY

No. 559 28 April 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 12 of 2004: Prevention and Combating of Corrupt Activities Act, 2003.

AIDS HELPLINE: 0800-123-22 Prevention is the cure

(English text signed by the President.)
(Assented to 27 April 2004.)

ACT

To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;

AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;

AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;

AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;

AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;

AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective;

AND WHEREAS the United Nations has adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;

AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;

AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;

AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF SECTIONS

Section

CHAPTER 6

REGISTER FOR TENDER DEFAULTERS

CHAPTER 7

MISCELLANEOUS MATTERS

SCHEDULE

CHAPTER 1

DEFINITIONS AND INTERPRETATION

Definitions

1. In this Act, unless the context indicates otherwise—

(i) **"agent"** means any authorised representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal, and **"agency"** has a corresponding meaning;

(ii) **"animal"** means any living vertebrate member of the animal kingdom, domestic or wild, but does not include a human being;

(iii) **"business"** means any business, trade, occupation, profession, calling, industry or undertaking of any kind, or any other activity carried on for gain or profit by any person within the Republic or elsewhere, and includes all property derived from or used in or for the purpose of carrying on such other activity, and all the rights and liabilities arising from such other activity;

(iv) **"dealing"** includes—

(a) any promise, purchase, sale, barter, loan, charge, mortgage, lien, pledge, caveat, transfer, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts or extension of credit;

(b) any agency or grant of power of attorney; or

(c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole or in part of any property being conferred on any person;

(v) **"foreign public official"** means—

(a) any person holding a legislative, administrative or judicial office of a foreign state;

(b) any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; or

(c) an official or agent of a public international organisation;

(vi) **"foreign state"** means any country other than South Africa, and includes—

(a) any foreign territory;

(b) all levels and subdivisions of government of any such country or territory; or

(c) any agency of any such country or territory or of a political subdivision of any such country or territory;

(vii) **"gambling game"** means any gambling game as defined in section 1 of the National Gambling Act, 1996 (Act No. 33 of 1996);

(viii) **"game of chance"**, includes a lottery, lotto, numbers game, scratch game, sweepstake, or sports pool;

(ix) **"gratification"**, includes—

(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

(e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) any forbearance to demand any money or money's worth or valuable thing;

(g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) any right or privilege;

(i) any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage;

(x) **"induce"** includes to persuade, encourage, coerce, intimidate or threaten or cause a person, and **"inducement"** has a corresponding meaning;

(xi) **"judicial officer"** means—

(a) any constitutional court judge or any other judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);

(b) a judge of the Labour Court appointed under section 153(1)*(a)* or *(b)*, (4) or (5) of the Labour Relations Act, 1995 (Act No. 66 of 1995);

(c) the President or judge of the Land Claims Court appointed under section 22(3), (4) or (8) of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994);

(d) any judge of the Competition Appeal Court appointed under section 36(2) of the Competition Act, 1998 (Act No. 89 of 1998);

(e) a judge or additional member appointed under section 7 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), to a Special Tribunal established in terms of section 2 of that Act;

(f) the presiding officer or member of the court of marine enquiry, the maritime court and the court of survey referred to in sections 267(1), 271(1) and 276(1) of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), respectively;

(g) any presiding officer appointed under section 10(3)*(b)* of the Administration Amendment Act, 1929 (Act No. 9 of 1929), to a divorce court established in terms of section 10(1) of that Act;

(h) any regional magistrate or magistrate defined in section 1 of the Magistrates Act, 1993 (Act No. 90 of 1993);

(i) any commissioner appointed under section 9 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984);

(j) any arbitrator, mediator or umpire, who in terms of any law presides at arbitration or mediation proceedings for the settlement by arbitration or mediation of a dispute which has been referred to arbitration or mediation;

(k) any adjudicator appointed under section 6 of the Short Process Courts and Mediation in Certain Civil Cases Act, 1991 (Act No. 103 of 1991);

(l) where applicable, any assessor who assists a judicial officer;

(m) any other presiding officer appointed to any court or tribunal established under any statute and who has the authority to decide causes or issues between parties and render decisions in a judicial capacity;

(n) any other person who presides at any trial, hearing, commission, committee or any other proceedings and who has the authority to decide causes or issues between parties and render decisions in a judicial capacity; or

(o) any person contemplated in paragraphs *(a)* to *(n)* who has been appointed in an acting or temporary capacity;

(xii) **"legislative authority"**, means the legislative authority referred to in section 43 of the Constitution;

(xiii) **"listed company"** means a company, the equity share capital of which is listed on a stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

(xiv) **"National Commissioner"** means the National Commissioner of the South African Police Service appointed in terms of section 207(1) of the Constitution;

(xv) **"National Director"** means the National Director of Public Prosecutions appointed in terms of section 179(1) of the Constitution;

(xvi) **"official"** means any director, functionary, officer or agent serving in any capacity whatsoever in a public body, private organisation, corporate body, political party, institution or other employment, whether under a contract of service or otherwise, and whether in an executive capacity or not;

(xvii) **"person who is party to an employment relationship"**, includes any person who in any manner assists in carrying on or conducting the business of an employer;

(xviii) **"police official"** means a **"member"** of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);

(xix) **"principal"**, includes—

(a) any employer;

(b) any beneficiary under a trust and any trust estate;

(c) the estate of a deceased person and any person with a beneficial interest in the estate of a deceased person;

(d) in the case of any person serving in or under a public body, the public body; or

(e) in the case of a legal representative referred to in the definition of **"agent"**, the person represented by such legal representative;

(xx) **"private sector"** means all persons or entities, including any—

(a) natural person or group of two or more natural persons who carries on a business;

(b) syndicate, agency, trust, partnership, fund, association, organisation or institution;

(c) company incorporated or registered as such;

(d) body of persons corporate or unincorporate; or

(e) other legal person,

but does not include—

(a) public officers;

(b) public bodies;

(c) any legislative authority or any member thereof;

(d) the judicial authority or any judicial officer; or

(e) the prosecuting authority or any member thereof;

(xxi) **"property"** means money or any other movable, immovable, corporeal or incorporeal thing, whether situated in the Republic or elsewhere and includes any rights, privileges, claims, securities and any interest therein and all proceeds thereof;

(xxii) **"public body"** means—

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when—

(i) exercising a power or performing a duty or function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public duty or function in terms of any legislation;

(xxiii) **"public international organisation"** means—

(a) an organisation—

(i) of which two or more countries are members; or

(ii) that is constituted by persons representing two or more countries;

(b) an organisation established by, or a group of organisations constituted by—

(i) organisations of which two or more countries are members; or

(ii) organisations that are constituted by the representatives of two or more countries; or

(c) an organisation that is—

(i) an organ of, or office within, an organisation described in paragraph *(a)* or *(b)*;

(ii) a commission, council or other body established by an organisation or organ referred to in subparagraph (i); or

(iii) a committee or a subcommittee of a committee of an organisation referred to in paragraph *(a)* or *(b)* or of an organ, council or body referred to in subparagraph (i) or (ii);

(xxiv) **"public officer"** means any person who is a member, an officer, an employee or a servant of a public body, and includes—

(a) any person in the public service contemplated in section 8(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

(b) any person receiving any remuneration from public funds; or

(c) where the public body is a corporation, the person who is incorporated as such,

but does not include any—

(a) member of the legislative authority;

(b) judicial officer; or

(c) member of the prosecuting authority;

(xxv) **"sporting event"** means any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted; and

(xxvi) **"valuable security"** means any document—

(a) creating, transferring, surrendering or releasing any right to, in or over property;

(b) authorising the payment of money or delivery of any property; or

(c) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation.

Interpretation

2. (1) For purposes of this Act a person is regarded as having knowledge of a fact if—

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact,

and **"knowing"** shall be construed accordingly.

(2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

(3) *(a)* A reference in this Act to accept or agree or offer to accept any gratification, includes to—

(i) demand, ask for, seek, request, solicit, receive or obtain;

(ii) agree to demand, ask for, seek, request, solicit, receive or obtain; or

(iii) offer to demand, ask for, seek, request, solicit, receive or obtain,

any gratification.

(b) A reference in this Act to give or agree or offer to give any gratification, includes to—

(i) promise, lend, grant, confer or procure;

(ii) agree to lend, grant, confer or procure; or

(iii) offer to lend, grant, confer or procure,

such gratification.

(4) A reference in this Act to any act, includes an omission and **"acting"** shall be construed accordingly.

(5) A reference in this Act to any person includes a person in the private sector.

CHAPTER 2
OFFENCES IN RESPECT OF CORRUPT ACTIVITIES

Part 1: General offence of corruption

General offence of corruption

3. Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.

Part 2: Offences in respect of corrupt activities relating to specific persons

Offences in respect of corrupt activities relating to public officers

4. (1) Any—

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to public officers.

(2) Without derogating from the generality of section 2(4), **"to act"** in subsection (1), includes—

(a) voting at any meeting of a public body;

(b) performing or not adequately performing any official functions;

(c) expediting, delaying, hindering or preventing the performance of an official act;

(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;

(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;

(f) showing any favour or disfavour to any person in performing a function as a public officer;

(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or

(h) exerting any improper influence over the decision making of any person performing functions in a public body.

Offences in respect of corrupt activities relating to foreign public officials

5. (1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—

(a) that amounts to the—

(i) illegal, dishonest, unauthorised, incomplete, or biased; or

(ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(b) that amounts to—

(i) the abuse of a position of authority;

(ii) a breach of trust; or

(iii) the violation of a legal duty or a set of rules;

(c) designed to achieve an unjustified result; or

(d) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2(4), **"to act"** in subsection (1) includes—

(a) the using of such foreign public official's or such others person's position to influence any acts or decisions of the foreign state or public international organisation concerned; or

(b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.

Offences in respect of corrupt activities relating to agents

6. Any—

(a) agent who, directly or indirectly—

(i) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(ii) gives or agrees or offers to give to any person any gratification, whether for the benefit of that person or for the benefit of another person; or

(b) person who, directly or indirectly—

(i) accepts or agrees or offers to accept any gratification from an agent, whether for the benefit of himself or herself or for the benefit of another person; or

(ii) gives or agrees or offers to give any gratification to an agent, whether for the benefit of that agent or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(aa) that amounts to the—

(aaa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bbb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(bb) that amounts to—

(aaa) the abuse of a position of authority;

(bbb) a breach of trust; or

(ccc) the violation of a legal duty or a set of rules;

(cc) designed to achieve an unjustified result; or

(dd) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to agents.

Offences in respect of corrupt activities relating to members of legislative authority

7. (1) Any—

(a) member of the legislative authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the legislative authority, whether for the benefit of that member or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to members of the legislative authority.

(2) Without derogating from the generality of section 2(4), **"to act"** in subsection (1) includes—

(a) absenting himself or herself from;
(b) voting at any meeting of;
(c) aiding or assisting in procuring or preventing the passing of any vote in;
(d) exerting any improper influence over the decision making of any person performing his or her functions as a member of; or
(e) influencing in any way, the election, designation or appointment of any functionary to be elected, designated or appointed by,

the legislative authority of which he or she is a member or of any committee or joint committee of that legislative authority.

Offences in respect of corrupt activities relating to judicial officers

8. (1) Any—

(a) judicial officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a judicial officer, whether for the benefit of that judicial officer or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—
(aa) illegal, dishonest, unauthorised, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
(ii) that amounts to—
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to judicial officers.

(2) Without derogating from the generality of section 2(4), **"to act"** in subsection (1) includes—

(a) performing or not adequately performing a judicial function;
(b) making decisions affecting life, freedoms, rights, duties, obligations and property of persons;
(c) delaying, hindering or preventing the performance of a judicial function;
(d) aiding, assisting or favouring any particular person in conducting judicial proceedings or judicial functions;
(e) showing any favour or disfavour to any person in the performance of a judicial function; or
(f) exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.

Offences in respect of corrupt activities relating to members of prosecuting authority

9. (1) Any—

(a) member of the prosecuting authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person;

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the prosecuting authority, whether for the benefit of that member or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to members of the prosecuting authority.

(2) Without derogating from the generality of section 2(4), **"to act"** in subsection (1) includes—

(a) performing or not adequately performing a function relating to the—

(i) institution or conducting of criminal proceedings;

(ii) carrying out of any necessary functions incidental to the institution or conducting of such criminal proceedings; or

(iii) continuation or discontinuation of criminal proceedings;

(b) delaying, hindering or preventing the performance of a prosecutorial function;

(c) aiding or assisting any particular person in the performance of a function relating to the institution or conducting of criminal proceedings;

(d) showing any favour or disfavour to any person in the performance of a function relating to the institution or conducting of criminal proceedings; or

(e) exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer, performing his or her official functions.

Part 3: Offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification

Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship

10. Any person—

(a) who is party to an employment relationship and who, directly or indirectly, accepts or agrees or offers to accept from any other person any unauthorised gratification, whether for the benefit of that person or for the benefit of another person; or

(b) who, directly or indirectly, gives or agrees or offers to give to any person who is party to an employment relationship any unauthorised gratification, whether for the benefit of that party or for the benefit of another person,

in respect of that party doing any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering an unauthorised gratification.

Part 4: Offences in respect of corrupt activities relating to specific matters

Offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings

11. (1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, in return for—

(a) testifying in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;

(b) withholding testimony or withholding a record, document, police docket or other object at any such trial, hearing or proceedings;

(c) giving or withholding information relating to any aspect at any such trial, hearing or proceedings;

(d) altering, destroying, mutilating, or concealing a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;

(e) giving or withholding information relating to or contained in a police docket;

(f) evading legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or

(g) being absent from such trial, hearing or proceedings,

is guilty of the offence of corrupt activities relating to witnesses and evidential material during certain proceedings.

(2) Any person who, directly or indirectly, gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person, with the intent to—

(a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or

(b) cause or induce any person to—

(i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;

(ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;

(iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;

(iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;

(v) give or withhold information relating to or contained in a police docket;

(vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or

(vii) be absent from such trial, hearing or other proceedings,

is guilty of the offence of corrupt activities relating to witnesses and evidential material during certain proceedings.

Offences in respect of corrupt activities relating to contracts

12. (1) Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

(i) in order to improperly influence, in any way—

(aa) the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or

(bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or

(ii) as a reward for acting as contemplated in paragraph *(a)*,

is guilty of the offence of corrupt activities relating to contracts.

(2) Any person who, in order to obtain or retain a contract with a public body or as a term of such contract, directly or indirectly, gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person—

(a) for the purpose of promoting, in any way, the election of a candidate or a category or party of candidates to the legislative authority; or

(b) with the intent to influence or affect, in any way, the result of an election conducted for the purpose of electing persons to serve as members of the legislative authority,

is guilty of an offence.

Offences in respect of corrupt activities relating to procuring and withdrawal of tenders

13. (1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as—

(a) an inducement to, personally or by influencing any other person so to act—

(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or

(iii) withdraw a tender made by him or her for such contract; or

(b) a reward for acting as contemplated in paragraph *(a)*(i), (ii) or (iii),

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

(2) Any person who, directly or indirectly—

(a) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as—

(i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) a reward for acting as contemplated in subparagraph (i); or

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to

any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as—

(i) an inducement to withdraw the tender; or

(ii) a reward for withdrawing or having withdrawn the tender,

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

Offences in respect of corrupt activities relating to auctions

14. (1) Any auctioneer who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person—

(i) in order to conduct the bidding process at an auction in a manner so as to favour or prejudice a specific person; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(b) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person—

(i) in order to influence that person to—

(aa) refrain from bidding at an auction; or

(bb) participate, personally or by influencing any other person so to participate, in the bidding process at an auction in such a manner so as to get a specific offer for the article or to sell the article at a specific amount or to sell the article to a specific bidder; or

(ii) as a reward for acting as contemplated in subparagraph (i),

is guilty of the offence of corrupt activities relating to auctions.

(2) Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person or an auctioneer, whether for the benefit of himself or herself or for the benefit of another person—

(i) in return for that person—

(aa) refraining from bidding at an auction; or

(bb) participating, personally or by influencing any other person so to participate, at an auction in the bidding process in order to get a specific offer for the article or to buy the article for a specific amount or to sell the article to a specific bidder; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(b) gives or agrees or offers to give any gratification to an auctioneer, whether for the benefit of that auctioneer or for the benefit of another person—

(i) in order to influence that auctioneer to conduct the bidding process at an auction in such a manner so as to favour or prejudice a specific person; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(c) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person—

(i) in return for that other person—

(aa) refraining from bidding at an auction; or

(bb) participating, personally or by influencing any other person so to participate, in the bidding process at an auction in such a manner so as to get a specific offer for the article or to sell the article at a specific amount or to sell the article to a specific bidder; or

(ii) as a reward for acting as contemplated in subparagraph (i),

is guilty of the offence of corrupt activities relating to auctions.

Offences in respect of corrupt activities relating to sporting events

15. Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person—

(i) in return for—

(aa) engaging in any act which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event; or

(bb) not reporting the act contemplated in this section to the managing director, chief executive officer or to any other person holding a similar post in the sporting body or regulatory authority concerned or at his or her nearest police station; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(c) carries into effect any scheme which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event,

is guilty of the offence of corrupt activities relating to sporting events.

Offences in respect of corrupt activities relating to gambling games or games of chance

16. Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person—

(i) in return for engaging in any conduct which constitutes a threat to or undermines the integrity of any gambling game or a game of chance, including, in any way, influencing the outcome of a gambling game or a game of chance; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(c) carries into effect any scheme which constitutes a threat to or undermines the integrity of any gambling game or a game of chance, including, in any way, influencing the outcome of a gambling game or a game of chance,

is guilty of the offence of corrupt activities relating to gambling games or games of chance.

Part 5: Miscellaneous offences relating to possible conflict of interest and other unacceptable conduct

Offence relating to acquisition of private interest in contract, agreement or investment of public body

17. (1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.

(2) Subsection (1) does not apply to—

(a) a public officer who acquires or holds such interest as a shareholder of a listed company;

(b) a public officer, whose conditions of employment do not prohibit him or her from acquiring or holding such interest; or

(c) in the case of a tender process, a public officer who acquires a contract, agreement or investment through a tender process and whose conditions of employment do not prohibit him or her from acquiring or holding such interest and who acquires or holds such interest through an independent tender process.

Offences of unacceptable conduct relating to witnesses

18. Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to—

(a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or

(b) cause or induce any person to—

(i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;

(ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;

(iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;

(iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;

(v) give or withhold information relating to or contained in a police docket;

(vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or

(vii) be absent from such trial, hearing or other proceedings,

is guilty of the offence of unacceptable conduct relating to a witness.

Intentional interference with, hindering or obstruction of investigation of offence

19. Any person who, at any stage, with intent to defraud or to conceal an offence in terms of this Chapter or to interfere with, or to hinder or obstruct a law enforcement body in its investigation of any such offence—

(a) destroys, alters, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device or any entry in such book, document, account or electronic device, or is privy to any such act;

(b) makes or is privy to making any false entry in such book, document, account or electronic device; or

(c) omits or is privy to omitting any information from any such book, document, account or electronic device,

is guilty of an offence.

Part 6: Other offences relating to corrupt activities

Accessory to or after offence

20. Any person who, knowing that property or any part thereof forms part of any gratification which is the subject of an offence in terms of Part 1, 2, 3 or 4, or section 21 (in so far as it relates to the aforementioned offences) of this Chapter, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person—

(a) enters into or causes to be entered into any dealing in relation to such property or any part thereof; or

(b) uses or causes to be used, or holds, receives or conceals such property or any part thereof,

is guilty of an offence.

Attempt, conspiracy and inducing another person to commit offence

21. Any person who—

(a) attempts;
(b) conspires with any other person; or
(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit an offence in terms of this Act, is guilty of an offence.

CHAPTER 3

INVESTIGATIONS REGARDING POSSESSION OF PROPERTY RELATING TO CORRUPT ACTIVITIES

Investigation regarding property relating to corrupt activities

22. (1) Whenever the National Director has reason to suspect that there may be in any building, receptacle or place, or in the possession, custody or control of any person any property which—

(a) may have been used in the commission, or for the purpose of or in connection with the commission, of an offence under Chapter 2;
(b) may have facilitated the commission of such an offence, or enabled any person or entity to commit such an offence, or provided financial or economic support to a person or entity in the commission of such an offence; or
(c) may be the proceeds of such an offence,

he or she may, prior to the institution of any asset forfeiture or criminal proceedings, under written authority direct that a particular Director of Public Prosecutions or a Special Director of Public Prosecutions, shall have the power to institute an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), relating to such property.

(2) For purposes of subsection (1), a reference in the said Chapter 5 to—

(a) the **"head of the Directorate of Special Operations"** or an **"Investigating Director"** shall be construed as a reference to a Director of Public Prosecutions or a Special Director of Public Prosecutions, as the case may be: Provided that for purposes of section 28(2)*(a)* of the said Act, a Director of Public Prosecutions or Special Director of Public Prosecutions, may only designate a Deputy Director of Public Prosecutions; and
(b) a **"special investigator"** shall be construed as to include a police official.

(3) If property seized under any power exercised under subsection (1) consists of cash or funds standing to the credit of a bank account, the Director of Public Prosecutions or a Special Director of Public Prosecutions who has instituted the investigation under that subsection shall cause the cash or funds to be paid into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), and the Director of Public Prosecutions or a Special Director of Public Prosecutions shall forthwith report to the Financial Intelligence Centre the fact of the seizure of the cash or funds and the opening of the account.

Application for, and issuing of investigation direction in respect of possession of property disproportionate to a person's present or past known sources of income or assets

23. (1) The National Director, or any person authorised in writing thereto by him or her (hereinafter referred to as the applicant), may apply to a judge in chambers for the issuing of an investigation direction in terms of subsection (3).

(2) An application referred to in subsection (1) must be in writing and must—

(a) indicate the identity of the—
  (i) applicant and, if known, the identity of the person who will conduct the investigation; and
  (ii) person to be investigated (hereinafter referred to as the suspect);
(b) specify the grounds referred to in subsection (3) on which the application is made;

(c) contain full particulars of all the facts and circumstances alleged by the applicant in support of his or her application;

(d) include the basis for believing that evidence relating to the ground on which the application is made will be obtained through the investigation direction;

(e) indicate whether any previous application has been made for the issuing of an investigation direction in respect of the same suspect in the application and, if such previous application exists, must indicate the current status of that application; and

(f) indicate the period for which the investigation is required.

(3) *(a)* A judge in chambers may upon an *ex parte* application made to him or her in terms of subsection (1), issue an investigation direction.

(b) An investigation direction may only be issued if the judge concerned is satisfied that—

(i) there has been compliance with the provisions of subsection (2); and

(ii) on the facts alleged in the application concerned, there are reasonable grounds to believe that—

(aa) a person—

(aaa) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or

(bbb) is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and

(bb) that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities; and

(cc) such investigation is likely to reveal information, documents or things which may afford proof that such a standard of living is maintained through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

(c) An investigation direction—

(i) must be in writing;

(ii) must indicate the identity of the suspect and, if known, the person who will conduct the investigation;

(iii) must specify the period for which it has been issued;

(iv) may specify conditions of restriction relating to the conducting of the investigation; and

(v) may be issued in respect of any place in the Republic.

(d) An application must be considered and an investigation direction issued without any notice to the suspect to whom the application applies and without hearing that suspect: Provided that where any previous investigation direction has been issued in respect of a suspect, the applicant may only apply for a further investigation direction in respect of that suspect on the same facts, after giving reasonable notice to the suspect concerned.

(e) A judge considering an application may require the applicant to furnish such further information as he or she deems necessary.

(4) If an investigation direction has been issued under subsection (3), the National Director or the person authorised thereto in the investigation direction, may, for the purposes of an investigation direction—

(a) summon the suspect or any other person, specified in the investigation direction, who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any property, book, document or other object relating to that subject, to appear before the National Director or the person so authorised, at a time and place specified in the summons, to be questioned or to produce that property, book, document or other object;

(b) question that suspect or other person, under oath or affirmation administered by the National Director or the person so authorised, and examine or retain for

further examination or for safe custody such property, book, document or other object; or

(c) at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises where the suspect is or is suspected to be or any premises on or in which anything connected with that investigation is or is suspected to be, and may—

(i) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(ii) examine any property found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the suspect or the owner or person in charge of the premises or from any person in whose possession or charge that property is, information regarding that property;

(iii) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein; or

(iv) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody:

Provided that any person from whom a book or document has been taken under paragraph *(b)* or *(c)*(iv), may, as long as it is in the possession of the person conducting the investigation, at his or her request be allowed, at his or her own expense and under the supervision of the person conducting the investigation, to make copies thereof or to take extracts therefrom at any reasonable time.

(5) *(a)* The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a suspect or any person referred to in subsection (4): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph *(a)* shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (7)*(b)*, or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(6) Subject to any directions, conditions or restrictions determined by the judge under subsection (3)*(c)*(iv), the provisions of sections 28(1)*(d)*, (2) to (10) and 29(2), (7)*(a)*, (9), (10)*(b)* and (11) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), relating to the conducting of an investigation and the execution of a warrant in terms of those provisions, apply, with the necessary changes, in respect of an investigation conducted in terms of subsection (4).

(7) Any person who—

(a) obstructs or hinders the person conducting the investigation or any other person in the performance of his or her functions in terms of this section; or

(b) when he or she is asked in terms of subsection (4) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence.

CHAPTER 4

PRESUMPTIONS AND DEFENCES

Presumptions

24. (1) Whenever a person is charged with an offence under Part 1 or 2, or section 21 (in so far as it relates to the aforementioned offences) of Chapter 2, proof that that person, or someone else at the instance of that person—

(a) accepted or agreed or offered to accept any gratification from; or

(b) gave or agreed or offered to give any gratification to,

any other person—

(i) who holds or seeks to obtain a contract, licence, permit, employment or anything whatsoever from a public body, private organisation, corporate body or other organisation or institution in which the person charged was serving as an official;

(ii) who is concerned, or who is likely to be concerned, in any proceedings or business transacted, pending or likely to be transacted before or by the person charged or public body, private organisation, corporate body, political party or other organisation or institution in which the person charged was serving as an official; or

(iii) who acts on behalf of a person contemplated in subparagraph (i) or (ii),

and, if the State can further show that despite having taken reasonable steps, it was not able with reasonable certainty to link the acceptance of or agreement or offer to accept or the giving or agreement to give or offer to give the gratification to any lawful authority or excuse on the part of the person charged, and in the absence of evidence to the contrary which raises reasonable doubt, is sufficient evidence that the person charged accepted or agreed or offered to accept such gratification from that person or gave or agreed or offered to give such gratification to that person in order to act, in a manner—

(aa) that amounts to the—

(aaa) illegal, dishonest, unauthorised, incomplete, or biased: or

(bbb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(bb) that amounts to—

(aaa) the abuse of a position of authority;

(bbb) a breach of trust; or

(ccc) the violation of a legal duty or a set of rules;

(cc) designed to achieve an unjustified result; or

(dd) that amounts to any other unauthorised or improper inducement to do or not to do anything.

(2) Whenever a public officer whose duties include the detection, investigation, prosecution or punishment of offenders, is charged with an offence involving the acceptance of a gratification, arising from—

(a) the arrest, detention, investigation or prosecution of any person for an alleged offence;

(b) the omission to arrest, detain or prosecute any person for an alleged offence; or

(c) the investigation of an alleged offence,

it is not necessary to prove that the accused person believed that an offence contemplated in paragraphs *(a)* to *(c)* or any other offence had been committed.

Defences

25. Whenever an accused person is charged with an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2, it is not a valid defence for that accused person to contend that he or she—

(a) did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered;

(b) accepted or agreed or offered to accept, or gave or agreed or offered to give the gratification without intending to perform or not to perform the act in relation to which the gratification was given, accepted or offered; or

(c) failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.

CHAPTER 5

PENALTIES AND RELATED MATTERS

Penalties

26. (1) Any person who is convicted of an offence referred to in—

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable—
  (i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;
  (ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or
  (iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years;

(b) section 17(1), 19, 20, 23(7)*(a)* or *(b)* or 34(2), is liable—
  (i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding 10 years; or
  (ii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding three years; or

(c) section 28(6)*(b)*, is liable to a fine of R250 000 or to imprisonment for a period not exceeding three years.

(2) A person convicted of an offence referred to in section 21, is liable to the punishment laid down in subsection (1) for the offence which that person attempted or conspired to commit or aided, abetted, induced, instigated, instructed, commanded, counseled or procured another person to commit.

(3) In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence.

Authorisation by National Director, Deputy National Director or Director to institute proceedings in respect of certain offences

27. The institution of a prosecution for an offence referred to in section 17(1), 23(7)*(b)* or 34(2), must be authorised in writing by the National Director, a Deputy National Director of Public Prosecutions or the Director of Public Prosecutions concerned and only after the person concerned has been afforded a reasonable opportunity by the investigating or prosecuting authority, as the case may be, to explain, whether personally or through a legal representative—

(a) in the case of section 17(1), how he or she acquired the private interest concerned;

(b) in the case of section 23(7)*(b)*, how he or she acquired the property or resources concerned; or

(c) in the case of section 34(2), why he or she failed to report in terms of section 34(2).

Endorsement of Register

28. (1) *(a)* A court convicting a person of an offence contemplated in section 12 or 13, may, in addition to imposing any sentence contemplated in section 26, issue an order that—

  (i) the particulars of the convicted person;
  (ii) the conviction and sentence; and
  (iii) any other order of the court consequent thereupon,

be endorsed on the Register.

(b) If the person so convicted is an enterprise, the court may also issue an order that—

  (i) the particulars of that enterprise;
  (ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was

involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned; and

(iii) the conviction, sentence and any other order of the court consequent thereupon,

be endorsed on the Register.

(c) The court may also issue an order contemplated in paragraph *(a)* in respect of—

(i) any other enterprise owned or controlled by the person so convicted; or

(ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such other enterprise,

and which—

(aa) enterprise, partner, manager, director or other person was involved in the offence concerned; or

(bb) partner, manager, director or other person knew or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned.

(d) Whenever the Register is endorsed as contemplated in paragraph *(a)*, *(b)* or *(c)*, the endorsement applies, unless the court directs otherwise, to every enterprise to be established in the future, and which enterprise will be wholly or partly controlled or owned by the person or enterprise so convicted or endorsed, and the Registrar must, in respect of every such enterprise, endorse the Register accordingly.

(2) Where a court has issued an order under subsection (1), the registrar or clerk of such court must forthwith forward the court order to the Registrar and the Registrar must forthwith endorse the Register accordingly.

(3) *(a)* Where the Register has been endorsed in terms of subsection (2), in addition to any other legal action, the following restrictions may or must, as the case may be, be imposed:

(i) The National Treasury may terminate any agreement with the person or enterprise referred to in subsection (1)*(a)* or *(b)*: Provided that—

(aa) in considering the termination of an agreement, the National Treasury must take into account, among others, the following factors, namely—

(aaa) the extent and duration of the agreement concerned;

(bbb) whether it is likely to conclude a similar agreement with another person or enterprise within a specific time frame;

(ccc) the extent to which the agreement has been executed;

(ddd) the urgency of the services to be delivered or supplied in terms of the agreement;

(eee) whether extreme costs will follow such termination; and

(fff) any other factor which, in the opinion of the National Treasury, may impact on the termination of the agreement; and

(bb) if that agreement involves any purchasing authority or Government Department, such restriction may only be imposed after consultation with the purchasing authority or Government Department concerned;

(ii) the National Treasury must determine the period (which period may not be less than five years or more than 10 years) for which the particulars of the convicted person or the enterprise referred to in subsection (1)*(a)*, *(b)*, *(c)* or *(d)* must remain in the Register and during such period no offer in respect of any agreement from a person or enterprise referred to in that subsection may be considered by the National Treasury; or

(iii) during the period determined in subparagraph (ii), the National Treasury, the purchasing authority or any Government Department must—

(aa) ignore any offer tendered by a person or enterprise referred to in subsection (1)*(a)*, *(b)*, *(c)* or *(d)*; or

(bb) disqualify any person or enterprise referred to subsection (1)*(a)*, *(b)*, *(c)* or *(d)*, from making any offer or obtaining any agreement relating to the procurement of a specific supply or service.

(b) A restriction imposed under paragraph *(a)* only comes into effect after any appeal against the conviction or sentence or both has been finalised by the court: Provided that if the appeal court sets aside, varies or amends the order referred to in subsection (1), the National Treasury must, if necessary, amend the restrictions imposed under paragraph *(a)* accordingly.

(c) Where the National Treasury has terminated an agreement in terms of paragraph *(a)*(i), it may, in addition to any other legal remedy, recover from the person or enterprise any damages—

(i) incurred or sustained by the State as a result of the tender process or the conclusion of the agreement; or

(ii) which the State may suffer by having to make less favourable arrangements thereafter.

(4) The National Treasury—

(a) may at any time vary or rescind any restriction imposed under subsection (3)*(a)*(i) or (ii); and

(b) must, when the period determined in terms of subsection (3)*(a)*(ii) expires, remove the particulars of the person or enterprise concerned, from the Register.

(5) When the National Treasury imposes a restriction under subsection (3)*(a)*(i) or (ii), or amends or rescinds such a restriction, it must within 14 days in writing notify—

(a) the person whose particulars have been so endorsed;

(b) any purchasing authority on which it may decide; and

(c) all Government departments,

of any resolution or decision relative to such restriction or the amendment or rescinding thereof, and request such authorities and departments to take similar steps.

(6) *(a)* Any person whose particulars, conviction and sentence have been endorsed on the Register as contemplated in this section and who has been notified as contemplated in subsection (5)*(a)*, must in any subsequent agreement or tender process involving the State, disclose such endorsement, conviction and sentence.

(b) Any person who fails to comply with paragraph *(a)*, is guilty of an offence.

(7) For purposes of this section—

(a) **"agreement"** includes an agreement to procure and supply services, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the State;

(b) **"enterprise"** 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;

(c) **"Registrar"** means the Registrar of the Register designated under section 30; and

(d) **"Register"** means the Register established under section 29.

CHAPTER 6

REGISTER FOR TENDER DEFAULTERS

Establishment of Register

29. Within six months after the commencement of this Chapter, the Minister of Finance must establish a register, to be known as the Register for Tender Defaulters, within the Office of the National Treasury.

Designation of Registrar

30. The Minister of Finance must designate a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, as Registrar.

Powers, duties and functions of Registrar

31. (1) The Registrar must, subject to the provisions of section 28 and this Chapter, exercise and perform his or her powers, duties and functions subject to the control and directions of the National Treasury.

(2) The Registrar must—

(a) maintain the Register;

(b) manage the Office of the Registrar; and

(c) carry out the duties and perform the functions assigned to him or her by section 28, this Chapter or the National Treasury or any other law.

Access to Register

32. The Register is open to the public as prescribed.

Regulations pertaining to Register

33. (1) The Minister of Finance may, in consultation with the Minister responsible for the administration of justice, make regulations relating to—

(a) the maintenance and management of the Register, the particulars to be entered in such Register, the manner in which such particulars must be recorded and the period for which the information in the Register must be retained;

(b) access to information contained in the Register;

(c) the safe-keeping and disposal of records; or

(d) any other matter which the Minister may consider necessary to prescribe in order to achieve the objects of section 28 and this Chapter.

(2) Regulations made in terms of subsection (1) may, in respect of any contravention thereof or failure to comply therewith, prescribe as a penalty a fine or imprisonment for a period not exceeding 12 months.

CHAPTER 7

MISCELLANEOUS MATTERS

Duty to report corrupt transactions

34. (1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed—

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

(2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.

(3) *(a)* Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

(b) The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph *(a)* in the *Gazette*.

(c) Any direction issued under paragraph *(b)*, must be tabled in Parliament before publication thereof in the *Gazette*.

(4) For purposes of subsection (1) the following persons hold a position of authority, namely—

(a) the Director-General or head, or equivalent officer, of a national or provincial department;

(b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

(c) any public officer in the Senior Management Service of a public body;

(d) any head, rector or principal of a tertiary institution;

(e) the manager, secretary or a director of a company as defined in the Companies

Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

(f) the executive manager of any bank or other financial institution;

(g) any partner in a partnership;

(h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;

(i) any other person who is responsible for the overall management and control of the business of an employer; or

(j) any person contemplated in paragraphs *(a)* to *(i)*, who has been appointed in an acting or temporary capacity.

Extraterritorial jurisdiction

35. (1) Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged—

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;

(d) is a company, incorporated or registered as such under any law, in the Republic; or

(e) any body of persons, corporate or unincorporated, in the Republic.

(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that—

(a) act affects or is intended to affect a public body, a business or any other person in the Republic;

(b) person is found to be in South Africa; and

(c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed—

(a) at the place where the accused is ordinarily resident; or

(b) at the accused person's principal place of business.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the offence, the offence is deemed to have been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.

Repeal and amendment of laws and transitional provisions

36. (1) The laws specified in the Schedule are repealed or amended to the extent indicated in that Schedule.

(2) All criminal proceedings which immediately prior to the commencement of this Act were instituted in terms of the provisions of the Corruption Act, 1992 (Act No. 94 of 1992), and which proceedings have not been concluded before the commencement of this Act, shall be continued and concluded, in all respects, as if this Act had not been passed.

(3) An investigation or prosecution or other legal proceedings, in respect of conduct which would have constituted an offence under the Corruption Act, 1992, and which occurred after the commencement of that Act but before the commencement of this Act, may be concluded, instituted and continued as if this Act had not been passed.

(4) Notwithstanding the repeal or amendment of any provision of any law by this Act, such provision shall, for the purpose of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (2) or (3), remain in force as if such provision had not been repealed or amended.

Short title and commencement

37. (1) This Act is called the Prevention and Combating of Corrupt Activities Act, 2004, and shall, subject to subsection (2), come into operation on 27 April 2004 or on such earlier date as the President may determine by proclamation in the *Gazette*.

(2) Section 34(2) shall come into operation on 31 July 2004.

SCHEDULE

LAWS REPEALED OR AMENDED BY SECTION 36

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 38 of 1927	Black Administration Act	The Third Schedule to the Act is hereby amended by the substitution of the offence "bribery" for the following offence: "any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004,".
Act 59 of 1959	Supreme Court Act	Section 24 is hereby amended by the substitution for paragraph *(b)* of subsection (1) of the following paragraph: "*(b)* interest in the cause, bias, malice or **[corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;".
Act 58 of 1962	Income Tax Act	Section 37H is hereby amended by the substitution for paragraph *(a)* of subsection (23) of the following paragraph: "*(a)* interest in the application, bias, malice or **[corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of any member of the board;".
Act 42 of 1965	Arbitration Act	Section 33 is hereby amended by the substitution for subsection (2) of the following subsection: "(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of **[or corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of the **[corruption]** that offence and in any case not later than three years after the date on which the award was so published.".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 61 of 1973	Companies Act	Section 218 is hereby amended by the substitution for subparagraph (iii) of paragraph *(d)* of subsection (1) of the following subparagraph: "(iii) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding one hundred rand.".
Act 51 of 1977	Criminal Procedure Act	1. Insert the following section after section 269: "**269A.** If evidence on a charge of an offence under Part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, does not prove the offence so charged but proves the offence of— *(a)* theft; *(b)* fraud; or *(c)* extortion, the accused may be found guilty of the crime or offence so proved.". 2. Schedule 5 to the Act is hereby amended by the substitution for the words in the 20th line of the following words: "Any offence relating to exchange control, **[corruption,]** extortion, fraud, forgery, uttering, **[or]** theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 91 of 1981	Co-operatives Act	Section 108 is hereby amended by the substitution for subparagraph (iii) of paragraph *(f)* of subsection (1) of the following subparagraph: "(iii) if he or she has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, any offence involving dishonesty or in connection with the formation or management of a co-operative or company and sentenced therefor to imprisonment without the option of a fine or to a fine exceeding two hundred rand;".
Act 19 of 1982	Veterinary and Para-Veterinary Professions Act	Section 24 is hereby amended by the substitution for paragraph *(b)* of subsection (3) of the following paragraph: "*(b)*he or she has at any time been convicted of extortion, bribery, any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, theft, fraud, forgery or uttering of a forged document or perjury, and was sentenced in respect thereof to imprisonment without the option of a fine;".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 61 of 1984	Small Claims Court Act	Section 46 is hereby amended by the substitution for paragraph *(b)* of the following paragraph: "*(b)* interest in the cause, bias, malice, or **[corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the commissioner; and".
Act 69 of 1984	Close Corporations Act	Section 47 is hereby amended by the substitution for subparagraph (iii) of paragraph *(b)* of the following subparagraph: "(iii) any person who has at any time been convicted of theft, fraud, forgery or uttering a forged document, perjury, any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty or in connection with the formation or management of a company or a corporation, and has been sentenced therefor to imprisonment for at least six months without the option of a fine; and".
Act 97 of 1990	Financial Services Board Act	Section 5 is hereby amended by the substitution for paragraph *(d)* of the following paragraph: "*(d)* if he or she has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, **[an]** any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding R100; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 80 of 1991	Public Accountants' and Auditors' Act	1. Section 4 is hereby amended by the substitution for paragraph *(b)* of subsection (2) of the following paragraph: "*(b)* if he or she has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, **[an]** any offence under the Prevention of Corruption Act, 1958 (Act No. 6 No. of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding R300;". 2. Section 15 is hereby amended by the substitution for paragraph *(b)* of subsection (4) of the following paragraph: "*(b)* if he or she has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, **[an]** any offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding R300; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 103 of 1991	Short Process Courts and Mediation in Certain Civil Cases Act	Section 12 is hereby amended by the substitution for paragraph *(b)* of subsection (1) of the following paragraph: "*(b)* interest in the cause, bias, malice or **[corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the mediator or the presiding adjudicator, as the case may be; and".
Act 94 of 1992	Corruption Act	The whole
Act 106 of 1993	Natural Scientific Professions Act	Section 11 is hereby amended by the substitution for paragraph *(b)* of subsection (9) of the following paragraph: "*(b)* has at any time been convicted of extortion, bribery, any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or sections 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, theft, fraud, forgery or uttering a forged document knowing it to be false or perjury and has in respect thereof been sentenced to imprisonment without the option of a fine or to a fine exceeding R1 000;".
Act 148 of 1993	Independent Media Commission Act	Section 6 is hereby amended by the substitution for subparagraph (i) of paragraph *(j)* of subsection (1) of the following subparagraph: "(i) in the Republic, of theft, fraud, forgery and uttering a forged document, perjury or an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 209 of 1993	Local Government Transition Act, 1993	1. Section 10G is hereby amended by the substitution for paragraph *(g)* of subsection (2) of the following paragraph: "*(g)* Any loss suffered by a municipality and which the chief executive officer, or if the chief executive officer is responsible, the council, suspects to be due to any fraudulent **[or corrupt]** act or an **[act of bribery]** offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, committed by any person, shall forthwith be reported by the chief executive officer or the council, as the case may be, to the South African Police Service.". 2. Section 10H is hereby amended by the substitution for the words following paragraph *(b)* of subsection (1) of the following words: "is *prima facie* of the opinion that a council member, a chief executive officer or an employee has acted unlawfully or is responsible for any act or omission which has resulted or may result in fraud, **[corruption]** an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or maladministration, or is of the opinion that the allegation is of such a nature that it justifies further action, he or she shall, subject to subsection (5), appoint a commission of inquiry in terms of the respective provincial laws to inquire into the matter: Provided that in the absence of a provincial law relating to a commission of inquiry, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), and the regulations made thereunder, shall with the necessary changes apply to the municipality concerned in so far as they are applicable to the functions of the municipality.".

No. and Year of Law	Short title	Extent of Repeal or Amendment
		3. Section 10H is hereby amended by the substitution for subsection (6) of the following subsection: "(6) If the MEC, after considering a report referred to in subsection (4) or a report of a commission contemplated in subsection (5), is of the opinion that a council, a member or a chief executive officer or employee either intentionally acted unlawfully or is responsible for any act or omission which has resulted or may result in fraud, **[corruption]** an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or maladministration, he or she may take such steps as he or she may deem necessary so as to deal with the matter.".
Act 23 of 1994	Public Protector Act	Section 6 is hereby amended by the substitution for subparagraph (iii) of paragraph *(a)* of subsection (4) of the following subparagraph: "(iii) Improper or dishonest act, or omission or **[corruption]** offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;".
Act 40 of 1994	Intelligence Services Control Act	Section 7 is hereby amended by the substitution for paragraph *(cA)* of subsection (7) of the following paragraph: "*(cA)* to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph *(a)*, **[corruption]** the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member;".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 66 of 1995	Labour Relations Act	Section 145 is hereby amended by the substitution for paragraphs *(a)* and *(b)* of subsection (1) of the following paragraphs: "*(a)* within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves **[corruption]** the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or *(b)* if the alleged defect involves **[corruption]** an offence referred to in paragraph *(a)*, within six weeks of the date that the applicant discovers **[the corruption]** such offence.".
Act 67 of 1995	Development Facilitation Act	1. Section 8 is hereby amended by the substitution for paragraph *(d)* of subsection (2) of the following paragraph: "*(d)* he or she is convicted of an offence involving dishonesty or **[corruption]** an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or sentenced to imprisonment without the option of a fine; or". 2. Section 15 is hereby amended by the substitution for subparagraph (iv) of paragraph *(b)* of subsection (6) of the following subparagraph: "(iv) he or she is convicted of an offence involving dishonesty, or **[corruption]** an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or sentenced to imprisonment without the option of a fine; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 33 of 1996	National Gambling Act	Section 3 is hereby amended by the substitution for item *(dd)* of subparagraph (iii) of paragraph *(a)* of subsection (7) of the following item: "*(dd)* has at any time been or is convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, **[an]** any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty.".
Act 65 of 1996	Films and Publications Act	Section 7 is hereby amended by the substitution for subparagraph (i) of paragraph *(h)* of subsection (1) of the following subparagraph: "(i) in the Republic, of theft, fraud, forgery and uttering a forged document, perjury, or **[an offence in terms of the Corruption Act, 1992 (Act 94 of 1992)]** any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), or Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;".
Act 74 of 1996	Special Investigating Units and Special Tribunals Act	Section 2 is hereby amended by the substitution for paragraph *(f)* of subsection (2) of the following paragraph: "*(f)* **[corruption]** offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was committed in connection with the affairs of any State institution; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 57 of 1997	Lotteries Act	1. Section 3 is hereby amended by— *(a)* the substitution for paragraph *(b)* of subsection (5) of the following paragraph: "*(b)* shall suspend the membership of any member of the board in the event of the State instituting criminal proceedings in a court of law on a charge of theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty; *(b)* the substitution for subparagraph (i) of paragraph *(c)* of subsection (5) of the following subparagraph: "(i) being found guilty in a court of law of contravening this Act or of theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992, Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty; or:":

No. and Year of Law	Short title	Extent of Repeal or Amendment
		(c) the substitution for item *(dd)* of subparagraph (iii) of paragraph *(a)* of subsection (7) of the following item: "*(dd)* has at any time been, or is, convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence in terms the Prevention of Corruption Act, 1958 (Act No.6 of 1958),the Corruption Act, 1992, Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty.". 2. Section 51 is hereby amended by the substitution for paragraph *(e)* of subsection (1) of the following paragraph: "*(e)* if the certificate holder is convicted on a charge of theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992, Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty.".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 105 of 1997	Criminal Law Amendment Act	1. Section 51 is hereby amended by the addition of the following subsection: "(9) The amounts mentioned in respect of the offences referred to in PART II of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the *Gazette*. 2. **PART II** of Schedule 2 is hereby amended by the substitution of the words preceding paragraph *(a)* in the last offence of PART II, of the following words: "Any offence relating to exchange control, **[corruption]** extortion, fraud, forgery, uttering, **[or]** theft, or an offence in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—".
Act 40 of 1998	South African Civil Aviation Authority Act	Section 9 is hereby amended by the substitution for subparagraph (ii) of paragraph *(a)* of subsection (3) of the following subparagraph: "(ii) of any offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, the Companies Act, 1973, or of contravening this Act;".
Act 105 of 1998	National Empowerment Fund Act	Section 7 is hereby amended by the substitution for paragraph *(e)* of subsection (1) of the following paragraph: "*(e)* has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery and uttering, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No.6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 112 of 1998	Witness Protection Act	The Schedule to the Act is hereby amended by the substitution for the words proceeding paragraph *(a)* in item 14 of the following words: "Any offence relating to exchange control, **[corruption]** extortion, fraud, forgery, uttering, **[or]** theft, or an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004,".
Act 121 of 1998	Prevention of Organised Crime Act	Schedule 1 to the Act is hereby amended by the substitution for item 12 of the following item: "12. any offence contemplated in Part 1 to 4, or section 17, 18, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;".
Act 131 of 1998	Medical Schemes Act	Section 5 is hereby amended by the substitution for paragraph *(d)* of subsection (1) of the following paragraph: "*(d)* has at any time been convicted (whether in the Republic of South Africa or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine,".
Act 132 of 1998	South African Medicines and Medical Devices Regulatory Authority Act	Section 8 is hereby amended by the substitution for subparagraph (i) of paragraph *(j)* of subsection (1) of the following subparagraph: "(i) theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958) the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty;".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 4 of 1999	Broadcasting Act	Section 16 is hereby amended by the substitution for subparagraph (i) of paragraph *(d)* of subsection (1) of the following subparagraph: "(i) in the Republic, of theft, fraud, forgery and uttering a forged document, perjury, or an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958) the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004,;".
Act 20 of 1999	Road Traffic Management Corporation Act	Section 10 is hereby amended by the substitution for subparagraph (ii) of paragraph *(a)* of subsection (1) of the following subparagraph: "(ii) of any offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, the Companies Act, 1973 (Act 61 of 1973), or this Act;".
Act 13 of 2000	Independent Communications Authority of South Africa Act	Section 6 is hereby amended by the substitution for subparagraph (i) of paragraph *(j)* of subsection (1) of the following subparagraph: "(i) theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty; or".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 38 of 2000	Construction Industry Development Board Act	Section 7 is hereby amended by the substitution for paragraph *(a)* of subsection (4) of the following paragraph: "*(a)* is convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, or any offence involving dishonesty or of any offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or the Companies Act, 1973 (Act 61 of 1973), or of contravening this Act;".
Act 63 of 2000	Home Loan and Mortgage Disclosure Act	Section 8 is hereby amended by the substitution for subparagraph (i) of paragraph *(e)* of subsection (2) of the following subparagraph: "(i) an offence involving dishonesty or **[corruption]** an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or".
Act 56 of 2001	Private Security Industry Regulation Act	The Schedule to the Act is hereby amended by the substitution for the offence mentioned in the 26th line of the following offence: "**[Corruption in terms of statutory law]** An offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004.".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 13 of 2002	Immigration Act	Schedule II to the Act is hereby amended by the substitution for the offence "Corruption" of the following offence: "An offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004".
Act 14 of 2002	Media Development and Diversity Agency Act	Section 5 is hereby amended by the substitution for paragraph *(e)* of the following paragraph: "*(e)* has, notwithstanding paragraph *(f)*, at any time been convicted of theft, fraud, perjury, an offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty;".
Act 15 of 2002	Land and Agricultural Development Bank Act	Section 10 is hereby amended by the substitution for subparagraph (i) of paragraph *(d)* of the following subparagraph: "(i) in the Republic of theft, perjury, or an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;".

No. and Year of Law	Short title	Extent of Repeal or Amendment
Act 70 of 2002	Regulation of Interception of Communications and Provision of Communi-cation related Information Act, 2002	The Schedule to the Act is hereby amended by the substitution for item 12 of the following item: "12. any offence contemplated in **[section 1(1) of the Corruption Act, 1992 (Act 94 of 1992),]** Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;".

MINIMUM

INFORMATION SECURITY

STANDARDS

COMMISSION OF INQUIRY
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COMMISSION OF INQUIRY
INTO STATE CAPTURE

CHAPTER 1

INTRODUCTION

1. The need for secrecy and therefore security measures in a democratic and open society, with transparency in its governmental administration, is currently the subject of much debate, and will continue to be for a long time.

2. However, the issue need not be controversial, since the intended Open Democracy Act (not yet promulgated at the time of going to press) itself will acknowledge the need for protection of sensitive information, and therefore, will provide for justified exemption from disclosure of such information.

3. Although exemptions will have to be restricted to the minimum (according to the policy proposals regarding the intended Open Democracy Act), that category of information which will be exempted, as such needs protection. The mere fact that information is exempted from disclosure in terms of the Open Democracy Act, does not provide it with sufficient protection. Such information will always be much sought after by certain interest groups or even individuals, with sufficient access to espionage expertise, and highly sophisticated technological backing. The extent of espionage against the new South Africa should never be under estimated - it has actually escalated alarmingly during the past few years.

4. Where information is exempted from disclosure, it implies that security measures will apply in full. This document is aimed at exactly that need: providing the necessary procedures and measures to protect **such** information. It is clear that security procedures do not concern **all** information and are therefore not contrary to transparency, but indeed necessary for responsible governance.

5. The procedures and measures taken up in this volume are based on general security principles. It should, however, be remembered that in drawing up

security directives it was not possible for the National Intelligence Agency (NIA) to take into account the particular circumstances and operations of each of the institutions where classified information is handled. Institutions should therefore compile their own rules of procedure to fit their own circumstances and operations. In the development of an own effective information security system, institutions should use this volume as a minimum standard on which to base it.

6. As stated above, this document lays down a minimum standard for the handling of classified information in all institutions, so that various institutions may send classified information to one another in the knowledge that the risk of compromising such information has been eliminated.

7. An effective security system, based on certain principles, is characterised by the following features:

7.1 Security prescriptions must be simple, comprehensible and capable of being carried out in practice.

7.2 Security prescriptions should not needlessly interfere with the actions of the individual. If this happens, the goodwill of the individual, which is essential for effective security, can be repressed. This can also lead to individuals treating security measures with disrespect.

7.3 In addition to what has been mentioned above, it is necessary to strive for a reconciliation between the requirements of sound administration with those of effective security.

7.4 It is necessary to constantly guard against both the overclassification and the underclassification of information. Misuse of classifications can result in the system being treated with contempt. The consequence will be carelessness with respect to the security system.

8. The security advisers of the National Intelligence Agency (NIA) are, in accordance with the responsibilities assigned to them (see Annexure A), constantly available to assist institutions in drawing up their own procedural directions. The security advisers may be contacted at the following address:

The Director-General
National Intelligence Agency
Private Bag X87
Pretoria
0001 (Attention: Information Security)

Telephone number: (012) 317-5911

9. Although every effort has been made to take into consideration different and new perspectives on security issues, this document is by no means final. To reach finality on all matters would have meant that authorising and distributing this document would have had to be postponed indefinitely, while it is being awaited urgently by all institutions. Matters that still need to be ironed out, e.g. criteria for the different security classifications, definitions of new terms and concepts related to the security field, etc, will receive attention after this volume has been issued and will be contained in a revised edition at a later stage.

10. This document replaces the former **Guidelines for the Protection of Classified Information** (SP 2/8/1) of March 1988.

CHAPTER 2

DEFINITIONS

1. **ACCESS CONTROL**

The process by which access to a particular area is controlled or restricted to authorised personnel only. This is synonymous with controlled access. See the Control of Access to Public Premises and Vehicles Act (Act 53 of 1985) as amended.

2. **AUTHOR**

The head of an institution, or the person acting on his behalf, who prepares, generates, or initially classifies a document or has it classified.

3. **CLASSIFICATION**

3.1 All official matters **requiring the application of security measures** (exempted from disclosure) must be classified "Restricted", "Confidential", "Secret" or "Top Secret".

3.2 Upgrading, downgrading and regrading of documents may take place and will involve changing the classification in accordance with the system prescribed (see Chapter 4, paragraph 1.4).

3.3 To avoid confusion, it is essential for all bodies/institutions to maintain uniformity with respect to the classification system, and to assign to documents the same rating in accordance with the degree of security warranted by the contents and nature of the documents. The security classifications as defined below should therefore be applied by all institutions. By "document" is meant those matters as

set forth in the definitions section of the Protection of Information Act (Act 84 of 1982).

3.4 The classifications mentioned above are described below.

Note: Security measures are not intended and should not be applied to cover up maladministration, corruption, criminal actions, etc, or to protect individuals/officials involved in such cases. The following descriptions should be understood accordingly:

3.4.1 **Restricted**

Definition: RESTRICTED is that classification allocated to all information that may be used by malicious/opposing/hostile elements to hamper activities or inconvenience an institution or an individual.

Test: Intelligence/information must be classified as RESTRICTED when the compromise thereof could hamper or cause an inconvenience to the individual or institution.

Explanation: RESTRICTED is used when the compromise of information can cause inconvenience to a person or institution, but cannot hold a threat of damage. However, compromise of such information can frustrate everyday activities.

3.4.2 **Confidential**

Definition: The classification CONFIDENTIAL should be limited to information that may be used by malicious/opposing/hostile elements to harm the objectives and functions of an individual and/or institution.

Test: Intelligence/information must be classified CONFIDENTIAL when compromise thereof can lead to:

- the frustration of the effective functioning of information or operational systems;
- undue damage to the integrity and/or reputation of individuals;
- the disruption of ordered administration within an institution; and
- adverse effect on the non-operational relations between institutions.

Explanation: CONFIDENTIAL is used when compromise of information results in:

- undue damage to the integrity of a person or institution, but not entailing a threat of serious damage. The compromise of such information, however, can frustrate everyday functions, lead to an inconvenience and bring about wasting of funds;
- the inhibition of systems, the periodical disruption of administration (eg logistical problems, delayed personnel administration, financial relapses, etc) that inconvenience the institution, but can be overcome; and
- the orderly, routine co-operation between institutions and/or individuals being harmed or delayed, but not bringing functions to a halt.

3.4.3 **Secret**

Definition: SECRET is the classification given to information that may be used by malicious/opposing/hostile elements to disrupt the objectives and functions of an institution and/or state.

Test: Intelligence/information must be classified as SECRET when the compromise thereof:

- can disrupt the effective execution of information or operational planning and/or plans;
- can disrupt the effective functioning of an institution;
- can damage operational relations between institutions and diplomatic relations between states;
- can endanger a person's life.

Explanation: SECRET is used when the compromise of information:

- can result in the disruption of the planning and fulfilling of tasks, ie the objectives of a state or institution in such a way that it cannot properly fulfil its normal functions; and
- can disrupt the operational co-operation between institutions in such a way that it threatens the functioning of one or more of these institutions.

3.4.4 **Top Secret**

Definition: TOP SECRET is the classification given to information that can be used by malicious/opposing/hostile elements to neutralise the objectives and functions of institutions and/or state.

Test: Intelligence/information must be classified TOP SECRET when the compromise thereof:

- can disrupt the effective execution of information or operational planning and/or plans;
- can seriously damage operational relations between institutions;
- can lead to the discontinuation of diplomatic relations between states; and
- can result in the declaration of war.

Explanation : TOP SECRET is used when the compromise of information results in :

- the functions of a state and/or institution being brought to a halt by disciplinary measures, sanctions, boycotts or mass action;
- the severing of relations between states; and
- a declaration of war.

4. **CLASSIFIED INFORMATION**

Sensitive information which in the national interest, is held by, is produced in, or is under the control of the State, or which concerns the State and which must by reasons of its sensitive nature, be exempted from disclosure and must enjoy protection against compromise.

5. **CLASSIFY/RECLASSIFY**

The grading/arrangement or regrading/re-arrangement of a document, in accordance with its sensitivity or in compliance with a security requirement.

6. **COMMUNICATION SECURITY**

That condition created by the conscious provision and application of security measures for the protection of classified communication.

7. **COMPROMISE**

The unauthorised disclosure/exposure or loss of sensitive or classified information, or exposure of sensitive operations, people or places, whether by design or through negligence.

8. **COMPUTER SECURITY**

That condition created in a computer environment by the conscious provision and application of security measures. This includes information concerning the procedure for the procurement and protection of equipment.

Everything that could influence the following is considered to be relevant to computer security:

- The confidentiality of data (an individual may have access only to that data to which he/she is supposed to).

- The integrity of data (data must not be tampered with and nobody may pose as another - e.g. in the electronic mail environment, etc).

- The availability of systems.

9. **CONTINGENCY PLANNING**

The prior planning of any action that has the purpose to prevent, and/or combat, or counteract the effect and results of an emergency situation where lives, property or information are threatened. This includes compiling, approving and distributing a formal, written plan, and the practise thereof, in order to identify and rectify gaps in the plan, and to familiarise personnel and co-ordinators with the plan.

10. **CONTROLLING BODY**

The body which in terms of the rationalisation agreement, is responsible for controlling the security position within its sphere of responsibility.

11. **COPYING / DUPLICATING / REPRODUCING**

The making of a copy of any document, whether by copying it out by hand, by photographic means or by any other means.

12. **DECLARATION OF SECRECY**

An undertaking given by a person who will have, has or has had access to classified information, that he/she will treat such information as secret

(see Appendix B).

13. **DELEGATE**

A delegate is a person who is granted certain powers/authorities or functions in order to represent a higher authority in performing a specific task.

14. **DELEGATION**

Delegation is the transfer of authority, powers or functions from one person/institution to another.

Delegation takes place in order to effect division of labour since it is physically impossible for a person/institution/body himself/herself to exercise all the powers/authorities assigned to him/her.

Delegatus delegare non potest - A delegate cannot delegate.

15. **DESTRUCTION OF CLASSIFIED MATERIAL**

The doing away with/expunging or destroying of classified documents.

16. **DISPATCHING CLASSIFIED DOCUMENTS**

The transfer of classified documents, in any manner whatever or by any channel whatever, from one point to another.

17. **DOCUMENT SECURITY**

That condition which is created by the conscious provision and application of security measures in order to protect classified documents.

18. **DOCUMENT**

In terms of the Protection of Information Act (Act 84 of 1982) a document is:

- any note or writing, whether produced by hand or by printing, typewriting or any other similar process;

- any copy, plan, picture, sketch or photographic or other representation of any place or article;

- any disc, tape, card, perforated roll or other device in or on which sound or any signal has been recorded for reproduction.

19. **EMPLOYER INSTITUTION**

The institution, whether a public, parastatal or private undertaking (where applicable), that employs any worker, official or officer who actually has, or may probably have, access to classified matters.

20. **ESPIONAGE**

The methods by which states, organisations and individuals, attempt to obtain classified information to which they are not entitled.

21. **HEAD OF AN INSTITUTION**

The person who is serving as the head of an institution, whether defined by law or otherwise, including the official acting in his place.

22. **INFORMATION SECURITY**

That condition created by the conscious provision and application of a system of document, personnel, physical, computer and communication security measures to protect sensitive information.

23. **INSTITUTION**

Institution means any department of State, body or organisation that is subject to the Public Service Act or any other law or any private undertaking that handles information classifiable by virtue of national interest.

24. **NEED-TO-KNOW PRINCIPLE**

The furnishing of only that classified information or part thereof that will enable a person/s to carry out his/her task.

25. **PERSONNEL CONFIDENTIAL**

A handling instruction indicated on personnel documents. Although these documents are to be handled in the same way as "restricted" documents, this is not a security classification. Should information regarding a personnel member be more sensitive than justified by the terms "Personnel confidential" or "Restricted" it should be classified according to regulations.

26. **PERSONNEL SECURITY**

Personnel security is that condition created by the conscious provision and application of security measures in order to ensure that any person who gains

access to classified information does have the necessary security clearance, and conducts him/herself in a manner not endangering him/her or the information to compromise. This could include mechanisms to effectively manage / solve personnel grievances.

27. **PHYSICAL SECURITY**

That condition which is created by the conscious provision and application of physical security measures for the protection of persons, property and information.

28. **PROTECTION OF PERSONS**

The physical protection of identified important persons against violence and insults, as well as the protection of information in the possession of such persons against unauthorised exposure or disclosure to malicious/opposing/hostile elements or persons.

29. **RECEIPT OF CLASSIFIED DOCUMENTS**

The receipt and documenting or taking on record of classified documents.

30. **SCREENING/ VETTING INSTITUTIONS**

Screening institutions are those institutions (the SA Police Service, the National Intelligence Agency, South African Secret Service or the SA National Defence Force) that, in terms of the rationalisation agreement, are responsible for the security screening/vetting of persons within their jurisdictions.

31. **SECURITY**

That condition free of risk or danger to lives, property and information created by the conscious provision and application of protective security measures. Not to be confused with national security (i.e. peace, stability, development and progress), which is a far broader concept that encompasses not only absence of threats, risk or danger, but also the basic principles and core values associated with and essential to the quality of life, freedom, justice, prosperity and development. (Quoted from the White Paper on Intelligence.)

PROTECTIVE SECURITY

Much narrower concept than National Security, although very much a part/element of the latter. This concept deals with the provisioning and maintaining of measures to protect lives, property and information and as such could include : vetting, security investigations, guarding, document, personnel, physical and IT security.

32. **SECURITY AREA**

Any area to which the general public is not freely admitted and to which only authorised persons are admitted.

33. **SECURITY AUDIT**

That part of security control undertaken to:

- determine the general standard of information security and to make recommendations where shortcomings are identified;

- evaluate the effectiveness and application of security policy/ standards/ procedures and to make recommendations for improvement where necessary;

- provide expert advice with regard to security problems experienced; and

- encourage a high standard of security awareness.

34. **SECURITY CLEARANCE**

An official document indicating the degree of security competence of a person.

35. **SECURITY COMPETENCE**

This is a person's ability to act in such a manner that he does not cause classified information or material to fall into unauthorised hands, thereby harming or endangering the security or interests of the State. Security competence is normally measured against the following criteria: susceptibility to extortion or blackmail, amenability to bribes and susceptibility to being compromised due to compromising behaviour, and loyalty to the state / institution.

36. **SECURITY LOCK**

A lock with at least six levers or five checks of which the tumblers are not springy (eg Chubb, Abloy and Real).

37. **SECURITY MEASURES**

All actions, measures and means employed to achieve and ensure a condition of security commensurate with the prevailing threat.

38. **SECURITY SCREENING/VETTING**

The systematic process of investigation followed in determining a person's security competence.

39. **STORAGE**

The safekeeping of classified documents in appropriate (prescribed) lockable containers, strongrooms, record rooms and reinforced rooms.

40. **TRANSMISSION SECURITY**

Transmission security is a part of communication security and entails the safeguarding and secure use of systems linked to one another for the sake of communication.

CHAPTER 3

THE PROVISION AND APPLICATION OF SECURITY MEASURES

1. RESPONSIBILITIES OF THE HEAD OF AN INSTITUTION

1.1 The head of every institution bears overall responsibility for the provision and maintenance of security in his/her institution, under all circumstances.

1.2 Apart from the ordinary or customary powers of delegation to senior officers or employees, it is necessary to prepare a clearly formulated policy signed by the head of the institution with regard to security in order to maintain information security and to ensure physical security. This security function must be delegated in writing to a fit and proper officer/employee and provision shall be made for the effective administration and practice of security.

1.3 The policy shall set forth in unambiguous terms the powers, responsibilities and duties of the security staff, and must require all personnel to submit to security measures. Security being an integral part of the management function, the composition of the security component must be such that the line of authority does not obstruct access to top management.

2. RESPONSIBILITIES OF THE HEAD OF THE SECURITY COMPONENT

2.1 The functional execution of security policy as the primary function of the chief security officer shall place emphasis on, inter alia, the following responsibilities:

- the recruitment and appointment of fit and proper persons as operational security officers;

- the training of and the exercise of control over the security personnel;

- the effective managing / administration of all spheres of security, which includes

  * planning

  * organising

  * financing

  * staffing

  * guiding and directing

  * controlling/checking.

2.2 The effective practice of security will include:

- raising security consciousness;

- drawing up rules of procedure;

- the updating of relevant knowledge through self-study, attending symposia, etc;

- training personnel to know, understand and apply security procedures and measures;

- constant liaison, co-operation and co-ordination with, and reporting to, the controlling institutions;

- reporting of all breaches or alleged breaches of security, or behaviour posing a security risk, to the appropriate institutions; and

- compliance with security directives, as issued by the controlling institution.

2.3 In order to ensure that information security is undertaken on a sound basis throughout, the head of the security component must have direct access to the head of the institution and/or a seat in management meetings in as far as functional matters and policy are concerned. Following on this, "Security" should be a fixed item on the agenda.

3. OPERATIONAL SECURITY PERSONNEL

The function of such personnel is to carry out policy and rules of procedure with regard to security, as laid down by the head of the institution (see Chapter 3, paragraph 1.2).

CHAPTER 4

DOCUMENT SECURITY

These prescriptions apply to documents classified Confidential, Secret and Top Secret.

1. CLASSIFICATION AND RECLASSIFICATION OF DOCUMENTS

1.1 All bodies/institutions/organisations have at their disposal intelligence/information that is to some extent sensitive in nature and obviously requires security measures. The degree of sensitivity determines the level of protection, which implies that information must be graded or classified according to it. Every classification necessitates certain security measures with respect to the protection of sensitive information which will be known as classified information (refer to Chapter 2, paragraph 6).

1.2 The responsibility for the gradings and regradings of document classifications rests with the institution where the documents have their origin. This function rests with the author or head of the institution or his delegate(s).

1.3 The classifications assigned to documents shall be strictly observed and may not be changed without the consent of the head of the institution or his delegate.

1.4 Where applicable, the author of a classified document shall indicate thereon whether it may be reclassified after a certain period or upon the occurrence of a particular event. **This option is to be applied consistently upon the award of a classification higher than Restricted**.

1.4.1 Should the author of a document on which there is no embargo, reclassify such document, he must inform all addressees of the new classification.

1.4.2 The receiver of a classified document who is of the opinion that the document concerned must be reclassified, must obtain oral or written authorisation from the author, the head of the institution or his delegate(s). Such authorisation must be indicated on the relevant document when it is reclassified.

1.5 The classification of a document or file will be determined by the highest-graded information it contains. The same classification as that of the original must be assigned to extracts from classified documents, unless the author consents to a lower classification.

1.6 Every document must be classified on its own merit (in accordance with its own contents) and in accordance with the origin of its contents, and not in accordance with its connection with or reference to some other classified document; provided that where the mere existence of a document referred to is in itself information that calls for a **higher** security classification than the document containing the reference, the **latter document** must be classified accordingly.

1.7 The author of a document must guard against the underclassification, overclassification or unnecessary classification of documents. The head of an institution or his/her delegate must on a regular basis test classifications of documents generated in his/her institution against the criteria applicable to the relevant classification (see Chapter 2, paragraph 3).

1.8 When a document is classified, the classification assigned to it must be indicated clearly on the document in the following way:

1.8.1 **Documents and bound volumes**

The classification of loose and not permanently bound documents and bound volumes (books, publications, pamphlets) and other documents that are securely and permanently bound is typed/printed or stamped at the top and the bottom (preferably in the middle) of every page (including the cover).

1.8.2 **Copies, tracings, photographs, drawings, sketches, etc**

1.8.2.1 Security classifications shall be indicated on such documents by means of rubber stamps or other suitable means. The exact position of the mark may vary, depending on the nature of the document, so that essential details shall not be obscured by the stamp. An effort must, however, be made to mark the document as clearly as possible, so that the mark will immediately attract attention.

1.8.2.2 Tracings or blueprints shall be marked in such a way that the security classification is visible on all copies. Where this is not possible, rubber stamps should be used to mark all the copies.

1.8.3 **Rolled or folded documents.** Apart from being marked as prescribed on the face, a document such as this shall also be marked in such a way that the security classification will be clearly visible when the document is folded or rolled up.

1.8.4 **Tape recordings and documents on which no marks can be made.** Where, as in the case of tape recordings, certain photographs and negatives, it is physically impossible to place clear classification marks on a document itself; the document should be placed in a suitable box, envelope or other container and, if necessary, sealed. The nature and classification of the contents clearly marked on the outside of the container.

1.8.5 **Files.** A clear distinguishing mark, the significance of which is known to those who deal with the file concerned, should be placed on both the front and the back cover of Secret or Top Secret files.

Note:For an explanation of the classifications, see Chapter 2, Definitions.

2. ACCESS TO CLASSIFIED INFORMATION

The general rules and prescriptions as to who may have access to or inspect classified matters are as follows:

2.1 A person who has an appropriate security clearance or who is by way of exception authorised thereto by the head of the institution or his/her delegate (see Chapter 5, paragraphs 3.6, 10.2 and 10.3), with due regard being paid to the need-to-know principle.

2.2 Persons who must necessarily have access to that classified information in the execution of their duties (the need-to-know principle) - **on condition that a suitable clearance has been issued or authorisation has been granted, as explained in Chapter 4, paragraph 2.1.**

2.3 Persons such as stand-in typists/secretaries and personnel at smaller centres who in general do not have access to classified material and who do not have a relevant security clearance, but are expected to have access to this information on an ad-hoc basis owing to the circumstances, on condition that the prescribed oath/declaration of secrecy was taken.

3. HANDLING OF CLASSIFIED DOCUMENTS

3.1 All classified documents must be stored in accordance with instructions while not in use (see Chapter 4, paragraph 10).

3.2 All incoming classified documents, including official, classified post marked "Personal" must be received and noted in a register by persons with the appropriate clearance. The object of such registration is to enable total control over such documents. This provision does not apply to documents bearing a classification of Restricted.

3.2.1 Officials who usually receive the incoming post of an institution (eg registration officers) must hand the unopened inner envelope of incoming classified correspondence to the appropriate official(s) who is/are authorised to open correspondence in a certain category. The latter is/are responsible for entering the correspondence concerned in the prescribed register.

3.3 All classified documents that are dispatched, made available or distributed, must be subjected to record keeping in order to ensure control thereof. This provision does not apply to documents that are classified as Restricted.

3.3.1 Measures must be taken to ensure that classified documents are not physically taken from one institution to another and/or informally handed to a member of another institution during a contact visit, in this way evading prescriptions for the registration of incoming and outgoing post.

3.3.2 The various institutions may draw up standard registers in which the particulars of classified postal material are to be entered. Registers for the particulars of postal material classified as Secret and Top Secret are to be classified accordingly. The registers must include the following particulars:

3.3.2.1 **Particulars of incoming post:** Serial number of the entry; Date of receipt; From whom received; Registered postal material and reference number; Classification (C/S/TS); Subject/heading; Disposal: File number, Recipient (signature); Further dispatch (serial number of the entry for outgoing mail in the register); Destruction (date and signature).

3.3.2.2 **Particulars of outgoing post:** Serial number of the entry; Date of dispatch; Reference number and date of the document; Classification; Subject/heading; Dispatched/addressed to; Nature of dispatch (courier, by hand, registered post, facsimile, by computer); Registered number of postal material; Signature of the recipient (courier, registration, person dispatching); Receipt number; Date when receipt was obtained.

3.4 When Secret and Top Secret documents are distributed, dispatched or made available, they must be accompanied by a receipt voucher signed by the addressee, the receipt of which must again be controlled by the sender. The receipt voucher is classified only if the subject/heading of the document itself is classified, in which case the classification must agree with that of the document.

3.5 All Secret and Top Secret documents must be given copy numbers and an indication must be given of the number of copies produced, eg Copy 1 of 7 copies. The copy number should appear on the first page of each document, in the upper right-hand corner. (See paragraph 14 for the procedure to be followed when copies are made of classified documents.)

3.6 A serial number must be allocated to every document filed in a **classified file** as is indexed on a page attached to the inside of the file cover, together with the name/heading of the document concerned.

4. TRANSMITTING DOCUMENTS BY MEANS OF FACSIMILE

4.1 When classified documents are transmitted by means of facsimile, **only** facsimile machines equipped with encryption as prescribed by Communication Security Policy/Instructions must be used.

4.2 Classified reports may only be handled by a suitably cleared operator.

4.3 The Cryptographic equipment and facsimile machines must be kept in a room that is manned **at all times while it is unlocked or in use** by a suitably cleared, trained and appointed official, while care has to be taken that reports received through this apparatus are not accessible to unauthorised persons. The Cryptographic equipment must be handled in accordance with Communication Security Policy/Instructions.

4.4 A record must be kept of the transmission and receipt of classified documents.

4.5 After receiving a message, receipt must be acknowledged immediately. The recipient shall ensure receipt of **all pages.**

4.6 The recipient or the communication centre of the recipient, upon receiving the document, must ensure that it has been received clearly, accurately and in full. Thereafter, he/she shall immediately transmit an acknowledgement of receipt to the sender.

4.7 The recipient shall, on his/her copy, note the copy number as indicated on the distribution list.

4.8 Effective control must be exercised over "open" facsimile machines to ensure that these are **not** used for the transmission of classified documents.

5. **TRANSMITTING DOCUMENTS BY COMPUTER**

5.1 Encryption as prescribed shall be applied with respect to the computerised transmission of classified documents.

5.2 A record shall be kept of the classified documents transmitted and received, provided that the recipient of documents must always acknowledge receipt of

classified documents. It must also be remembered that all magnetic media must be regarded as documents and handled as such.

5.3 Such documents must be supplied with copy numbers (see Chapter 4, paragraph 3.5).

6. **DISPATCHING CLASSIFIED DOCUMENTS BY COURIER**

6.1 All classified documents (sealed according to prescription - see Chapter 4 paragraph 8) must be noted in a register indicating the title/description of the document and the date and time of dispatch, and must be handed over against the signature of the courier.

6.2 A courier must convey classified documents in a safe locked container. It is recommended that where possible, the container should have a combination lock.

6.2.1 Secret and top secret documents (and where necessary also sensitive confidential documents) should be delivered locally only by hand (ie by a courier. The following shall be adhered to:

- Couriers must have at least a Confidential security clearance).

- Where possible the courier must be accompanied by a second person.

- All classified material must be conveyed under safe conditions, that is preferably in an attache case with a code or combination lock (particularly if the courier is not accompanied by a second person).

- The courier must obtain an appropriate receipt for the material.

- On the return of the courier the receipts for classified deliveries must be checked by a responsible officer.

6.2.2 Control must be exercised over the time taken by the courier to deliver the documents. Upon receipt, the recipient of such documents must check that the documents have not been compromised.

6.2.3 Couriers must be able to identify themselves when fetching or dispatching post.

6.2.4 Cryptographic equipment must be handled according to Communication Security Policy/Instructions.

7. DISPATCHING CLASSIFIED DOCUMENTS BY MAIL

7.1 Classified documents in the Secret and Top Secret categories that cannot be dispatched by courier may, as an exception, be mailed on provision that it be sent by registered mail and then only with the express permission of the head of the institution or his delegate.

8. **SEALING OF CLASSIFIED DOCUMENTS BEFORE DISPATCH**

8.1 Classified documents that are dispatched (excluding by facsimile and computer) must be sealed and handled in the following way:

8.1.1 A receipt to be signed by the addressee and returned to the sender, must be attached to the document and placed in the inside envelope. This does not apply to "Restricted" documents.

8.1.2 Classified documents must always be dispatched in a double envelope/cover, ie in an envelope placed within another (excluding "Restricted" documents). The following process shall be followed:

- The seams of the inside envelope must be properly sealed with paper seals, counter signed and with the name of the office of origin clearly stamped on them. If paper seals are used for this purpose, they must be attached with passport glue (seals that can be re-used are not suitable for this purpose).

- Thereafter wide translucent tape must be put on the seams, covering the seals and the stamps.

- The reference number of the document, name and address of the addressee and other special instructions for dealing with the document must appear clearly on the front of the inside envelope.

- The security classification of the document must be indicated clearly on the front and the back of the envelope by means of a rubber stamp.

Alternative method for sealing postal material in bulk: The inside envelope can be sealed without seals, stamps, tape, reference number and classification

by means of a mechanical process of vacuum packaging in plastic. Some of the requirements in this case are:

- A sticker on the envelope bearing the following particulars: reference number of the document, name, address and special handling instructions

- The plastic packaging must be of good quality (ie it may not tear).
- Changeable stamps of the relevant institution must be imprinted on the plastic packaging. For this purpose the ink must not be able to be removed from the plastic.

- Dispatch of such documents may **only** take place by courier. The delivery time must be controlled strictly and consistently.

Remark: Before implementing this alternative, the National Intelligence Agency must be contacted in order that the relevant institution may be advised on the maintaining of security standards.

8.1.2.2 The outer envelope should bear only the name and address of the addressee and the name and address of the sender. Under no circumstances should there be an indication of the nature or classification of the contents, since this could attract undesirable attention to the document.

8.1.3 Persons who normally receive incoming post in an office (such as the registry officers) must make sure that they know who is authorised to open incoming classified correspondence in each particular category and must hand the inner envelope unopened to the authorised officer(s) concerned.

9. BULK CONVEYANCE OF CLASSIFIED DOCUMENTS

9.1 **Note.** When classified documents have to be conveyed in bulk by road, rail or air, the appropriate precautions must be taken for the protection thereof.

9.2 **The bulk conveyance of classified documents by train**

9.2.1 The transportation of official documents to and from Cape Town at the beginning and end of the Parliamentary Session should comply with the following minimum requirements:

9.2.1.1 Documents must be packed in steel trunks and the locks of the trunks must be of an acceptable quality. Departments/ministries must apply proper key control at all times, even when the locks are not in use.

9.2.1.2 Each trunk/cabinet must be bound with at least two steel hoops (of the packing type) as an additional precaution to prevent the trunk/cabinet from being opened or opened accidentally during transport as a result of handling.

9.2.1.3 Trunks must not be marked with a mark indicating whether the contents are classified or not; each should merely bear a number to facilitate record-keeping.

9.2.1.4 A list must be kept of the contents of each trunk/cabinet opposite the number allocated to the trunk/cabinet.

9.2.1.5 Departments must co-ordinate the transportation arrangements for their trunks/cabinets of documents with their own ministries. Where more than one department is accommodated in the same building, there can be interdepartmental co-ordination with regard to transportation arrangements (also see Chapter 4, paragraph 9.2.1.12).

9.2.1.6 Departments must make arrangements in good time with Spoornet for trailers/containers (ie a lockable trailer on its own wheels/a lockable container) in which to load the trunks/cabinets.

9.2.1.7 After the trunks have been packed, locked and bound, the record of the numbers of the trunks and their contents, as well as the keys to the locks, must be given to responsible officer (eg the Parliamentary Officer), who will personally take the records and the keys with him to Cape Town or Pretoria as the case may be.

9.2.1.8 The trunks/cabinets must then be carried out of the building and packed directly into the trailer/container, after which the trailer/container is sealed in the presence of the officer concerned. Care should be taken not to stack trunks/cabinets on the sidewalk to wait for the trailer/container.

9.2.1.9 The responsible officer must further ensure that he is present when the trunks/cabinets arrive at their destination, so that the seals of the trailer/container can be broken in his presence and trunks/cabinets (still locked and bound) can be checked.

9.2.1.10 When trunks/cabinets are not in use, proper control must be exercised over the locks and their keys. If possible they should be kept, sealed in envelopes, in a safe or strongroom.

9.2.1.11 Where departments have the capacity of their own for the transportation of documents between Cape Town and Pretoria, the documents must still be packed as prescribed above and the same control measures with regard to trunks/cabinets must be instituted.

9.2.1.12 Arrangements for the transportation of classified documents under accompaniment between Pretoria and Cape Town before and after the Parliamentary sessions can be co-ordinated with the National Intelligence Agency.

9.3 **Diplomatic bags**

9.3.1 Classified and unclassified documents to be dispatched to RSA missions abroad or departmental representatives there must be sent to the Department of Foreign Affairs for dispatch, whether in diplomatic or airfreight bags. Unclassified documents are normally dispatched by freight bag, while

Confidential, Secret and Top Secret material must be dispatched by diplomatic bag.

9.3.1.1 The diplomatic bag is classified as a Category A bag, and is therefore opened and handled differently from the freight bag for security reasons. Both types of bag are sent to missions abroad by scheduled flights (usually once a week but in some cases only every second week) and departments must therefore hand such postal items in to the relevant division of Foreign Affairs on or before the dispatch date, making use of a courier. A signature must be obtained acknowledging receipt of classified material.

9.3.1.2 In view of the substantial difference between the airfreight rates for the different types of bag, classified and unclassified documents destined for RSA missions abroad must be carefully separated beforehand by authorised officers in the dispatch offices of departments and made up into two (2) separate envelopes or packages. More than one classified document may be placed in each envelope for each individual mission (except in the case of cryptographic material) and it is therefore not necessary for Secret and Top Secret documents to be sealed individually in double envelopes as indicated in Chapter 4, paragraph 9.3.1.4 below. Cryptographic material must still be dispatched in accordance with the Communication Security Policy/Instructions. Strict precautions must, however, be taken to ensure that classified documents under cover of an unclassified letter are not erroneously placed in the envelope intended for the freight bag.

9.3.1.3 All confidential, secret and top secret documents for a particular mission must, as far as, possible be placed in a single envelope by authorised officers of departments. A schedule recording the titles, reference numbers and dates. of all the classified postal items for the mission concerned, must be made out in triplicate. The original plus one copy should be sealed in the envelope with the classified documents in the prescribed way. The third copy of the schedule is kept for record purposes, while the second copy, which is sealed into the

envelope, is signed by the representative of the department concerned at the mission and returned to the department by the next returning freight bag as a receipt for the classified documents. In the case of non-sensitive documents, ie those that are sent by freight bag, a schedule is not required.

9.3.1.4 The envelope containing the classified material must be stamped clearly on the front and the back in the upper right-hand corner with the letters "DIP", (about 4cm x 4cm in size). The other envelope containing the non-classified items must be stamped "FV" in the same way and with the letters of the same size. For the rest only the name of the mission (eg: The SA Embassy, London; or, The Consulate-General, New York) the name of the addressee or the post occupied by him (eg: The Counsellor [Trade]), and the reference number, if any, should appear on the outside of the envelope. The envelope may also bear the address stamp of the sender department.

9.3.1.5 No private or personal items such as gifts, or foodstuffs or bank notes may be dispatched in the diplomatic bags, whether to an officer at a mission abroad or in the RSA. The Vienna Convention also provides that only official material may be dispatched in the bags concerned. In order to ensure that this provision is complied with, the Department of Foreign Affairs may therefore, where it is considered necessary, examine the contents to ensure that the mentioned provisions are complied with.

9.3.1.6 Diplomatic bags must be conveyed to and from airports by an authorised, security-cleared officer. Where circumstances require this, two officers should be detailed for the task. In the case of RSA missions abroad, one of these may be a locally recruited person. While the bags are in the vehicle it may not under normal circumstances (with due regard to the ordinary traffic regulations) stop along the way for any reason, nor may the bags be left unguarded in the vehicle.

9.3.1.7 An officer travelling abroad must not take secret or top secret documents with him, unless it will be possible for the documents to remain continuously under his personal supervision, he has a courier's letter with him and he has the consent of the head of his department, who may delegate the giving of approval to the chief security officer or other senior officer(s). Officers requiring classified documents abroad should, when at all possible, arrange in advance for the documents to be dispatched by diplomatic bags as described above.

9.3.1.8 **Conveyance of diplomatic and freight bags to and from airports**

9.3.1.8.1 Unless approval has been obtained for a different procedure the bags concerned must be conveyed to and from airports by car by at least two persons from the mission. One of these persons must be a transferred officer at the mission while the second may be a locally recruited staff member. The services of the latter may only be used in a supporting capacity, eg to drive the car and carry the bags. Locally recruited members may not, however, be permitted to sign for the bags.

9.3.1.8.2 While the bags are in the vehicle it may not under normal circumstances, with due regard to the ordinary traffic regulations, stop along the way for any reason, nor may the bags be left unguarded in the vehicle.

9.3.1.8.3 The officer receiving the incoming bags at the airport must satisfy himself that the bags are correctly addressed, that the consignment is complete, that the seals are unbroken and that the bag has not been tampered with in some way or other. Any irregularities in this regard must be investigated immediately and reported to Head Office, Department of Foreign Affairs, by telex or facsimile for the attention of Diplomatic Bags.

9.3.1.8.4 The diplomatic postal service to and from airports concerned remains the joint responsibility of attached divisions (departments) of a mission. Therefore the

attached personnel components concerned should undertake trips to the airport on a rotation basis to deliver or fetch diplomatic bags.

9.3.1.8.5 The head of the mission is responsible for, inter alia, the efficient functioning of the mission and therefore also for the handling of diplomatic bags. Accordingly it is his prerogative to make suitable arrangements, at his discretion and in consultation with heads of divisions, for the transportation of the diplomatic bags to and from airports.

9.3.1.8.6 The following applies in terms of the procedures for week-end/after hours duty at a mission by officers of attached departments:

- Where only one officer of another department has been attached to a mission, diplomatic bag duty during normal office hours will be the exclusive responsibility of officers of the Department of Foreign Affairs, and week-end and after-hours duty (including diplomatic bag duty) will be the responsibility of officers of all attached departments.

- Where more than one officer of another department has been attached to a mission, officers of all departments will be responsible for week-end/after-hours duty as for diplomatic bag duty during and outside normal office hours.

- The Standing Committee (ie representatives of all departments at the mission) will be responsible for drawing up a duty roster which will be binding on all officers at the mission. Only the Standing Committee will have the power to make changes to such a duty roster.

9.3.1.9 The Department of Foreign Affairs will from time to time extend/amend instructions regarding the handling of diplomatic bags.

10. STORAGE OF CLASSIFIED DOCUMENTS

10.1 Classified documents that are not in immediate use must be locked away in a safe storage place (see par 10.4.2).

10.2 The doors of all offices in which classified documents are kept must at least be fitted with security locks.

10.2.1 There must be proper control over access to and effective control over movement within any building or part of a building in which classified information is handled. The identification of visitors, the issue of visitors' cards or temporary permits, the escorting of visitors, the provision of identity cards for officers/employees working in the building/offices and the use of related documents and registers for this purpose are prerequisites for effective control over access to and within a building or part of a building.

10.2.2 Effective control must be instituted over access to security areas in a building such as cryptographic and computer centres, the registry (where secret and top secret documents and files are kept) and other areas identified as sensitive. An access register must be instituted and kept up to date for all persons/officers not normally working in these areas.

10.3 Where necessary (depending on the sensitivity of the classified material kept or dealt with in a particular room or division) doors, windows, fanlights, passages, stairs, etc, giving access to the room or division should be equipped with locks, bolts, iron bars or metal blinds of adequate strength, as the case may be. In some cases it may be sufficient to equip one room in a building in this way to serve as registry or storeroom for classified material.

10.4 Apart from taking the precautions mentioned above, all the doors of any room in which classified secret or top secret material is dealt with or handled must be

fitted with security locks (see Chapter 2: Definitions) and must be locked when it is vacated, even for a short period, by the person(s) using the room.

10.4.1 If the officer(s) leave the room for a longer period, eg during the lunch hour, all classified secret and top secret material must be locked away in a safe or metal cabinet which is of adequate strength and equipped with a security lock.

10.4.2 When classified documents are not in use, it must be stored in the following way:

- **Restricted:** Normal filing cabinet.
- **Confidential:** Reinforced filing cabinet.
- **Secret:** Strongroom or reinforced filing cabinet.
- **Top Secret:** Strongroom, safe or walk-in safe.

10.5 The keys to any building, part of a building, room, strongroom, safe, cabinet or any other place where classified material is kept must be looked after with the utmost care and **effective key control must be instituted. The keeping of the necessary key registers and the safe custody of duplicate keys and control over such keys must be strictly adhered to.**

10.6 The keys to safes and strongrooms must be kept in safe custody in accordance with Chapter 23, paragraphs 23.3.6, 23.3.10, 23.3.12 and 23.3.14 of the Provisioning Administration Manual and other relevant directions.

10.7 If a strongroom or safe is fitted with a combination lock, the combination must, apart from being reset when it is purchased, **be changed at least once every three months**, or on the following occasions:

- When it is suspected that it has been compromised.

- On resumption of duty after a continuous period of absence, whether on vacation leave or for official reasons, if the combination had necessarily to be made known to some other person for use during the period concerned.
- When a new user takes over.

10.7.1 Combinations may be compromised by:

- unauthorised persons noting the combination through observation when the lock is opened;

- failure to set the combination in accordance with the manufacturer's specifications;

- failure to change the combination after a reasonable period.

10.7.2 Precautions must therefore be taken by the authorised user to ensure that no other unauthorised person is present when the new combination is set or the lock is opened. When a combination is reset, the following rules should be adhered to :

- The figures making up a specific combination should not be used more than once in succession, even if they are in a different order.

- Avoid the use of numbers with some personal significance, eg age, date of birth, telephone numbers, street addresses and numbers of safes, etc. Also avoid the figures zero (0), five (5), ten (10) and multiples of the last two. High and low numbers should preferably be used alternately. (eg 68-13-57-11)

- Only the user may set a combination lock.

10.7.3 Knowledge of a combination should be restricted to the minimum number of persons desirable on the grounds of operational requirements, eg in the case of a communal safe.

10.7.4 After the combination has been reset, the new combination must be handed to the Head of Security or other person designated for the purpose in a sealed envelope for safe custody, so that he can complete the combination lock register.

10.8 As far as safe and strongroom keys and the combinations of cryptographic centres are concerned, the requirements contained in the Communication Security Instructions must be complied with.

10.9 Access to any controlled building, part of a building or room where classified information is handled/stored outside normal office hours should be prohibited to all persons who do not work there. Repairs to and the cleaning of such premises must take place in the presence **and under supervision** of the persons who work there. Persons who have to gain access to a building after hours must be duly authorised accordingly by the Head of the Institution or his delegate. The Head of Security must take appropriate steps to arrange access and record keeping.

11. REGISTRIES AND FILES

11.1 Central Registries for Receiving of Incoming Mail and Dispatching of Outgoing Mail

11.1.1 An effective registry is the core of effective document control and of document security. One registry in an institution should be the central/main registry where **all** incoming mail must be received, opened and from where it must be distributed internally. This receiving and distributing must be recorded in the relevant registers (whether electronic or hard copy).

11.1.1.1 Internal distribution should be reflected in registers for incoming and outgoing mail, that should be kept at all other registries or offices where internal mail are received. These registers should contain the following particulars:

Particulars of incoming post: Serial number of the entry; Date of receipt; From whom received; Registered postal material and reference number; Classification (C/S/TS); Subject/heading; Disposal: File number, Recipient (signature); Further dispatch (serial number of the entry for outgoing mail in the register); Destruction (date and signature).

Particulars of outgoing post: Serial number of the entry; Date of dispatch; Reference number and date of the document; Classification; Subject/heading; Dispatched/addressed to; Nature of dispatch (courier, by hand, registered post, facsimile, by computer); Registered number of postal material; Signature of the recipient (courier, registration, person dispatching); Receipt number; Date when receipt was obtained.

11.1.1.2 Apart from being registered, a system of route cards, or similar, should be implemented to ensure that a document can be traced at any time.

11.1.2 Outgoing mail should be forwarded to the central registry from where it will be dispatched. This forwarding and dispatching must be subject to the control measures as described in the MISS/elsewhere.

11.2 **Access to Registries**

Access to registries should be controlled. No unauthorized person (any person that has no direct line functional responsibility inside the registry) must be allowed inside.

11.3. **Management of Files**

11.3.1 Files should be opened according to the actual need when the need arises, and not just because the filing system provides for the existence of such a file.

11.3.2 The particulars appearing on the file should be at least: the name/topic of the file, the file number, the classification, and who are/is authorized to have access to that file.

11.3.3 A register should be kept of all files opened/in existence. As and when a file is opened, the particulars must be entered in the register. This register must indicate the number of volumes in existence for any given file number.

11.3.4 A file must be classified according to the highest level of classification of the documents it contains.

11.3.5 The classification mark must be affixed on the file as described elsewhere/in the MISS.

11.3.6 Classified files must be stored in facilities as prescribed for classified documents.

11.3.7 All documents filed in a file must be given a serial or index number, in the sequence as it is filed, but preferably in chronological order. An index page must be fixed in the file, on which should be recorded the index/serial numbers of the documents on that file, as well as the topic/heading of each document.

11.3.8 A subfile must be opened for each file and kept inside the main file. It should have the same particulars as the main file. When the main file is drawn and taken out of the registry (which should **not** be common practice), an indication must be made on the subfile to whom the main file has been issued, and when. The subfile should remain in the registry and all documents that should be filed on the main file must be placed on this until the main file has been returned.

11.3.9 No file must be allowed to remain outside the registry for more than one working day - all files must be returned to the registry before closure on the same working day. Exceptions can be allowed, **provided** that storage facilities in the relevant office are on standard (as prescribed) and that the return of the file is followed up on a **daily** basis by the head of the registry.

11.3.10 **Only** authorized persons may be allowed access to classified files. Internal policy should dictate who may authorize such access, subject to the need-to-know principle.

12. REMOVAL OF CLASSIFIED DOCUMENTS FROM PREMISES

12.1 The removal of classified documents from office buildings shall be prohibited as far as possible.

12.2 Classified material (with the exception of "Restricted" documents) may not be taken home without the written approval of the Head of the Institution or his delegate; a list of the documents to be removed must be handed to the person

in control of record keeping. (The form in Appendix C can be adjusted to suit this purpose.) Persons may take classified documents home only if they have proper lock-up facilities (see Chapter 4, paragraph 10.1), in other words, if a person has no such facilities, the documents may not be kept at such a person's home for the purpose of work after hours.

12.3 Classified documents taken out of a building with a view to utilisation at meetings or appointments must be removed in a lockable security attache case. Furthermore, all guidelines included in Chapter 4, paragraph 10 apply in this regard.

13. THE TYPING OF CLASSIFIED DOCUMENTS

13.1 Classified documents may be typed only by persons having the appropriate security clearance. Such typing must be done in a manner that will ensure that the information is not divulged to unauthorised persons.

13.2 Drafts of classified documents, typewriter ribbons, and copies and floppy disks must at all times be treated as classified documents.

13.3 In this regard also see the **Manual for Computer Security**.

14. DESTRUCTION OF CLASSIFIED DOCUMENTS

14.1 In terms of the Archives Act, 1962, all documents received or created in a government office during the conduct of affairs of such office are subject to the Act, except where they are excluded, due to their very nature or the prescriptions of some or other Act of Parliament. It should be a point of departure that all state documentation is subject to the Archives Act, unless justifiably excluded along the above-mentioned lines. It should be noted that no document is to be excluded merely because it is classified. Heads of

Departments will have to decide, after consultation with their legal advisers as well as the Director: State Archives whether the document(s) concerned is/are of such a nature that there is a legitimate demand for secrecy that goes beyond the degree of safekeeping by the State Archives.

14.2 Where destruction has been properly authorised, it should take place by burning or some other approved method, eg by means of a shredder (in the latter case - preferably a cross-cut machine), in which case the strips may be no wider than 1,5 mm. The officer who has destroyed the documents must give a certificate of destruction of the documents concerned to the head of the institution or his delegate.

14.2 The process of destruction must be such that reconstitution of the documents destroyed is impossible.

14.3 If the necessary precautions are not instituted, access to waste-paper baskets is probably one of the easiest ways for unauthorised persons to obtain sensitive information. Special attention should therefore be given by all those concerned to the disposal of drafts, notes, used carbon paper, typewriter ribbons, etc, that may contain information. Such waste must be stored separately under lock and key and must be periodically collected by an officer(s) specially designated for this purpose and destroyed by means of burning or shredding.

14.4 In terms of the procedure for the destruction of classified documents from other departments/institutions, a destruction certificate must be supplied to the author.

15. MAKING PHOTOCOPIES OF CLASSIFIED DOCUMENTS

15.1 All mechanical/electronic reproduction appliances should be properly controlled to prevent the unauthorised or uncontrolled copying of classified documents.

This apparatus must therefore either be centralised or distributed and be under the direct control of an authorised and aptly cleared officer.

15.2 The relevant institution/body must keep a record of all the reproductions of classified documents at its disposal. The register must contain the following particulars: Date, Person requesting copies/reproduction, Classification, File reference, Heading/nature of documents, Purpose of the copies, Number of copies, Meter reading before and after copying.

15.3 Oral or written authorisation for the copying of secret and/or top secret documents by the author, head of the institution or his delegate(s) is required for the copying of secret and/or top secret documents. Such authorisation must be indicated on the original document.

15.4 Copies of all secret and top secret documents must receive a copy number and be registered in the same way as the original document. The number of copies of such documents must be restricted to a minimum, and copies of appendices and addenda must be numbered in accordance with the relevant classified document. All addressees/departments, individuals concerned and the corresponding copy numbers must be written in the file and record copy. Alternatively a distribution list can be attached to all copies of the relevant document concerned, indicating the addressees and the applicable copy number.

15.5 No copies or duplicates may be made of the documents of The National Intelligence Co-ordinating Committee (NICOC). Only NICOC may make available additional copies on request.

16. **THE HANDLING OF RESTRICTED DOCUMENTS**

16.1 Documents classified as "**Restricted**" are deemed to be restricted to only the relevant institution.

16.2 Precaution must therefore be taken to prevent unauthorised persons from gaining insight into **Restricted** documents.

17. **CONTINGENCY PLANNING**

17.1 The contingency plan of an institution must provide for the destruction, storage and/or moving of classified/sensitive documents in the event of an emergency in order to prevent the risk of being compromised.

CHAPTER 5

PERSONNEL SECURITY:

GUIDELINES WITH RESPECT TO SECURITY VETTING

1. **INTRODUCTION**

1.1 Security vetting is the systematic process of investigation followed in determining a person's security competence.

1.2 The degree of security clearance given to a person is determined by the content of and/or access to classified information entailed by the post already occupied/to be occupied by the person.

1.3 A clearance issued in respect of a person is merely an indication of how the person can be utilised, and does not confer any rights on such a person.

1.4 A declaration of secrecy should be made on an official form by an applicant to any government post, before he/she is appointed or during the appointing process.

1.5 Political appointees (Director Generals, Ambassadors, etc) will not be vetted, unless the President so requests or the relevant contract so provides. From the lowest level up to Deputy Director General all staff members and any other individuals who should have access to classified information, must be subjected to security vetting.

1.6 A security clearance gives access to classified information in accordance with the level of security clearance, subject to the need-to-know principle.

2. **VETTING CRITERIA**

2.1 Vetting/screening criteria need to be adjusted continuously owing to the development in the political field and changes in the social and socio-economic fields. On a macro level, screening criteria must be adjusted to the norms and values of the community of which the person is a part. However, on the micro level, screening criteria must provide for the unique nature of individuals and organisations. The overall picture of an individual's security competence (which is the result of individual differences and the individual's unique way of handling situations) has to play a determining role in a vetting recommendation/decision.

2.2 Aspects such as gender, religion, race and political affiliation do not serve as criteria in the consideration of a security clearance, but actions and aspects adversely affecting the person's vulnerability to blackmail or bribery or subversion and his loyalty to the State or the institution do. This also includes compromising behaviour.

3. **SECURITY SCREENING IN RESPECT OF IMMIGRANTS AND PERSONS WITH MORE THAN ONE CITIZENSHIP**

3.1 **Confidential Clearance.** A confidential clearance may be considered in respect of an immigrant who has been resident in the RSA for ten consecutive years of which at least those five years preceding the clearance were spent as a South African citizen. He/she must provide sufficient proof that any former citizenship has been relinquished.

3.2 **Secret Clearance.** A secret clearance is only considered in respect of an immigrant who has been resident in the RSA for fifteen consecutive years of which at least those ten years preceding the clearance were spent as a South African citizen, also on the condition that the person has relinquished his/her former citizenship.

3.3 **Top Secret Clearance.** After an immigrant has been resident in the RSA for a period of twenty consecutive years (of which fifteen years were spent as a South African citizen), a top secret clearance may be considered, on the condition that such a person has relinquished his/her former citizenship. Every case will be dealt with on merit owing to the unique nature of each situation. This means that not all immigrants who comply with the requirements will automatically qualify for a top secret clearance.

3.4 **Dual Citizenship.** Each application for a security clearance in respect of persons with dual citizenship must be assessed on the merits of each individual case.

3.5 **Persons without valid Identification Documents.** No clearance can be issued in the following cases:

3.5.1 Any person who is not in possession of a valid identification document or residence permit for the RSA.

3.5.2 Naturalised RSA citizens who have not applied for a new identification document after naturalisation, since the document that was issued before naturalisation expires on naturalisation.

3.6 **Employing Immigrants who do not meet Clearance Requirements.** If on account of his/her indispensable expertise, it is considered essential to employ an immigrant while he/she does not satisfy the clearance requirements as laid out above and he/she is to be utilised in a post, the work of which is classified, the vetting authority will be unable to make a positive recommendation with regard to the issue of a security clearance in respect of such a person, but can merely institute an investigation to determine whether such an immigrant is suitable from a security point of view for the post concerned. In such an event the head of the employing institution may authorise that the immigrant be used

in the post (see Chapter 5, paragraph 10.2), on the condition that the employing institution must

- submit a certificate to the National Intelligence Agency and the responsible screening institution in which the absolute necessity of employing such immigrant is set forth and it is also declared that no **RSA citizen** with the same expertise is available or can be recruited in the RSA and, in cases where an immigrant from a state formerly seen as controversial has been employed, that an immigrant from **a non-controversial country** could not be obtained;

- provide the responsible screening institution with a description of and an indication of the sensitivity of the responsibilities attached to the post to be occupied by the immigrant;

- declare that it accepts full responsibility for compliance with the security requirements connected with the employment of such immigrant;

- ensure that no classified information or material that is not needed for the performance of his duties comes into the possession of the incumbent of the post; and

- reconsider the authorisation every year and relate in writing to both the National Intelligence Agency and the responsible screening authority any incident which could pose a threat to security or any incidence which may bring his/her security competence into question.

3.6.1 **Take note:** When the person concerned changes his/her posting, the authorisation is automatically terminated.

3.7 In respect of immigrants already employed in sensitive positions and in whose case the conditions laid out in Chapter 5, paragraph 3.6 above have not yet

been complied with, the employing institution must immediately give effect to those conditions as set out in paragraph 3.6.

4. **SCREENING / VETTING OF PERSONS WHO HAVE LIVED/WORKED ABROAD FOR LONG PERIODS**

4.1 Where a security clearance is required for an RSA citizen who has resided/studied/worked abroad for a long period (excluding transferred public servants or students) and who applies to a government or semi-government institution or a national key point for employment, such a person is temporarily not eligible for any grade of security clearance. Applications for clearance can, however, be considered after a period, as set out hereunder, on condition that the applicant did not give up RSA citizenship or accepted dual citizenship during the period of absence:

4.1.1 A Confidential clearance after one year back in the RSA. Such a person can be appointed on condition that a re-application is submitted after one year. On appointment, the subject thus completes and submits all relevant forms for a security clearance. The requesting authority will then be informed as to whether or not there is any negative information on the subject. The subject is also to undertake, in writing, that he/she will resign should the issuing of a security clearance be refused after one year. If such an undertaking is not specifically included in the service contract, a written undertaking to this extent, under signature of the subject, must accompany the application for a security clearance.

4.1.2 A Secret clearance after three years back in the RSA.

4.1.3 A Top Secret clearance after five years back in the RSA.

5. **SECURITY SCREENINGS : CONTRACTORS SUPPLYING SERVICES TO GOVERNMENT DEPARTMENTS OR OTHER GOVERNMENT INSTITUTIONS**

5.1 The onus is on the department/institution concerned in each case to indicate expressly in documents sent to the State Tender Board or private contractors whether there are security implications that should be taken into account in advance when they perform their duties for the department/institution involved. If there are such implications, reasons must be given for the inclusion of a clause in the tender document indicating the degree of clearance required, as well as a clause to ensure the maintenance of security during the performance of the contract. The clause could read as follows:

"Acceptance of this tender is subject to the condition that both the contracting firm and its personnel providing the service must be cleared by the appropriate authorities to the level of **CONFIDENTIAL/SECRET/TOP SECRET**. Obtaining a positive recommendation is the responsibility of the contracting firm concerned. If the principal contractor appoints a subcontractor, the same provisions and measures will apply to the subcontractor.

Acceptance of the tender is also subject to the condition that the contractor will implement all such security measures as the safe performance of the contract may require."

5.2 The security responsibilities of the contractor will be determined by the department/institution concerned.

6. **PROCEDURE FOR REQUESTING SECURITY SCREENINGS**

6.1 Requests for security screening and re-screening must be submitted to the appropriate screening authority on the prescribed form (see Appendix D) accompanied by a set of clear fingerprints.

6.2 The requesting institution should provide the screening authority with a post description of the employee concerned and an indication of the access he/she has/will have and with all other facts that may influence the issue of a clearance.

7. PERIOD OF VALIDITY OF SECURITY CLEARANCES

7.1 The head of an institution or his/her delegate must ensure that an officer in respect of whom a security clearance of Secret or Top Secret has been issued, is rescreened every five (5) years and every ten years in respect of a Confidential clearance.

7.1.1 Enquiries will be done with the supervisor every five (5) years with respect to the security competence of an official who has received a Confidential clearance.

7.1.2 This arrangement does not preclude rescreening before a period of five years has lapsed in the case of occupational change or where something prejudicial has been established about an officer which may affect his or her security competence. Personnel in ultra sensitive posts should be cleared every three years.

8. TRANSFERABILITY OF CLEARANCES

8.1 A security clearance issued in respect of an officer while he/she is attached to a particular institution is not automatically transferable to another institution, for example when the officer is transferred. When an officer changes his employer,

the responsibility for deciding whether an applicant's existing clearance will be accepted or whether the rescreening of such an officer will be requested in the prescribed way rests with the new employer.

8.2 However, for the purpose of meetings and other co-operative functions clearances are transferable. The employing institution is responsible for informing the chairman of such a meeting in writing as to the level and period of validity of the clearances of the representatives involved.

9. RESPONSIBILITIES OF THE SCREENING AUTHORITY

9.1 The screening authority will investigate and advise on the security competence of a person on the basis of prescribed guidelines.

9.2 After the investigation the screening authority will merely make a recommendation regarding the security competence of the person concerned to the head of the requesting institution, and this should in no way be seen as a final testimonial as far as the utilisation of the person is concerned.

10. RESPONSIBILITIES OF THE HEAD OF THE REQUESTING INSTITUTION

10.1 The head of an institution or his delegate must make a decision and issue a clearance after receiving the recommendation made by the screening institution, and in accordance with circumstances/information at his/her disposal.

10.2 Notwithstanding a negative recommendation from the screening authority, for whatever reason, the head of the institution may still, after careful consideration and with full responsibility, use the person concerned in a post where he/she has access to classified matters if he/she is of the opinion that the use of the

person is essential in the interest of the RSA or his/her institution, on the understanding that a person satisfying the clearance requirements is not available.

10.3 When **any** person is utilised without a clearance, the responsible screening institution and the National Intelligence Agency must be furnished every year with a certificate regarding such person's security conduct (see Chapter 5, paragraph 3.6). Any conduct entailing a security risk must be reported immediately to the screening authority concerned (also see Chapter 9: Breaches of Security).

10.4 Heads of institutions whose officers attend meetings where classified matters are discussed must inform the chairperson of such a meeting in writing of the level of security clearance of such officers. It is the responsibility of the chairperson to satisfy himself/herself regarding the security clearance of all those present at the meeting.

10.5 Further, it is also the responsibility of the head of the institution or his/her delegate to

- ensure that there is continuous supervision of persons in respect of whom security clearances have been issued;

- present security awareness programmes for his/her employees and to warn staff members not to supply personal particulars of colleagues/officers to unauthorised persons;

- ensure that persons dealing with classified matters sign the prescribed declaration of secrecy (see Appendix B, a draft declaration that can be modified to suit the requirements in each particular case);

- pertinently bring to the attention of the officers working with classified matters any other legislation, regulation and/or orders that entail secrecy and/or the protection of activities, installations, etc, of any particular institution.

- to point out to employees dealing with classified matters when they resign or leave the service that they will continue to be the target of foreign intelligence services and that they remain subject to the declaration of secrecy.

- to ensure that all classified documents in the possession of the person concerned are returned when such person resigns or leaves the service; and

- to ensure that no information comes into the possession of an individual that is not essential for the performance of his or her duties.

11. OFFICERS TRAVELLING ABROAD

11.1 In the event where an official with a clearance travels abroad, the head of the institution employing the official or his/her delegate must keep a thorough record of such visits.

11.2 When officials are travelling abroad they must be on their guard against any attempt by a foreign intelligence service to recruit them. If a person is approached, he or she must, immediately on returning, report the fact to the head of the institution or his/her delegate for transmission to the responsible screening authority and the National Intelligence Agency. While travelling, officials should maintain a low profile and be careful not to place themselves in compromising situations.

12. PROTECTION OF EXECUTIVE OFFICIALS

12.1 Since executive officials are constantly the target of enemies of the State, the necessary precautions should be taken to protect these officials against threats of blackmail or violence. Such threats should be reported to the NIA or the SAPS or the SANDF (MI), as the case may be. The necessary precautionary and protective measures must be undertaken by the various institutions to ensure the safety of the officials concerned. More particulars in this regard may be obtained from the National Intelligence Agency.

13. **STATUTORY AND OTHER PROVISIONS FOR THE PROTECTION OF INFORMATION**

13.1 The attention of all persons dealing with classified matters should be drawn specifically to the provisions of the Protection of Information Act (No 84 of 1982) as amended.

13.2 Any other legislation, regulations and/or directives relating to secrecy and/or the safeguarding of the activities, installations, etc of a particular institution must also be specifically brought to the attention of officers dealing with classified matters.

CHAPTER 6

COMMUNICATION SECURITY

1. Policy/ standards in the computer/ communications security field will be more frequently updated (because of technological advances) than policy in the other security fields. As the computer/ communications security policy is currently being updated and integrated in order to reflect the amalgamation of the previous Computer Security Task Group and the Joint Communications Security Council, computer/ communications security policy will be separately promulgated. The computer and communications security policy is however regarded as part of the Minimum Information Security Standard.

2. The authority to promulgate computer and communications policy is hereby delegated to the Chairman of the Functional Security Committee of the National Intelligence Co-ordinating Committee (NICOC) after :

- the Chairman has ensured that it is integrated and in line with policy regarding other security disciplines;

- legal principles were taken into account.

3. Communication security may be described as a condition that is created by the deliberate application of measures to safeguard sensitive communication, whatever form it may take.

4. Communication may be divided into two main categories:

4.1 Communication taking place with the aid of communications equipment, telex equipment, computer equipment, radio and facsimile equipment and the

telephone. The Communications Security Policy serves as the minimum communication security standard.

4.2 Communication taking place without communications equipment, ie mainly personal communication.

5. In terms of Communications Security Policy classified information may be transmitted only under the following conditions:

5.1 Via acceptable and approved apparatus.

5.2 The necessary encryption, as prescribed, must be present.

6. Personal communication of a sensitive or classified nature must necessarily be subject to strict self discipline on the part of the communicator. In this regard the following guidelines apply:

6.1 the need-to-know principle.

6.2 such conversation should take place in such a way that sensitive information/intelligence does not come into the possession of unauthorised persons or persons who happen to overhear;

6.3 places such as offices, conference rooms etc, where sensitive or classified matters are discussed on a regular basis should be subject to

- proper and effective access control (eg outside maintenance personnel and cleaners);
- regular electronic surveillance counter measures (sweeping). (In this regard the National Intelligence Agency can be contacted in the case of government departments, parastatals and private institutions. The SASS,

SANDF and the SAPS are responsible for electronic surveillance counter measures with regard to their own environments).

7. The Chief Directorate Security of NIA or SACSA may be approached for further advice and guidance in respect of communication security needs.

CHAPTER 7

COMPUTER SECURITY

1. Policy/ standards in the computer/ communications security field will be more frequently updated (because of technological advances) than policy in the other security fields. As the computer/ communications security policy is currently being updated and integrated in order to reflect the amalgamation of the previous Computer Security Task Group and the Joint Communications Security Council, computer/ communications security policy will be promulgated separate from this issue of the MISS. The computer and communications security policy will however regarded as part of the Minimum Information Security Standard (MISS).

2. The authority to promulgate computer and communications policy is hereby delegated to the Chairman of the Functional Security Committee of the National Intelligence Co-ordinating Committee (NICOC) after :

   - the Chairman has ensured that it is integrated and in line with policy regarding other security disciplines;

   - legal principles were taken into account.

3. In the light of the increasing dependence on and the proliferation of computers in the administration of the country in general, and also of the extent to which classified information is processed by means of computers, security has become essential in this area.

4. All computer storage media (usually magnetic or optical), are documents in terms of the definition in the Protection of Information Act (Act 84 of 1982).

These documents, when containing classified information, must be handled according to the document security standards as described in Chapter 4.

5. It is the responsibility of the head of the institution or his delegate to ensure that all personnel concerned with computers receive the necessary security training. In addition, the security awareness of all personnel using computers must receive regular attention.

6. Against this background the following measures must be implemented:

- essential backup of computer systems and data;
- physical security measures as prescribed;
- computer security responsibilities should be clearly established;
- the allocation and use of passwords as prescribed.

7. Where use is made of computer communications and data is transmitted through an unprotected area, the transmission should be protected in accordance with Communication Security Policy/Instructions.

8. All breaches of security in the computer environment must be reported as soon as possible in accordance with Chapter 9 of this document.

9. In cases of uncertainty regarding the implementation or appropriateness of security measures in the computer environment, the Chief Directorate Security of the NIA should be consulted.

CHAPTER 8

PHYSICAL SECURITY MEASURES

Remark: The SA Police Service acts as advisor in terms of physical security measures (see Appendix A).

1. ACCESS CONTROL

1.1 A system of security measures is essential to create an optimal information security environment. Such system naturally is as efficient as its weakest link/element. In this regard access control and movement control are the links or elements that are prerequisites for an effective security system.

1.2 Access control is multidimensional. The **different levels or degrees** thereof must be developed and applied according to the degree of safeguarding required. Factors such as the sensitivity of information handled and the degree in which zoning (placement and isolation of certain regions) is/can be implemented play a role in determining these levels/degrees.

1.2.1 The different levels/degrees of access control can vary from the mere locking of offices, with the accompanying access restriction (where effective key control will inevitably play a vital role) to large-scale access control to a building or part of a building where security officials identify, control and conditionally allow visitors access.

1.3 Heads of institutions are responsible for the enforcement of the provisions of the Control of Access to Public Premises and Vehicles Act (Act 53 of 1985) for the purpose of safeguarding buildings or premises occupied or used by or under the control of government departments.

1.3.1 Compliance with the provision of Section 2(2), under which the furnishing of information, the furnishing of identification, declarations concerning hazardous objects and the contents of any suitcase, briefcase, handbag, bag, etc, the subjection of persons or objects to electronic examination and the handing over of any object for examination or custody may be required as a prerequisite for effective access control. The searching of persons under Section 2(2)(g) may take place only if the Minister of Safety and Security or his/her delegate (the Commissioner of the SA Police Service) gives authority for this by notice in the Government Gazette.

1.4 In cases where different government departments occupy or use or control different parts of the same building or where different government departments occupy or use or control different parts of the same building together with other institutions, consensus between the heads of departments and the heads of other institutions is a prerequisite for the uniform application of the provisions of the Control of Access to Public Premises and Vehicles Act. Where government departments or other institutions apply the provisions of the Act, notices should be displayed to inform members of the public who wish to gain access in a reasonable manner that the Act is being applied.

1.5 Effective access control should be applied to areas where photocopiers, printers, facsimile machines, etc are used. These equipment should also be under constant supervision to ensure that no unauthorised transmission of classified documents take place, or unauthorised copies are made.

2. KEY CONTROL AND COMBINATION LOCKS

2.1 Effective key control, including control over duplicate keys, must be accompanied by the keeping of effective records in order to ensure that the keys to a building and safes or strongrooms or other safe storage places in which classified information is kept are dealt with in a safe manner. Where storage

places are equipped with combination locks, the combinations must be used, kept and changed in accordance with the prescribed procedures (see Chapter 4, paragraphs 10.7 and 10.8).

3. **MAINTENANCE SERVICES, REPAIRS AND THE CLEANING OF BUILDINGS/OFFICES**

3.1 Occupiers of buildings/offices where classified or sensitive matters are dealt with must always be present when artisans, technicians or cleaners are performing their duties. Special care should be taken on such occasions to ensure that they do not gain access to classified matters.

4. **CONTINGENCY PLANNING**

4.1 Institutions must make provisions for contingency planning (see Chapter 2 "Definitions") aimed at preventing and/or combating any disaster or emergency. The contingency plan must be geared for saving lives, safeguarding property and information and ensuring that activities can continue with as little disruption as possible.

4.2 These aims can be achieved only through well-organised action in which all the available means and manpower are used in a co-ordinated and effective way to put preventative and/or control measures into operation, and through regular practise of the contingency plan.

CHAPTER 9

BREACHES OF SECURITY

1. Heads of security or those tasked with the security responsibility of an institution must report all instances of a breach of security, or failure to comply with security measures, or conduct constituting a security risk, as soon as possible to the Chief Directorate Security of the National Intelligence Agency, and where appropriate to the SAPS (Crime Prevention Unit) or the SANDF (MI) (see Appendix A). Where official encryption is concerned, a security breach must also be reported to the South African Communication Security Agency (SACSA).

2. When a breach of security occurs, the existing channels must be used to report it. It is the responsibility of the head of the institution to ensure that all breaches of security are reported.

3. Breaches of security must at all times be dealt with using the highest degree of confidentiality in order to protect the officer concerned and prevent him or her from being unnecessarily done an injustice to.

APPENDIX A

DIVISION OF RESPONSIBILITIES WITH RESPECT TO THE PRACTICE OF PROTECTIVE SECURITY IN THE RSA

Note : This appendix serve only to reflect the situation regarding the division of responsibilities, as agreed upon and approved elsewhere and in other documentation. This appendix therefore has no legal standing and is subject to alteration whenever the original agreements are amended.

NATIONAL INTELLIGENCE AGENCY	SA SECRET SERVICE
- Responsible for its own physical and information security	- Responsible for its own physical and information security
- Advises, co-ordinates, audits and exercises control with regard to information security in the public, parastatal and private environment in South Africa (excluding SASS, SAPS and SANDF responsibilities).	- Advises, co-ordinates and exercises control with regard to physical, personnel and document security abroad (excluding SAPS and SANDF responsibilities)
- Advises, co-ordinates and exercises control with regard to physical security within NIA and as far as it relates to information security, also in the public, parastatal and private environment	- Advises and exercises control with regard to physical security at missions abroad
- Carries out security screening of NIA personnel as well as screening investigations abroad if necessary	- Carries out security screening of SASS personnel as well as security interviews and screening investigations abroad at the request of NIA
- Advises, co-ordinates and exercises control with regard to technological security abroad	

SA POLICE SERVICE

- Responsible for its own physical and information security
- Advises, co-ordinates and controls physical security in South Africa, excluding the NIA, SASS and the SANDF, with the aim of preventing crime
- Security screenings in respect of the government and parastatal environment, excluding NIA, SASS and SANDF personnel
- VIP protection in South Africa.

- Responsible for its own physical and information security and that of Armscor
- Carries out security screening of its own personnel and those of the Armscor family.
- Administers the National Key Points Act
- Facilitates the South African Communication Security Agency

SA NATIONAL DEFENCE FORCE

APPENDIX B

I, ...

(full name)

solemnly declare that

1. I have taken note of the provisions of the Protection of Information Act (Act 84 of 1982) and in particular of the provisions of section 4 of the Act;

2. I understand that I shall be guilty of an offence if I reveal any information which I have at my disposal by virtue of my office and concerning which I know or should reasonably know that the security or other interests of the Republic require that it be kept secret from any person other than a person

   - to whom I may lawfully reveal it; or

   - to whom it is my duty to reveal it in the interests of the Republic; or

   - to whom I am authorised by the Head of the Department or by an officer authorised by him to reveal it;

3. I understand that the said provisions and instructions shall apply not only during my term of office but also after the termination of my services with the Department; and

4. I am fully aware of the serious consequences that may follow any breach or contravention of the said provisions and instructions.

(Signature) .....

(Place) .....

(Date) .....

WITNESSES 1. .....

2. .....

APPENDIX C

APPENDIX D

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO. 26912/12

In the matter between:

Freedom Under Law	Applicant
And	
The National Director of Public Prosecutions	First Respondent
The National Commissioner: South African Police Service	Second Respondent
The Head: Specialised Commercial Crime Unit	Third Respondent
The Inspector-General of Intelligence	Fourth Respondent
Richard Naggie Mdluli	Fifth Respondent
Minister of Safety and Security	Sixth Respondent

JUDGMENT

Murphy J

1. This application is a matter of public interest and national importance on account of it raising significant issues of propriety, accountability and justifiable conduct in the governance of the Republic. The main issue is whether certain decisions made by the various respondents to withdraw criminal and disciplinary charges against the fifth respondent, Lieutenant-General Richard Mdluli ("Mdluli"), the Head of Crime Intelligence within the South African Police Service ("SAPS"), were unlawful.

2. The applicant, Freedom under Law ("FUL"), a public interest organisation, seeks an order directing the National Prosecuting Authority ("the NPA") to reinstate several withdrawn criminal charges, (including murder, attempted murder, kidnapping, assault, fraud and corruption), against Mdluli. It also seeks orders directing the

National Commissioner of SAPS ("the Commissioner") to reinstate withdrawn disciplinary charges against Mdluli arising from the same alleged misconduct.

3. FUL is a non-profit company as contemplated in section 10 of the Companies Act.[1] It was established in 2008 and has offices in South Africa and Switzerland. It is actively involved *inter alia* in the promotion of democracy, the advancement of and respect for the rule of law and the principle of legality as the foundation for constitutional democracy in Southern Africa. Its board of directors and international advisory board are made up of respected lawyers, judges and role players in civil society in various parts of the world.

4. Dr Mamphela Ramphele, the deponent to the founding and supplementary affidavit, is a member of the international advisory board of FUL and was previously Vice-President of the World Bank in Washington and Vice-Chancellor of the University of Cape Town. She was a universally recognised leader of the Black Consciousness Movement in the struggle against apartheid and is currently President of Agang, a new political formation in South Africa. The deponent to the replying affidavit is the chairperson of the board of FUL, Justice Johann Kriegler, a retired judge of the Constitutional Court, who in 1994 served as Chairperson of the Independent Electoral Commission overseeing the first democratic election in South Africa.

5. Both the Constitutional Court ("the CC") and the Supreme Court of Appeal ("the SCA") have in the past recognised the right of FUL to act in the public interest in terms of section 38 of the Constitution in relation to infringements of the Bill of Rights.[2] FUL has on occasion also been admitted by the courts as *amicus curiae* in important cases involving constitutional matters.

6. These review proceedings, brought in terms of Part B of the Notice of Motion, challenge the decisions of the first, second and third respondents to withdraw the criminal and disciplinary charges that were pending against Mdluli who, though currently interdicted by this court from performing his duties, remains the Head of Crime Intelligence within SAPS; and, as stated, are aimed at reinstating the criminal and disciplinary charges forthwith. The present proceedings were preceded by an urgent application, in terms of Part A of the Notice of Motion, for an interim order interdicting Mdluli from carrying out his functions and the Commissioner from assigning any tasks to him pending the finalisation of the review proceedings. The interim order was granted by Makgoba J on 6 June 2012.

7. The first respondent is the National Director of Public Prosecutions ("the NDPP"), the head of the NPA. The NDPP is appointed by the President of the Republic and invested by section 179(2) of the Constitution and Chapter 4 of the National Prosecuting Authority Act[3] ("the NPA Act") with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary function and duty which is incidental thereto. At the time these proceedings were launched, the office of the NDPP was vacant as a consequence of the decisions of

[1] Act 71 of 2008
[2] *Freedom under Law v Acting Chairperson: Judicial Services Commission and Others* 2011 (3) SA 549 (SCA)
[3] Act 32 of 1998

the SCA and the CC finding the appointment of the previous incumbent, Advocate Simelane, to be unconstitutional. During the period relevant to these proceedings, the position was occupied by Advocate Nomgcobo Jiba, who served as the Acting NDPP until the recent appointment of Mr Nxasana as NDPP by President Zuma.

8. The second respondent is the Commissioner, who in terms of the relevant legislation is the head of SAPS. The Commissioner withdrew the disciplinary charges against Mdluli and reinstated him as Head of Crime Intelligence in SAPS. Section 207(2) of the Constitution, read with the relevant provisions of Chapter 5 of the South African Police Services Act[4] ("the SAPS Act") and the Regulations made in terms thereof, oblige the Commissioner to ensure that members of SAPS diligently fulfil their duties to prevent, combat and investigate crimes, maintain public order, protect and secure the inhabitants of the Republic, and uphold and enforce the law of the land. The Commissioner and his or her provincial or divisional subordinates have the duty to institute and prosecute disciplinary action against any member of SAPS who is accused of and charged with misconduct and to suspend from office such a member, pending the outcome of disciplinary proceedings.[5]

9. When these proceedings commenced, the office of the Commissioner was occupied by Lieutenant-General Nhlanhla Mkhwanazi ('the Acting Commissioner"), who was serving in an acting capacity, following the suspension of the former Commissioner, General Bheki Cele, on grounds of alleged impropriety. Subsequent to the commencement of these proceedings and the ultimate dismissal of General Cele, President Zuma appointed General Mangwashi Phiyega as Commissioner. The impugned decisions of the Commissioner withdrawing disciplinary charges and reinstating Mdluli in his position were taken by Lieutenant-General Mkhwanazi.

10. The third respondent is Advocate Lawrence Mrwebi, ("Mrwebi"), a Special Director of Public Prosecutions, and the head of the Specialised Commercial Crimes Unit ("SSCU") within the NPA. It was he who took the decision and gave instructions to withdraw charges of fraud and corruption against Mdluli. Other charges of murder, attempted murder, kidnapping, intimidation and assault were withdrawn by Advocate Chauke ("Chauke"), Director of Public Prosecutions ("DPP") for South Gauteng, who has not been cited as a party, it having been deemed sufficient to cite the NDPP as titular head of the NPA to whom Chauke is accountable.

11. The fourth respondent is Ambassador Faith Radebe, the Inspector General of Intelligence ("the IGI"), appointed in terms of section 7 of the Intelligence Services Oversight Act.[6] She is the only respondent not to not to oppose the application and has filed a notice to abide.

12. The fifth respondent, Mdluli, did not actively oppose the relief sought in Part B of the notice of motion. He filed an answering affidavit opposing the relief sought in Part A of the notice of motion. He however did not file further opposing papers and was not represented at the hearing before me.

[4] Act 68 of 1995
[5] Regulations 12 and 13 of the Discipline Regulations published under the SAPS Act in GNR. 643 GG 28985 on 3 July 2006.
[6] Act 40 of 1994.

13. The sixth respondent, the Minister of Safety and Security, was joined in the proceedings to give effect to the interim order interdicting the assignment of tasks to Mdluli pending the finalisation of the review. He has joined the Commissioner in opposing the application.

14. In sum, FUL seeks to review and set aside four decisions in relation to Mdluli: the decision taken by Mrwebi on 5 December 2011 to withdraw the corruption and related charges; the decision taken by Chauke on 1 February 2012, to withdraw the murder and related charges; the decision taken by the Acting Commissioner, on 29 February 2012, to withdraw the disciplinary proceedings; and the decision, of 27 or 28 March 2012, to reinstate Mdluli as the Head of Crime Intelligence within SAPS. It also seeks an order directing that the criminal and disciplinary charges be immediately re-instated and prosecuted to finalisation, without delay.

Preliminary evidentiary and procedural issues

15. The background facts giving rise to the review are for the most part common cause. However, in its founding affidavit FUL conceded that it was compelled by force of circumstances in bringing the application to rely on hearsay statements reported in the media and elsewhere. It accordingly made a general application for any hearsay evidence to be admitted in the interests of justice in terms of section 3 of the Law of Evidence Amendment Act.[7] It based the application on five broad considerations: the relevant source documents relating to the decisions were inaccessible as they are under the control of the respondents; some of the statements have been reported in the media and have not been repudiated by the respondents; the impugned decisions were taken without any public explanation in violation of the constitutional obligation of transparency, openness and accountability; the review deals with subject matter of significant public interest; and the respondents would suffer no material prejudice by the admission of the hearsay, with any prejudice being outweighed by the public interest in proper justification of the decisions.

16. In motivating the admission of the evidence, FUL did not identify the specific statements upon which it hoped to rely. Nonetheless, it is evident that it had in mind a range of statements made in certain newspaper articles, as well statements and reports made by members of SAPS and the NPA (in particular Colonel Kobus Roelofse and Colonel Peter Viljoen of the Directorate Priority Crime Investigations in Cape Town, the Hawks; and Advocate Glynnis Breytenbach of the NPA) who investigated the allegations against Mdluli but were inhibited by institutional constraints and perceived conflicts of interest from deposing to confirmatory affidavits.

17. In the answering affidavits filed by the NDPP and the Mrwebi, the hearsay evidence was for the most part dealt with in general terms without any particular statement being objected to. The Commissioner largely avoided dealing with the merits of the factual allegations in relation to the decisions, raised mainly technical defences and objected to the hearsay in general terms.

[7] Act 45 of 1988

18. In reply, FUL reiterated the point that the problem of hearsay in most respects would have fallen away had the NDPP and the Commissioner taken the court into their confidence by making full and frank disclosure regarding the Hawks investigation and by consenting to their employees testifying in these proceedings. Instead, it alleged, the deponents, in violation of their constitutional obligations of transparency and accountability, strained to withhold vital information in their possession. FUL therefore submitted that it is not open to the respondents to seek to have the evidence disallowed on the basis that it is hearsay when they have declined to fulfil their obligation to provide it.

19. The dispute between the parties about hearsay, delineated as it is in such general terms, is frankly much ado about not a great deal and not especially helpful in deciding any disputes of fact. Because evidence was sourced from other proceedings in which evidence was given under oath, most of the relevant factual issues have become less contentious. And where there are factual disputes they must be resolved by reference to the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[8] For the reasons put forward by FUL, I will adopt a generous approach. The hearsay nature of any statements allowed as evidence in the interests of justice, and which form the basis of averments of either party, will nonetheless influence the determination of the veracity, probability, reliability and ultimate cogency of the averments.

20. FUL complained furthermore that the respondents have, through their conduct, delayed and frustrated the prosecution of the review. Each of the first to third respondents was called upon, in terms of Rule 53 of the Uniform Rules of Court, to file a record of decision, and reasons, justifying his or her decision under attack. Each of them failed to file a record timeously or on request. FUL was compelled to serve Rule 30A notices, upon which the first and third respondents eventually filed incomplete records. FUL's attorney addressed a letter to the state attorney on 25 July 2012 requesting a complete record of decision itemising twelve identified items that had not been disclosed, including the representations made to the NDPP by Mdluli requesting the withdrawal of charges, communications with the IGI and the Auditor General to whom the allegations of misconduct had been referred for investigation, representations made by Advocate Breytenbach to Mrwebi recommending that the charges not be withdrawn and so on. The request was not heeded. FUL also had to bring an application to compel production of the Commissioner's record. Even then an incomplete record was delivered. The Acting Commissioner filed a record comprising only two letters notifying Mdluli of the withdrawal of the disciplinary charges and the upliftment of his suspension.

21. The respondents' failure to comply fully with their obligations to file complete records of decision undermined FUL's ability to prosecute the review and has meant that it has had to rely on evidence put up by itself, sourced from other proceedings in which the respondents were involved, in particular those involving the suspension and discipline of Advocate Breytenbach, a Senior Deputy DPP of the NPA who doggedly insisted on the prosecution of Mdluli. On 30 April 2012 the NDPP suspended Breytenbach pending the outcome of an investigation into a complaint made against her in an unrelated matter some six months before her suspension. Breytenbach has contended in the other proceedings that the complaint was

[8] 1984 (3) SA 623 (A) at 634-635

spurious and the real reason for her suspension was the stance she took in relation to the prosecution of Mdluli. She challenged her suspension by way of an urgent application to the Labour Court, which was struck from the roll for want of urgency. She was ultimately cleared of all charges (additional charges having been preferred against her after her suspension) in a disciplinary hearing held under the auspices of an independent chairperson. In the absence of a complete record of decision, FUL has relied on the affidavits filed in the Labour Court application and the transcript of the cross examination of NPA witnesses in the disciplinary hearing to supplement its evidence.

22. The failure to file complete records timeously contributed to a delay in the proceedings. The review in terms of Part B of the Notice of Motion was heard almost two years after it was first instituted. Throughout that time, Mdluli remained suspended on full pay. Despite the incomplete records of decision, FUL filed its supplementary founding affidavit on 8 October 2012, and a further supplementary founding affidavit, necessitated by the paucity of the records filed and by further documents becoming publicly available, on 14 March 2013. It meant that the respondents had to file answering papers by no later than 02 May 2013. None of the respondents filed answering papers in the review by that date.

23. Ultimately the Deputy Judge President ("the DJP") directed the respondents to file answering papers by 24 June 2013, to enable the matter to be heard on 11 and 12 September 2013. Even then, the second and sixth respondents filed their answering papers only on 25 June 2013, and the first and third respondents filed theirs on 4 July 2013 – nine court days late. The NDPP and Mrwebi in addition did not file their heads of argument on 12 August 2013 as directed by the DJP, preferring to do so a month late on 9 September 2013, two days before the hearing, much to the inconvenience of the court and the other parties. The respondents filed additional affidavits in the afternoon of the day before the hearing. Despite being ambushed in this way, the applicant did not object to their admission, no doubt because it preferred not to have the matter postponed. I indicated to the parties that the creditworthiness of the averments made in the late filed supplementary affidavits would have to be assessed in the light of the applicant not having had a right of reply to them. It was agreed by all parties to proceed on that basis.

24. The reasons for the various delays, and late filing, are sparse and mostly unconvincing. However, in the interests of justice I was persuaded that the matter should proceed without further delay and condoned the non-compliance with the rules and directives of the DJP. 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.

25. FUL submitted that the respondents' conduct in delaying the proceedings, their lack of transparency and their attitude to disclosure and the admission of any hearsay evidence gives rise to an inference that they lack adequate justification for the decisions at issue. The legitimacy of that submission is borne out by the analysis which follows.

The facts

26. As stated, the facts giving rise to the application are for the most part common cause. Mdluli joined SAPS on 27 August 1979. He rose through the ranks and was finally appointed as the Head of the Crime Intelligence Division of SAPS on 1 July 2009. The position is one of the senior leadership positions within SAPS and in the intelligence community of the state. The incumbent exercises complete control over all surveillance that any division of SAPS carries out in any investigation, and has access to highly sensitive and confidential information, and to the funds making up the Secret Service Account ("the SSA"). The position calls for an official with an exemplary record of honesty, discretion and integrity.

27. On 31 March 2011, Mdluli was arrested and charged with 18 counts, including murder, intimidation, attempted murder, kidnapping, assault with intent to do grievous bodily harm, and with defeating the ends of justice. These charges alleged that on 17 February 1999 Mdluli was party to the unlawful and intentional killing of Mr Tefo Ramogibe, who at the time was married to Ms Tshidi Buthelezi, a former lover of Mdluli. The charges of attempted murder, kidnapping etc. make allegations that Mdluli and persons associated with him brought pressure upon the relatives and friends of Ramogibe by violence, kidnapping and other threatening means with the aim of bringing the relationship between Ramogibe and Buthelezi to an end. Ramogibe was shot dead during a pointing out while in the company of SAPS officers from Vosloorus Police Station. The pointing out was held ostensibly for the purpose of gathering evidence in relation to a case of attempted murder opened by Ramogibe at the Vosloorus Police Station a few days previously. At the time Mdluli was Branch Commander of the Detective Branch at Vosloorus. Although Mdluli was a suspect in the investigation into the murder and attempted murder of Ramogibe, he was not arrested on the charges and the matter did not proceed to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

28. Information about the discontinued investigation surfaced shortly after Mdluli was promoted to Head of Crime Intelligence in late 2009. In light of the seriousness of the charges and on the weight of the evidence, the then Commissioner, General Cele, after following due process, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him. Mdluli is of the opinion that the allegations have re-surfaced as part of a conspiracy against him by those opposed to his promotion to high rank. In a letter dated 3 November 2011, addressed to President Zuma, the Minister of Police and the Acting Commissioner, Mdluli alleged that Commissioner Bheki Cele, and other senior officers, Generals Petros, Lebeya and Dramat were "working together against" him. In the letter he tactlessly stated:

> "In the event that I come back to work, I will assist the President to succeed next year"

He did not explain how he would assist the President, but it is reasonable to assume that he had in mind the conference of the governing party in 2012 at which President Zuma was re-elected as party leader for a second five year term. His entreaty to the President implies that Mdluli believed he had it in his gift to use his influence and the means at his disposal to the advantage of the President. The Minister later responded by causing the allegations of conspiracy to be investigated by a special task team which ultimately found them to be baseless.

29. Mdluli made various appearances in court on the murder and related charges. The matter was postponed to later dates without Mdluli being asked to plead to the charges.

30. In late September 2011 Mdluli was arrested and charged on further charges of fraud, corruption, theft and money laundering ("the fraud and corruption charges"). The charges relate to the alleged unlawful utilization of funds from the SSA for the personal benefit of himself and his spouse. Mdluli was brought before the Specialized Commercial Crimes Court in Pretoria and granted bail. He was not asked to plead to the charges. The case was postponed to 14 December 2011.

31. The investigation of these charges was conducted by Colonel Viljoen of the Hawks who worked in conjunction with Advocate Smith of the Specialised Commercial Crimes Unit ("the SCCU"). Smith applied for a warrant for the arrest of Mdluli on 1 August 2011. The application was authorised by the magistrate on 6 September 2011, and executed on 20 September 2011.

32. The evidence in relation to the fraud and corruption charges is derived from an affidavit made by Viljoen in support of the application for the warrant of arrest of Mdluli and a report from Colonel Roelofse. Neither officer has deposed to an affidavit in these proceedings on the grounds of conflict of interest. Strictly speaking their evidence is hearsay. However, none of the respondents deny the averments in relation to the nature of the charges or their investigation, and they may be accepted to be common cause.

33. The charges allege that Mdluli received an unlawful gratification in an approximate amount of R90 000 when he used the funds of the SSA to acquire two vehicles supposedly for covert use, but which were recovered from his wife at their home in Cape Town. As part of the transaction, he is alleged to have traded in his own vehicle, which was valued at about R90 000 less than the amount Mdluli owed as outstanding instalments under his credit agreement. The purchase of the new vehicles, apparently for the use of himself and his wife, was allegedly done in such a manner that discounts payable to the Secret Service were applied for Mdluli's personal benefit and extinguished his obligation to pay R90 000 to his credit provider.

34. The charges thus essentially allege that Mdluli abused state financial resources for private gain for his and his wife's benefit. The SSA is controlled by the crime intelligence unit over which Mdluli exercises control. The charges are therefore serious, impacting upon the proper administration of justice and control of state resources, and raise the question of Mdluli's fitness for his position.

35. In his answering affidavit filed in the Part A proceedings, Mdluli dealt mainly with procedural issues related to his suspension, his constitutional right to be presumed innocent, attacks on his integrity in the media, the alleged conspiracy against him and the leaking of classified information. Although expressing doubt about the sufficiency of the evidence against him, he did not address the specifics of the allegations made in respect of the various criminal charges in any detail or disclose his defence in relation to them.

36. The legal representatives of Mdluli addressed, and delivered by hand, written representations to the NDPP on 26 October 2011. They were not disclosed by the respondents, as one might have expected, as part of the Rule 53 process. They are annexed as part of Annexure GB 10 to the affidavit of Breytenbach filed in the Labour Court proceedings. The opening paragraph reads:

> "We hereby make representations to you as to why you should review the preference of charges against our client Lt Gen Mdluli and possibly withdraw the charges against him, as proceeding against him is less likely to result in a conviction on any of the charges preferred against him"

The Acting NDPP, Advocate Jiba, made no mention of these representations in her answering affidavit. Her scant averment on the issue is to the effect that "the decisions" of the Special DPP and the DPP who instructed the charges to be withdrawn "have not been brought to my office for consideration in terms of the regulatory framework"; the implication of her statement being that she has made no decision in relation to the representations.[9]

37. The representations contend for the most part that the charges arose from a conspiracy against Mdluli by fellow officers and others who disapproved of his promotion.

38. Written representations in relation to the fraud and corruption charges, dated 17 November 2011, were delivered by hand to Mrwebi in his capacity as a Special DPP and the head of the SCCU. They record that similar representations, presumably in relation to the murder and related charges, had been made to Chauke, the DPP South Gauteng. In the representations to the Special DPP, Mdluli's legal representatives alleged an abuse of the criminal justice system and stated:

> "Our instructions are that Mdluli's arrest is a continuation of the dirty tricks and manoeuverings relating to the contestation and jostling for the position of Head of Crime Intelligence."

The representations made to Chauke, although alluded to in his record of decision filed in terms of Rule 53, do not form part of the record of this application.

39. Mrwebi in response to the representations made to him requested a report from Breytenbach and sight of the docket. An initial report was submitted to Mrwebi under cover of a memorandum from Breytenbach. Mrwebi was dissatisfied with the report and asked for more information. A final report prepared by Smith was placed before Mrwebi on 2 December 2011. The reports and memorandum argued in favour of pursuing the case against Mdluli.

40. Mrwebi stated in his answering affidavit that after he considered the reports and examined the docket, he concluded that there "were many complications with the matter particularly with regard to the nature and quality of evidence" and how that evidence had been obtained. He was of the view that "there was no evidence, other than suspicion linking the suspects to the alleged crimes". He also had concerns that the evidence had been acquired improperly because documents in relation to the SSA are privileged and that the documents could not be relied on until the IGI waived the privilege. And, thus, he believed there would be problems with the

[9] Para 21 of the confirmatory affidavit of the first respondent at page 1758 of the record.

admissibility of the incriminating documentation. As will appear presently, this account is inconsistent with the objective facts as reflected in contemporaneous correspondence.

41. Mrwebi determined to withdraw the fraud and corruption charges against Mdluli and prepared a memorandum and a "consultative note" setting out his reasons dated 4 December 2011. Mrwebi did not disclose these obviously relevant documents as part of his record of decision belatedly filed in terms of Rule 53. They came to light however as annexures to Breytenbach's founding affidavit in her application to the Labour Court.

42. Mrwebi said that he met with Advocate Mzinyathi, the DPP of North Gauteng, on 5 December 2011 to "discuss" the matter. He claims that the consultative note was incorrectly dated and was in fact drafted after he met with Mzinyathi. There is some doubt about this, but because in the final analysis not much turns on the issue I am prepared to accept that the note was written on 5 December 2011. The consultative note is addressed to Mzinyathi and Breytenbach. The opening paragraph records that Mrwebi had consulted with the DPP North Gauteng, as required by section 24(3) of the NPA Act. Mzinyathi in a confirmatory affidavit, filed on the day before the application was enrolled for hearing, contradicts this. His averments in that affidavit create the distinct impression that his engagement with Mrwebi on 5 December 2011 was in the way of a brief encounter in which the issues were not fully canvassed. They did however meet again on 9 December 2011 and had a more substantive discussion. In the consultative note, Mrwebi expressed his essential view in relation to the prosecution as follows:

> "Essentially my views related to the process that was followed in dealing with the matter particularly in view of the fact that the matter fell squarely within the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigations can never be complete without access to such documents and information."

Later in the note, after briefly referring to the investigation, Mrwebi stated:

> "However, because of the view I hold of the matter, I do not propose to traverse the merits of the case and the other questions any further. Whether there was evidence in the matter or not, is in my view, not important for my decision in the matter. The proposition which I allude to below, should alone and without any further ado, be dispositive of the matter."

43. The proposition in question, and thus the sole reason for his decision to instruct the charges to be withdrawn, was his belief that those charges fell within the exclusive preserve of the IGI in terms of section 7 of the Intelligence Services Oversight Act.[10] It is common cause that Mrwebi did not consult the SAPS or the IGI prior to withdrawing the charges and that Mzinyathi and Breytenbach informed Mrwebi at the meeting with him on 9 December 2011 that the IGI was not authorised to conduct criminal investigations. However, their advice did not prompt him to change his stance.

44. In his answering affidavit, as I mentioned earlier, Mrwebi attempted to cast a different spin on his reasons for passing the matter to the IGI. He referred it to the

[10] Act 40 of 1994

IGI, he said, because he believed "that the IG would not only help with access to documents and information" but could also resolve the issue of privilege. He was merely postponing the matter until the IGI sorted out the evidentiary problems.

45. Subsequent events do not bear that out. In particular, correspondence from the IGI to the Acting Commissioner dated 19 March 2012 indicates that she understood the matter to have been referred to her to investigate and institute proceedings. This letter was forwarded to the NDPP and Mrwebi on 23 March 2012, after the IGI's legal adviser had prevailed unsuccessfully upon Mrwebi to re-instate the charges against Mdluli. In her letter the IGI commented on Mrwebi's consultative note as follows:

> "The IGI derives her mandate from the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994…which provides for the monitoring of the intelligence and counter-intelligence activities of the Intelligence Services…Any investigation conducted by the IGI is for the purposes of intelligence oversight which must result in a report containing findings and recommendations…The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the Police. As such we are of the opinion that the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that the matter be referred back to the NPA for the institution of the criminal charges."

Her perception is patent. She appreciated that Mrwebi had instructed the charges to be withdrawn and discontinued the criminal proceedings. Both Breytenbach and Mzinyathi understood the position likewise. Mrwebi took no apparent steps to heed the advice of the IGI.

46. In his answering affidavit, and in the consultative note, Mrwebi stated that he consulted with Mzinyathi on 5 December 2011 in terms of section 24(3) of the NPA Act before making his decision. The provision requires that a Special Director may only discontinue criminal proceedings "in consultation" with the relevant DPP. The nature and extent of the consultation that occurred is a matter of dispute. The record of Breytenbach's disciplinary proceedings indicates that it may have fallen short of the statutory requirement.

47. What transpired between Mrwebi and Mzinyathi at their meetings on 5 December 2011 and 9 December 2011 is of decisive importance. It was the subject of extensive and thorough cross examination by Advocate Trengrove SC, counsel for Breytenbach, during her disciplinary proceedings. The respondents have not placed the authenticity, accuracy or reliability of the record in issue. It therefore may be accepted as a correct and complete account of the testimony of Mrwebi and Mzinyathi under oath in those proceedings. Considering that Mrwebi and Mzinyathi are senior officers of the court, one may assume the evidence was given with due consideration to the need for propriety and appropriate candour.

48. After lengthy cross examination by Mr. Trengrove, Mrwebi conceded that when he took the final decision, either on 4 December 2011 or 5 December 2011, to withdraw the charges and discontinue the prosecution of Mdluli on the fraud and corruption charges, he did not know Mzinyathi's view of the matter and did not have his concurrence in the decision. He admitted that he took the decision prior to writing the consultative note and did so relying on representations made to him in

confidence by anonymous people, who he was not prepared to name and whose input he did not share with Mzinyathi. Mzinyathi's views were conveyed to Mrwebi for the first time in an email on 8 December 2011 in response to the consultative note, after Mrwebi had already informed Mdluli's attorney that the charges would be withdrawn.

49. Mzinyathi acknowledged such to be the case during his evidence in the disciplinary proceedings. He was referred during cross examination to the email and affirmed the correctness of its content. In the email Mzinyathi stated:

> "I am concerned that you indicate in your memorandum to me that you will advise the attorneys of Mr. Mdluli of your instruction that charges be withdrawn. I hold the view that such advice to the attorneys would be premature as I do not share your views, nor do I support your instruction that the charges will be withdrawn."

50. Mzinyathi also confirmed that at the meeting on 9 December 2011 (attended by the two of them and Breytenbach), Mrwebi took the position that he was *functus officio* because he had already informed Mdluli's attorneys of the intended withdrawal. Mzinyathi and Breytenbach, unable to persuade Mrwebi to reverse the decision, then prevailed on him to withdraw the charges provisionally, to which he agreed. Mzinyathi retreated somewhat from this testimony in his confirmatory affidavit filed on the day before the application was enrolled to be heard. His explanation of events in the affidavit differs from his testimony at the disciplinary hearing with regard to the degree of concurrence. His exchange with Advocate Trengrove is therefore important. The most relevant part merits quoting in full:

> **Trengrove:** Now when you, when you then saw him the following day on the 9th….he told you that he was *functus officio*, do you remember that?
>
> **Mzinyathi:** He did indeed.
>
> **Trengrove:** Because he had already informed the attorneys of his decision to withdraw the charges.
>
> **Mzinyathi:** Yes
>
> **Trengrove:** Do you know that he sent off that letter to the attorneys withdrawing the charges, at the same time sending you those memos (including the consultative note)?
>
> **Mzinyathi:** Oh, I was not aware.
>
> **Trengrove:** That is what he told us in evidence. So, by the time he met with you on 9 December 2011 he said he was *functus officio*, correct?
>
> **Mzinyathi:** Yes
>
> **Trengrove:** And we all know that *functus officio* means that I have taken my decision and I no longer have the power to reopen it, correct?
>
> **Mzinyathi:** Yes
>
> **Trengrove:** So that presented you with a *fait accompli*, the horse had bolted, the case will have to be withdrawn.
>
> **Mzinyathi:** Indeed.

51. In the supplementary founding affidavit, delivered in March 2013, six months before the application was heard, FUL dealt comprehensively with Mzinyathi's involvement, his evidence in the disciplinary enquiry and the contention that the failure to consult him rendered the withdrawal of the charges illegal. Mzinyathi, it may be re-called is the DPP for North Gauteng, the most senior public prosecutor in Pretoria. The record shows he has been involved in this dispute from the beginning. His evidence in the Breytenbach disciplinary hearing was that he disagreed with the decision which had been presented to him as a *fait accompli*. This was the factual basis upon which FUL relied in the founding and supplementary affidavits, as well as its heads of argument, to submit that the withdrawal of the charges was illegal.

52. Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary enquiry (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 eleventh 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 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 email 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 characterisation 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 un-creditworthy. The affidavit is a belated, transparent and unconvincing attempt to re-write the script to avoid the charge of unlawfulness. The version in the supplementary founding

affidavit, originally uncontested by Mzinyathi, and corroborated by Mzinyathi's testimony in the disciplinary hearing, must be preferred and accepted as the truth.

55. In light of the contemporaneous evidence, Mrwebi's averment in the answering affidavit that he consulted and reached agreement with Mzinyathi before taking the decision is equally untenable and incredible to a degree that it too falls to be rejected.

56. That a decision to withdraw the charges and discontinue the prosecution had been made without the concurrence of Mzinyathi is borne out not only by Mzinyathi's email of 8 December 2011 and his evidence at the disciplinary hearing, but also by Mrwebi's own interpretation of events. In his answering affidavit, Mrwebi described the purpose of the visit by Breytenbach and Mzinyathi to his office on 9 December 2011 as being "to discuss their concerns that they do not agree *with my decision*". After discussing the evidentiary issues, according to Mrwebi, they agreed with his position that the case against Mdluli was defective, had been enrolled prematurely and could be reinstated at any time. Breytenbach, he said, agreed to pursue the matter and would come back to him with further evidence. Breytenbach failed to pursue the matter diligently and did not come back to him. He then considered the matter "closed", as he stated in a letter to General Dramat of the Hawks, on 30 March 2012. The court, on the basis of this account, is asked to accept that the reason the prosecution has not been re-instated is that Breytenbach failed in her duty to obtain additional evidence and report back, as she had promised at the meeting of 9 December 2011.

57. Breytenbach, as mentioned, was suspended from her position as Regional Director of the SCCU in late April 2012, on numerous unrelated charges of which she was later acquitted at the disciplinary hearing.

58. Mrwebi's reference to "*my decision*" in his answering affidavit implies that he believed the decision to withdraw the charges against Mdluli was his decision and one made prior to the meeting of 9 December 2011 without the concurrence of Mzinyathi. His use of the term "closed" in the letter to Dramat, albeit a few months later, supports Mzinyathi's evidence that Mrwebi viewed himself as *functus officio*, was unwilling to re-instate the charges and that the decision was presented to him as a *fait accompli*. The subsequent agreement to categorise the withdrawal of charges as "provisional" was a concession to his concerns, which did not alter Mrwebi's prior unilateral decision and instruction that the charges should be withdrawn. Mrwebi's own evidence thus supports a finding that the decision to withdraw the fraud and corruption charges was taken by him alone before the meeting of 5 December 2001, and prior to his writing of the consultative note, without the concurrence of Mzinyathi.

59. Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. 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 re-instated.

60. FUL was justifiably sceptical in its reply to these allegations. Paragraph 106 and 107 of the reply read:

> "106. Advocate Mrwebi's version as set out in this paragraph is, I submit, palpably implausible and in conflict with his *ipsissima verba*. In its ordinary meaning 'closed" is unequivocal. As it is used in Advocate Mrwebi's letter to General Dramat, seen in the context, there can in my submission be no doubt that Advocate 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 Mrwebi's subsequent claim that investigations 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, who is an experienced prosecutor with more than two decades of experience in the criminal courts, accused 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.

62. In a 24 page memo to the Acting NDPP dated 13 April 2012, annexed to her affidavit in the Labour Court application, Breytenbach made a forceful argument in favour of proceeding against Mdluli on the corruption charges and stated her view that the instruction to withdraw the case against Mdluli and his co-accused, Colonel Barnard, was "bad in law and in fact illegal". She asked the NDPP for an internal review of Mrwebi's decision not to institute criminal proceedings and to review the lawfulness of the decision.

63. The memo is a credible indication that the decisions were indeed brought to the attention of the Acting NDPP for consideration. The NDPP in her answering affidavit, though not dealing directly with the memo, maintained that the decisions to withdraw charges had not come to her office for consideration "in terms of the regulatory framework". Be that as it may, the memo leaves no doubt that Breytenbach did not consider the case against Mdluli to be "defective". She was confident that there was a good *prima facie* case and reasonable and probable cause for a prosecution, so much so that she wanted a review by the NDPP of the Special DPP's decision and requested permission to re-enrol the charges and to pursue additional charges in relation to Mdluli's misuse of the funds of the SSA. Her firm conviction that there was a good case against Mdluli was the reason she wrote the memo. Breytenbach concluded:

> "Our professional ethics dictate that we pursue the matter to its logical conclusion, which may include, of necessity, taking further steps if there is no agreement between us"

64. Breytenbach's attempts to have the charges re-instated were not successful. She was suspended about two weeks later on 30 April 2012.

65. Mrwebi offered no detail at all in his answering affidavit of any continuing investigation into the fraud and corruption charges by SAPS or the NPA, nor did he name any person supposedly seized with them. He also did not comment on the recommendation of the IGI that criminal proceedings should be instituted against Mdluli. His averments in the answering affidavit regarding continuing investigations, on the face of them, are unsubstantiated and hence unconvincing. He sought belatedly to supplement his deficient evidence in these respects in his supplementary answering affidavit filed on 10 September 2013.

66. Motivated in part, as he said, by a need to respond to what he considers to be a withering attack by Justice Kriegler on his integrity, credibility, and the propriety of his decisions, and hence by implication his suitability to hold his office, Mrwebi delivered the supplementary answering affidavit (making averments going beyond the challenge to his integrity) on the day before the matter was enrolled for hearing, two months after the replying affidavit was filed and one month after the applicant filed its heads of argument. His reasons for taking so long are not compelling and pay little heed to the fact that his timing ambushed the applicant and denied it the opportunity to deal with the allegations made in the affidavit.

67. For the most part, the affidavit does not take the matter further and basically repeats his assertion that the decision was not unilateral and that investigations are continuing. Mrwebi referred for the first time in this affidavit to five written reports from members of the prosecuting authority who are investigating the matter, the contents of which he was disinclined to share with the court for strategic and tactical reasons on the grounds that disclosure will hamper and prejudice the investigation. He was however prepared to share with the court the fact that the NPA has experienced “challenges” in relation to the declassification of documents. Moreover, on 25 June 2013, three months before the hearing of the application, it was established by investigating prosecutors that the evidence of the main witness (who is not identified by name) will have to be ignored in its entirety because it is apparently a fabrication not reflecting the true version of events. The exact nature of that evidence and the basis for its refutation is not disclosed.

68. For reasons that should be self-evident, it is not possible to attach much weight to this evidence. The applicant has been denied the opportunity to respond to it, and by its nature it is vague and unsubstantiated. Mrwebi, by his own account, and for reasons he does not explain, sat on this information for three months before disclosing it to the court on the day before the hearing. The averments accordingly can carry little weight on the grounds of unreliability. The conduct of the Special DPP, again, I regret, as evidenced by this behaviour, falls troublingly below the standard expected from a senior officer of this court.

69. Accordingly, in the final result, I am compelled to find that Mrwebi took the decision to withdraw the charges against Mdluli without the concurrence of Mzinyathi and decided to discontinue the prosecution.

70. The fraud and corruption charges were formally and “provisionally” withdrawn in the Specialised Commercial Crimes Court on 14 December 2011. FUL submits that a provisional withdrawal which has endured for two years may be considered to be a

permanent withdrawal. The characterisation of the withdrawal as provisional, as I explain later, would not normally deflect from any proven illegality or irrationality of the decision.

71. The charges of murder and related offences were withdrawn on 14 February 2011 by Chauke, the DPP for South Gauteng, based in Johannesburg, the area of jurisdiction in which the alleged offences were committed. Chauke determined to withdraw the charges on 1 February 2012 and publicly announced the fact on 2 February 2012. In his reasons for decision and in his supporting answering affidavit, Chauke explained that given the seriousness of the charges and the lack of direct evidence to sustain the charge of murder, he decided to withdraw the charges provisionally and for an inquest to be held to determine the cause of death of Ramogibe. Chauke withdrew the 17 other charges of intimidation, assault, attempted murder and kidnapping because he wanted to avoid fragmented trials.

72. An inquest is an investigatory process held in terms of the Inquests Act[11] which is directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. Section 16(2) of the Inquests Act requires a magistrate conducting an inquest to investigate and record his findings as to the identity of the deceased person, the date and cause (or likely cause) of his death and whether the death was brought about by any act or omission that *prima facie* amounts to an offence on the part of any person. The presiding officer is not called on to make any determinative finding as to culpability.

73. In his supporting answering affidavit, Chauke explained that he took the decision to withdraw the charges and to refer the murder allegations to an inquest in response to the written representations made on behalf of Mdluli to the DPP South Gauteng in November 2011. He did not annex a copy of those representations to his affidavit.

74. The inquest was held during the course of April and May 2012. The magistrate handed down his reasons six months later on 20 November 2012. The reasons suffer a measure of incoherence and the ultimate findings are contradictory. He found first that an inference of Mdluli's involvement would be consistent with the facts but not the only inference. He then concluded:

> "The death was brought about by an act *prima facie* amounting to an offence on the part of unknown persons. There is no evidence on a balance of probabilities implicating Richard Mdluli….."

75. The magistrate found correctly that the inquest had no jurisdiction to deal with the other charges against Mdluli.

76. In its supplementary founding affidavit delivered in March 2013, FUL submitted that the evidence put up in the inquest discloses a *prima facie* case against Mdluli of murder, kidnapping, assault with intent to do grievous bodily harm and defeating the end of justice.

77. In relation to the killing of the deceased, given that he was shot three times by unknown assailants, there is no doubt that an offence was involved. The only question for the magistrate, in terms of section 16(2) of the Inquest Act, was whether

[11] Act 58 of 1959.

the death was brought about by conduct *prima facie* amounting to an offence on the part of any person. A *prima facie* case will exist if the allegations, as supported by statements and real documentary evidence available, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict.[12] The magistrate's conclusion that an inference of Mdluli's involvement would be consistent with the proved facts amounts to a finding that Mdluli has a *prima facie* case to answer. The magistrate in effect (but perhaps unconsciously) accepted that although a case had not been established beyond reasonable doubt or on a balance of probabilities, there was a *prima facie* case of murder against Mdluli. It was not the responsibility of the magistrate to establish culpability either beyond reasonable doubt or on a balance of probabilities.

78. The affidavits before the inquest and the evidence as summarised by the magistrate in his written reasons do indeed support a conclusion that there is a *prima facie* case against Mdluli on the murder and related charges. The magistrate found the following to be common cause. Mdluli and Ramogibe, the deceased, were both in a relationship with the same woman, Buthelezi, from 1997 until the murder of the deceased in 1999. Ramogibe had secretly married Buthelezi during the period in question. Mdluli was upset about the relationship "and on a number of occasions addressed the issue". On 23 December 1998 Ramogibe was the victim of an attempted murder. He reported the incident to the Vosloorus SAPS. Ramogibe was requested to report to the Vosloorus police station to meet with the investigating officer and to point out the scene of the attempted murder. On 17 February 1999, Ramogibe was taken to the scene in Mdluli's official vehicle, a green Volkswagen Golf. Ramogibe was murdered at the scene on that day while pointing it out to the investigating officer.

79. In its supplementary founding affidavit, FUL highlighted the following key attributes of the evidence demonstrating a *prima facie* case against Mdluli, and upon which the magistrate's inference of Mdluli's involvement is soundly based.

80. The deceased's mother, Ms Maletsatsi Sophia Ramogibe, testified that during 1998 Mdluli came to her home looking for the deceased, obviously unhappy with the fact that the deceased was in a relationship with Buthelezi. A few days later, Mdluli came and fetched her and took her to the police station. There she found her son bleeding with his shirt covered in blood. Mdluli insulted her son in his presence and warned him to keep away from Buthelezi. Her son was killed a few days later. After his death, Ms Ramogibe's daughter, Jostinah, was kidnapped and raped (confirmed by her in a confirmatory affidavit). She later received a call from an unknown caller who warned her that if she proceeded to press the case of her son's murder all her daughters would be killed.

81. Ms Alice Manana, an acquaintance of the deceased and Buthelezi, described how in August 1998 she was allegedly kidnapped, intimidated and assaulted by Mdluli and two fellow officers of the Vosloorus SAPS, and forced to disclose the whereabouts of the couple and to take the police to them at Orange Farm. The deceased and Buthelezi were then taken to Vosloorus police station where they were assaulted for 30 minutes before being discharged. On 17 October 1998, Ms Manana was repeatedly shot by an assailant who shot her at the front door of her

[12] Du Toit, *Commentary on the Criminal Procedure Act* Juta at 1-4T-7

home. During the shooting, she saw Mdluli sitting in the driver's seat of a green Volkswagen Golf, which she knew belonged to him, parked outside her house.

82. Buthelezi, now deceased, stated in an affidavit deposed to before her death that she and the deceased had been kidnapped and assaulted by Mdluli and his colleagues.

83. Five other witnesses, including the deceased's father, testified that Mdluli had visited them repeatedly looking for the deceased and informed them that he would kill Ramogibe if he did not end his relationship with Buthelezi. Mr Steven Buti Jiyane testified that Ramogibe had periodically stayed at his family home because Mdluli was threatening to kill him.

84. Mary Lokaje in her affidavit heard the shooting of Ramogibe outside her house and saw three uniformed policeman running away from the scene, and saw the Golf being driven away.

85. Various affidavits by police officers who investigated the murder were filed confirming that Mdluli was the main suspect in the case although there was no evidence of his direct involvement in the murder and dealing with the loss of the dockets and evidence linked to some of the charges.

86. The magistrate did not reject any of this evidence. He in fact accepted it. In the conclusion to his reasons, the magistrate stated:

> "But be this as it may, their evidence of Mdluli being to such a degree upset with Oupa's (Ramogibe) relationship with an estranged Tshidi (Buthelezi) that they deemed it necessary to have reported it and mentioned it in their affidavits shortly after Oupa's death, runs like a golden thread through the murky waters of their evidence. Evidence that he passed threats to kill Oupa, whether made repeatedly or not, against the background of the strong current of Mdluli's emotions at the time, is in my opinion *overwhelmingly probable*" (emphasis supplied).

He then found that it had been proved on a balance of probabilities that Mdluli was "highly upset and humiliated" by Ramogibe's relationship with his former lover, had not come to terms with the fact that Buthelezi had ended their relationship, had made threats to kill Ramogibe and that his family would mourn him and had wanted Ramogibe out of Buthelezi's life in the hope that he could rescue his relationship with her. He, however, went on to point out that it might be difficult to link the threats, intimidation and alleged kidnapping to the ultimate fatal shooting of Ramogibe. The inability to call Buthelezi, now deceased, was in his opinion a complicating factor. These weaknesses (and others) in the evidence led the magistrate to conclude that an inference of Mdluli's involvement was permissible but not conclusive. His ultimate conclusion that there was no evidence on a balance of probabilities "implicating" Mdluli is wrong and inconsistent with his otherwise correct assessment and evaluation of the evidence.

87. Neither the Acting NDPP nor Chauke dealt meaningfully in their answering affidavits with the incriminating evidence against Mdluli, FUL's submissions regarding the evidence, or the finding of the magistrate that an inference of Mdluli's involvement was consistent with the facts.

88. The Acting NDPP, after setting out the legal and policy framework, confined herself to the following averments in paragraphs 19-24 of her answering affidavit:

> "19. When Advocate Chauke decided to withdraw the criminal charges of murder and related charges against the Fifth Respondent (Mdluli), he was authorised to do so by the Act, the Policy and the Policy Directives.
>
> 20. I am aware that Advocate Chauke referred the matter to an inquest by a magistrate and that the magistrate found that there was no evidence on a balance of probabilities implicating the Fifth Respondent and his co-accused in the death of Mr Ramogibe.
>
> 21. The decisions of the Third Respondent and Advocate Chauke on this matter have not been brought to my office for consideration in terms of the regulatory framework.
>
> 22. In the light of the above I did not take any decision referred to in the Applicant's founding affidavit. In terms of section 22(2)(b) of the NPA Act, I may intervene in any prosecution process when policy directives are not complied with. I may also in terms of section 22(2)(c) of the NPA Act review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations of the accused person, within the time period specified by me, the complainant or any party whom I consider to be relevant.
>
> 23. At this stage there was no policy contravention and/or representations received by me to warrant my intervention as set out above.
>
> 24. This therefore makes the application to review the withdrawal of charges by this honourable court premature."

The Acting NDPP fails to mention the representations made to her by Breytenbach, or that Mdluli's written representations of 26 October 2011 were in fact addressed to her. Nor does she refer to the magistrate's finding that an inference of Mdluli's involvement was consistent with the proven facts.

89. Chauke in his answering affidavit similarly ignored some of the inquest findings, saying simply that the magistrate had found there was no evidence implicating Mdluli. Clearly there is evidence implicating Mdluli. The magistrate's conclusion is anyhow not decisive. Guilt or innocence is a matter for the trial court tasked with the responsibility of determining culpability. Section 16(2) of the Inquests Act only requires a magistrate conducting an inquest to determine whether the death was brought about by any act or omission that amounts *prima facie* to an offence on the part of any person and, insofar as this is possible, a finding as to whom the responsible offenders might be.[13] The DPP is besides not bound by the findings of the inquest.

90. Chauke added that resources should not be wasted pursuing inappropriate cases where there is no prospect of success. On that basis he concluded that it would be "presumptuous and foolhardy" to proceed with the prosecution. He, in other words, is of the opinion that the charges provisionally withdrawn should now be finally withdrawn. He also contended that an inappropriate or "wrong" decision to prosecute would undermine the community's confidence in the prosecution system. FUL's predictable rejoinder is that his withdrawal of the charges has already done so.

[13] *Marais NO v Tiley* 1990 (2) SA 899 (A) at 901E-H.

91. It is difficult to fathom why the DPP of South Gauteng has not proceeded with the 17 charges of attempted murder, assault, kidnapping etc. after the inquest. His reason for provisionally withdrawing them in his reasons for decision was that he wanted to avoid fragmented trials. The inquest resolved that problem. If he did not want to pursue the murder charge on the basis of the inquest finding, he had a duty to continue with the balance of the charges and has given no reason for not proceeding. The evidence given in relation to them during the inquest, on the limited information available, looks reasonably cogent and compelling.

92. In terms of the prosecution policy and directives issued in terms of the NPA Act, there is a duty to pursue a prosecution where there is a reasonable prospect of success, and regard should always be had to the nature and seriousness of the offence and the interests of the broader community. Despite the obvious anomalies in the inquest findings, the evidence as a whole, read particularly with the witness statements, establishes *a prima facie* case and points to more than a reasonable prospect that a prosecution on the murder and related charges may meet with success on at least some of the counts.

93. Two weeks after the criminal charges against Mdluli were withdrawn, on 29 February 2012, the Acting Commissioner withdrew the disciplinary charges against him and disciplinary proceedings were terminated. Mdluli was therefore re-instated and resumed office from 31 March 2012. During April 2012, his role was extended to include responsibility for the unit which provides VIP protection to members of the National Executive, including President Zuma.

94. However, shortly afterwards, as a result of the serious allegations of conspiracy that he had levelled against other senior members of the SAPS, the Minister announced, on 9 May 2012, that Mdluli would be re-deployed from his post as Head of Crime Intelligence whilst those allegations were investigated by a ministerial task team. It will be re-called also that on 19 March 2012 the IGI recommended that Mdluli be prosecuted on the fraud and corruption charges.

95. The applicant launched these proceedings on 15 May 2013. On the same day the Acting Commissioner re-initiated disciplinary proceedings and brought charges against Mdluli, the nature and extent of which remain unknown. Mdluli was suspended for a second time on 25 May 2012 pending the outcome of that new process. As mentioned earlier, this court on 6 June 2012 granted the relief sought in Part A of the notice of motion and interdicted Mdluli from discharging any function or duty as a member and senior officer of the SAPS pending the outcome of this review; and further interdicted the Commissioner and the Minister from assigning any function or duty to him.

96. In a press statement issued by SAPS on 5 July 2012 it was announced that the ministerial task team, headed by Chief State Law Adviser, Mr Enver Daniels, had found that there was no evidence of a conspiracy against Mdluli and that the officials and his colleagues who had accused him of criminal conduct had acted professionally, in good faith and with a proper sensitivity to the issues at hand.

97. No steps have been taken to re-instate the murder or related charges against Mdluli since that date – even though, to repeat, the evidence put up in the inquest proceedings discloses at least *prima facie* cases of murder, kidnapping, attempted

murder, assault to do grievous bodily harm and defeating the ends of justice against Mdluli. Chauke has given no indication of whether the murder investigation is being continued or not.

The structure of the prosecuting authority and the power to withdraw charges against an accused person

98. Before considering the grounds of review, it will be useful to examine the legislative provisions governing the structure and functioning of the prosecuting authority.

99. Section 179(1) of the Constitution establishes a single national prosecuting authority in the Republic, which is required to be structured in terms of an Act of Parliament. The relevant statute is the National Prosecuting Authority Act [14] ("the NPA Act"), which was enacted shortly after the Constitution was adopted. The NPA Act must be read together with Chapter 1 of the Criminal Procedure Act[15] ("the CP Act") titled "Prosecuting Authority", which has been amended to reflect the post-constitutional arrangements established by the NPA Act.

100. In terms of section 179(1) of the Constitution the prosecuting authority consists of the NDPP, who is the head of the prosecuting authority, and is appointed by the President; and DPPs and prosecutors as determined by the NPA Act.[16] The single prosecuting authority consists of the Office of the NDPP and the Offices of the prosecuting authority at the High Courts.[17] The Office of the NDPP consists of the NDPP, Deputy NDPPs, Investigating Directors and Special Directors and other members of the prosecuting authority appointed at or assigned to the Office.[18]

101. The powers of a Special Director are relevant to this case. A Special Director is defined in section 1 of the NPA Act to mean a DPP appointed under section 13(1)(c), which provides that the President, after consultation with the Minister and the NDPP, may appoint one or more DPP as a Special Director to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette.

102. Section 6 of the NPA Act establishes an Office for the prosecuting authority at the seat of each High Court in the Republic. Each Office established by this section consists of the head of the Office, who is required to be a DPP or a Deputy DPP, and other Deputy DPPs and prosecutors appointed in terms of section 16(1) of the NPA Act. Prosecutors are appointed on the recommendation of the NDPP or a member of the prosecuting authority designated for that purpose by the NDPP. They can be appointed to the Office of the NDPP, the Offices at the seat of a High Court, to the lower Courts or to an Investigating Directorate established by the President in terms of section 7.

[14] Act 32 of 1998
[15] Act 51 of 1977
[16] Section 4 of the NPA Act
[17] Section 3 of the NPA Act
[18] Section 5 of the NPA Act

103. Section 179(2) of the Constitution provides that 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. Section 179(4) importantly provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

104. The power to institute and conduct criminal proceedings as contemplated in section 179(2) of the Constitution is given legislative expression in section 20(1) of the NPA Act, which reads:

> "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."

105. All DPPs and Deputy DPPs in Offices at the seat of a High Court, as well as DPPs who are Special Directors in the Offices of the NDPP, are entitled to exercise the powers in section 20(1) in respect of the area of jurisdiction for which he or she has been appointed.[19] There is an important qualification though in respect of Special Directors which has obvious relevance to this case. Section 24(3) of the NPA Act provides:

> "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 referred to in section 20(1), they shall be exercised, carried out and performed in consultation with the Director of the area jurisdiction concerned."

The intended effect of the proviso to section 24(3) is that whenever a Special Director based in the office of the NDPP wishes to institute, conduct or discontinue criminal proceedings he or she is obliged to act "in consultation with" the DPP of the High Court in the area of jurisdiction concerned.

106. Prosecutors are competent to exercise the power in section 20(1) to the extent that they have been authorised by the NDPP or a person designated by the NDPP. The powers of DPPs, Deputy DPPs and Special Directors to carry out the duties and functions contemplated in section 20(1), are to be exercised subject to the control and directions of the NDPP.[20]

107. Section 22 of the NPA Act defines the scope of the powers, duties and functions of the NDPP. Section 22(1) provides that the NDPP as head of the prosecuting authority shall have the authority over the exercising of all the powers,

[19] Section 20(3) and (4) of the NPA Act
[20] Section 20(3) and (4). of the NPA Act

and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority. Section 22(2) gives verbatim effect to section 179(5) of the Constitution. Section 179(5) reads:

> "The National Director of Public Prosecutions -
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
>
> (b) must issue policy directives which must be observed in the prosecution process;
>
> (c) may intervene in the prosecution process when policy directives are not complied with; and
>
> (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions, from the following:
>
> (i) The accused person.
> (ii) The complainant.
> (iii) Any other person or party whom the National Director considers to be relevant."

108. The power of the NDPP to issue policy directives contemplated in section 179(5)(a) and (b) must be exercised with the concurrence of the Minister and after consulting the DPPs.[21]

109. Section 22(4) bestows additional powers, duties and functions on the NDPP. They include a duty to maintain close liaison with DPPs *inter alia* to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the prosecuting authority;[22] as well as a duty to assist DPPs and prosecutors in achieving the effective and fair administration of criminal justice.[23]

110. The powers, duties and functions of DPPs are set out in section 24 of the NPA Act. They include the power to institute and conduct criminal proceedings. Although section 24(1) makes no express reference to the power to discontinue proceedings, such power vests in a DPP by virtue of section 20(3) which confers on DPPs the authority to exercise the powers in section 20(1), including the power to discontinue proceedings in terms of section 20(1)(c). Section 24(1)(d) is a general provision which empowers DPPs to "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". As I will discuss presently, section 6 of the CP Act confers the power to withdraw charges or to stop a prosecution upon DPPs and prosecutors. There can accordingly be no doubt that DPPs have the power to discontinue criminal proceedings. However, as I have explained, the power of a Special Director, who is by definition a DPP, is qualified by the proviso to section 24(3). Similarly, only a DPP who is not a

[21] Section 21 of the NPA Act
[22] Section 22(4)(b) of the NPA Act
[23] Section 22(4)(d) of the NPA Act

Special Director[24] may give written directions to a prosecutor within his or her area of jurisdiction who institutes or carries on prosecutions[25].

111. Section 6 of the CP Act provides:

> **"Power to withdraw charge or stop prosecution.**- An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may -
> (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
> (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto."

The withdrawal of charges and the stopping of a prosecution after plea have different consequences. If the charge is withdrawn before plea, an accused is not entitled to an acquittal and the charges can be re-instated at some future date. The stopping of a prosecution, as envisaged in section 6(b), involves a conscious act to terminate the proceedings after a plea has been entered, in which event an accused will be entitled to an acquittal and to raise the plea of *autrefois acquit* (double jeopardy) if the prosecuting authority should attempt to re-institute criminal proceedings on the same or substantially similar charges. A stopping of a prosecution may occur only at the instance of a DPP[26] or with his consent. A prosecutor, however, may withdraw charges. At issue in this case is whether a Special Director may withdraw charges or instruct a prosecutor to withdraw charges without the consent of a DPP, a matter to which I will return when discussing the grounds of review.

112. The NDPP, acting in terms of section 21 of the NPA Act, has issued a Policy Manual containing a Prosecution Policy and Policy Directives. They set out relevant policy considerations which normally should inform any decision to review a prosecution or to discontinue proceedings by withdrawing charges or stopping a prosecution. The NDPP has stated in her answering affidavit that the review of a case is a continuing process taking account of changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made. This may occur, and I imagine often does occur, after the prosecuting authority has heard and considered the version of the accused and representations made on his or her behalf.

113. Paragraph 4(c) of the Prosecution Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction a prosecution should normally follow, unless "public interest demands otherwise". It continues:

[24] i.e. one appointed in terms of section 13(1)(a)
[25] Section 24(4)(c)(ii)(bb) of the NPA Act
[26] A DPP is the equivalent of an Attorney-General under the old legislation.

> "There is no rule of law which states that all provable cases brought to the attention of the Prosecuting Authority 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."

The policy further provides that when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.

114. Part 5 of the Policy Directives deals with the withdrawal and stopping of cases. The guidelines draw a clear distinction between withdrawing charges and the stopping of a prosecution. Paragraphs (8) and (9) of Part 5 note that the stopping of a prosecution in terms of section 6(b) of the CPAct effectively means that the prosecuting authority is abandoning the case and accordingly, as a rule, criminal proceedings should only be stopped when it becomes clear during the course of the trial that it would be impossible to obtain a conviction or where the continuation thereof has become undesirable due to exceptional circumstances.

115. Likewise, in relation to the withdrawal of charges, paragraph (1) of Part 5 states that once enrolled, cases may only be withdrawn on compelling grounds "e.g. if it appears after thorough police investigation that there is no longer any reasonable prospect of a successful prosecution". Paragraph (5) provides that no prosecutor may withdraw any charges without the prior authorisation of the NDPP or the DPP where the prosecution has been ordered by either the NDPP or DPP; while paragraph (6)(a) stipulates that the advice of the NDPP or DPP should be sought where the case is of a sensitive or contentious nature or has a high profile.

116. Part 6 of the Policy Directives governs the question of representations. It generally provides that representations should be given earnest attention. Paragraphs (5) and (6) have assumed importance in this case. They read:

> . Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. Potential representors should, where possible, be advised accordingly.
>
> As a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP."

The reviewability of prosecutorial decisions

117. The NDPP in paragraph 47.7 of her written submissions argued that section 179(5)(d) of the Constitution, allowing her to review decisions to prosecute or not to prosecute, excludes the power of the courts to review non-prosecution. Mr Hodes SC, on behalf of the NDPP, initially persisted in argument with the contention that the Constitution vests exclusive power in the NDPP to review prosecutorial decisions. The courts, he submitted, have no power to review any prosecutorial decision, only the NDPP may do so and her decision will be final and not reviewable. That can never be; if only because the SCA has already pronounced that prosecutorial decisions are subject to rule of law review. It is inconceivable in our constitutional

order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission. The mere existence of a permissive extra-judicial measure allowing the NDPP to review decisions to prosecute or not to prosecute taken by subordinates on policy, evidentiary and public interest grounds, does not deny an aggrieved party access to court. Section 179(5)(d) of the Constitution does not aim to oust the constitutional and statutory jurisdiction of the courts to review on grounds of legality, rationality and administrative reasonableness.

118. During the course of argument counsel's line of reasoning evolved and transformed, as it had to, into two principal assertions: first, granted that judicial review of prosecutorial decisions is constitutionally ordained, it is restricted to extremely limited grounds; and second, resort to the courts is excluded until the process envisaged in section 179(5)(d) of the Constitution has been exhausted. I deal in this part only with the nature and extent of the power to review prosecutorial decisions. I will consider counsel's contention that the section 179(5)(d) process must be exhausted before resort to the courts is permitted at a later stage in this judgment.

119. At times it would be naïve of the courts to pretend to be oblivious to the political context and consequences of disputes before them.[27] In politically contentious matters, the courts should expect to be called upon to explicate the source, nature and extent of their powers. There has been much public commentary in the media in relation to this case which has sought to represent the issue of contestation to be about the extent of judicial power in relation to the executive. There is an important and legitimate element of truth in that. A danger exists though in the arising of a false perception that the courts when exercising judicial review of prosecutorial decisions may trespass illegitimately into the executive domain.

120. It accordingly seems to me imperative, in light of counsel's submissions, to deal comprehensively with the power of the courts in relation to executive decisions of this kind. I do so in the hope of dispelling the myth that the courts are untowardly assuming powers of review, and to illustrate that the powers of the courts to review prosecutorial decisions are clearly defined and are consistently exercised within the parameters set by the Constitution and Parliament.

121. The discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a *prima facie* case and if there is no compelling reason for non-prosecution.

122. Courts all over the world are reluctant to interfere with a prosecuting authority's *bona fide* exercise of the discretion to prosecute. In *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office*[28] the House of Lords (per Lord Bingham) expressed the need for deference and caution, stating that

[27] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.
[28] [2008] UKHL 60 at paras 30-32

courts should disturb the decisions of an independent prosecutor only in "highly exceptional cases". Courts recognise that at times it will be within neither their constitutional function nor practical competence to assess the merits of decisions where the polycentric character of official decision-making, including policy and public interest considerations, mean they are not susceptible or easily amenable to judicial review.[29] The constitutional requirement that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice, justifies judicial restraint.

123. However, judicial restraint can never mean total abdication. The discretions conferred on the prosecuting authority are not unfettered. In the United Kingdom, for instance, prosecutors must exercise their powers in good faith and so as to promote the statutory purpose for which they are given, direct themselves correctly in law, act lawfully, exercise an objective judgment on the relevant material available to them, and be uninfluenced by any ulterior motive, predilection or prejudice.[30] Hence, although following a deferential approach, in the UK review of all prosecutorial decisions is permissible on legality and rationality grounds.

124. Our law is not significantly different. Courts will interfere with decisions to prosecute where the discretion is improperly exercised (illegal and irrational),[31] *mala fides*,[32] or deployed for ulterior purposes.[33] They will do so on the ground that such conduct is in breach of the principle of legality. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.[34] The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of the Promotion of Administrative Action Act[35] ("PAJA"), our legislative code of administrative law which gives effect to the constitutional right to administrative action which is lawful, reasonable and procedurally fair,[36] and which to a considerable extent shapes the separation of powers between the judiciary and the executive. PAJA provides a broader range of review grounds than the principle of legality. Section 1(ff) of PAJA, however, excludes decisions *to institute or continue a prosecution* from the definition of administrative action.

125. The law in relation to decisions *not to prosecute or to discontinue a prosecution* is in some respects different. The CC has recognized in an *obiter dictum* that different policy considerations may apply to a decision to prosecute and a decision not to prosecute.[37] The SCA has also referred to the policy considerations underpinning the exclusion of decisions to prosecute from administrative review.[38] In

[29] *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735-736.
[30] *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office [*2008] UKHL 60 at para 32
[31] *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order* 1994 (1) SA 387 (C)
[32] *Mitchell v Attorney-General Natal* 1992 (2) SACR 68 (N).
[33] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38.
[34] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.
[35] Act 3 of 2000
[36] In section 33 of the Constitution.
[37] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 84
[38] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 35 .

National Director of Public Prosecutions v Zuma[39]Harms DP acknowledged in an *obiter dictum* the possibility of a judicial review of a decision not to prosecute and held that such review had not been excluded by PAJA. In *Democratic Alliance and Others v Acting National of Public Prosecutions and Others*[40] Navsa JA, without referring to the view of Harms DP in *Zuma*, seemed to intimate, also in an *obiter dictum,* that a decision to discontinue a prosecution might not be reviewable under PAJA, but held that a decision to discontinue a prosecution was in any event subject to a rule of law review. The learned judge of appeal said:

> "While there appears to be some justification for the contention that a decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of 'administrative action' in terms of section 1(ff) of PAJA, it is not necessary for us to finally decide that question. Before us it was conceded…that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made …[I]n *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) this court noted that the office of the NDPP was integral to the rule of law and to our success as a democracy. In that case this court stated emphatically that the exercise of public power…must comply with the Constitution."

126. So whether or not PAJA applies, decisions not to prosecute or to discontinue a prosecution are subject to legality and rationality review. Legality review, if I may state the obvious, is concerned with the lawfulness of exercises of public power. Decisions must be authorised by law and any statutory requirements or preconditions that attach to the exercise of the power must be complied with. Rationality review is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must also be rational.[41] As pointed out by the CC in *Democratic Alliance v President of the Republic of South Africa and Other*[42] a rationality standard prescribes a low threshold of scrutiny, and hence validity, for executive or administrative action. It is the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.

127. Rationality review also comprises a procedural element. A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational. In *Albutt v Centre for the Study of Violence and Reconciliation and Others*[43] the CC held that the exclusion of victims from participation in a special pardon dispensation was irrational because it disregarded the objective of nation building and reconciliation in the legislative scheme.

128. Decisions coloured by material errors of law, based on irrelevant considerations or ignoring relevant considerations could arguably be considered to be illegal or irrational. Traditionally these grounds are acknowledged as distinct review grounds, like the ground of unreasonableness, which permits review of decisions that no reasonable person could have so decided. These grounds are available in our law

[39] 2009 (2) SA 277 (SCA) para 36 fn 33.
[40] 2012 (3) SA 486 (SCA) at para 27
[41] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).
[42] 2013 (1) SA 248 (CC) at para 42
[43] 2010 (3) SA 293 (CC) at paras 65-68.

under PAJA in respect of decisions that fall within the definition of "administrative action". As some of the challenges made by the applicant to the decisions of the respondents in this case are predicated upon such grounds, it is necessary to consider if they are available. This requires me to make a finding whether or not a decision to discontinue a prosecution (or to withdraw charges) is administrative action within the meaning of that term as defined in section 1 of PAJA.

129. Section 1(ff) of PAJA, as mentioned, explicitly excludes decisions to institute or continue a prosecution from the definition of administrative action, and hence such are patently not reviewable under PAJA. The legal position with regard to decisions not to prosecute or to discontinue a prosecution is less clear. The CC has not pronounced finally on whether the decision not to prosecute constitutes administrative action; and the SCA, as mentioned, has expressed two different *prima facie* opinions on the matter.

130. In general, a decision will constitute administrative action if it is made under an empowering provision and taken by an organ of state exercising a power in terms of the Constitution, or exercising a public power or performing a public function in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect.[44] The SCA and the CC have interpreted the definition to include a decision which has the capacity to affect legal rights and where it impacts directly and immediately on individuals.[45]

131. The NDPP and the DPPs, making up the prosecuting authority in terms of the Constitution and the NPA Act, are unquestionably organs of state. In addition, the power of non-prosecution is a corollary to the power to institute and carry out criminal prosecutions.[46] The power derives from s 179(2) of the Constitution which provides that 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. It follows that a decision by the prosecuting authority to withdraw charges or to stop a prosecution constitutes the exercise of a power in terms of the Constitution. It involves exercising a public power in terms of legislation, namely the NPA Act; and has a direct, external legal effect. It results in a prosecution being stopped or avoided. And, lastly, it adversely affects the rights of the public, and at least the complainants, who are entitled to be protected against crime through, amongst other measures, the effective prosecution thereof. A decision to withdraw criminal charges or to discontinue a prosecution accordingly meets each of the definitional requirements of administrative action.

132. A purely textual interpretation of the definition of administrative action thus confirms that prosecutorial decisions in general do indeed constitute administrative action and are subject to review under PAJA. This is affirmed further by the fact that section 1(ff) excludes from the definition of administrative action specific instances of prosecutorial discretion, namely the institution and continuance of a prosecution, thus implying *ex contrariis* that other prosecutorial decisions, most especially the

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[44] Section 1 of PAJA.
[45] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23; and *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 30
[46] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 64.

decision not to institute or to discontinue a prosecution, are not so excluded.[47] That choice by the legislature appears to have been deliberate, and is based on sound policy considerations. Professor Cora Hoexter in her seminal work, *Administrative Law in South Africa*, comments on the exclusionary clause as follows[48]:

> "The intention behind this provision, as reflected by the draft Administrative Justice Bill appended to the South African Law Commission's 1999 report, was to confine reviews under PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law."

I would accordingly respectfully disagree with the *obiter dictum* of Navsa JA, in *Democratic Alliance and Others v Acting National of Public Prosecutions and Others,*[49] that a decision to discontinue a prosecution is of the same *genus* as a decision to prosecute. For the reasons stated by Professor Hoexter, a decision of non-prosecution is of a different *genus* to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not.

133. In addition to the language of the definition of administrative action incorporating prosecutorial decisions within its ambit, as well as the implication of the text of the exclusionary clause, (that but for its terms a decision to prosecute would have fallen within the definition and would have constituted administrative action), the original historical intent, as evidenced in the context and the *travaux preparatoire* mentioned by Professor Hoexter, fortifies the proposition that the intention of the legislature was to limit the extent of the exclusion and bestow a more extensive power of review over decisions not to prosecute or to discontinue a prosecution. Added to that, as already intimated, there are legitimate structural and prudential arguments justifying the distinction. There is no need to review decisions to prosecute because the lawfulness and rationality of the decision can be challenged in the subsequent criminal trial; but there is perhaps a need for wider review of a decision not to prosecute because without it there will be inadequate supervision.

134. Consequently, the preponderance of all the modalities of interpretation, the text, historical intent, the ethos of our culture of justification, prudential and structural considerations, and doctrine, points inexorably to the conclusion that it was the intention of Parliament, pursuant to its obligation in section 33(3) of the Constitution to enact PAJA, that decisions not to prosecute or to discontinue prosecutions would be subject to judicial review in terms of PAJA.

135. Such a finding, I trust, will not be viewed as a case of the courts assuming the power of review on the basis of casuistic practice or doctrine, or worse still, a judicial whim, as the media and social commentators appear sometimes mistakenly to believe. It is not the judiciary which has mandated judicial review of decisions not to prosecute or to discontinue prosecution. It is Parliament that has done so. In fulfilment of its obligation to define the parameters of the doctrine of the separation of powers, Parliament enacted PAJA.

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[47] *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 712
[48] 2ed (Juta & Co, Cape Town, 2012) at 241-242, citing the South African Law Commission (Project 115) "*Report on Administrative Justice*" (August 1999)
[49] 2012 (3) SA 486 (SCA) at para 27

136. I make the point, and most likely labour it, because the bald submission was made in argument, repeatedly, and at times vociferously, that a court exercising a power to review a decision of the prosecuting authority to discontinue prosecution *ipso facto* will trespass on the executive domain. The constitutional ethos and the governing legislative provisions, textually and contextually, demonstrate that proposition to be false. Arguments of this order are predicated on an incorrect understanding of the principle of the separation of powers. They misstate the proper legal position and carry the danger of demeaning the courts in the eyes of the public by misrepresenting the nature and legitimacy of the judicial function.

137. In conclusion, therefore, the law enacted by Parliament, in compliance with the obligation entrusted to it by the founders of our Constitution, imposes a duty on judges to review certain prosecutorial decisions. Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers. PAJA has separated the powers. And the power to review a decision not to prosecute has been constitutionally and legislatively separated to the judiciary.

138. A similarly misplaced argument calling for deference was advanced in the CC in *Democratic Alliance v President of the Republic of South Africa and Others*[50] in an attempt to persuade the court to adopt restraint in a rationality review of a decision of the President on the ground that review would violate the separation of powers. The argument was rejected as follows:

> "It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not"

139. By the same token, the submission, made on behalf of the NDPP in this case, that the court should not exercise a review power over prosecutorial decisions or, if it does so, should decline from ordering a prosecution because that would offend against the principle of the separation of powers, is, as I have said, equally unsustainable. Either the decision is administrative action or it is not. If it is, it may be reviewed on the grounds enunciated in section 6 of PAJA and one of the remedies provided for in section 8 of PAJA must be appointed. Our law, unlike that of other countries, rests upon a fundamental right to administrative justice and a legislative code unambiguously bestowing a power to review decisions not to prosecute or to discontinue a prosecution on the courts.

[50] 2013 (1) SA 248 (CC)

140. There is in any event no logical reason to confine review of non-prosecution to grounds of illegality and irrationality, while excluding grounds such as reliance on irrelevant considerations, ignoring relevant considerations or even unreasonableness. These standards are judicially determinable and just as capable of application as the standards of legality and rationality. It seems to me, therefore, inherently wrong to allow laxity to prosecutors, by permitting them to act unreasonably or unfairly, when there is no compelling policy or moral reason for doing so, especially in an era where throughout the world corruption and malfeasance are on the rise. Our Parliament in permitting review of non-prosecution on these grounds is patently of similar persuasion.

The withdrawal of the fraud and corruption charges

141. The first impugned decision is the one of 5 December 2011 taken by Mrwebi to withdraw the fraud and corruption charges preferred against Mdluli on 20 December 2011. The charges essentially allege that Mdluli abused the State's financial resources for private gain for his and his wife's benefit. The SSA, as I have mentioned, is controlled by the crime intelligence unit over which Mdluli exercises control.

142. FUL contends that that decision by Mrwebi to withdraw the fraud and corruption charges is liable to review on five alternative grounds. First, in terms of the Constitution, only the NDPP is entitled to discontinue a prosecution. The decision was therefore *ultra vires*. Second, the decision was unlawful because it was taken by Mrwebi alone, when he could only take such decision in consultation with the DPP of North Gauteng. Third, the decision was irrational because it was taken without properly consulting the prosecutors and investigators directly involved in the case. Fourth, the decision was arbitrary because it was taken in the face of overwhelming evidence in support of prosecution. Fifth, the decision was based on Mrwebi's incorrect belief that the fraud and corruption charges could only be investigated by the IGI and was thus based on a material error of law.

143. The first ground rests on an interpretation of section 179(5)(d) of the Constitution, which empowers the NDPP to review a decision to prosecute or not to prosecute, after consulting with the relevant DPP, the accused, the complainant and any other relevant person. In *National Director of Public Prosecutions v Zuma* [51] the SCA held that the power of review conferred on the NDPP by section 179(5)(d) of the Constitution "can only be an 'apex' function, in other words, a function of the head of the NPA qua head", which according to FUL suggests that no other functionary within the NPA may exercise the power of review.

144. Section 179(3)(b) of the Constitution provides that national legislation must ensure that DPPs are responsible for prosecutions in specific jurisdictions, but specifically adds that the provision is subject to subsection (5). The cross reference to subsection (5) implies that the DPPs are answerable to the NDPP who in terms of the various paragraphs of the subsection has the power to determine prosecution policy and the right to intervene in the prosecution process to ensure compliance with policy directives, as well as the right of review conferred in paragraph (d). The

[51] 2009 (2) SA 277 (SCA) at para 55 *et seq*.

rationale for such arrangement, according to FUL, would appear to be that once commenced a prosecution should continue to conclusion unless there are weighty considerations justifying cessation. In order to avoid inappropriate influence in that regard, the Constitution consciously assigned the function of review to a more impartial official at the apex, removed from the jurisdiction in which the prosecution was commenced. FUL accordingly submits that only the NDPP is entitled to re-visit a decision to prosecute made by a member of the NPA and to withdraw the charges; and then only after proper consultation as contemplated by section 179(5)(d). If correct, it would follow that Mrwebi had no power to withdraw the fraud and corruption charges at all. It was incumbent on him to refer the matter to the NDPP. He did not do that. His decision would accordingly be *ultra vires*, and could be set aside on that basis alone.

145. I am not persuaded that this submission is correct. I doubt its merit from a pragmatic and policy perspective. It would be onerous indeed if every decision to discontinue a prosecution taken by prosecutors throughout the country had to pass across the desk of the NDPP. The argument also takes insufficient account of the context and legislative scheme enacted by the NPA Act, section 6 of the CP Act and the Prosecution Policy which, as the Acting NDPP has pointed out in her answering affidavit, allow DPPs to discontinue a prosecution and more junior prosecutors to withdraw charges and stop prosecutions.

146. As head of the SCCU, Mrwebi was a Special DPP, appointed in terms of section 13(1)(c) of the NPA Act. A Special Director is entitled to exercise the powers and perform the functions assigned to him pursuant to his appointment. In terms of section 24 of the NPA Act, a DPP may institute and conduct criminal proceedings and carry out functions incidental thereto as contemplated in section 20(3). They include the powers in section 20(1) to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and to discontinue criminal proceedings. Both a DPP and a Special DPP may therefore discontinue a prosecution.[52]

147. Moreover, a DPP, or a more junior prosecutor, is empowered by section 6 of the CP Act to withdraw charges or stop a prosecution in circumscribed circumstances with the only limitation being that the prosecution shall not be stopped in terms of section 6(b) unless the DPP or any person authorized thereto by the DPP, whether in general or in any particular case, has consented thereto. Likewise, a prosecutor may withdraw a charge in terms of section 6(a), but where the NDPP or the DPP has ordered the prosecution he or she will need prior authorisation. Where the case is of a sensitive or contentious nature or has high profile, then in terms of the Policy Directives the prosecutor is only required to seek the advice (not even the permission) of the NDPP or DPP.

148. It is therefore evident from section 20(1)(c) of the NPA Act, section 6 of the CP Act and various provisions of the Policy Directives that legislation and prevailing practice permit prosecutors in many cases to withdraw charges without referring the question to the NDPP for permission or review. The Acting NDPP is accordingly correct in her submission that in terms of the NPA Act and the Policy Directives

[52] Provided when a Special DPP does so, he or she acts in consultation with the relevant DPP proviso to section 24(3) of NPA Act.

Mrwebi did not need to refer the decision to withdraw the fraud and corruption charges to the NDPP.

149. In my opinion, section 179(5)(d) of the Constitution does not reserve an exclusive power to the NDPP to discontinue a prosecution. It merely empowers the NDPP to review a decision of her subordinates to prosecute or not to prosecute, and specifies the procedure he or she should follow. The use of the verb "may" in section 179(5)(d) is indicative of a permissive discretion rather than a mandatory pre-condition. The NDPP may review decisions to prosecute or not to prosecute, at his or her own instance or on application from affected and interested persons. The intention of the drafters of the constitutional provision was not that all withdrawals of charges have to be approved by the NDPP.

150. Be that as it may, and whatever the case, there is no need to pronounce finally on this ground because the decision to withdraw the charges was in fact illegal for other non-constitutional reasons.

151. Mrwebi, as I have said, is a Special DPP appointed by President Zuma as such on 1 November 2011 under proclamation 63 of 2011 published in Government Gazette no. 34767 of 25 November 2011 and in terms of section 13(1)(c) of the NPA Act. The section allows the President after consulting the NDPP and the Minister to appoint "special" DPPs. These are not ordinary DPPs or prosecutors. They have special duties and functions. In terms of the subsection they are "to exercise certain powers, carry out certain duties and to perform certain functions conferred or imposed or assigned to him or her by the President by proclamation in the Gazette." In terms of the proviso to section 24(3) of the NPA Act a Special DPP may only exercise the powers referred to in s 20(1) of the NPA Act, including the power to discontinue criminal proceedings, in consultation with the Director of the area of jurisdiction concerned.[53] The rationale for this arrangement is that certain key decisions of a Special Director should be subject to the supervision of the most senior ordinary prosecutor in the area of jurisdiction. In this case, the relevant Director was the DPP of North Gauteng, Mzinyathi.

152. The requirement in section 24(3) of the NPA Act that the Special Director exercise any power to discontinue proceedings "in consultation with" the DPP meant that he could only do so with the concurrence or agreement of the DPP.[54] In *MacDonald v Minister of Minerals and Energy*[55] the principle was explained as follows:

> "Likewise, where the law requires a functionary to act 'in consultation with' another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act 'after consultation with' another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary."

153. The NPA Act in various provisions reflects that distinction, by requiring certain powers to be exercised "after consultation with" a specified functionary, while others

[53] The proviso to section 24(3) of the NPA Act.
[54] *President of the RSA v SARFU* 1999 (4) SA 147 (CC) at para 63.
[55] 2007 (5) SA 642 (C) at para 18.

can only be taken "in consultation with" the functionary.[56] Parliament in enacting legislation is presumed to have known of the rulings of the courts on the interpretation of terms enacted in the legislation, and thus to have consciously adopted and used them in the same sense.[57]. By using the term "in consultation with" in the proviso to section 24(3) of the NPA Act, Parliament consciously and deliberately introduced a requirement that a Special DPP may only discontinue a prosecution with the concurrence of the DPP in the area of jurisdiction.

154. The evidence, extensively analysed above, shows that Mrwebi did not consult with Mzinyathi before taking the decision to withdraw the charges, let alone obtain his concurrence. By the time he met Mzinyathi he had formed a fixed, pre-determined view and was not open to persuasion never mind willing to submit to disagreement. Both he and Mzinyathi confirmed under oath in the Breytenbach disciplinary proceedings that the decision to withdraw was a *fait accompli* by the time Mrwebi raised it with Mzinyathi. Under cross examination by counsel for Breytenbach, Mrwebi conceded that he had taken the decision to withdraw the charges before he wrote the consultative note. It is evident from both Mzinyathi's email of 8 December 2011 and his testimony that Mrwebi did not seek Mzinyathi's concurrence because he believed he was *functus officio*.

155. Mrwebi did not claim in his answering affidavit that Mzinyathi assented to the withdrawal of the charges at the 5 December 2011 meeting. He hardly could because Mzinyathi repeatedly confirmed that he did not support the withdrawal of the fraud and corruption charges against Mdluli. It is clear from the contemporaneous correspondence and his evidence in the disciplinary proceedings that Mzinyathi wished the case to continue. Mzinyathi's changed version of the position he took in the meeting of 9 December 2011, set out in his belatedly filed confirmatory affidavit, for the reasons stated, is not credible or reliable.

156. Hence, Mrwebi's claim in paragraphs 27-29 of his answering affidavit that Mzinyathi and Breytenbach agreed on 9 December 2011 that the case against Mdluli was defective and should only proceed with the assistance of IGI and the Auditor General is both irrelevant and improbable. It is irrelevant because Mrwebi by that time on his own admission had already taken the decision to withdraw the charges, without obtaining the consent of the DPP, North Gauteng. It is improbable for the same reasons, and also because it is in conflict with the contemporaneous and subsequent documents prepared by Breytenbach and Mzinyathi, with their conduct and with their testimony on the course of events. On the basis of that evidence it is clear that Mrwebi took the decision to withdraw the fraud and corruption charges without first securing the DPP's consent, which is a jurisdictional prerequisite under the NPA Act. His decision was unlawful for want of jurisdiction and must be set aside for that reason alone in accordance with the principle of legality.

157. There was some debate in argument about whether Mrwebi's decision and his consequent instruction to Breytenbach and Smith to withdraw the charges constituted a discontinuance of criminal proceedings as contemplated in section 20(1)(c) of the NPA Act. If it did not, there was no requirement for Mrwebi to have obtained the concurrence of the DPP.

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[56] See, for example sections 13(1)(c), 16(3), 22(6)(a) and 43A(9)(b) of the NPA Act.
[57] *De Villiers v Sports Pools (Pty) Ltd* 1975 (2) SA 253 (RA) at 261

158. The applicable legislation uses three expressions with regard to the powers involved in a cessation of enrolled criminal proceedings. Section 6 of the CP Act speaks of the power to withdraw a charge and the power to stop a prosecution. The NPA Act refers to the power to discontinue criminal proceedings. The question arising is whether the powers in section 6 of the CP Act are specific instances of the more general power to discontinue a prosecution. Logically and linguistically it would seem they are. The *Oxford English Dictionary* gives as the first meaning of the word "discontinuance":

> "the action of discontinuing or breaking off; interruption (temporary or permanent) of continuance; cessation"

"Cessation" in turn means:

> "ceasing, discontinuance, stoppage, either permanent or temporary".

This meaning was accepted as the definitive meaning of the word in *Cape Town Municipality v Frerich Holdings*.[58] In *Mazibuko v City of Johannesburg,* [59] however, it was held that the cessation was required to be of a more permanent nature to amount to discontinuance. The meaning of the term naturally will depend on its context.

159. The withdrawal of charges in terms of section 6 of the CP Act has as its immediate consequence the interruption or stoppage, permanent or temporary, of a prosecution. The stopping of a prosecution, because of the resultant availability of the plea of *autrefois acquit*, will always be permanent. The possibility of a permanent cessation in both instances justifies the conclusion that they are species of the same *genus*, namely discontinuance. Accordingly, a decision by a DPP to withdraw charges under section 6(a) of the CP Act constitutes an exercise of the discretion to discontinue criminal proceedings in section 20(1)(c) of the NP Act. To repeat: in terms of section 24(3) of the NPA, a Special DPP like Mrwebi may only exercise that discretion with the concurrence of the DPP. On the facts he did not have it.

160. It has always been a principle of our common law that where a statute confers power on a public functionary subject to certain preconditions or jurisdictional facts, a failure to comply with the preconditions will render the exercise of the power illegal. Such jurisdictional facts are a necessary pre-requisite to the exercise of the statutory power.[60] If the jurisdictional fact does not exist, the power may not be exercised and any purported exercise of the power will be illegal and invalid. It is trite that all exercises of public power are reviewable on the same grounds for non-compliance with the constitutional requirements of the rule of law.[61] The decision of Mrwebi and his instruction to withdraw the fraud and corruption charges consequently falls to be set aside irrespective of its categorisation as administrative action or not. If we accept that the decision did constitute administrative action as defined, it is reviewable in terms of section 6(2)(b) and section 6(2)(i) of PAJA which provide that a court has power to review administrative action if a mandatory and material

[58] 1981 (3) SA 1200 (AD)
[59] 2010 (4) SA 1 (CC) at para 120
[60] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34G-H
[61] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at para 27.

procedure or condition prescribed by an empowering provision was not complied with, or if the action is otherwise unconstitutional or unlawful.

161. The decision and instruction are similarly vulnerable to review on other grounds. In deciding to withdraw the corruption and fraud charges against Mdluli, Mrwebi considered representations from Mdluli's lawyers, and from further unnamed operatives. He did not, however, call for or consider representations from the investigators in the case, the Hawks, the IGI or the Acting Commissioner of Police. Nor did he consult the prosecutors directly involved in the case on his decision to refer the matter to the IGI. He contends that he was not required to do so. FUL has argued he was obliged to consult with these stakeholders in terms of section 179(5)(d) of the Constitution, which compels the NDPP to consult with the accused, the complainant and any relevant party whenever she reviews a decision to prosecute. That duty, according to FUL, applies equally to subordinate functionaries performing the same role in terms of legislation. Section 20(3) of the NPA Act provides that the powers in section 20(1) of a DPP to discontinue a prosecution are subject to the Constitution.

162. The provisions of section 20(1)(c) of the NPA Act and section 6 of the CP Act are silent on the question of consultation. It may be that an argument could be advanced that these provisions read with the Policy Directives violate section 179(5)(d) of the Constitution, which infringement might be cured by reading the procedural requirements of section 179(5)(d) into these sections. That argument was not made before me. The less adventurous submission made by Mr Maleka SC on behalf of FUL, if I understand it correctly, is that section 20(1)(c) of the NPA Act must be read in conformity with the constitutional provision.

163. While it is correct that the Constitution requires legislation to be interpreted, where possible, in ways which give effect to its fundamental values and in conformity with it, reading words into a statutory provision should only follow upon a pronouncement of constitutional invalidity under s 172(1)(a) of the Constitution. A court, however, should still prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can be reasonably ascribed to the provision. Legislation, which is open to a meaning which would be unconstitutional but is reasonably capable of being read and applied in conformity with the scheme envisaged by the Constitution, should be so read, but the interpretation and application of it may not be unduly strained.[62]

164. I hesitate to pronounce definitively on whether the requirements of the Constitution should be read directly into the legislation solely on the basis that the powers in section 20(1) of the NPA Act are stated to be subject to the Constitution. There is no need to do so. The decision, as I have found, is illegal for not complying with the duty to consult the DPP and it is unnecessary to resort to the Constitution to introduce, as a concrete requirement, jurisdictional facts which the legislation has not expressly enacted. More compelling though, in my possibly pedantic view, and in the end of equal consequence, is FUL's argument that the failure properly to consult was fatal to the validity of Mrwebi's decision in this case because it did not meet the requirements of rationality. An interpretation that the powers conferred by the

[62] *Minister of Safety and Security v Sekhoto and Another* [2011] 2 All SA 157 (SCA)

legislation should be exercised rationally in conformity with the Constitution will not be unduly strained and will give sufficient effect to the fundamental values.

165. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.[63] The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of PAJA. Rationality review, as explained earlier, is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must be rational.[64] A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational.[65]

166. Given the purpose and objectives of the power to discontinue a prosecution, to ensure justice in the prosecutorial process, once Mrwebi decided to consider representations from any relevant person, the standard of rationality required him to deal with all stakeholders even-handedly and to consider representations both from those in favour of withdrawal and those against.[66] The process by which he reached his decision was arbitrary, and the consequent decision irrational, because the means were not rationally linked to the purpose. He could not do justice without hearing all relevant stakeholders. At the very least, he had to observe the Policy Directives, which he also failed to do. The Prosecution Policy requires the advice of the NDPP to be sought where a sensitive, or contentious, or high profile case is to be withdrawn.[67] My understanding of the position of the NDPP is that Mrwebi's decision was not referred to her.

167. For those reasons also, the decision to withdraw the fraud and corruption charges was irrational and consequently illegal.

168. FUL has lastly argued that Mrwebi's decision was coloured by material errors of law, based on irrelevant considerations and, though it does not say so in so many words, intimated that the decision was so unreasonable that no reasonable person could have so decided. Strictly speaking, because of my findings that the decision was illegal and irrational in violation of the principle of legality, I do not need to deal with these submissions. However, in view of the possibility of an appeal, it seems appropriate to make a finding on the merit or otherwise of these review grounds as well.

169. To recap briefly: a decision to discontinue prosecution is administrative action within the meaning of that term as defined in section 1 of PAJA. Mrwebi's decision to withdraw the fraud and corruption charges and to discontinue the prosecution is

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[63] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.
[64] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).
[65] *Albutt v Centre for the Study of Violence and Reconciliation and Others Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 65-68.
[66] That obligation flows from the rule of law and para 3 of Part 5 of the Prosecution Policy.
[67] Prosecution Policy para 6(a).

accordingly susceptible to review on PAJA grounds other than illegality and irrationality.

170. The charges of fraud, corruption and money-laundering were initiated against Mdluli as a result of a comprehensive investigation by Colonel Viljoen that uncovered the evidence in support of his prosecution. The prosecutors, the DPP, and the IGI all opposed the withdrawal of those charges. Breytenbach, the regional head of the SCCU, wrote a detailed memorandum to the NDPP cogently motivating why the charges should not be withdrawn. The Prosecution Policy requires that cases should only be withdrawn on compelling grounds.

171. Mrwebi, however, advanced only two reasons for his decision to withdraw the charges, which were recorded in his consultative note of 4 December 2011, and which were far from compelling. First, he was concerned that the charges initiated against Mdluli may have been pursued with an ulterior motive. Second, he found that the offences with which Mdluli had been charged fell within the mandate of the IGI and could only be investigated by her offices. Mr Maleka submitted that each of these findings was unfounded, and was based on irrelevant considerations and material errors of law and fact.

172. The factual claim of a conspiracy against Mdluli by his colleagues was investigated and rejected by an inter-ministerial task team established for that purpose. The evidentiary basis for that decision is not before me and I am unable to assess its probative value. But, in any event, an improper motive would not render an otherwise lawful prosecution unlawful[68] and would not excuse a prosecutor from engaging with the merits of the case. Mrwebi at the outset stated openly in his consultative note of 4 December 2011 that he saw no need to engage with the merits of the case against Mdluli. In accordance with his incorrect understanding that it was a matter for the IGI he considered it unnecessary to traverse the merits or to evaluate the evidence. He believed the referral to the IGI was “dispositive of the matter”. He took the decision without regard to the merits of a prosecution in the interests of justice and thus ignored mandatory relevant considerations.

173. The purported referral to the IGI was equally misdirected. The IGI’s oversight role over the intelligence and counter-intelligence services is restricted to monitoring their compliance with the Constitution and other laws, and to receive complaints of misconduct.[69] As mentioned by the IGI in her letter of 19 March 2012 to the Acting Commissioner, the IGI’s mandate does not extend to criminal investigations. Mrwebi’s decision to withdraw the fraud and corruption charges because he apparently believed them to fall within the exclusive purview of the IGI was accordingly based on a material error of law. Yet, despite being aware of the IGI’s view, as appears from his reasons for decision dated 12 July 2012, he irrationally adhered to his position.

174. These were the only reasons advanced by Mrwebi at the time he decided to withdraw the charges. His decision was thus evidently based on errors of law and fact. He took account of irrelevant considerations and ignored relevant

[68] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 37.
[69] Section 7(7) of the Intelligence Services Control Act 40 of 1994.

considerations. The decision is therefore liable to review in terms of sections 6(2)(b), and 6(2)(e)(iii) of PAJA. In so far as the decision was attended by factual errors, and in view of Mrwebi's stance overall, the decision was not rationally connected to the information before him and the purpose of the NPA Act, and is thus reviewable also under section 6(2)(f)(ii)(bb) and (cc) of PAJA.

175. As discussed earlier, in his reasons filed pursuant to Rule 53 and in his answering papers, Mrwebi took a different tack. He there claimed that there was insufficient evidence to support a successful prosecution against Mdluli and that he referred the matter to the IGI so that she could investigate or facilitate access to the privileged documentation required. The withdrawal of the charges, he said, was merely provisional, to allow for further investigation to take place. This version is at odds with the contemporaneous reasons Mrwebi gave for his decision, and the evidence of Breytenbach and Mzinyathi in the disciplinary proceedings. Even if the charges were supposedly provisionally withdrawn in court, Mrwebi's pronouncements at the time evinced an unequivocal intention to stop proceedings altogether. He considered the referral to the IGI as "dispositive"; and in his letter of 30 March 2012 to General Dramat he referred to the matter as "closed". In the circumstances, his new version is implausible and probably invented after the fact, in what FUL submits was "a last-ditch attempt to explain his otherwise indefensible approach". But even if the decision was in fact "provisional", its qualification as such does not save it from illegality, irrationality and unreasonableness. A provisional decision which languishes for two years without any noticeable action to alter its status may be inferred to have acquired a more permanent character.

176. For all of the many reasons discussed, the decision and instruction by Mrwebi to withdraw the fraud and corruption charges must be set aside. It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it.

The withdrawal of the murder and related charges

177. The second decision challenged by FUL is the decision of Chauke, the DPP of South Gauteng, to withdraw the murder charge and refer the issue of Ramogibe's death to an inquest and to withdraw all the other charges against Mdluli, to avoid "fragmented trials" in order to allow Mdluli to stand one trial where he could answer all of the charges against him. FUL challenges the decision on three grounds: it was taken by the DPP, South Gauteng when only the NDPP is entitled to review a decision by another official of the NPA to discontinue a prosecution; it was taken without proper consultation; and was unfounded and irrational.

178. I have already addressed FUL's contention that the NDPP has exclusive power to review and withdraw a decision to prosecute. The power conferred on the NDPP to review the decision of a subordinate to prosecute or not to prosecute by section 179(5)(d) of the Constitution and section 22 of the NPA Act, in my estimation, does not directly exclude or limit the power conferred upon a DPP by section 20(1)(c) of the NPA Act to discontinue criminal proceedings and by section 6 of the CP Act to withdraw charges or to stop a prosecution. It was never intended in enacting the constitutional provisions that the NDPP would be the sole repository of the power to discontinue a prosecution.

179. However, as I explained in the analysis of the first impugned decision, any decision by an official of the prosecuting authority to discontinue a prosecution will need to be properly informed by relevant considerations if it is to be upheld as rational. The failure to consult with affected and interested parties often, if not invariably, will have the consequence that vital relevant information is ignored and the decision will be coloured by irrationality because there is no rational connection between the information available to the official, the purpose of the empowering provision, the decision and the reasons for it.

180. Accordingly, I accept FUL's submission that the rule of law and the requirement of rationality constrained Chauke to consider representations from the complainants and victims of the alleged crimes. Chauke did not deny the averments made in the founding affidavit and the supplementary founding affidavit that he did not seek input from the victims and other role players. He referred only to representations from the legal representatives of Mdluli. Moreover, the Policy Directives also obliged him to seek the advice of the Acting NDPP before withdrawing the murder and related charges. Both the Acting NDPP and Chauke confirm in their affidavits that he did not refer the matter to her. The decision to withdraw those charges was accordingly taken without the legal and rational prerequisites to the exercise of the power being met. The process leading to the decision being taken was irrational because it lacked input from crucial stakeholders in the process. It also appears to have given no weight at all to the evidence of the victims of the other crimes as alleged in the 17 non-murder charges, from which it may be inferred symptomatically that Chauke failed to apply his mind to all the relevant considerations mandated by the Constitution, and in the ultimate analysis acted capriciously; meaning that his decision was reviewable in terms of section 6(2)(e)(vi) of PAJA.

181. The details of the investigation that led to the murder and related charges being preferred against Mdluli are painstakingly set out in a report by the investigating officer, Colonel Roelofse, which strictly speaking is hearsay, but with the content of which none of the respondents has taken issue. The evidence against Mdluli also appears from the affidavits filed in the inquest proceedings, which, as discussed, include affidavits from different witnesses claiming that they were personally intimidated, assaulted and/or kidnapped by Mdluli; and affidavits from seven witnesses who personally witnessed Mdluli threatening to kill Ramogibe, or threatening and assaulting other people. This evidence presents a compelling *prima facie* case against Mdluli.

182. In terms of the Prosecution Policy Directives, Chauke may only withdraw charges in the face of such formidable evidence if there are compelling reasons to do so. Yet, he has advanced none. Instead, he has stated puzzlingly that he is disinclined to prosecute because there is no direct evidence linking Mdluli to the murder of Ramogibe. He has offered no evaluation of the cogency of the circumstantial evidence against Mdluli. And although circumstantial evidence involves an additional tier of inferential reasoning, it is incorrect to assume such evidence in the end will prove less cogent than direct evidence. All involved in the administration of criminal justice, including I imagine Chauke, the most senior public prosecutor in Johannesburg, know that circumstantial evidence at times can be more persuasive than direct evidence. In any event, there is in fact direct evidence in

relation to the charges of attempted murder, kidnapping and assault, which were withdrawn as a corollary to the decision to avoid prosecuting Mdluli on a piecemeal basis.

183. Chauke's reliance on the inquest finding for his decision not to proceed is patently irrational. An inquest, as I explained when discussing the facts, is an investigatory process directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. It is not aimed at establishing anyone's guilt and, indeed, could not competently do so.[70] The presiding officer is not called on to make any finding as to culpability. An inquest is no substitute for a criminal prosecution because it cannot determine guilt. In fact, once criminal charges have been brought in relation to a particular death, an inquest will generally be precluded, since the two processes should not run concurrently.

184. Chauke's motive for referring the matter to an inquest was therefore dubious. The identity of the deceased was known, as was the cause of his death. The only outstanding issue is the culpability of Mdluli. Chauke could never have hoped to establish Mdluli's culpability, and to resolve the criminal prosecution, by referring the matter to an inquest. The inquest findings are not binding on the prosecuting authority. Chauke's statement in his affidavit that in the light of the inquest finding "it would be presumptuous and foolhardy" to prosecute is accordingly wrong in law and symptomatic of the irrationality of his decision, evincing as it does a lack of rational connection between the purpose of his decision, the various empowering provisions, the evidence before him and the reasons he gave for his action.

185. In any event, to state the blatantly obvious, and as the magistrate himself was at pains to point out, the inquest could only deal with the murder charges. It could not, and did not, address the remaining 17 charges of kidnapping, assault, intimidation and defeating the ends of justice that were preferred against Mdluli. It follows that a referral to inquest proceedings could never have provided a sufficient basis to withdraw those remaining charges. The justification of avoiding fragmented trials fell away on 2 November 2012, almost a year ago, when the magistrate handed down his reasons. Chauke has failed to address these other charges (and the purported basis for their withdrawal) in his answering affidavit at all. As Mr Maleka correctly submitted, that must be because he has not properly applied his mind to those charges, and the correctness of their withdrawal; or, more troublingly, perhaps because he is acting capriciously and with an ulterior purpose.

186. Accordingly, the decision to withdraw the murder and related charges was taken in the face of compelling evidence for no proper purpose, is irrational and therefore reviewable on legality and rationality grounds, as well as in terms of section 6(2)(e) and (f) of PAJA and falls to be set aside.

The NDPPs arguments on reviewability and the duty to exhaust internal remedies

187. In both his written submissions and in argument, counsel for the NPA gave little attention to the review grounds raised by FUL in relation to the two impugned decisions, and concentrated instead upon the contention that the court had no power

[70] *De'ath (substituted by Tiley) v Additional Magistrate, Cape Town* 1988 (4) SA 769 (C) at 775G.

to review the decisions of a DPP or Special Director. As he put it in paragraph 12 of his heads of argument:

> "The most significant aspect that this Honourable Court will be required to decide is whether it does in fact have the right (sic) to review these two decisions."

The submission was developed in paragraphs 42-43 of the heads as follows:

> "These statutory provisions have been the subject matter of numerous judicial decisions. Nevertheless, despite commentary and statements to the contrary, it has never been judicially pronounced that there is in fact a right to review a decision by a Director of Public Prosecutions or the National Director of Public Prosecutions to provisionally withdraw criminal charges against an accused person.
>
> Put somewhat differently, the Applicant's legal representatives are challenged to identify any matter in which such an application for review has succeeded and resulted in a decision by the First Respondent or any of its subordinates to withdraw charges being set aside and the First Respondent being compelled to forthwith reinstate criminal charges and prosecute them without delay, which is the relief sought herein against the First and Third Respondents."

188. After analysing the judgment of Harms DP in *National Director of Public Prosecutions v Zuma*[71] in some detail, counsel submitted that the decision was authority for various propositions, only three of which are relevant for present purposes (the others have been disposed of in the preceding analysis). In paragraph 47 of the heads he submitted: firstly, a prosecutorial review is not an administrative decision that is subject to review in the normal course or in terms of PAJA; secondly, a decision to withdraw charges pending the receipt of further evidence and to prosecute or not to prosecute is not necessarily final; and thirdly a decision to prosecute or not to prosecute is not subject to judicial review.

189. As to the first proposition, if by a "prosecutorial review" is meant an exercise by the NDPP of her discretion under section 179(5)(d) of the Constitution, then the contention is not sustainable. As I have said, and it bears repeating, it is inconceivable that the Constitution intended to exclude judicial review of such decisions entirely. Whether the decision would be administrative action or not is possibly debatable, but the authorities already discussed leave no doubt that any action in terms of that provision will still be subject to a rule of law review on grounds of legality and rationality. However, it is important to note, we are not here concerned with a review under section 179(5)(d). Although Mdluli's initial representations were addressed to the NDPP, it does not seem that she acted on them. Mrwebi and Chauke took the impugned decisions. The decisions at issue are in fact decisions to withdraw charges in terms of section 6 of the CP Act

190. The third proposition, presumably with section 6 of the CP Act in mind, is plainly wrong. For the reasons spelt out earlier, when discussing the reviewability of prosecutorial decisions, a decision to prosecute is subject to rule of law review and a decision not to prosecute or to discontinue a prosecution is subject to rule of law review and in addition to review in terms of PAJA. Nor do I accept Mr Hodes' related

[71] 2009 (2) SA 277 (SCA)

submission that the possibility of obtaining a certificate of *nolle prosequi* and the right to pursue a private prosecution in terms of section 7 of the CP Act ousts the review jurisdiction of the courts. The existence of this procedure cannot be read to give the NDPP *carte blanche* to act without regard to the requirements of legality, rationality and reasonableness. The suggestion is preposterous and no more need be said.

191. The second proposition does however pose a legitimate challenge. It forms the basis of the argument counsel developed in court that resort to the court should be denied until internal remedies are exhausted. All the deponents who filed affidavits on behalf of the NPA highlighted the alleged "provisional" nature of the decision to withdraw charges. And, the Acting NDPP consciously pleaded that the decisions to discontinue the prosecutions "have not been brought to my office for consideration in terms of the regulatory framework" and submitted that the application to review the withdrawal of the charges by the court was accordingly "premature".

192. The regulatory framework to which the NDPP refers is of course section 179(5)(d) of the Constitution read with section 22(2)(c) of the NPA Act which permit her to review decisions of her subordinates to prosecute or not to prosecute. It includes also Part 6 of the Policy Directives, in particular paragraphs (5) and (6) which provide that where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. It is explicitly stated that as a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP. Unfortunately, these provisions were not referred to in argument and I do not have the benefit of counsel's submissions regarding their content or status. They normally would require compliance, and do indicate an intention to introduce a duty to exhaust internal remedies by representors (which FUL is not) where representations have been made. However, for reasons I will elucidate presently, non-compliance is not fatal to this review application.

193. First of all, the categorisation of the withdrawal of charges as "provisional" is inconsequential. All withdrawals which do not amount to the stopping of a prosecution in terms of section 6(b) of the CP Act are provisional in the sense that it always remains possible to re-institute charges withdrawn under section 6(a) of the CP Act. The withdrawal of charges under section 6(a) of the CP Act, as explained, and as I suspect is the case in the majority of withdrawals, can easily become permanent. The mere characterisation of an illegal, irrational or unreasonable decision as provisional would not automatically save it from review. Provisional or not, an illegal decision will normally be set aside.

194. The fact of the matter, and the more relevant truth, is that the NDPP can review any decision "not to prosecute" in terms of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act; and the real inquiry therefore is whether the decisions of Mrwebi and Chauke to discontinue the prosecution of Mdluli on the respective charges could only be reviewed in court once the applicant had exhausted the remedy of a review before the NDPP under those provisions.

195. FUL's response to the contention that the application is premature is somewhat cryptic. In paragraph 78 of the replying affidavit it first rejects the proposition that only

the NDPP may review the decisions of DPPs and Special DPPs to discontinue a prosecution and then in paragraph 79 states:

> "In any event, it is plain that the first respondent has long since been aware of the relevant decisions and at the very least tacitly confirmed them."

The Acting NDPP did not make any replicating averment in answer to this plea. In the belatedly filed supplementary answering affidavit, Mrwebi merely re-asserted that the court has no power at all to review prosecutorial decisions, which is patently wrong, and, as Justice Kriegler rightly says, a little worrying to hear from a senior prosecutor. In fairness though, Mrwebi did add that the application was in any event "premature". However, Mrwebi did not take issue with the allegation that the NDPP had tacitly confirmed the decisions to withdraw. She clearly has done exactly that.

196. The dispute that forms the subject matter of this application has been on-going for more than 18 months since February 2012. Given its high profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by section 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions *mero motu;* yet despite the public outcry she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by section 195 of the Constitution to be responsive, accountable and transparent.

197. Besides not availing herself of the opportunity to review the decision, she waited more than a year after the application was launched before raising the point and then did so in terms that can fairly be described as abstruse. Her "plea" made no reference to the relevant paragraphs of the Prosecution Policy Directives, the relevant provisions of PAJA or the principles of the common law. A plea resting only on an averment that an application is "premature" is meagrely particularised and lacks sufficient allegations to found a complete defence that there had been non-compliance with a duty to exhaust internal remedies. Had we to do here with a set of particulars of claim, they would have been excipiable on the grounds of being vague and embarrassing.

198. At common law the mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted before bringing a rule of law review.[72] As I have said, I consider the power in section 179(5)(d) of the Constitution to be permissive. There is nothing in the provision itself, or expressly stated or necessarily implied in the legislative scheme as a whole, which overtly requires a person aggrieved by a decision to discontinue a prosecution to first take the matter on review to the NDPP.

[72] See generally Hoexter *Administrative Law in South Africa* at 538 et seq

199. Moreover, in *Maluleke v MEC for Health and Welfare, Northern Province*,[73] Southwood J remarked, correctly in my respectful opinion, that the duty to exhaust internal remedies, if one exists, will seldom be enforced where the complaint is one of illegality, or, I would add, one of irrationality, or in cases where the remedy would be illusory. It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted before now to assess them, explain her perception, and, if so inclined, to correct them.

200. Section 7(2)(c) of PAJA is more stringent than the common law and permits exemption from the duty to exhaust internal remedies only in exceptional circumstances on application. I am satisfied that there are exceptional circumstances in this case, being those pleaded by FUL. Admittedly, there is no formal application for exemption, primarily I imagine because the special plea, if that, was so abstrusely pleaded; which is sufficient basis to grant condonation. In *Koyabe v Minister of Home Affairs*[74] the Constitutional Court stated that these requirements should not be rigidly enforced and should not be used by officials to frustrate the efforts of an aggrieved person or to shield the decision-making process from judicial scrutiny. Furthermore, and most importantly in this case, the remedy in question must be available, effective and adequate in order to count as an existing internal remedy. For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed solely at shielding the illegal and irrational decisions from judicial scrutiny.

201. In any event, if I am wrong in this, the more stringent PAJA standard does not apply to a rule of law review, and the duty to exhaust internal remedies before resorting to such a review may be dispensed with on the grounds and for the reasons to which I have already alluded.

202. In the result, the failure of FUL to resort to a review in terms of section 179(5)(d) of the Constitution is no bar to this application or the jurisdiction of the court.

The withdrawal of the disciplinary proceedings and the reinstatement of Mdluli

203. FUL challenges the decision to withdraw the disciplinary charges against Mdluli, made by the Acting Commissioner, Lieutenant-General Mkhwanazi, on 29 February 2012, as well as the related decision of 27 March 2012 to lift his suspension and to

[73] 1999 (4) SA 367 (T) at 372G-H
[74] 2010 (4) SA 327 (CC) para 38

re-instate him to his position, on two grounds: firstly, it contends that the Acting Commissioner took those decisions acting on the dictates of another, and therefore failed to discharge his duties under s 207(2) of the Constitution; and in taking those decisions, the Acting Commissioner failed to protect the integrity of the SAPS, and to give effect to the SAPS Act and Regulations.

204. The Commissioner has raised defences that FUL has no standing to challenge the decisions, and the court no jurisdiction to hear them, because they are disciplinary labour matters within the prerogative of the Commissioner and any dispute in that regard within the exclusive jurisdiction of the Labour Court. She contended further that the review of the disciplinary proceedings have become moot since new disciplinary proceedings were initiated on 15 May 2012 and Mdluli was re-suspended on 25 May 2012.

205. Section 207(2) of the Constitution provides:

> "The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing."

206. As the official responsible for managing and controlling the SAPS, it fell to the Acting Commissioner to take disciplinary decisions concerning high-level officials. He had to exercise the discretion conferred on him himself, and could not abdicate his decision-making power to another, nor act on the instructions of a functionary not vested with those powers.[75]

207. In paragraph 45 of the founding affidavit FUL, alleged that the Acting Commissioner publicly stated in Parliament that he took the decisions to withdraw the disciplinary charges on instruction from authorities "*beyond*" him. It added that by acting on the instructions of authorities beyond him, the Acting Commissioner failed to act independently in the discharge of his functions, and accordingly acted inconsistently with section 207 of the Constitution. Mkhwanazi in his answering affidavit filed in the proceedings related to Part A of the notice of motion, did not deny making the statement or the inference drawn. In paragraph 4 of his affidavit he admitted that he had read FUL's founding affidavit and the annexures thereto but went on only to deal with points *in limine*, without admitting or denying any of the averments in the founding affidavit.

208. A respondent in motion proceedings is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts. A failure to deal with an allegation by the applicant amounts to an admission. An admission, including a failure to deny, will be binding on the party and prohibits any further dispute of the admitted fact by the party making it, as well as any evidence to disprove or contradict it.[76] Mkhwanazi must accordingly be taken to have admitted that he acted under dictation, without independence and inconsistently with his constitutional duties.

[75] *President of the Republic of South Africa and Others v SARFU* 2000 (1) SA 1 (CC) at paras 38- 41
[76] *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (A) 605H.

209. In paragraph 47 of her answering affidavit, the Commissioner (who was appointed subsequent to the events at issue in these proceedings) in response to the averments in paragraph 45 of the founding affidavit stated:

> "General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never obtained instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue."

210. No confirmatory affidavit was filed on behalf of Mkhwanazi, despite the issue being raised repeatedly and it being evident that the court would be called upon to assess the probative value of the statement and to make a factual finding about whether he had acted under dictation or not.

211. In paragraph 14 of his judgment in the Part A proceedings, Mokgoba J expressed concern about the allegations of political interference in the disciplinary process and noted that Mkhwanazi had not disputed them in his answering affidavit. The learned judge subtly pointed to the need for the allegations to be addressed.

212. As the issue was not adequately dealt with in the answering affidavits, FUL, in paragraph 64 of the replying affidavit, contested the explanation by the Commissioner, noted that the confirmatory affidavit and objective evidence had not been delivered, and intimated that it would argue that the appropriate factual finding should be made. It did so again more fully in paragraph 83 of its heads of argument. Despite all of these calls to the Commissioner to file an affidavit from Mkhwanazi explaining the statement, the Commissioner did not oblige.

213. When the matter was raised in argument before me, Mr Mokhari SC, counsel for the Commissioner, asserted implausibly that the non-filing of a confirmatory affidavit by Mkhwanazi was merely an oversight. He undertook to file an affidavit by the close of proceedings. It was made clear to him that absent a confirmatory affidavit, the hearsay averment of the Commissioner could not be accepted as a tenable and creditworthy denial and that the averment of FUL was likely to be preferred. After all, Mkhwanazi is available as a witness and the Commissioner in her answering affidavit gave an undertaking to file a confirmatory affidavit. After an adjournment, Mr Mokhari informed the court that his instructions were that no affidavit from Mkhwanazi would be filed. Nor has any objective evidence of his alleged statements been provided, notwithstanding the Commissioner's tender in this regard. Mr Maleka predictably submitted that the most credible explanation for the non-filing is that neither Mkhwanazi nor Hansard supports the Commissioner's interpretation. The allegation has always been that Mkhwanazi acted under the unauthorised and unwarranted dictates of persons who had no constitutional or legal authority over or interest in the decision. Despite having had ample opportunity, he has not refuted that allegation.

214. In the premises, the Commissioner's explanation is untenable and must be rejected. The explanation is irreconcilable with the Acting Commissioner's clear statement. The statement that he was instructed by authorities "*beyond*" him is

unambiguous and cannot bear the meaning that the Commissioner contends for. Mkhwanazi was not subject to the authority of or any instruction by the NPA.

215. That Mkhwanazi dropped the disciplinary charges on orders from above, is furthermore borne out by the Rule 53 record filed on his behalf. The record he supplied comprises nothing more than two letters addressed to Mdluli, one notifying him of the withdrawal of the disciplinary charges against him and the other advising him of his re-instatement. There is no charge sheet or correspondence dealing with the allegations or the process to be followed. From this it may be reasonably inferred that Mkhwanazi did not apply his mind to the facts at all, because he was inclined on the basis of instructions from beyond to stop the process irrespective of the merit or otherwise of that action.

216. The inescapable finding is that the decisions of the Acting Commissioner to withdraw the disciplinary charges and to re-instate Mdluli as head of Crime Intelligence were taken in an attitude of subservience pursuant to an unlawful dictation from a person unknown, who was "beyond" the Acting Commissioner. They were therefore unlawful and invalid. An abdication of power violates the principle that the responsibility for a discretionary power rests with the authorised body and no one else.

217. The second prong of FUL's attack on these decisions is that the Acting Commissioner failed to protect the integrity of SAPS and to abide by its legislative framework. Every organ of state is required to exercise the powers conferred upon it accountably, responsively and openly, and to protect the integrity of the institution by ensuring the proper exercises of powers by its functionaries.[77] Congruent with that, the Commissioner is required to maintain an impartial, accountable, transparent and efficient police service.[78] The SAPS, in turn, is tasked with preventing, combating and investigating crime, and with upholding and enforcing the law.[79]

218. To ensure the proper functioning of the SAPS, the Commissioner, in discharging his obligations under section 11 of the SAPS Act, must protect and give effect to SAPS Discipline Regulations.[80] These provide that serious misconduct must be referred to disciplinary proceedings[81] and that, where there is strong evidence to suggest that the member will be dismissed, the member must be suspended.[82] A suspension is a precautionary measure.

219. By withdrawing the disciplinary proceedings against Mdluli and allowing him to resume his senior position in the SAPS when there were serious and unresolved allegations of misconduct against him, which called into question his integrity, the

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[77] Section 195(1) of the Constitution; see also *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) at para 66

[78] Section 11(1) of the SAPS Act. See also section 195(1)(e)(f) and (g) of the Constitution.

[79] Section 205(3) of the Constitution.

[80] GNR 643 GG 28985 3 July 2006.

[81] Regulation 12(1) provides:

> " Subject to regulation 6 (2), a supervisor who is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, must ensure that the investigation into the alleged misconduct is completed as soon as reasonably possible and refer the documentation to the employer representative to initiate a disciplinary enquiry."

[82] Regulation 13.

Acting Commissioner frustrated the proper functioning of the SAPS Act and the Discipline Regulations. He also undermined the integrity of the SAPS and failed to ensure that it operated transparently and accountably. His conduct could only serve to damage public confidence in the SAPS, particularly where no reasons were advanced for that decision and in the face of public disquiet about possible political interference.

220. The decisions to withdraw the disciplinary charges and to re-instate Mdluli were accordingly taken in dereliction of the Acting Commissioner's constitutional and statutory duties to control and manage the SAPS in any open, transparent, accountable, impartial and efficient manner, and fall also to be set aside on that basis.

221. On both legs, the review sought by FUL is a rule of law review and it is unnecessary to locate the review grounds within the provisions of PAJA, or to determine whether the action constituted administrative action for that purpose.[83] The decisions are illegal for both the reasons advanced.

Standing, jurisdiction and mootness in relation to the decision to withdraw the disciplinary charges

222. Rather than engaging with the substance of the claims of illegality, the Commissioner confined herself to formal defences. As mentioned, she contended that FUL lacks *locus standi* to bring this review, that this court has no jurisdiction over it, and that the review of the decisions is, in any event, moot or academic.

223. Neither the Commissioner nor the NDPP questioned FUL's public interest standing to review the withdrawal of criminal charges against Mdluli. But the Commissioner contended that FUL has no standing to challenge the decision to withdraw disciplinary charges against Mdluli and to re-instate him to his post on the grounds that those decisions are labour decisions that are only liable to challenge by a party to the employment contract at issue. This is not correct. As discussed, the Commissioner is required, under s 207(2) of the Constitution, to manage the SAPS and to maintain the discipline and integrity of the force. The disciplinary powers are public powers and the fitness of Mdluli to hold a high ranking position in the SAPS is a matter of public concern. As Mr Maleka submitted, the issues have implications for public order and legitimacy of SAPS as a law-enforcement body. For as long as the disciplinary allegations against Mdluli remain unresolved, his presence in the senior echelons of the SAPS will diminish public confidence. The disciplinary decisions are

[83] The decisions to suspend Mdluli and to institute disciplinary proceedings against him were made pursuant to the powers conferred by the SAPS Discipline Regulations. The revocation of those decisions was in terms of the same public power. A decision by an organ of state to abandon disciplinary proceedings against a high-ranking police official and to re-instate him to his post while matters concerning his honesty and respect for the law remain unresolved is public in nature. It affects the security and the stability of South Africa, and goes to the accountability of its officials. The decisions have direct external legal effect, and affect the public's right to have the alleged misconduct against a high-level police official assessed and finally determined. For those reasons, FUL submits, not unconvincingly, that the decisions constitute administrative action liable to review under PAJA.

therefore public in nature, and liable to review on the grounds of illegality, at the instance of FUL acting in the public interest.

224. The Commissioner's claim that this court has no jurisdiction in terms of section 157(1) and (2) of the Labour Relations Act[84] ("the LRA") to review the disciplinary decisions is similarly unfounded. These provisions read:

> (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -
>
> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
>
> (c) the application of any law for the administration of which the Minister is responsible."

225. The Commissioner argued that the relief sought by FUL is in effect a suspension from employment. The order obtained in Part A proceedings interdicted Mdluli from discharging any function or duty as an employee of SAPS. Consequently, Mdluli has been suspended from his employment. It was argued that the suspension of Mdluli can only be done in compliance with the SAPS Discipline Regulations read with section 186(2) of the LRA. Since the Labour Court has exclusive jurisdiction in terms of section 157(1) to deal *inter alia* with unfair labour practices, it was submitted that the High Court may not adjudicate such matters. The argument went further, asserting in addition that the High Court can only assume jurisdiction over a labour matter if it involves a Bill of Rights violation as contemplated by section 157(2) of the LRA.

226. Section 157(1) of the LRA confirms that the Labour Court has exclusive jurisdiction over any matter which the LRA prescribes should be determined by it, which includes the power to review unfair labour practice determinations by bargaining councils or the Commission for Conciliation Mediation and Arbitration ("the CCMA"). In terms of section 191 of the LRA, disputes about unfair labour practices must be referred either to the CCMA or a bargaining council with jurisdiction, and the award of such body is reviewable by the Labour Court. The labour forums, it is correct, do indeed have exclusive power to enforce LRA rights to the exclusion of the High Courts. However, the High Courts and the Labour Courts have concurrent jurisdiction to enforce common-law contractual rights and fundamental rights entrenched in the Bill of Rights insofar as their infringement arises from employment.[85]

[84] Act 66 of 1995
[85] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 18, and section 157(2) of the LRA

227. The argument that the jurisdiction of the High Court is excluded on account of the dispute being one regarding an unfair labour practice is fundamentally misconceived and wrong, being based upon a misunderstanding of the relevant statutory provisions. It is predicated on the false supposition that the present case involves an unfair labour practice. It most certainly does not. The relevant part of the definition of an unfair labour practice in section 186(2) of the LRA reads:

> "Unfair labour practice" means any unfair act or omission that arises between an employer and an *employee* involving—(b) the unfair suspension of an employee"

It must be read with section 191(1) of the LRA which provides:

> "(1) (*a*) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
> (i) a council……; or
> (ii) the commission, if no council has jurisdiction"

It is thus clear from the definition that an unfair labour practice can only "arise between an employer and an employee" and from the procedural provision that only an employee can refer an unfair labour practice dispute to the CCMA or a bargaining council.

228. Notwithstanding section 157(1) of the LRA, other existing common law and statutory causes of action remain available to litigants, even in cases that arise factually out of an employment relationship between an organ of state and an individual. In *Gcaba v Minister of Safety and Security and Others*[86] the CC explained the position thus:

> "Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies to the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be meant to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour-and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies"

229. The only jurisdiction removed from the High Court by section 157 of the LRA, therefore, is that in respect of those causes of action which the LRA prescribes should be dealt with by the Labour Court, and for the most part that is confined to the review of unfair dismissal and unfair labour practice awards, and the adjudication of operational requirement dismissals and unfair employment discrimination. The High Court retains its jurisdiction over all other causes of action. In fact, section 157(2) of the LRA takes nothing away from the High Court's jurisdiction. It merely confers a concurrent human rights jurisdiction on the Labour Court in respect of Bill of Rights violations in the employment context, which it otherwise would not have enjoyed. It does not restrict the jurisdiction of the High Court, as the Commissioner incorrectly assumes. The purpose of the provision is to give jurisdiction to the Labour Court not

[86] 2010 (1) SA 238 (CC) at para 73

to remove it from the High Court. There is accordingly no merit at all in the submission that the High Court must establish a Bill of Rights violation before it may "assume jurisdiction" over a labour matter. The Commissioner's argument misconstrues the wording and import of the subsection; she has it the wrong way round.

230. Likewise, FUL's challenge to the Acting Commissioner's disciplinary decisions does not involve an unfair act or omission that arises between an employer and an employee *involving the unfair suspension* of an employee. The mere fact that the remedy appointed by the court may be akin to a suspension is not sufficient for the dispute to be categorised as an unfair labour practice. A dispute in order to be an unfair labour practice, as I have said, must be between an employee and his or her employer and must arise in the employment relationship. The dispute between FUL and the Commissioner is not one which falls within the employer-employee nexus, but one which raises issues concerning the legality (and, consequently, the constitutionality) of the Acting Commissioner's decisions, and his application and interpretation of the SAPS Act and the Regulations. It is also a matter that affects the complainants' and the public's constitutional rights to the protection of the rule of law. The effects of the decisions on Mdluli, which may well be the subject of an employment dispute, are not the subject of this application.

231. The review of the Acting Commissioner's disciplinary decisions accordingly falls within the jurisdiction of this court.

232. The Commissioner's contention that the review of the Acting Commissioner's disciplinary decisions has become academic cannot be sustained either. She says the issue is now moot because disciplinary proceedings have been "instituted" against Mdluli and he is currently under suspension. The original disciplinary charges against Mdluli were dropped and he was re-instated in March 2012. It is common cause that Mdluli was re-suspended on 25 May 2012, shortly after this application was launched. Although it has been stated that the intention was to discipline Mdluli it is not clear on what disciplinary charges. Neither the charges in the original disciplinary proceedings nor the new disciplinary charges have been disclosed in the Rule 53 record on behalf of the Commissioner, or in any of the answering affidavits. There is no evidentiary basis to assume that the disciplinary charges and reasons underlying the most recent suspension are the same as the previous occasion; indeed, to the contrary, there are indications that his suspension may relate to other charges related to the defrauding of the SSA. The relief sought by FUL is for Mdluli to be arraigned on all of the original charges.

233. But even if we accept that the charges are the same, the court has not received any assurance from the Commissioner that she will not allow them to be dropped again. Indeed, but for the order of Makgoba J, Mdluli would have been within his rights to return to work in late July 2012. In terms of the Discipline Regulations, if an employee is suspended with full remuneration, the employer must hold a disciplinary hearing within sixty calendar days from the commencement of the suspension. Upon the expiry of the sixty days, the chairperson of the hearing must take a decision on whether the suspension should continue or be terminated.[87] It follows that a failure to

[87] Regulation 13(4).

convene disciplinary proceedings will result in the suspension automatically lapsing. Mr Mokhari was unable to give the court an assurance that a hearing had been convened at which the chairperson had taken a decision on whether the suspension should continue or be terminated. The suspension in terms of the regulations has accordingly probably lapsed. That fact alone disposes of the claim of mootness.

234. Moreover, there is no evidence of any serious intent to proceed with the disciplinary process or to finalise the matter, despite Mdluli having been suspended again more than a year ago. Yet the Commissioner in these proceedings seeks to discharge the interdict granted by Makgoba J on the spurious jurisdictional grounds just discussed, without conceding that the disciplinary proceedings should not have been withdrawn and without furnishing any undertakings that they will be pursued to finality. The Commissioner wants the interdict discharged and is happy for the disciplinary process to lapse. She apparently sees no need to place any obstacle in the way of Mdluli's return to work, despite her constitutional duty to investigate the allegations against him and the unfeasibility of his holding a position of trust at the highest level in SAPS until the truth is established in a credible process. For as long as there are serious unresolved questions concerning Mdluli's integrity, he cannot lawfully act as a member and senior officer of the SAPS, or exercise the powers and duties associated with high office in the SAPS.[88]

235. The review of the Acting Commissioner's decisions is for those reason by no means academic. There remains a live dispute between the parties, and any relief granted will have practical effect.[89]

Remedies

236. The automatic consequence of my findings in relation to the withdrawal of the criminal charges is that the charges will revive. FUL however seeks in addition an order directing that the fraud and corruption charges be re-enrolled and prosecuted without any further delay. Such is permissible in terms of section 172(1)(b) of the Constitution and section 8 of PAJA which empower the court on review to grant an order that is just an equitable. Given the respondents' equivocal stance and their dilatory and obstructive approach to these proceedings, it is necessary to expedite the prosecution not only in the public interest but also in the interests of Mdluli who cannot resume his duties while the charges are pending.

237. Counsel for the NDPP has argued in relation to the criminal charges that they should be referred back to the NDPP for a fresh decision instead of the court ordering a prosecution. There may be polycentric issues around the prosecution in relation to the evidence and possible defences, so he contended, which will make the prosecution difficult. I would venture the old adage: "where there is a will there is a way". In the hands of skilled prosecutors, defence counsel and an experienced trial judge, I am confident that justice will be done on the evidence available, leading as the case may be to convictions or acquittals on the various charges in accordance with the law and justice. But more than ever, justice must be seen to be done in this case. The NDPP and the DPPs have not demonstrated exemplary devotion to the

[88] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248(CC).
[89] *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) at para 16

independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of what has gone before, will be a foregone conclusion, and further delay will cause unjustifiable prejudice to the complainants and will not be in the public interest. The sooner the job is done, the better for all concerned. Further prevarication will lead only to public disquiet and suspicion that those entrusted with the constitutional duty to prosecute are not equal to the task.

238. The same can be said with regard to those responsible for the disciplinary process.

239. Accordingly, the orders sought by FUL are appropriate, just and equitable.

240. With regard to the question of costs, Mr Maleka, assisted by Ms Yacoob and Ms Goodman, together with their instructing attorneys, acted on behalf of FUL *pro bono* and in the public interest. A costs order must accordingly be restricted to the recovery of disbursements.

Orders

241. The following orders are made:

(a) The decision made on or about 5 or 6 December 2011, as the case may be, by the third respondent in terms whereof the criminal charges of fraud, corruption and money laundering instituted against the fifth respondent under case number CAS 155/07/2011 were withdrawn, is hereby reviewed and set aside

(b) The decision made on 2 February 2012 by or on behalf of the first respondent in terms whereof the criminal charges of murder, kidnapping, intimidation and assault with intent to cause grievous bodily harm and defeating the ends of justice under case number CAS 340/02/99 were withdrawn, is hereby reviewed and set aside.

(c) The decision made on 29 February 2012 by or on behalf of the second respondent in terms whereof the disciplinary proceedings instituted by the second respondent against the fifth respondent were withdrawn, is hereby reviewed and set aside.

(d) The decision made on 31 March 2013 by or on behalf of the second respondent in terms whereof the fifth respondent was reinstated as Head of Criminal Intelligence in the South African Police Services with effect from 31 March 2012, is hereby reviewed and set aside.

(e) The first and third respondents are ordered to reinstate forthwith the criminal charges which were instated against the fifth respondent under case number CAS 155/07/2011 and case number 340/02/99 and to take such steps as are necessary to ensure that criminal proceedings for the prosecution of the criminal charges under the aforesaid cases are re-enrolled and prosecuted diligently and without delay.

(f) The second respondent is ordered to reinstate disciplinary charges which had been instituted against the fifth respondent but were subsequently withdrawn on 29 February 2012, and to take such steps as are necessary to institute or reinstate disciplinary proceedings that are necessary for the prosecution and finalisation of the aforesaid disciplinary charges, diligently and without delay.

(g) The first, second, third and sixth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved on the basis that the applicant's attorneys and counsel appear *pro bono*.

(h) The Taxing Master is directed that the applicant's costs nevertheless should include all the disbursements and expenses of the applicant's attorneys of record.

JR MURPHY
JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv V Maleka SC assisted by Adv S Yacoob and Adv I Goodman; instructed by Cliffe Dekker Hofmeyr Inc.

Counsel for the first and third respondents: Adv L Hodes SC assisted by Adv N Manaka and Adv E Fasser; instructed by the State Attorney.

Counsel for the second and sixth respondents: Adv WR Mokhari SC assisted by Adv M Zulu and Adv DM Matlou; instructed by the State Attorney

Date heard: 11 and 12 September 2013
Date of judgment: 23 September 2013

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 67/2014

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPELLANT**
THE HEAD: SPECIALISED COMMERCIAL CRIME UNIT	**SECOND APPELLANT**
THE NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICE	**THIRD RESPONDENT**
RICHARD NAGGIE MDLULI	**FOURTH APPELLANT**
v	
FREEDOM UNDER LAW	**RESPONDENT**

Neutral citation: *National Director of Public Prosecutions v Freedom Under Law* (67/14) [2014] ZASCA 58 (17 April 2014).

Coram: Mthiyane DP, Navsa, Brand, Ponnan *et* Maya JJA

Heard: **1 April 2014**

Delivered: **17 April 2014**

Summary: Review application – decisions to withdraw criminal charges by National Prosecuting Authority – reviewable on principle of legality not under the Promotion of Administrative Justice Act 3 of 2000 – decisions by Commissioner of Police to terminate disciplinary proceedings and lift suspension of member – reviewed and set aside under s 6 of PAJA – not competent for the high court to issue mandatory interdicts to compel prosecution and disciplinary charges.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

JUDGMENT

Brand JA (Mthiyane DP, Navsa, Ponnan *et* Maya JJA concurring):

[1] This is an appeal against an order of the high court granted at the behest of the respondent. In substance the order reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant and directed the first three respondents to reinstate criminal prosecutions and disciplinary proceedings against him. The appeal is with the leave of the court a quo. More precise details of the order appealed against will appear from the exposition of the background that follows. I find it convenient to start that exposition by presentation of the parties.

The Parties

[2] The first appellant is the National Director of Public Prosecutions (NDPP). Advocate Nomgcobo Jiba was appointed on 28 December 2011 as the acting NDPP by the President of the Republic after the suspension from that office of the then incumbent, Mr Menzi Simelane in consequence of a judgment of this court. The second appellant is Advocate Lawrence Mrwebi (Mrwebi) who was appointed on 1 November 2011 as Special Director of Public Prosecutions as the Head of the Specialised Commercial Crimes Unit (SCCU) of the National Prosecuting Authority.

[3] The third appellant is the National Commissioner of the South African Police Service (the Commissioner). During the time period relevant to these proceedings that position was occupied first by General Bheki Cele, thereafter by Lieutenant General Nhlanhla Mkhwanazi, in an acting capacity and finally by General Mangwashi Victoria Phiyega. The fourth appellant, who took centre stage in these proceedings, is Lieutenant General Richard Mdluli (Mdluli) who held the office of National Divisional Commissioner: Crime Intelligence in the South African Police Service (SAPS), a position also described as Head of Crime Intelligence, since 1 July 2009.

[4] The respondent, Freedom Under Law, is a public interest organisation, registered as a non-profit company with offices in South Africa and Switzerland. It is actively involved, inter alia, in the promotion of democracy and the advancement of respect for the rule of law in the Southern African region. Both its board of directors and its advisory board are composed of respected lawyers, judges and other leading figures in society at home and abroad.

Background

[5] It is common cause that on 31 March 2011 Mdluli was arrested and charged with 18 criminal charges, including murder, intimidation, kidnapping, assault with intent to do grievous bodily harm and defeating the ends of justice. The murder

charge stemmed from the killing of Mr Tefo Ramogibe (the deceased) on 17 February 1999. From about 1996 until 1998 the deceased and Mdluli were both involved in a relationship with Ms Tshidi Buthelezi. The deceased and Buthelezi were secretly married during 1998. Mdluli was upset about this and addressed the issue on numerous occasions with Ms Buthelezi and the deceased and members of their respective families. At the time Mdluli held the rank of senior superintendent and the position of commander of the detective branch at the Vosloorus police station. Charges of attempted murder, intimidation, kidnapping, et cetera, rested on allegations by relatives and friends of the deceased and Ms Buthelezi that Mdluli and others associated with him – including policemen under his command – brought pressure to bear upon them through violence, assaults, threats, kidnappings and in one instance rape, with the view to compelling their co-operation in securing the termination of the relationship between the deceased and Ms Buthelezi. According to one of the complainants who is the mother of the deceased, Mdluli had on occasion taken her to the Vosloorus police station where she found the deceased injured and bleeding. In her presence Mdluli then warned the deceased to stay away from Ms Buthelezi. The deceased was killed a few days thereafter.

[6] On 23 December 1998 the deceased was the victim of an attempted murder. He reported the incident to the Vosloorus police station. On 17 February 1999 the deceased and the investigating officer, Warrant Officer Dhlomo, drove to the scene in Mdluli's official vehicle for the stated purposes of the deceased participating in a pre-arranged pointing out. According to Dhlomo they were attacked by two unknown assailants at the scene who shot at them and took away his firearm and the vehicle in which they were travelling. He ran to a nearby tuck-shop to summon the police. Upon his return he found that the deceased had been killed. At the time, the matter never proceeded to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

[7] Information about the discontinued investigation re-surfaced after Mdluli was appointed the Head of Crime Intelligence in 2009. Two senior officers of the

Directorate of Priority Crime Investigation (the Hawks), Colonel Roelofse and Lieutenant-Colonel Viljoen, were appointed to assist in the renewed investigations and Mdluli came to be arrested on these charges – to which I shall refer as the murder and related charges – on 31 March 2011. In the light of the seriousness of these charges, the then Commissioner of Police, General Bheki Cele, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him.

[8] After Mdluli's arrest on the murder and related charges, some members of Crime Intelligence came forward with information concerning alleged crimes committed by some of its members, including Mdluli. Lieutenant Colonel Viljoen, who was involved in the investigation of the murder and related charges, was instructed to investigate these allegations in conjunction with Advocate C Smith of the Specialised Commercial Crime Unit (SCCU). Following upon these investigations, Smith successfully applied for a warrant for Mdluli's arrest on charges of fraud and corruption which was executed on 20 September 2011.

[9] What emerges from the papers filed of record is that the charges of fraud and corruption originate from the alleged unlawful utilisation of funds held in the Secret Service account – created in terms of the Secret Services Act 56 1978 – for the private benefit of Mdluli and his wife, Ms Theresa Lyons. Broadly stated it is alleged that one of Mdluli's subordinates, Colonel Barnard, purchased two motor vehicles ostensibly for use by the Secret Service but structured the transaction in such a manner that a discount of R90 000 that should have been credited to the Secret Service account, was utilised for Mdluli's personal benefit. The further allegation was that those two motor vehicles were then registered in the name of Mdluli's wife and appropriated and used by the two of them.

[10] On 3 November 2011 Mdluli wrote a letter to President Zuma, the Minister of Safety and Security and the Commissioner stating that the charges against him were the result of a conspiracy among senior police officers – including the then

Commissioner, General Bheki Cele, and the head of the Hawks, General Anwar Dramat. The letter also stated, rather inappropriately, that '[i]n the event that I come back to work, I will assist the President to succeed next year' which was an obvious reference to the forthcoming presidential elections of the ruling African National Congress in Mangaung towards the end of 2012. The allegations of a conspiracy led to the appointment by the Minister of a task team which later reported that there was no evidence of a conspiracy and that the police officers who had accused Mdluli of criminal conduct had acted in good faith.

[11] On 17 November 2011 Mdluli's legal representatives made representations to Mrwebi in his capacity as Special DPP and head of the SCCU, seeking the withdrawal of the fraud and corruption charges. These representations again contended that the charges against Mdluli resulted from a conspiracy against him involving the most senior members of the South African Police Service. The representations also indicated that a similar approach had been made to Advocate K M A Chauke, the DPP South Gauteng, for withdrawal of the murder and related charges. Mrwebi, in response to the representations made to him, requested a report from Smith and his immediate superior, Advocate Glynnis Breytenbach, who both responded with a motivation that the charges should not be withdrawn. Despite this motivation, Mrwebi decided to withdraw these charges and notified Mdluli's representatives of his decision to do so on or about 5 December 2011. The circumstances under which Mrwebi's decision was arrived at is central to one of the disputes in this case. I shall revert to this in due course.

[12] On 1 February 2012 Chauke decided to withdraw the murder and related charges as well. He explained that after he received the representations by Mdluli's legal representatives, he realised that there was no direct evidence implicating Mdluli in the murder charge. He therefore decided that an inquest should be held before he proceeded with that charge and that the murder charge should therefore be provisionally withdrawn pending the outcome of the inquest. To prevent

fragmented trials, so he said, he decided that the 17 charges related to the murder should also be provisionally withdrawn, pending finalisation of the inquest.

[13] I pause to record that at Chauke's request the inquest was held in terms of the Inquests Act 58 of 1959 by the magistrate of Boksburg who handed down his reasons and findings on 2 November 2012. His ultimate conclusions make somewhat peculiar reading, namely that:

'The theory of Mdluli being the one who had orchestrated the death of [the deceased] is consistent with the facts.'

And that:

'The death [of the deceased] was brought about by an act *prima facie* amounting to an offence on the part of **unknown persons**. There is **no evidence** on a balance of probabilities implicating Richard Mdluli [and his co-accused persons] in the death of the deceased.'

[14] I say peculiar, because s 16(2) of the Inquests Act required the magistrate to determine whether the death of the deceased was brought about by any act or omission amounting to an offence on the part of any person. The evidence before him clearly established a prima facie case against Mdluli. That appears to be borne out by the first conclusion. The second conclusion, which appears to contradict the first seems to be both unhelpful and superfluous. It was not for the magistrate to determine Mdluli's guilt on a murder charge, either beyond reasonable doubt or on a balance of probabilities. But if Chauke had any uncertainty about the import of the magistrate's findings he could have asked for clarification or even requested that the inquest be re-opened in terms of s 17(2) of the Inquests Act. Furthermore, it is clear that the magistrate's findings were wholly irrelevant to the 17 related charges. Nonetheless it is common cause that no further steps have since been taken by the prosecuting authorities to reinstitute any of the 18 charges.

[15] I return to the chronological sequence of events. On 29 February 2012 the Acting National Commissioner of Police at the time, General Mkhwanazi, withdrew

the disciplinary proceedings against Mdluli and on 31 March 2012 he was reinstated and resumed his office as Head of Crime Intelligence. In fact, shortly thereafter, his duties were extended to include responsibility for the unit which provides protection for members of the national executive.

[16] On 15 May 2012 FUL launched the application, the subject of the present appeal. The notice of motion contemplated proceedings in two parts. Part A sought an interim interdict, essentially compelling the Commissioner to suspend Mdluli from office pending the outcome of the review application in part B. In part B FUL sought an order reviewing and setting aside four decisions, namely:

(a) The decision made by Mrwebi on or about 5 December 2011 to withdraw the charges of fraud and corruption.

(b) The decision by Chauke on or about 2 February 2012 to withdraw the murder and related charges.

(c) The decision by the Commissioner of Police on or about 29 February 2012 to terminate the disciplinary proceedings; and

(c) The decision by the Commissioner on or about 31 March 2012 to reinstate Mdluli to his office.

[17] Apart from the orders setting aside the four impugned decisions, FUL also sought mandatory interdicts:

(a) directing the prosecution authorities to reinstate the criminal charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and

(b) directing the Commissioner of Police to take all steps necessary for the prosecution and finalisation of the disciplinary charges.

On 6 June 2012 the interim interdict sought in part A was granted by Makgoba J. The application for leave to appeal against that order was unsuccessful and the interim interdict is thus extant. The review application came before Murphy J who granted an order (a) setting aside the four impugned decisions as well as (b) the mandatory interdict sought together with (c), an order for costs in favour of FUL

against the respondents. His judgment has since been reported sub nom *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP).

FUL's locus standi

[18] I now turn to the appellant's contentions on appeal and I deal first with those arising from challenges by the NDPP and Mrwebi. These relied mainly on formal and procedural objections rather than the merits of the case. Included amongst these formal objections was a challenge to FUL's legal standing. However, this challenge was not pursued in argument. Suffice it therefore to say that in my view the objection to FUL's standing was unsustainable from the start. FUL's mission to promote accountability and democracy and to advance respect for the rule of law and the principle of legality in this country has been recognised by this court (see eg *Freedom Under Law v Acting Chairperson Judicial Service Commission & others* 2011 (3) SA 549 (SCA) paras 19-21). In addition, I agree with the finding by the court a quo that the matter is one of public interest and national importance (para 1 of its judgment). What I do find somewhat perturbing is the court's high praise for Dr Mamphela Ramphele and Justice Johan Kriegler who deposed to FUL's founding and replying affidavits respectively (see para 4). It needs to be emphasised that all litigants, irrespective of their status, should be treated equally by our courts. Judges must therefore be wary of creating the impression – which would undoubtedly be unfounded in this case – that they have more respect for some litigants or their representatives than for others.

Reviewability of decisions to withdraw a prosecution

[19] The next challenge by the NDPP, which was embraced by Mrwebi and Mdluli, related to the reviewability of a prosecutorial decision to discontinue a prosecution. The issue arising from this is a narrow one. This is so because it is not contended by the NDPP that decisions of this kind are not reviewable at all. On the contrary, the NDPP conceded that these decisions are subject to what has become known as a principle of legality or a rule of law review by the court. The allied issue is whether

these decisions are reviewable under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Although the answer to that question is by no means decisive of the matter. I nonetheless believe the time has come for this court to put the issue to rest. This belief is motivated by two considerations. First, because the court a quo had pronounced on the question and held that PAJA is of application (paras 131-132 of the judgment). Secondly, and more fundamentally, by the considerations that appear from the following statement by Ngcobo J in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another* as Amici Curiae) 2006 (2) SA 311 (CC) paras 436-438:

'Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law . . . Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question . . . It follows that the SCA . . . erred in failing to consider whether PAJA was applicable. The question whether PAJA governs these proceedings cannot be avoided in these proceedings.'

[20] The domain of judicial review under PAJA is confined to 'administrative action' as defined in s 1 of the Act. The definition starts out from the premise that 'administrative action' is 'any decision taken, or any failure to take a decision, by . . . a natural or juristic person . . . when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect . . .'. Mrwebi and Chauke derived their power to withdraw the criminal charges against Mdluli from the provisions of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). On the face of it, their decisions sought to be impugned in this case clearly constituted 'administrative action'. But s 1(*ff*) of the definition excludes 'a decision to institute or continue a prosecution'. The question in the present context is thus – does the

exception extend to its converse as well, namely a decision not to prosecute or to discontinue a prosecution?

[21] Cora Hoexter *Administrative Law in South Africa* (2 ed, 2012) at 241-242 is of the firm view that the intention behind the exception 'was to confine review under the PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law'. Thus far our courts have, however, been less decisive. In *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) para 84 Chaskalson CJ acknowledged that:

'In terms of the [PAJA] a decision to institute a prosecution is not subject to review. The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions [as opposed to the decision to institute a prosecution] and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a Court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.'

[22] The implication is therefore that decisions not to prosecute are not necessarily excluded from the application of PAJA. Conversely, in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 27 Navsa JA stated:

'While there appears to be some justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of "administrative action" in terms of s 1(*ff*) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made.'

[23] The court a quo (in paras 131-132 of its judgment) found itself in disagreement with what it described as the *obiter dictum* of Navsa JA that a decision to discontinue prosecution is of the same genus as a decision to prosecute. 'For the reasons stated by Professor Hoexter' so it held, 'a decision of non-prosecution is of a different genus to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not'.

[24] However, unlike the court a quo I am not persuaded by the reasoning advanced by Professor Hoexter for the view that she proffers. To say that the validity of a decision to prosecute will be tested at the criminal trial which is to follow, is, in my view, fallacious. What is considered at the criminal trial is a determination on all of the evidence presented in the case of the guilt or lack thereof of the accused person, not whether the preceding decision to prosecute was valid or otherwise. The fact that an accused is acquitted self-evidently does not suggest that the decision to prosecute was unjustified. The reason advanced by the court a quo itself, namely, that a decision not to prosecute is final while a decision to prosecute is not, is in my view equally inaccurate. Speaking generally, both these decisions can be revisited through subsequent decisions by the same decision-maker, by in the one case re-instituting the prosecution, and by withdrawing the prosecution in the other.

[25] What is called for, as I see it, is to focus on the policy considerations that underlie the exclusion of a decision to institute or continue to prosecute from the ambit of PAJA and to reflect on whether or not the same considerations of policy will apply to a decision not to prosecute or to discontinue a prosecution. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 35 fn 31 Harms DP cited a line of English cases that emphasised the same policy considerations that underlie the exclusion of decisions to prosecute from the PAJA definition of administrative action. These included *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 (PC) para 14 and *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 para 17. The first principle established by these cases, as I see it, is that in England, decisions to prosecute are not immune from judicial

review but that the courts' power to do so is sparingly exercised. The policy considerations for courts limiting their own power to interfere in this way, appear to be twofold. First, that of safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought. Secondly, the great width of the discretion to be exercised by the prosecuting authority and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy.

[26] As I see it, the underlying considerations of policy can be no different with regard to decisions not to prosecute or to discontinue a prosecution. This view is supported by English authorities dealing with non-prosecution. So, for instance it was said in *R v Director of Public Prosecutions, Ex Parte Manning* [2001] QB 330 para 23:

'[T]he power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the [prosecutor] as head of an independent, professional prosecuting service, answerable to the [National Director of Public Prosecutions] in his role as guardian of the public interest, and to no-one else.'

And by Kennedy LJ in *R v Director of Public Prosecutions, Ex Parte C* [1995] 1 Cr App R 136 at 139G-140A:

'It has been common ground before us in the light of the authorities that this Court does have power to review a decision of the Director of Public Prosecutions not to prosecute, but the authorities also show that the power is one to be sparingly exercised.'

At 141B-C Kennedy LJ then continued to say:

'From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions . . . arrived at the decision not to prosecute . . .'

Whereupon, he proceeded to set out the grounds recognised by the English courts for interference in decisions not to prosecute. Suffice it to say these grounds are substantially similar to the ones recognised by our courts as justification for a rule of law review. The dictum from *Kaunda* does not indicate that a PAJA review might be available, but on the assumption made, the suggestion appears to be that in appropriate circumstances a rule of law review might be apposite.

[27] My conclusion from all this is that:

(a) It has been recognised by this court that the policy considerations underlying our exclusion of a decision to prosecute from a PAJA review is substantially the same as those which influenced the English courts to limit the grounds upon which they would review decisions of this kind.

(b) The English courts were persuaded by the very same policy considerations to impose identical limitations on the review of decisions not to prosecute or not to proceed with prosecution.

(c) In the present context I can find no reason of policy, principle or logic to distinguish between decisions of these two kinds.

(d) Against this background I agree with the *obiter dictum* by Navsa JA in *DA & others v Acting NDPP* that decisions to prosecute and not to prosecute are of the same genus and that, although on a purely textual interpretation the exclusion in s 1(*ff*) of PAJA is limited to the former, it must be understood to incorporate the latter as well.

(e) Although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.

[28] The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in *Affordable Medicines Trust & others v Minister of Health & others 2*006 (3) SA 247 (CC) para 49:

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of

control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say currently is because it is accepted that '[l]egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner' (see *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614; Cora Hoexter op cit at 124 and the cases there cited). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) paras 28-30).

Impugned decisions to withdraw criminal charges only provisional and not final

[30] This brings me to the further technical challenge by the NDPP, namely that the impugned decisions by Mrwebi and Chauke were not final, but only provisional. The contentions underlying this challenge will be better understood against the statutory substructure of these decisions which is to be found in s 179 of the Constitution, read with the relevant provisions of the NPA Act. Under the rubric 'prosecuting authority' s 179 of the Constitution provides in relevant part:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(*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; and

(*b*) *Directors* of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(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.

(3) . . .

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions-

(*a*)

(*b*)

(*c*)

(*d*) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the National Director considers to be relevant.'

[31] The national legislation contemplated in s 179 of the Constitution was promulgated in the form of the NPA Act. The power to institute and conduct criminal proceedings is given legislative expression in s 20 which provides:

'(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*.

(2) . . .

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* [defined in s 1 as a DPP] 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*) . . ..'

[32] Mrwebi and Chauke, who were both DPPs, were therefore authorised by s 20(3), read with s 20(1)(*c*), to withdraw the criminal charges against Mdluli. But because Mrwebi was appointed as a special DPP his powers were limited by the provisions of s 24(3) which provides:

'A Special Director shall exercise the powers . . . assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers . . . include any of the powers . . . referred to in section 20(1), they shall be exercised . . . in consultation with the Director of the area of jurisdiction concerned.'

[33] According to the NDPP's argument, the withdrawal of the criminal charges in this case must also be understood against the background of s 6 of the Criminal Procedure Act 51 of 1977 (the CP Act). This section draws a distinction between the withdrawal of criminal charges, before an accused person has pleaded – in s 6(*a*) – and the stopping of a prosecution after the accused person has pleaded, as contemplated in s 6(*b*). The latter section provides that where the prosecution is stopped the court is obliged to acquit the accused person, while a withdrawal in terms of s 6(*a*) does not have that consequence. A charge withdrawn under s 6(*a*) can therefore be reinstituted at any time.

[34] The withdrawal of charges by Mrwebi and Chauke, so the NDPP's argument went, was covered by s 6(*a*) and not by s 6(*b*). In consequence, so the argument proceeded, these decisions were only provisional and therefore not

subject to review. Although I am in agreement with the premise of the argument, that both decisions to withdraw were taken in terms of s 6(*a*), my difficulty with its further progression is twofold. First, I can see no reason why, at common law, a decision would in principle be immune from judicial review just because it can be labelled 'provisional' however illegal, irrational and prejudicial it may be. My second difficulty is more fundamental. I do not believe a decision to withdraw a criminal charge in terms of s 6(*a*) can be described as 'provisional' just because it can be reinstituted. It would be the same as saying that because a charge can be withdrawn, the institution of criminal proceedings is only provisional. As I see it, the withdrawal of a charge in terms of s 6(*a*) is final. The prosecution can only be recommenced by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.

[35] The NDPP's second argument as to why the impugned decisions were not final rests on the provisions of s 179(5)(*d*) of the Constitution. Since in terms of this section the decisions were still subject to review by the NDPP, so the argument went, they were only provisional. I have already expressed my reservations about the proposition that because a decision is provisional it is not subject to challenge, based on legality or rationality. What the NDPP's argument based on s 175(5)(*d*) mutated to was the contention that, because the impugned decisions were subject to an internal review, FUL should have been non-suited for failure to exhaust the internal remedies available to it. That, of course, is a completely different case.

Exhaustion of internal remedy

[36] The NDPP's final argument as to why review proceedings were not competent, was that FUL had failed to exhaust an internal remedy available to it. What this contention relied upon was the provision in s 179(5)*(d),* which enables the NDPP to review a decision not to prosecute at the behest of any person or party who the NDPP considers to be relevant. Since I have found a review under PAJA unavailable, s 7(2) of the Act, which compels exhaustion of internal remedy

as a pre-condition to review, save in exceptional circumstances, does not apply. At common law the duty to exhaust internal remedies is far less stringent. As Hoexter (op cit 539) explains, the common law position is that a court will condone a failure to pursue an available internal remedy, for instance where that remedy is regarded as illusory or inadequate.

[37] In this case we know that Advocate 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 ongoing 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 as meaningless and illusory in a matter of some urgency.

Challenge to decision to withdraw the fraud and corruption charges

[38] FUL's first challenge of this decision rests on the contention that Mrwebi had failed to comply with the provisions of s 24(3) of the NPA Act in that he did not take the decision to withdraw the charges 'in consultation' with the DPP 'of the area of jurisdiction concerned' as required by the section. As to the legal principles involved, it has by now become well established that when a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after consultation with' which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.

[39] An understanding of the factual basis for the challenge calls for elaboration of the facts given thus far. The DPP of the area of jurisdiction concerned, as envisaged by s 24(3), was Advocate Mzinyathi, the DPP of North Gauteng. Mrwebi's version in his answering affidavit is that he briefly discussed the matter with Mzinyathi on 5 December 2011, after which he prepared an internal memorandum addressed to Mzinyathi, setting out the reasons why, in his view, the fraud and corruption charges should be withdrawn. Although Mzinyathi did not agree with him at that stage, there was a subsequent meeting between the two of them, together with Advocate Breytenbach, on 9 December 2011. At that meeting, so Mrwebi said, the other two were initially opposed to the withdrawal of the charges, but that all three of them eventually agreed that there were serious defects in the State's case and that the charges should be provisionally withdrawn. However, the problems with this version are manifold. Amongst others, it is in direct conflict with the contents of Mrwebi's internal memorandum of 5 December 2011 from which it is patently clear that by that stage he had already taken the final decision to withdraw the charges. The last two sentences of the memorandum bear that out. They read:

'The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Colonel Barnard immediately.'

And:

'The lawyers of Lt-General Mdluli will be advised accordingly.'

[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 a 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 that stage he did not know what Mzinyathi's views were; and that he only realised 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.

[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.

[42] The court a quo gave various other reasons why Mrwebi's impugned decision cannot stand. These are comprehensively set out in the judgment of the court a quo under the heading 'the withdrawal of the fraud and corruption charges' (para 141 et seq). However, in the light of my finding that the decision falls to be set aside on the basis that it was in conflict with the empowering statute, I find it unnecessary to revisit these reasons. Suffice it to say that, in the main, I find the court's reasoning convincing and nothing that has been said in arguments before us casts doubt on their correctness.

The decision to withdraw the murder and related charges

[43] This brings me to the decision by Chauke to withdraw the murder and related charges. It will be remembered that on Chauke's version, he withdrew the murder charge pending the outcome of the inquest that he had requested and that

he withdrew the 17 other related charges to avoid a fragmented trial. The contention by FUL was in essence that this decision was irrational. However, as I see it, the contention has not been substantiated in argument. On the face of it the decision that the findings at an inquest could perhaps enable him to take a more informed view of the prospects of the State's case with regard to the murder charge, was not irrational. It is true that the outcome of the inquest could have no impact on the 17 related charges. But Chauke never thought that it would. As I understand his reasoning, he always intended to reinstate at least some of the charges after the inquest, with or without the murder charge. What he tried to avoid, so he said, was a fragmentation of trials. That line of reasoning I do not find irrational either, particularly since the evidence supporting the related charges would also impact on the murder charge. It is true that he could have asked for a postponement of the 17 related charges pending the inquest, but we know that a postponement is not for the asking. It could be successfully opposed by Mdluli, in which event the fragmentation, which Chauke sought to avoid for understandable reasons, may have become a reality.

[44] FUL's real argument, which found favour with the court a quo (para 183) is that Chauke's failure to proceed with the murder and related charges after the findings of the inquest became available, was irrational. But that decision – or really his failure to apply his mind afresh to the matter after the conclusion of the inquest – was not the subject of the review application. It will be remembered that the review application started in May 2012 while the results of the inquest only became available in November of that year. Stated somewhat more concisely: I do not believe the earlier decision to withdraw the charges – which is the impugned decision – can be set aside on the basis that a subsequent decision, taken in different circumstances, not to reinstate all or some of those charges, was not justified. To that extent the appeal must therefore succeed.

[45] However, having said that, senior counsel for the NDPP conceded, rightly and fairly in my view, that there is no answer to the proposition that at least some

of the murder and related charges are bound to be reinstated. In the light of this concession he undertook on behalf of his client – which undertaking was subsequently elaborated upon in writing:

(a) That the NDPP will take a decision as to which of the 18 charges are to be reinstated and will inform FUL of that decision within a period of 2 months from this order.

(b) If the NDPP decides not to institute all 18 charges, he will provide FUL with his reasons for that decision during the same period.

I can see no reason why this undertaking should not be incorporated in this court's order and I propose to do so.

Jurisdiction of the high court to review the decision to terminate disciplinary proceedings

[46] This brings me to the decisions by the Commissioner of Police, to terminate the disciplinary proceedings against Mdluli and then to reinstate him to his position on 27 March 2012. Not unlike the NDPP, the Commissioner's response to FUL's challenge to these decisions focused mainly on technical objections, rather than to defend the decisions on their merits. The first technical objection was that the high court lacked jurisdiction to review the impugned decisions by virtue of s 157 of the Labour Relations Act 66 of 1995. The court a quo found this argument fundamentally misconceived (para 227) and I agree with this finding. The argument rests on the premise that this is a labour dispute, which it is not. It is not a dispute solely between employer and employee. The mere fact that the remedy sought may impact on the relationship between Mdluli and his employer does not make it a labour dispute. It remains an application for administrative law review in the public interest, which is patently subject to the jurisdiction of the high court.

Mootness

[47] The Commissioner's next technical objection was that the impugned decision had become moot. The factual basis advanced for the contention was that, shortly after the application had been launched, disciplinary charges were again initiated against Mdluli – which charges are currently pending – and that he was again suspended from office, which suspension is still in force. It is common cause, however, that the new disciplinary charges do not pertain to the murder and 17 related charges. Nor do they correspond with the fraud and corruption charges that were withdrawn by Mrwebi. In this light I can find no merit in the mootness argument. The fact that disciplinary proceedings had been instituted on charges A and B obviously does not render moot the challenge of a decision to terminate disciplinary proceedings on charges Y and Z.

Review of a decision to terminate disciplinary proceeding

[48] The Commissioner's powers to institute disciplinary charges and to suspend members of the police derive from regulations published under the South African Police Services Act 68 of 1995. These powers can be traced back to s 207(2) of the Constitution which requires the Commissioner to manage and exercise control over the SAPS. These powers are clearly public powers. That is why they were promulgated by law and not merely encapsulated in a contract between the parties. The Commissioner took the decision to institute disciplinary proceedings against Mdluli and to suspend him pursuant to these powers. When he decided to reverse those decisions, he did so in the exercise of the same public powers. It follows that the latter decisions constituted administrative action, reviewable under the provisions of PAJA.

[49] As the factual basis for the challenge of these decisions, FUL relied in its founding affidavit on a statement by the then Acting Commissioner, Lieutenant-General Mkhwanazi, in Parliament that he was instructed by authorities 'beyond' him to withdraw disciplinary charges and reinstate Mdluli in his office. FUL added that in doing so Mkhwanazi had failed to make an independent decision which

rendered his actions reviewable. Though Mkhwanazi filed an answering affidavit in the interim interdict proceedings in part A of the notice of motion, he did not deal with these allegations. In the answering affidavit filed in part B, the present Commissioner, General Phiyega, said the following in response to these allegations by FUL.

'General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never received any instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of the Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue.'

[50] But despite these undertakings, no confirmatory affidavit was filed by Mkhwanazi nor was a copy of Hansard provided. In argument before the court a quo, the Commissioner's representatives again undertook to file an affidavit by Mkhwanazi, but this undertaking was later withdrawn (para 213 of the judgment a quo). In the premises the court a quo held (para 214) that the Commissioner's explanation was untenable and stood to be rejected. I do not believe this finding can be faulted. Moreover, after all is said and done, neither Mkhwanazi nor Phiyega gave any reasons for the impugned decision. The inevitable conclusion is thus that the decisions were either dictated to Mkhwanazi or were taken for no reason at all. In either event they fall to be set aside under s 6 of PAJA. This means that the appeal against the court a quo's order to that effect cannot be sustained.

Appropriate remedy

[51] What remains are issues concerning the appropriate remedy. As we know, the court a quo did not limit itself to the setting aside of the impugned decisions. In

addition, it (a) ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and (b) directed the Commissioner of Police to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings (para 241(*e*) and (*f*)). Both the NDPP and the Commissioner contended that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far.

Costs

[52] As to the court a quo's costs order against the appellants in favour of FUL, I can see no reason to interfere. Although I propose to set aside some of the orders granted by the court a quo, it does not detract from FUL's substantial success in that court. On appeal the position is different. Here it is the appellants who achieved substantial success. Ordinarily this would render FUL liable for the appellants' costs on appeal. But it has by now become an established principle that in constitutional litigation unsuccessful litigants against the Government are generally not mulcted in costs, lest they are dissuaded from enforcing their constitutional rights. (See eg *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).) Although the rule is not immutable, I find no reason

to deviate from the general approach in this case. Hence I shall make no order as to the costs of appeal.

[53] The order I propose should therefore reflect the intent:

(a) To confirm the setting aside of Mrwebi's decision to withdraw the fraud and corruption charges in para (*a*) as well as the setting aside of the Commissioner's decision to terminate the disciplinary proceedings against Mdluli in para (*c*) as well as the setting aside of Mdluli's reinstatement by the Commissioner on 28 March 2012 in para (*d*) of the order of the court a quo.

(b) To reverse the setting aside of Chauke's decision to withdraw the murder and related charges in para (*b*) of that order.

(c) To set aside the mandatory interdicts in paras (*e*) and (*f*) of the order;

(d) To confirm the costs order in paras (*g*) and (*h*) of the order; and

(e) To give effect to the undertaking on behalf of the NDPP with regard to the reinstitution of the murder and related charges.

[54] In the premises it is ordered that:

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

_____
F D J BRAND
JUDGE OF APPEAL

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APPEARANCES:

For the 1st and 2nd Appellants:	L Hodes SC (with him N Manaka, E Fasser) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 3rd Appellants:	W R Mokhali SC (with him M Zulu) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 4th Appellant:	I Motloung Instructed by: Maluleke Seriti Makume Matlala Inc, Germiston c/o Peyper Attorneys, Bloemfontein
For the Respondent:	S Yacoob (with him I Goodman, N van der Walt) Instructed by: Cliffe Dekker Hofmeyr, Johannesburg Matsepes, Bloemfontein

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 402/2017

In the matter between:

MTHANDAZO BERNING NTLEMEZA **APPELLANT**

and

HELEN SUZMAN FOUNDATION **FIRST RESPONDENT**

FREEDOM UNDER LAW **SECOND RESPONDENT**

Neutral citation: *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93 (9 June 2017)

Coram: Navsa, Ponnan, Majiedt, Dambuza, Mathopo JJA

Heard: 2 June 2017

Delivered: 9 June 2017

Summary: Application in terms of s 18 of the Superior Courts Act 10 of 2013 for execution order pending finalisation of an appeal process: whether refusal of an application for leave to appeal stultifies application for leave to execute notwithstanding that a further application for leave to appeal to next highest court envisaged: whether applicant for execution order proved existence of exceptional circumstances as contemplated in s 18(1): whether respondent, in terms of s 18(3), proved on balance of probabilities that it will suffer irreparable harm in the event of the execution order not being granted and that the appellant would not: provisions of s 18(4) discussed: requirement that court must 'immediately record' its reasons for granting execution order: meaning of 'next highest court' not entirely clear: whether two parallel appeal processes in the same appeal court in the same case desirable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse, Kollapen and Baqwa JJ sitting as court of first instance):

1 The appeal is dismissed with costs including the costs of two counsel.

2 The appellant is ordered to pay the costs personally.

JUDGMENT

Navsa JA (Ponnan, Majiedt, Dambuza, Mathopo JJA concurring):

[1] This appeal is concerned with whether the appellant, Lieutenant-General Mthandazo Berning Ntlemeza (General Ntlemeza), ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigations (DPCI), pending the finalisation of an application for leave to appeal filed in this court. It might appear strange and perhaps even confusing that there are two parallel processes being conducted in an appeal court in one case, but that is on account of the provisions of s 18 of the Superior Courts Act 10 of 2013, which gives an aggrieved party an automatic right of appeal 'to the next highest court' against a decision of the high court ordering the execution of an earlier ruling issued by it, pending the finalization of an appeal or an application for leave to appeal. The background culminating in the present appeal appears hereafter.

[2] General Ntlemeza was appointed National Head of the DPCI on 10 September 2015 by the erstwhile Minister of Police, Mr Nkosinathi Phiwayinkosi Thamsanqa Nhleko.[1] Before his aforesaid permanent appointment, General Ntlemeza had served as acting National Head of the DPCI[2] for a period of approximately one year.

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[1] Minister Nhleko was subsequently removed from that position by the President of South Africa and appointed as Minister of Public Works. He was succeeded by the present Minister of Police, Mr Fikile Mbalula.

[2] From December 2014 to September 2015.

[3] At this early stage it is necessary to locate the DPCI in its constitutional and statutory setting. The South African Police Service Act 68 of 1995 (the Act), in terms of which the DPCI was established, has its genesis in s 205 of the Constitution, which provides that the National Police Service must be structured to function in the national, provincial and, where appropriate, local spheres of government. Section 205(2) of the Constitution provides:

'(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.'

Section 205(3) sets out the objects of the Police Service, which are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of our country and their property and to uphold and enforce the law. The political responsibility for the South African Police Service, in terms of s 206 of the Constitution, vests in the Minister of Police. Moreover, the Minister is, in terms of that section, responsible for determining the national policing policy.

[4] The DPCI was established in terms of s 17C of the Act, which is in part the legislation contemplated by the Constitution. The material part of s 17C reads as follows:

'(1) The Directorate for Priority Crime Investigation is hereby established as a Directorate in the Service.

(1A) The Directorate comprises –

(a) the Office of the National Head of the Directorate at national level; and

(b) the Office of the Provincial Directorate in each province.

(2) The Directorate consists of –

(a) the National Head of the Directorate at national level, who shall manage and direct the Directorate and who shall be appointed by the Minister in concurrence with Cabinet;

….

For present purposes, we need not concern ourselves with the other personnel that comprise the directorate. The DPCI's functions are set out as follows in s 17D of the Act:

'(1) The functions of the Directorate are to prevent, combat and investigate –

(a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate . . .

(aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004…'

As can be seen from all of the above, the National Head of the DPCI occupies a pivotal position within the statutory scheme.

[5] General Ntlemeza's appointment as National Head of the DPCI by Minister Nhleko was purportedly effected in terms of s 17CA(1) of the Act, read with s 17C(2)*(a)*. Section 17 CA(1) reads:

'(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is –

(a) a South African citizen; and

(b) *a fit and proper person*,

with due regard to his or her experience, *conscientiousness and integrity*, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed terms of not shorter than seven years and not exceeding 10 years.'
(My emphasis.)

[6] During March 2016 General Ntlemeza's appointment was challenged in the Gauteng Division of the High Court, Pretoria, by the first and second respondents, the Helen Suzman Foundation (HSF) and Freedom Under Law NPC (FUL), respectively. Both HSF and FUL are non-profit organisations concerned with promoting constitutional values and the rule of law. The application to review and set aside General Ntlemeza's appointment was brought in their own and the national interest.

[7] In its application, HSF and FUL noted that the DPCI is a premier law enforcement agency, integral to the battle against corruption and maladministration, which is why the Act requires the National Head to be a person of integrity. They contended that in appointing General Ntlemeza to that high office, Minister Nhleko acted irrationally and unlawfully and failed to fulfill his constitutional duty to protect the integrity and independence of the DPCI. The principal ground of review was that Minister Nhleko had not taken into account materially relevant considerations, more particularly, he failed to have proper regard to a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza's integrity was called into

question. The case was *Sibiya v Minister of Police & others* (GP) unreported case no 5203/15 (20 February 2015).

[8] *Sibiya* concerned the legality of General Ntlemeza's suspension of Major General Shadrack Sibiya, a Provincial Head of the DPCI, and the appointment, in his stead, of General Elias Dlamini, as acting Provincial Head of the DPCI. General Ntlemeza had accused General Sibiya of being involved in the illegal rendition of certain Zimbabwean citizens. In deciding the matter, Matojane J made adverse findings against General Ntlemeza. He stated that the decision to suspend General Sibiya 'was taken in bad faith and for reasons other than those given. It [was] arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it [was] unlawful as it violate[d] applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair'. Matojane J went on to make the following order:

'1. It is declared that the Notice to Suspension served on the applicant on 20 January 2015 is unlawful, unconstitutional and invalid; and

2. It is declared that the appointment of Major-General Elias Dlamini as the acting Provincial Head of DPCI Gauteng is unlawful, unconstitutional and invalid.

3. [The Office of the National Head Directorate for Priority Crime Investigations: Acting Nationals Head-Major General Berning Ntlemeza] is ordered to pay the costs of the applicant, which will include the costs of a senior and junior counsel.'

[9] Aggrieved, General Ntlemeza filed an application for leave to appeal but did not hasten to have it set down for hearing. Thereafter, General Sibiya filed an application under s 18 of the Superior Courts Act, seeking leave to execute the declaratory order referred to above. Matojane J, in his judgment dealing with the application for leave to appeal by General Ntlemeza and the application to execute by General Sibiya, had regard to correspondence sent to his registrar on behalf of General Ntlemeza, suggesting that he (Matojane J) had acted improperly in privately engaging with General Sibiya's legal representatives. Similar remarks were made in General Ntlemeza's affidavit filed in opposition to the application to execute, brought by HSF and FUL. In his assessment of the merits of the two applications, Matojane J once again made remarks calling into question General Ntlemeza's integrity. He accused General Ntlemeza of misleading the court by not informing it of a report by

the National Independent Police Directorate which exonerated General Sibiya. According to Matojane J, General Ntlemeza referred only to a prior report by the Provincial Independent Police Directorate, which incriminated General Sibiya. He went on to say: 'In my view, the conduct of [General Ntlemeza] shows that he is biased and dishonest. To further show that [General Ntlemeza was] dishonest and lack[ed] integrity and honour, he made false statements under oath'.

[10] Matojane J, in dealing with exceptional circumstances, which, as will be seen later, need to be established before an execution order can be granted, said the following:

'On the question whether exceptional circumstances exist [General Ntlemeza's] contemptuous attitude towards the rule of law and the principle of legality and transparency makes this case unique and exceptional.'

[11] Matojane J dismissed the application for leave to appeal and granted the application to execute. He ruled that the order he had issued, set out in para 8 above, 'shall operate and be executed in full until the final determination of all present and future appeals . . . The order will operate and be executed despite the delivery of any present or future applications for leave to appeal . . . and any noting of any appeal by any party'. The court stated that there was no need for General Sibiya to furnish security for the execution of the order.

[12] A full court (the high court) comprising three judges (Mabuse, Kollapen and Baqwa JJ) probably because of the national importance of the case, was constituted to hear the review application brought by HSF and FUL to have General Ntlemeza's appointment set aside. As Part A of that application, HSF and FUL sought an interim interdict preventing General Ntlemeza from exercising any power or discharging any function or duty as head of the DPCI, pending the final determination of the review application. The application for interim relief was dismissed by Tuchten J, whose judgment featured in the decision by the high court and in argument before us. It is an aspect to which I shall revert. A judgment by the high court in the review application (Mabuse J, with the other two judges concurring) was delivered on 17 March 2017.

[13] The high court held in favour of HSF and FUL. It reasoned as set out in this and the following two paragraphs. Section 17CA, referred to in para 5 above, requires an appointee as National Head of the DPCI to be a fit and proper person who is also conscientious and has integrity. The high court had regard to the decision of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) (the *Simelane* judgment), which involved the appointment of Mr Menzi Simelane as National Prosecuting Authority Head, and held that the Minister, like the President, had an obligation to ensure that there were no disqualifying factors impinging on the appointment of an individual as the Head of an important national constitutional institution.

[14] The high court found that the criteria set by the relevant provisions of the Act were objective and constituted essential jurisdictional facts on which General Ntlemeza's appointment had to be predicated. Mabuse J, with reference to the *Simelane* judgment, said the following (para 33):

'In the Simelane case, the Constitutional Court accepted the approach of the Supreme Court of Appeal. In paragraph [14] of the said case this is what the Constitutional Court had to say:

"The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment."

Accordingly, even where the relevant decision maker has, in terms of the law, a discretion relating to the person to be appointed, the person who is ultimately appointed must be a fit and proper person in the eyes of the Minister:

"Second, and as the Supreme Court of Appeal correctly points out, the Act itself does not say that the candidate for appointment as National Director should be fit and proper 'in the President's view'. The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as the Supreme Court of Appeal again pointed out, the section 'is couched in imperative terms. The appointee "must" be a fit and proper person"'.

[15] The high court considered the judicial pronouncements by Matojane J referred to above, that reflected negatively on General Ntlemeza, to be crucial in the assessment of whether the criteria set by s 17CA of the Act had been satisfied for the appointment of General Ntlemeza. Mabuse J had regard to Minister Nhleko's affidavit filed in opposition to the application by HSF and FUL challenging General Ntlemeza's appointment, in which he stated that he had been aware of the remarks made in the judgments but took the view that they could be discounted. The high court held that the Minister was not entitled to ignore Matojane J's findings concerning General Ntlemeza's lack of honesty and integrity. It found that it was for the Minister to determine positively from the objective facts whether General Ntlemeza was a fit and proper person. It reasoned that Minister Nhleko failed to do so. In that regard it stated, at para 37 of its judgment:

'The judicial pronouncements made in both the main judgment and the judgment in the application for leave to appeal are directly relevant to and in fact dispositive of the question whether Major General Ntlemeza was fit and proper if one considers his conscientiousness and integrity. Absent these requirements Lieutenant General Ntlemeza is disqualified from being appointed the National Head of the DPCI.'

The court concluded that Minister Nhleko failed to take into account relevant factors such as the findings by Matojane J, and thus acted irrationally and unlawfully. It made the following order:

'1. The decision of the Minister of 10 September 2015 in terms of which Major General Ntlemeza was appointed the National Head of the Directorate of Priority Crimes Investigations is hereby reviewed and set aside.

2. The first and second respondents, in their official capacities, are hereby ordered to pay the applicant's costs, including the costs consequent upon the employment of two counsel, the one paying the other to be absolved.'

[16] Subsequently, General Ntlemeza applied to the high court for leave to appeal that order (the principal order). HSF and FUL, in turn, filed a 'counter-application', in terms of which they sought, inter alia, as a matter of urgency, a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal. That court dismissed General Ntlemeza's application for leave to appeal, upheld the counter-application and made an order in the following terms:

'…

2. The operation and execution of the order granted by this court under case no. 23199/16 on 17 March 2017 is not suspended and will continue to be operational and executed in full whether or not there are any applications for leave to appeal and appeals or whether or not there is any petition for leave to appeal against the said order.

3. The second respondent in the counter-application is hereby ordered to pay the costs of this counter-application.'

It is against that order (the execution order) and the conclusions on which it was based, that the present appeal, in terms of s 18 of the Superior Courts Act, is directed. Since s 18(4)(ii) gives a person against whom an execution order was granted an automatic right of appeal, it was not necessary for leave to appeal to have been sought.

[17] In heads of argument filed in this court and at the outset of oral argument before us, counsel on behalf of General Ntlemeza relied on a jurisdictional point which they submitted, was dispositive of the appeal. The proposition was framed as follows:

In terms of s 18(1), a pending decision on an application for leave to appeal or an appeal was a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind set out in the preceding paragraph. It was contended that sequentially the application for leave to appeal by General Ntlemeza had been refused before FUL's counter-application was upheld and thus the high court was precluded from considering HSF and FUL's counter-application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent.

[18] It is necessary to consider whether that contention is well-founded. To that end, I propose to first consider the position at common law in relation to such applications before the enactment of s 18 of the Superior Courts Act. In the event of it being held that the preliminary point is without substance, I propose to deal with the further provisions of s 18 to determine whether HSF and FUL satisfied its requirements thereby justifying the grant of the execution order.

[19] This court, in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty)* 1977 (3) SA 534 (A) at 544H-545G, set out the common law position as follows:

'Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland . . . it is today the accepted common law rule of practice . . . that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application . . . The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from . . . The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised . . . In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.' (Authorities omitted.)

[20] In *South Cape* this court held that in an application for leave to execute the onus rests on the applicant to show that he or she is entitled to such an order.[3] The court went on to hold that an order granting leave to execute pending an appeal was one that had to be classified as being purely interlocutory and was thus not appealable. There were exceptions to the rule that purely interlocutory orders were

[3] At 548C-D.

not appealable. It is necessary to point out that a number of judgments of this court relaxed this rule on the basis that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable. In *Philani-Ma-Afrika & others v Mailula & others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) this court considered the position where a high court had granted leave to execute an eviction order despite having granted leave to appeal. It held the execution order to be appealable in the interests of justice.[4] It must also be borne in mind that before the advent of s 18, the position at common law was that the court had a wide general discretion to grant or refuse an execution order on the basis of what was just and equitable whilst appreciating that the remedy was one beyond the norm.

[21] Until its repeal on 22 May 2015, Rule 49(11) of the Uniform Rules, read as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

This was a restatement of the common law and formed the basis on which applications of this kind were determined.

[22] Section 18 of the Superior Courts Act introduced on 23 August 2013[5] reads as follows:

'**18 Suspension of decision pending appeal**

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of an final judgment, which is the subject of an application for leave

[4] See also *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Services* 1996 (3) SA 1 (A*); S v Western Areas Ltd & others* 2005 (5) 214 (SCA), and *Nova Property Group Holdings Ltd & others v Cobbett & another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA).
[5] Issued in terms of GN R36, *GG* 36774, 22 August 2013.

to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[23] As can be seen, s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not granted and that the other party 'will not' suffer such harm.

[24] Since a court of three judges was constituted to hear the matter, this court, so it was submitted, was 'the next highest court' envisaged in s 18(4)(ii). It is on that basis that the present appeal came to be set down on an expedited basis before this court, because s 18(4)(iii) directed that the appeal had to be dealt with as a matter of extreme urgency. Understandably, because it is such a dramatic change, only one appeal to 'the next highest court' is permissible. No further appeal beyond this court appears competent – for present purposes it is not necessary to decide this point. Nor, is it necessary to determine whether the next highest court could, as well, be the full court of the high court in circumstances where the execution order was

issued by a single Judge.[6] Whatever else, this matter, which is properly before this court, requires the consideration of a novel statutory provision and it would be in the interests of justice for us to do so.

[25] In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, set out in para 17 above, has substance, it is necessary to consider the provisions of s 18(1) and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a case the default position is that the operation and execution of the principal order is suspended pending 'the decision of the application for leave to appeal or appeal'. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above.

[26] Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court's judgment on the merits of General Ntlemeza's appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a decision that is the 'subject of an application for leave to appeal or appeal' is suspended pending the decision of either of those two processes. Section 18(5) defines what the words 'subject of an application for leave to appeal or appeal' mean: 'a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[27] When the high court made its decision on the merits of General Ntlemeza's appointment on 17 March 2017, that order immediately came into operation and

[6] This court might in future face a growing number of appeals against execution orders, particularly because the right to appeal is automatic, which might clog its roll.

could be executed. When General Ntlemeza, on 23 March 2017, filed his application for leave to appeal, the order (the principal order) of that court was suspended pending a decision on that application. HSF and FUL's 'counter-application', seeking the execution order, was thus well within the parameters of s 18(1). Did the dismissal of General Ntlemeza's application for leave to appeal prior to a decision on the execution application remove the jurisdictional underpinning for an execution order? The short answer is no. The reasons for that conclusion are set out hereafter.

[28] The primary purpose of s 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high.

[29] The preliminary point on behalf of General Ntlemeza referred to in para 17 above does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended.

[30] Moreover, contextually, the power granted to courts by s 18 must be seen against the general inherent power of courts to regulate their own process. This inherent jurisdiction is now enshrined in s 173 of the Constitution which provides:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[31] A further application for leave to appeal the principal order was filed in this court on 21 April 2017. This was always highly likely and always in prospect. The nature of the contestation in the high court, including the negative aspersions concerning the character of the head of a leading crime-fighting unit of the South African Police Service, leads to that compelling conclusion. So too, one would imagine, whatever this court decides it is unlikely to be the final word on the matter. The execution order by the high court reasonably anticipated further appeal processes. This was in any event what was sought by HSF and FUL in their counter application. In their notice of motion, they sought an order that the operation and execution of the principal order not be suspended 'by any application for leave to appeal or any appeal, and the order continues to be operational and enforceable and operate … until the final determination of all present and future leave to appeal applications and appeals…' A court charged with the adjudication of an application for an execution order would be astute to avoid a multiplicity of applications.

[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Courts must be the guardians of their own process and be slow to avoid a to-ing and fro-ing of litigants.[7] The high court's order achieved that end. A proper case had been made out by HSF and FUL for anticipatory relief. The high court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallize the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point.

[7] In *Copthall Stores Ltd. v Willoughby's Consolidated Co. Ltd.* (1)1913 AD 305 at 308, this court stated that it has an inherent right to control its own judgments, and in the light of the circumstances of each case to say whether or not execution should be suspended pending an application for special leave to appeal. See also *Fismer v Thornton* 1929 AD 17 at 19.

[33] There is a further point taken on behalf of General Ntlemeza that requires only brief attention. The high court's order was handed down on 12 April 2017 and the reasons for the order were provided on 10 May 2017. It was submitted on behalf of General Ntlemeza that since s 18(4)(i) states that a court must immediately record its reasons for ordering 'otherwise', the high court by not doing so was in contravention of a peremptory provision, which must be seen in conjunction with the provisions of s18(4)(iii) that provides that the court hearing the automatic appeal must deal with it as a matter of extreme urgency. The consequence, so it was contended, was that General Ntlemeza was frustrated in asserting his constitutionally guaranteed right of access to court. It appears to be suggested that this somehow nullified the proceedings related to the application for leave to execute the principal order. It must be pointed out that General Ntlemeza filed his notice of appeal in this court a day after the order upholding the application for leave to execute was issued, on 13 April 2017. The application for leave to appeal in relation to the principal order was filed on 21 April 2017. General Ntlemeza's notice of appeal was amended on 11 May 2017, after the high court had provided its reasons. The present appeal was heard on 2 June 2017. Far from being frustrated, General Ntlemeza has had a speedy hearing. Furthermore, since the order to execute was suspended pending the finalisation of the present appeal, no prejudice appears to have been occasioned. Simply put, the purpose of s 18(4) namely, to ensure a speedy appeal, was achieved. That being said it would be a salutary practice to provide reasons *pari passu* with the order being issued.

[34] That leads us to a consideration of whether the high court in granting the order to execute had due regard to the relevant provisions of s 18 and applied them correctly.

[35] Section 18(1) entitles a court to order otherwise 'under exceptional circumstances'. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of s 18(1) is required 'in addition', to prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order *and* that the other party will not suffer irreparable harm if the court so orders.

[36] In *Incubeta Holdings & another v Ellis & another* 2014 (3) SA 189 (GJ) para 16, the court said the following about s 18:

'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not "exceptional circumstances" exist; and
- Second, proof on a balance of probabilities by the applicant of –
    - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
    - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

[37] As to what would constitute exceptional circumstances, the court, in *Incubeta*, looked for guidance to an earlier decision (on Admiralty law), namely, *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C), where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts. However, at 156H-157C, the court said the following:

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[38] In *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016), para 9, this court stated that it was immediately discernable from ss 18(1) and (3) that the Legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by the requirement of s 18(4)(i); that the court making such an order 'must immediately record its reasons for doing so'. I interpose to state that the reasons contemplated in s 18(4)(i) must relate to the court's entire reasoning for deciding 'otherwise' and must therefore also include its findings on irreparable harm as contemplated in s 18(3).

[39] In *UFS,* this court agreed that whether exceptional circumstances were present depended on the facts of each case. The circumstances must be such as to justify the deviation from the norm.[8] The high court, in deciding the application in terms of s 18(1), after referring to *Incubeta,* went on to consider the facts. It took into account that the DPCI was an essential component of South Africa's democracy and that given its functions, it was vital that the National Head had to be someone of integrity. In this regard it considered the judicial pronouncements of Matojane J to be crucial.

[40] Before the high court, counsel on behalf of General Ntlemeza had submitted that HSF, FUL and the high court itself had not taken into account the remarks of Tuchten J in his judgment declining to grant an interim interdict pending finalization of the application to have General Ntlemeza's appointment declared unlawful.[9] It was contended that those remarks had the effect of neutralizing the negative judicial pronouncements of Matojane J.

[41] It is apt at this stage to pause and consider the remarks made by Tuchten J. He considered Matojane's adverse comments, referred to in para 8 above, and the accusation that Matojane J had met privately with the legal representatives of one party. According to Tuchten J, these statements had 'distressed' Matojane J.[10] Tuchten J considered the further negative findings by Matojane J, referred to in

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[8] *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016) para 13.
[9] *Helen Suzman Foundation & another v Minister of Police & others* (GP) unreported case no 23199/15 (19 April 2016).
[10] Ibid, para 25.

paras 9 and 10 above, which were based on events related to the application for leave to appeal and the 'counter-application'. He said the following (para 27):

'It is difficult to understand how the conduct of [General Ntlemeza] in relation to the application to put the main judgment into force pending appeal could have a bearing on the ground of appeal.'

He went on to state (para 66):

'I do not think that in *Sibiya*, in relation to the application for leave to appeal and to put the order into operation pending the appeal, I would have judged [General Ntlemeza] as severely as did Matojane J. I think one must make some allowance for an aggrieved litigant. In addition the preposterous conclusion to which [General Ntlemeza] came regarding the probity of the learned judge was probably fueled by absurd legal advice. [General Ntlemeza] and probably one or more of his lawyers jumped to a wholly unjustified conclusion. But that, as I see it, does not necessarily, or even probably, prove a lack of integrity.'

[42] To the submissions by counsel on behalf of General Ntlemeza in relation to the remarks of Tuchten J, referred to in para 41 above, the high court responded as follows:

'[General] Ntlemeza and the Minister sought leave ... to appeal the *Sibiya* judgment and leave to appeal was refused. The Minister thereafter petitioned the Supreme Court of Appeal against Matojane's judgment in which he made remarks about General Ntlemeza. The Minister's application for leave to appeal was dismissed….'[11]

Later the court said:

'It is our considered view that those remarks which constituted the foundation upon which the applicants launched the main application themselves constitute exceptional circumstances as envisaged by s 18(1) of the Act.'[12]

[43] In adjudicating the application for leave to execute the principal order the high court considered General Ntlemeza's prospects of success on appeal in relation to the finding that his appointment was unlawful. It concluded that the findings by Matojane J which reflected negatively on General Ntlemeza were a major obstacle for him to overcome and held that his prospects of success were 'severely limited'.

[11] Para 14.
[12] Para 16.

[44] *In UFS,* this court, after considering that *Incubeta* had held that the prospects of success in the pending appeal played no part in deciding whether to grant the application, preferred the contrary approach of the court in *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* (WCC) unreported case no 20806/13 (1 April 2016). However, in *UFS*, in deciding the matter before it, this court recorded that the review record was not before it and thus had no regard to the prospects of success. We are in the same position in the present appeal. As in *UFS*, but more so, because of the application for leave to appeal the principal order pending in this case, before us the question of prospects of success recedes into the background. As stated at the commencement of this judgment, s 18 has now had as a consequence the curious and ostensibly undesirable position that there are two appeal processes in one appeal court in relation to the same case.

[45] Before us it was submitted that the appellants had failed to show exceptional circumstances and that the high court had erred in deciding the contrary. I disagree, for the reasons provided by that court, referred to above, and those submitted on behalf of HSF and FUL. I agree with the remarks of the high court in relation to the pronouncements by Tuchten J. In my view he misconceived his role. He was not sitting as a court of appeal or review. His remarks do not, as suggested by counsel for HSF and FUL, have a neutralising or any other effect of disturbing the findings of Matojane J. The proper functioning of the foremost corruption busting and crime fighting unit in our country dictates that it should be free of taint. It is a matter of great importance. The adverse prior crucial judicial pronouncements and the place that the South African Police Service maintains in the constitutional scheme as well as the vital role of the National Head of the DPCI and the public interests at play, are all factors that weighed with the court in its conclusion that there were exceptional circumstances in this case.

[46] The high court turned its attention to the requirements of s 18(3), namely the irreparable harm that would be suffered by either party. It took into account the submission on behalf of General Ntlemeza that removal from his office, ‘even if it is momentary’ would be a devastating blow to his ‘long and unblemished’ career. The high court held that the damage that had been done was not as a consequence of

the main application but because of the findings of Matojane J, and stated that it failed to see how the enforcement order would wreak the harm General Ntlemeza complained would be occasioned. It took into account that he continued to be paid his full salary and that he still had the possibility of vindication by way of an appeal, should it ensue as a result of a favourable outcome of his petition and a subsequent appeal to this court. Before us, counsel for General Ntlemeza appeared to restrict himself to the contention that General Ntlemeza was suffering reputational harm. But given the findings of Matojane J, the submission that being kept out of his office occasions him reputational harm does not withstand scrutiny. I may add that General Ntlemeza sought to appeal against the judgment of Matojane J, but his petition to this court failed. In the result, the findings by Matojane J are no longer susceptible to reconsideration.

[47] Insofar as the requirements of s 18(3) are concerned the high court cannot be faulted for its approach in respect of the question of irreparable harm to General Ntlemeza. On the other side of the coin there is the public interest and the crucial place that the DPCI enjoys in our young democracy as set out above.[13]In my view the high court cannot be criticized for concluding that HSF and FUL had proved, on a balance of probabilities, that the public will suffer irreparable harm if the court does not grant the order, and that General Ntlemeza will not suffer irreparable harm in light thereof.

[48] For completeness, it is necessary to record that Minister Nhleko, the decision-maker in relation to General Ntlemeza's appointment, made common cause with him in his opposition to the challenge by HSF and FUL. The Minister of Police and General Ntlemeza applied for leave to appeal the judgment. On 11 April 2017 Minister Nhleko's successor, Minister Mbalula, withdrew the application for leave to appeal and tendered costs. The present Minister played no part in this appeal. Simply put, the present Minister did not seek to defend Minister's Nhleko's decision to appoint General Ntlemeza.

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[13] *Helen Suzman Foundation & another v Minister of Police & others* (GP) unreported case no 23199/15 (19 April 2016) para 30.

[49] Even though the present appeal is being pursued by General Ntlemeza in his personal capacity, it became apparent towards the end of proceedings before us that his case was funded by the State. The propriety of that course is beyond our scrutiny. There is of course no reason in the present case for a costs order to attach in any other way than personally.

[50] It must by now be apparent that the appeal is bound to fail. The effect of the order that follows is that the high court's execution order set out in para 16 above remains extant with the consequence that General Ntlemeza is unable to return to his post pending the final determination of the present application for leave to appeal and/or any further appeal processes in relation to the merits of his appointment.

[51] For all the reasons aforesaid the following order is made:

1 The appeal is dismissed with costs including the costs of two counsel.

2 The appellant is ordered to pay the costs personally.

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M S Navsa

Judge of Appeal

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