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

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

WITNESS STATEMENT IN TERMS OF RULE 3.4 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY

AFFIDAVIT: JACOBUS PETRUS PRETORIUS and APPLICATION TO CROSS EXAMINE WITNESS MR BOOYSEN

I, the undersigned

JACOBUS PETRUS PRETORIUS

do hereby state under oath as follows:

1.

1.1. I am an adult advocate employed by the NPA and presently working at the NPA Head Office at VGM building, Creswell Street, Weavind Park, and Pretoria.

1.2. The facts herein contained fall within my personal knowledge, unless otherwise indicated or appearing from the context, and are true and correct.

INTRODUCTION:

2.

I have been notified in terms of Rule 3.3 of the Rules of the Commission on the 9th of April 2019 that the Commission's legal team intend to present the evidence of Mr JOHAN WESSEL BOOYSEN (Booysen) during the proceedings on the 15th of April 2019 or as soon thereafter as his evidence may be heard, and further that his evidence implicates me or may implicate me in unlawful, illegal or improper conduct. I have been informed further that I may attend the proceedings and that I may be assisted by legal representation when the witness gives evidence. I have also been notified that I may decide to give evidence myself, call any witness to give evidence or cross-examine the witness (BOOYSEN). It has, however, been stated that should I wish to participate in the manner aforesaid, I have to apply in 14 calendar days in writing to the Commission for leave to do so. I was informed further that such an application has to be accompanied by a statement from me in response to the allegations of Booysen in his statement.

3.

The evidence of Booysen on the 2nd and 3rd May 2019 before the Commission confirmed my concerns and persuaded me that it is absolutely necessary to request the opportunity to participate in the proceedings, give evidence and cross-examine Mr JOHAN WESSEL BOOYSEN. I base my request on the following:

3.1. I deem it my duty as a citizen of the Republic of South Africa to assist this Commission to establish the true facts relating to issues of national interest that are being investigated. The true facts should be presented to the Commission and both sides should be heard; this is this basis of the audi alteram partem rule. This, with respect, should be coupled with cross-examination.

3.2. The untrue allegations by Booysen have and will continue to have serious and detrimental consequences for me. It will not only destroy my reputation and dignity but will also have a harmful effect on my career and profession as a State Advocate in the employ of the NPA. It already has. In all probability, if left unchallenged, it will give rise to investigation into my fitness to hold office and disciplinary proceedings against me.

4.

To discover the truth and reliability of the allegations by Booysen, it is imperative to have the evidence of Booysen tested by counsel properly instructed by client(s) or by myself who has/have personal knowledge of the factual allegations testified to by the relevant witness (es).

My concern is that if the untested allegations of Mr JOHAN WESSEL BOOYSEN are accepted, my fundamental rights relating to my integrity and freedom of trade, occupation and profession will be destroyed without ever having had the

opportunity to defend myself. I am advised in this regard, and as a lawyer I know, that it will affect my right to be heard which is a basic pillar of my right to fair proceedings.

5.

I thus herewith apply to the Commission to cross-examine Booysen and give evidence to the Commission.

6.

I therefore provide the Commission with this statement in order to identify the material disputes and the grounds for such disputes between my version and the allegations put forward by Booysen in his statement.

GENERAL RESPONSES TO ALLEGATIONS BY BOOYSEN AGAINST AND IN RELATION TO ME IN SECTION RULE 3.3 NOTICE

7.

7.1. I deny that I improperly and/or unlawfully sought to unduly interfere in the investigative independence of the NPA the Directorate for Priority Crime Investigations ("DPCI") commonly known as the Hawks and/or the South African Police Service ("SAPS").

7.2. I further deny that I unduly declined and/or delayed and/or obstructed recommended prosecutions. I have never declined and or delayed any

prosecutions relevant here and was never involved in the obstruction or delay of any prosecutions as alleged.

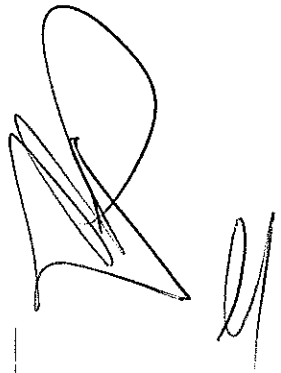
7.3. I further deny that I participated in the undue persecution of officials of the NPA, the Independent Police Investigative Directorate ("IPID"), and/or the DPCI. I never persecuted anybody in my life and in a proper structured fashion, the dockets relating to *inter alia* Robert McBride ("McBride"), Ivan Pillay ("Pillay"), and others were presented to me and I, *bona fide*, independently, with no fear, favour, or prejudice, and always in accordance with the duties of my office, decided on the facts presented to me at the time. The necessary checks and balances were part of the system and other persons were also involved in evaluating the dockets. For instance I provided a copy of a docket regarding Mr McBride to the nodal point with the Commission, Adv C Macadam, which bore out this principle. If, on the facts, a prosecution could not be sustained, I would decline to prosecute in the specific instance. I deny that these were unsustainable prosecutions. I deny that my actions were politically driven and that these decisions were malicious prosecutions. My representation to the President is attached to my affidavit as **Annexure A** as well as the answering affidavits that are relevant to the cases **Annexure B** that provide insight into the merits of the prosecution.

7.4. In regard to the inadmissible hearsay where Mr. Booysen wants to act as conduit for inadmissible hearsay relating to the Breytenbach-, Ivan Pillay,

and other prosecutions it needs to be stated that these decisions were taken independently and properly with no ulterior motive and *bona fide* on the facts.

7.5. I deny that I destabilized the NPA, the DPCI and/or the SAPS. On the contrary, I tried my utmost to do my job to the best of my abilities

7.6. I deny that I sought to enable the state capture of the criminal justice system.



SPECIFIC RESPONSES TO ALLEGATIONS BY BOOYSEN AGAINST AND IN RELATION ME IN HIS SECTION RULE 3.3 NOTICE

8.

8.1. It is stated in the notice that the evidence of Mr Booysen which implicates or may implicate me is set out in paragraphs 83 – 89, 102, 115 – 122, 137 and 230 of his statement and the annexures referred to therein.

8.2. **Ad paras 83 – 89**: I can state categorically that I have never been part of a malicious prosecution of *inter alia* Gordhan, Dramat, McBride, Sibiya, Pillay, Breytenbach, Johann van Loggerenberg ("Van Loggerenberg"), Ivan Pillay ("Pillay"), the Cato Manor detectives, Oupa Magashula ("Magashula"), Mathews Sesoko ("Sesoko"), Andries Janse Van Rensburg ("Janse Van Rensburg"), Gerhard Wagenaar ("Wagenaar") or Booysen himself. I deny that I was essentially designated through political manipulation to disrupt investigations into corrupt politicians and their associates by targeting individuals seized with those investigations. I did not even know one relevant person that was involved in investigating the specific corrupt individuals and never used that criterion to decide to prosecute or not prosecute any matter.

Ad para 84: I never acted with patent disregard for the Constitution and my oath of office. I never unlawfully withdrew criminal charges against certain individuals like Mabuyakulu, Nkoyeni, Mdluli, Jiba and or Panday. I

was not remotely involved. I never disingenuously contrived reasons not to prosecute certain individuals where *prima facie* cases exist. I challenge Booysen to name one such incident against me. And conversely, I deny that I prosecuted others where no *prima facie* evidence existed such as Sibiya and Dramat. I state categorically that I was not involved in their prosecution. The prosecution of Pillay, Magashula and (not just) Minister Gordhan, Breytenbach, McBride, and Booysen was done *bona fide* on the facts with no ulterior motive (compare answering affidavits **Annexure B**).

8.3. **Ad para 85**: The attack on the PCLU in paragraph 85 is unwarranted. It will be shown that properly in accordance with the law these matters were specifically and for good reason referred to the PCLU. (See **Annexure C**) Legislatively it was thus done on a proper and sound and logical basis.

8.4. **Ad para 86**: I had no knowledge of the so-called BOSASA matter, State Capture, and/or the Steinhoff matter at that time. The PCLU decided a number of matters relating to the GUPTAS that were relevant to the PCLU mandate and information will be provided to the Commission if required. The BOSASA matter, State Capture, and/or the Steinhoff matter did not remotely have anything to do with the mandate and was never presented to us and it would have been illegal for PCLU to investigate this without a mandate. Furthermore, we deny electing to focus on relatively "minor

cases" To depict the case against Pillay, Magashula and Minister Gordhan as a minor matter is a gross misrepresentation. If a minister is prosecuted and the effect is to have such "catastrophic" economic consequences as the deponent himself alleges, it is total misnomer to depict it as relatively minor matter. Public interest was taken into account before the final decision was taken, and the decision was taken without fear, favour or prejudice. See for instance paragraph 117 of the Mr Booysen affidavit where in total contradiction to the above depiction as a "minor offence" the incident is described as having a catastrophic effect on the country[1] and that we (the prosecutors) cannot go unpunished. (Compare paragraphs 57, 58 and 59 of **Annexure B**) This matter was specifically lawfully referred to the PCLU under the mandate and was anything but a minor matter. No case docket, investigation into any of the matters relating to BOSASA and or STATE CAPTURE as referred to here, was ever presented nor could I have deduced from the circumstances that these matters related to state security. I was unaware of the shocking corruption at BOSASSA for instance. It would have been illegal for me or anybody at the PCLU unit to investigate it, yet presently the deponent, Mr Booysen as well as top management at NPA blames the PCLU for this.

8.5. **Ad para 87:** Booysen's states: "*It is now public knowledge that the individuals mentioned above were all involved in sensitive investigations*

[1] This is referred to as "paper losses" see paragraph 57, 58 and especially 59 of Annexure B.

by the HAWKS and SARS respectively." [My emphasis]. The operative word is "now" as I was not aware of this at that time; without fear favour or prejudice I judged the facts that were presented to me. Never was I involved in a decision to prosecute any matter to prevent any person or anybody from investigating corruption.

8.6. **Ad para 88**: I deny ever forming part of what is now termed a "captured group". I was never captured by anybody, sovereign country, faction in ruling party, or any person or body. I never persecuted anybody in my life. The perception that I was part of a group that was in the forefront of investigations of individuals with political links to offset prosecutions of legitimate prosecutions is wrong, false, and deeply slanderous. The contrary is true and all the unprecedented vilifications and denigration of the prosecutors at the PCLU in the media, and other publications have a severely negative effect on not only the perception of the PCLU and the persons working at this unit but also the actual and honest work that my colleagues and I do every day. I was never involved in a malicious prosecution and I strongly deny that any action that was taken by me was politically driven.

8.7. **Ad para 89:** I never acted at the instance of anybody else who in turn did the bidding of the then-President, Mr Jacob Zuma, and/or Mr Mdluli or those associated with them. I do not know Mr. Mdluli. Adv Jiba was my senior at certain stages and her lawful instructions would have had to be

complied with. I never had any indication that there was an ulterior motive in any of her instructions to me. Booysen states: "*Some of the prosecutors that I believe have been captured by individuals with a vested interest in having investigations manipulated...*" I deny being a prosecutor that has been "*captured by individuals with a vested interest in having investigations manipulated*". On the contrary, I submit that Booysen has a vested interest in having the investigation against him manipulated so that he is not prosecuted.

8.8. Ad para 102:

8.8.1. This paragraph constitutes inadmissible hearsay evidence. He has years of experience in judicial proceedings. He gives himself out is an expert on racketeering and other legal matters. He is quite well aware that what he presents is hearsay, yet he still persists. The genesis of the prosecution in the SARS Rogue Unit prosecution is quite logical and nullifies any suggestion of an ulterior motive. Before certain disclosures about the so called "Sunday evenings" project were to be published in the newspaper, two witnesses (Mr Helgard Lombard and Johann De Waal) approached the Commissioner of SARS to inform him of the impending disclosures. Quite correctly they were channelled to the DPCI. An independent advocate from the bar, Adv. F Schnetler appeared for all the section 204 state witnesses

(more than 6 independent witnesses) and look after their interests. Their version is logical and accords with the probabilities. I have no reason not to believe these witnesses or to suspect an ulterior motive. There is real and tangible evidence, like eavesdropping equipment (bugging devices), transcriptions that correlates exactly with the meetings that were held by Scorpions in regard to the Selebi prosecution at that stage, and documentary evidence that corroborates the above. There is in fact no reason not to believe these witnesses. This is a matter for the Courts to decide and not trial by media.

8.8.2. In regard to the formal complaint by Van Loggerenberg, this was referred by the NDPP to an independent DPP, ADV JOHAN SMIT of the North West and the Deputy National Director Adv. Silas Ramaite. They found no substance in the complaint. Contrary to the allegation of dishonesty from our side (the prosecutors) the applicants lied under oath where they state "*...in my case in particular no warning statement was ever sought from me in respect of* ***any of the charges that I now face.***" See discussion in regard to paragraph 120 infra.

8.9. **Ad paras 115 – 122 generally:** From paragraph 115 to 122, Booysen launches a personal attack on me as a prosecutor and I respectfully submit that I therefore have the right to cross examine this witness.

8.10. **Ad para 115**: It was not an aborted prosecution; the NDPP, in fulfilling his constitutional review function, decided against the prosecution since the *mens rea* could not be proven. This was partially based on a legal opinion of Symington, which was only provided by the Hawks after the decision to prosecute. (Vide Answering affidavit in regard to legal opinion).

8.11. **Ad paras 116 – 188**: The representations to the President is attached to affidavit as Annexure A and this provide the background why no inquiry was held.

8.12. **Ad para 119:**

8.12.1. Booysen states that fraud does not fall in remit of the PCLU. This is not correct. It is specifically stated in the Mandate of the PCLU "...***such other priority crimes*** *to be determined by the National Director*." These matters were specifically referred to the PCLU (See **Annexure C**) and any common law or statutory offence can be prosecuted by the PCLU. I deny that the prosecution of Pillay, Magashula, and Minister Gordhan was an abuse of power and suggestive of a political motive. (See answering affidavits **Annexure B** paragraph 120 - 186).

8.12.2. The following statement: *"I understand from Sibiya that Pretorius also played a key role in the now aborted Rendition prosecution"* is again inadmissible hearsay evidence and slanderous as it is false. I strongly deny having any involvement in the so-called "Rendition Prosecution".

8.13. Ad para 120:

8.13.1. Once again Booysen is used as a conduit for inadmissible hearsay in that he is *"informed by Van Loggerenberg"* that Van Loggerenberg, Pillay, and Janse van Rensburg have lodged complaints of dishonesty against me at the NPA. I deny this. On the contrary, I alleged dishonesty on Van Loggerenberg's side.

8.13.2. The statement in the formal complaint founding affidavit[3] is the following: *"...in my case in particular no warning statement was ever sought from me in respect of **any of the charges that I now face.**"* [My emphasis]. This is false. Consider the indictment in this instance (**Annexure D**); 3 pages of the indictment set out in detail the provisions of the Strategic Intelligence Act 39 of 1994, with a focus on section 3. Something Van Loggerenberg was specifically referred/

[3] See paragraph 55 of formal complaint where they refer to par 46 of the founding affidavit. Stated pertinently under oath that "In my case, in particular, no warning statement was ever sought from me in respect of any if the charges that I now face"

confronted with and questioned about in the warning statement. Thus to alleged dishonesty on our side not correct. The answers in the answering affidavit were specifically framed: compare Paragraph 117. The prosecution specifically referred to the warning statements (these statements are attached as Annexure FA 3 of the founding affidavit as "I" "N" and "V") Thus the warning statements themselves would have been before the Court. There could never have been an intention to mislead. It is also specifically stated "*The Summons served on the First Applicant refers to charges emanating* ***from the same act.*** (This is with reference to the Corruption Act.)

8.14. **Ad para 121:** It is most peculiar who would have provided a very recent confidential internal memorandum of the NPA to Booysen. This legal opinion was drafted after the new NDPP, Adv Shamila Batoyi, took office and reviewed all the decisions of the PCLU. I studied the position as the Acting Head and I responded and supported the prosecutors that work with me at the PCLU in regard to the CATO Manor investigation and prosecution. I did not merely assume that they were not appointed by the Minister of Justice. Therefore I provided and opinion and evidence to the contrary. (See Annexure **E**.) This was provided to the head of NPS, adv. Sibongile Mzinyathi on the 20 March 2019 (See **Annexure F**) Before this

opinion I had very little to do with the CATO MANOR/BOOYSEN prosecution and how this "ex post facto" legal opinion could have influenced Mr Booysen to view me as being captured remains a mystery. As to the legal opinion which is attached to this affidavit (**Annexure E**) with the contrary legal opinion of Adv Macadam (**Annexure G**) who replaced me as the head of the PCLU. He is also acting as the nodal point of this commission. With respect I should be allowed to cross examine on this confidential internal memorandum that was leaked at a very late stage to the witness Booysen and on which he based his subjective opinion.

8.15. As to the legal opinion I am still of the belief that it is absolutely correct that the Prosecutors that was appointed by the Minister for the extra ordinary situation in Kwa Zulu Natal (alleging a hit squad in the police), where inter alia a woman was killed notwithstanding the fact that she obtain not just an interim order but a final interdict that police should not kill her, and she was still killed - was done legitimately. With respect the contrary legal opinion without knowing all the facts is wrong. With respect his contrary opinion brings the new leadership of the NPA under a false impression. Why this opinion that was provided *ex post facto* proves that I am captured is beyond me and I request to cross examine the witness.

8.16. Ad **para 122**: I deny that I have "allowed" myself to be "deployed as a lightning conductor" to "deflect attention for those in the coalface of the malicious prosecutions." I never shrunk from my duty and never tried and

was never requested to deflect attention from anyone. I support the prosecutors that work with me and I have no ulterior motives in my conduct of supporting them.

8.17. **Ad para 137:** It is stated that I have "contributed to invent cases" against Dramat Sibiya, Pillay, Breytenbach, McBride, Van Loggerenberg, members of Cato Manor and Booysen. I have never invented any case against anybody. The dockets that were submitted to me were legitimate dockets, properly initiated at the SAP and properly presented to the management that had to decide on the facts at that time. It is further stated that it was done to "disrupt legitimate investigations by abusing state machinery and processes." I deny every wanting to disrupt legitimate investigations. I never had any ulterior motive in deciding any case that was presented to me. On the contrary, PCLU and other units' legitimate investigations and prosecutions were disrupted by incessant applications and unfounded allegations against us and prevented the COURTS from deciding the facts. Effectively, the case has been prevented to be decided by the courts for a number of years. I also deny ever undermining or violating the Constitution.

8.18. **Ad para 230.1:** Booysen states that it is "incontrovertible" that I *inter alia* protected certain political connected individuals from facing justice. And then to investigate and "persecute" those who investigate those politicians and their associates. In this paragraph it is stated categorically that I am

part of captured faction. This, with respect, is a direct and "incontrovertible" attack on me and I should be allowed to cross examine this witness. I vehemently deny ever protected certain politically connected individuals from facing justice. People against whom there are legitimate cases must face justice and it is for the Courts to decide on the evidence. I never investigated anybody and persecuted anybody because they investigated corrupt politicians.

8.19. **Ad para 230.2:** Booysen states that I "actively or tacitly promoted state capture." I never shielded anybody from criminal sanction and never actively or tacitly promoted state capture. My whole career is built and attests of my commitment against state capture in any format. I also deny that any of my actions (or inactions, for that matter) ever eroded the capacity within the NPA to deal with large scale corruption and organized crime. Large scale corruption and organized crime never resorted under the PCLU, was never brought to my attention, and I had never had any reason to initiated inquiries because the above touches state security. Contrary to what is stated by Booysen, it actually will take many years to restore the damage done (if ever) by wantonly attacking the institution like the PCLU and persons at the NPA by Booysen and his collaborators.

8.20. **Ad para 230.3**: In 230.3 it is stated that it defies logic that HAWKS, SAPS and NPA have spent more than 5 years wasting valuable scarce resources to persecute innocent loyal hard working Public Servants in order to protect corrupt politicians and other state officials from

prosecution. The NPA was prevented from providing evidence to court for more than 5 years on legitimate investigations that goes to the heart of the independence of the NPA. (For example, eavesdropping by the Executive on most sensitive meetings.) It is only the courts that must judge who is innocent or not. Valuable resources were wasted in answering applications against us. I never took any decision in order to protect corrupt politicians and other State Officials from prosecution. The deponent deliberately follows a strategy to conflate the situation that it is our fault that corruption was not addressed.

8.21. **Ad para 230.4:** In answer to the submission that our conduct comes down to Racketeering under the Organized Crime Act, my response is that the incessant wanton attacks on the institution of PCLU and persons working at the NPA, constitute unlawful acts against NPA and a transgression of act section 32 (1) (b) of the NPA Act ,

Section 32 of NPA ACT, ACT 32 OF 1998: Impartiality of, and oath or affirmation by members of prosecuting authority *state the following:*

(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.

Booysen et al are improperly interfering and hindering and obstructing the exercise of our duties and functions and also preventing the courts from deciding the facts by their incessant wanton attacks on the institution and the PCLU in particular.

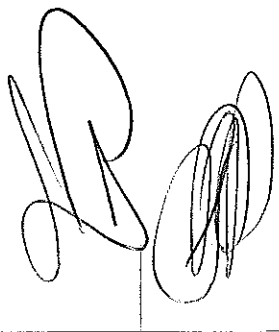
8.22. **Ad para 230.5**: I never sought to protect former President Zuma, Mabuyakhulu, or Nkoyeni. The courts must decide the facts and, with respect, it should not be allowed that cases be decided through media ("trial-by-media") and political books.

8.23. **Ad para 230.6**: It is clear that Mr Booysen just accepts that I am part of a "captured group" and "we" must be removed. On the contrary, these unfounded attacks on institutions like the NPA or specialist units that deal with difficult and controversial cases, will undermine democracy. Booysen has an interest that he should not be prosecuted and is playing politics by referring to the recovery of the economy and serious crimes. Again, the facts in regard to all these case have to be decided by the courts and not trial by media and through books.

8.24. **Ad para 230.7:** Many careers in the NPA have been ruined by wanton and unfounded attacks of the "faction" that wanted, at all costs, to prevent any prosecution of themselves (McBride, O Sullivan, Van Loggerenberg, etc)

and blamed and created the narrative of a captured PCLU. The compounding effect of their malicious acts can never be measured. Dedicated public servants, including those implicated in Booysen's testimony, have to spend endless hours to try and clear our names and to battle the wide brush of allegedly being captured.

8.25. **Ad para 230.8:** I was not part of any of previous litigation mentioned in para 230.8 regarding Booysen but the request of the scrapping of his case from the role was during my tenure and the state was successful in this matter. The quest for justice in a factional time frame is very complex and the nuances in factional situation must be decided by the Courts after all the evidence which have been properly tested has been presented. Just to blame the prosecutors of the PCLU and stating they are guilty is not correct. Countless hours was spent to answer endless applications and motion proceedings with private counsel. This constitute wasted resources which could have made an enormous contribution in fighting crime and if it were left for the courts to decide the cases once evidence properly presented and tested by cross examination can prevent this trial by media. I never had two sets or rules.



RULES OF THE COMMISSION

9.

9.1. Rule 3.4 stipulates that an application in terms of sections 3.3.6 must be submitted in writing to the Secretary of the Commission within (14) fourteen calendar days from the date of the notice referred to in 3.3, and that the application must be accompanied by a statement from the implicated person responding to the witness's statement in so far as it implicates him.

9.2. With respect my statement identified the parts of MR BOOYSEN affidavit that are disputed and denied in regard to paragraph 83 – 89, 102, 115 – 122, 137 and 230 and I also ventilated my version as the grounds on which those parts are disputed and denied. I am indeed an implicated person and in his *viva voce* evidence the witness also identified me as such on more than one occasion.

9.3. It is submitted that my application to cross-examine Mr Booysen is in the interest of the work of the Commission. If my application is granted the Commission will have both side of the incidents and it will enable the Chairman to have a full picture of the position so that he can take into account the extent of divergence in the two versions. With respect a proper case for granting leave to cross examine Mr BOOYSEN has been made out at a time suitable to the Commission.

APPLICATION FOR CONDONATION

10.

10.1. Immediately when I received my notice that I would be an implicated person, I approached my employer to appoint counsel to represent me. Initially the response was positive, but to date, nobody has been appointed. I am aware that there are negotiations with the commission by Marco Voller but no concrete concessions relating condonation has yet been made as on 14th June 2019. Therefore, I deem it my duty to apply to give evidence and cross examine the witness Mr Booysen. I respectfully request condonation for the late filing of my affidavit and application but the reasons are as set out above for this unfortunate set of circumstances.

10.2. I therefore wish to emphasize that I dispute all of the allegations by Mr Booysen insofar as it is contradicted by what I have stated above.

10.3. Notwithstanding the fact that the notice that I am an implicated person allowed 14 days, I respectfully submit that I only received the complete statement through the website during the week of 13 – 17 May 2019, and therefore respectfully request the condonation of the late filing of my affidavit and request to cross-examine the witness Booysen. The moment I realized that it will still take a long time before counsel is appointed by my employer and consultations with all involved, I crafted this affidavit and got it commissioned.

10.4. I therefore request the Honourable Commission to allow my participation in the process and to indeed allow myself or my legal representatives to cross-examine Booysen in order to test the veracity and reliability of his version insofar as his version differs from mine.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 14th day of June 2019 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

AREA:

DESIGNATION:

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Annexure "A"

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

28 November 2016

E-mail: ntoeng@presidency.gov.za

Dear President,

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

Introduction:

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

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

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

3. The Presidency afforded us an opportunity to make written submissions why we should not be placed on suspension pending the outcome of an enquiry into our fitness to hold office in terms of section 12(6)(a) read with section 14(3) of the National Prosecuting Authority Act, Act 32 of 19888 ("the NPA Act"), for which I am grateful.

4. In compiling these submissions to the Honourable President and in an attempt not to unduly burden this representation I accept the following:

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

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

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

GENERAL REMARKS:

5. It appears that the complaint by FUL and HSF and their request for an enquiry and suspension are based upon a complete wrong understanding

of the legal principles, a failure to appreciate prosecutorial policy and duties and by enlarged upon speculation.

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

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

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

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

9. This approach will, with respect, lead to a situation that the President becomes the mere rubberstamp of the media. The President is accused of acting irrational insofar as he indicated any need to investigate the true

facts before he exercises his discretion in terms of the Constitution and relevant Legislation.

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

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

Approach:

11. I respectfully submit that the suspension of senior officials of any governmental department and in particular of the NPA is a very serious matter. It should clearly only be considered in exceptional circumstances and only in the event that there are at least clear indications, based on

objective facts, not mere speculation, of serious misconduct by the relevant officials. The principle of a presumption of innocence should surely also apply in these circumstances. Only in the event that there is evidence of a danger of prejudice to the office of the NPA and/or the administration of Justice and our criminal Justice system should suspension not be ordered will it be justifiable.

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

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

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

Preliminary procedural issue:

15. I was appointed by the Minister of Justice as the ***Acting*** Special Director of Public Prosecutions in terms of section 13(3) of the National

Prosecuting Authority Act 32 of 1998 (NPA Act). The provisions of section 12(6) of the NPA Act, allowing the President to provisionally suspend the NDPP or a Deputy National Director from his or her office pending an enquiry into his or her fitness, is thus not applicable to me. Notwithstanding the aforementioned, I will address the concerns regarding my fitness to hold office.

Structure:

16. By and large the attack on me (as well as Abrahams and Mzinyathi) turns on – and the crux of the matter is – whether there was a basis in law and fact to institute criminal proceedings against the abovementioned persons. From the content of the mentioned letter it appears as if the complainants actually only based their request for an enquiry and our suspension on the prosecution against Minister Gordhan. I will firstly address whether there was sufficient evidence to prefer charges against Gordhan and whether those charges were sustainable in law. Secondly, I address the specific paragraphs of the letter addressed to the President are answered in sequence. The allegations contained in FUL and HSF's application[1] have been addressed in the litigation papers referred to above.

1. See paragraph 4 on page 2 of ... and annexure A to that. Notice of motion and founding affidavit attached as Annexure A.

Mandate to deal with the case:

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

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

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

Factual basis:

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

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

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

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

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

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

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

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

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

Legal basis:

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

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

> *"14.3.3 Members with 10 years and more pensionable service-*
>
> *(a) ...*

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

(My emphasis)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33.1. **Ad paragraph 10:**

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

33.2. **Ad paragraph 11:**

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

33.3. **Ad paragraph 12:**

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

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

33.4. **Ad paragraph 13:**

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

33.5. **Ad paragraph 14:**

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

33.6. **Ad paragraph 15:**

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

Personal information:

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

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

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

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

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

Consequences of suspension:

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

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

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

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

Conclusions

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

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

J P Pretorius

Acting Special Director and Head: PCLU

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION;PRETORIA

CASE NO:87643/2016

In the matter between :-

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

And

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

FILING NOTICE

DOCUMENT: **2nd, 3rd and 5th RESPONDENTS' ANSWERING AFFIDAVIT**

ON ROLL: **24 NOVEMBER 2016**

FILED BY: **2nd, 3rd and 5th RESPONDENTS' ATTORNEYS**

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 87643/16

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

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

ANSWERING AFFIDAVIT OF SECOND, THIRD AND FIFTH RESPONDENTS

I, the undersigned,

SHAUN KEVIN ABRAHAMS

do hereby make oath and state as follows:

INTRODUCTION

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

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

3 This application concerns prosecutions instituted against the Minister of Finance ("**the Minister/Gordhan**"), Mr. Ivan Pillay ("**Pillay**") and Mr. Oupa Magashula ("**Magashula**"). For convenience, and to the extent that the context requires, I refer to these individuals together as "**GP&M**."

4 The applicants contend that prosecutions ought not to have been brought in the first instance. In support of this contention, they make unsubstantiated allegations against me and the other Respondents. On

the basis thereof they contend that I and the other Respondents are not fit to remain in office, and that we should be suspended pending an enquiry. We dispute this.

5 For the convenience of the Court, I have quoted extensively from the documents upon which I rely in this answering affidavit, in particular, the documents which justified the decision to bring charges against GP&M.

6 The second to fifth Respondents oppose this application. I also depose to this answering affidavit on behalf of the fifth respondent. The third respondent files a supporting and confirmatory affidavit attached hereto marked Annexure "**SA1**" The fourth respondent is filing a separate affidavit. I understand that the first respondent also opposes this application.

7 A word about the third Respondent, Dr Pretorius ("**Pretorius**"), who made the decision to prosecute, in consultation with Mzinyathi, the Fourth Respondent. Pretorius, having received his LLB in 1981 from the University of Pretoria, obtained a Masters of Law at the University of London and an LLD at the University of Pretoria. He joined the Department of Justice in 1976, and has been employed in prosecution since then. He was an evidence leader at the Goldstone Commission. He was a member of the Scorpions and a former member of the Priority Crimes Litigation Unit. Since October 2015 he has been Special Director at the PCLU, in an acting capacity.

8 I observe that the Applicants make reference to "charges" having been laid against GP&P. That is not accurate. In fact, a summons was issued for them to appear in Court. A charge would be formally laid only in Court. Nonetheless, to minimize confusion, I have in this affidavit followed Applicants' usage of the term in its loose sense.

THE APPLICATION IS NOT URGENT

9 The applicant offers no more than broad-brush generalised reasons why this matter should be heard as a matter of urgency. The applicant's *per se* based upon the fact that the second, third and fourth Respondents occupy senior positions in an important organ of state falls short. One finds no claim that for them to remain in place until such time as the application is heard in the ordinary course would hinder, scupper or prejudice any particular ongoing or pending prosecution.

10 It helps not for the applicant to anticipate "potential" harm. The burden is upon the applicant to set out *particular* facts that establish an *actual or well-grounded* apprehension of irreparable loss if no relief is granted. It is trite that the degree of abridgment of times and deviation from Rule 6 of the Uniform Rules should be no greater than the necessary exigency of the case. One must carefully analyse the facts of each case to determine the degree of urgency for purposes of setting down the application for hearing.

11 The aforementioned principles were articulated in the well-known and often quoted decision in Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers) -1977 (4) SA 135 (W):

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

12 Applicants have fallen short. They allege that they are "a proven severe threat to the economy", and that I may "repeat my misconduct by bringing further ill-conceived charges in the near future." That is patently inadequate.

13 Similar language and unconvincing allegations were made in the application brought by the first applicant against Ms Jiba. Having made these allegations, the first applicant's urgent application was struck from the roll for want of urgency. Ms Jiba remained in office as the Deputy National Director of Public Prosecutions. The sky did not fall. In fact the first applicant, dragged its heels, notwithstanding their forebodings as to what was likely to happen if Jiba remained in office while the President was considering whether to suspend her.

14 Here, the applicants railroaded the matter into court, gave the President six days to suspend the Respondents and hold an enquiry, without the

Respondents having a reasonable opportunity to respond to the allegations, after having sent to the President the entire application in the earlier application brought to have the charges set aside as irrational (under Case No. 83058/16) in this Court. The affidavits in that matter, with Annexures, ran to some 198 pages.

15 It has been held that:

> "Practitioners would be well advised to be more realistic and to afford State departments a more reasonable time in which to file affidavits." In Re Several Matters on the Urgent Role 2013 (1) SA 549 (GSJ), para 17

16 Wepener J held that Applicants who abuse the court process should be penalised, their applications struck off the roll, with costs.

17 It is our respectful submission that the same result should follow here. For it was unreasonable in the extreme to expect the President to deal with this matter within a period of six days, including weekends, and at a time when it was reported in the media that he travelled outside the country. And when he did not comply, the applicants immediately, the next day – no doubt having prepared this application in anticipation of the President not complying within such a short period – launched it and claimed urgency.

Jeopardising "dozens of critical prosecutions"

18 The applicants say that our remaining in office would jeopardise "*dozens of critical prosecutions and investigations daily.*" But applicants have not

identified the prosecutions and investigations upon which they rely – nor have they suggested the basis on which they say we would jeopardise those. They effectively urge the Court to assume that, by virtue of Respondents being prosecutors, prosecutions and investigations will ipso facto be jeopardised.

19 The applicants are simply unhappy with the fact that a decision was made to prosecute the Minister. Assuming incorrectly that the decision to prosecute was unsustainable, they infer that, were the Respondents to remain at their posts, they would prejudice future prosecutions and investigations. This *non sequitur* cannot warrant the hearing of this application on an urgent basis.

"Rogue" Unit investigation

20 The applicants say that they fear that the Minister and others may be charged in respect of the rogue spy unit investigation. What is surprising is that they do not say why they should not be charged if there is a case against them to answer. It is implicit in paragraph 155 of the founding affidavit that the applicants are suggesting that any charges arising from the SARS rogue unit investigations would be ill-conceived. The investigation is not complete and no decision has been made one way or the other. However, it is patently clear that the real objective of the applicants in this application is to ensure that no charges are preferred against the Minister arising from the SARS rogue unit, irrespective of the merits of any such charges.

21 I emphasise that I have stated publicly that such investigation is still on-going. It is only once the investigation has been completed that a decision to prosecute or not to prosecute would be made. Until then, the Court should not allow the applicants to justify the hearing of this application on an urgent basis on speculation.

22 The fact that a decision to prosecute might be made does not justify the hearing of the application on an urgent basis. Furthermore, this does not justify the suspension of the prosecutors.

Destruction of Economy

23 The suggestion that R 50 billion was wiped out of the stock exchange or that it is going to be wiped out again if the Minister is charged in relation to the rogue spy unit investigation is based on speculation. There is no merit on this. I do not understand the markets to operate on the basis that a Minister should not be charged with an offence if there is evidence of wrongdoing on his part. One can only speculate as to how the markets are going to react when the circumstances which led to the charges being laid are now made public when this answering affidavit is filed in Court. The markets clearly cannot condone the burdening of the taxpayer with the penalty which Pillay ought to have paid himself by way of reducing his pension benefits – instead this penalty was paid on his behalf by SARS because the Minister said so, and not because it is lawful.

Allegation that President's "failure" to act warrants urgency

24 There is no merit in the ground that the President's failure to suspend and institute an enquiry must be addressed without delay.

25 The applicants' contention in this regard ignores the fact that the President has not failed to decide. The President has not refused to decide, nor has he refused to institute an enquiry. The President has simply asked for more time to consider the matter.

26 The President's request for more time to deal with the matter is not unreasonable. It is the applicants who were unreasonable by giving the President three working days to arrive at a decision favourable to them in circumstances where the President remains obliged to give us an opportunity to make representations as to why we should not be suspended.

27 Insofar as the application and the grounds of urgency are based on the fact that the President has not yet favourably answered the applicants' request, then the urgency was self-created once again to create negative atmosphere against the government and its institutions. The Court should not create a precedent by allowing this type of conduct to serve as a basis for hearing applications on an urgent basis.

Redress at hearing in due course

28 I deny that the applicants are not going to obtain substantial redress at a hearing in due course.

29 Applicants baldly state the conclusion that "*substantial redress cannot be obtained in due course*" and that this "*conclusion is fortified by the fact that the issues raised in this matter strike at the heart of our constitutional democracy …*" In addition, the applicants say that the reputation of the NPA would suffer irreparable harm if the matter is not heard on an urgent basis.

30 The allegations that the reputation of the NPA would suffer prejudice are unfounded. At the heart of the complaint against the bringing of charges against GP&M is the allegation that the charges were politically motivated or that they have been brought in order to pursue a political agenda. I am not a politician. The other Respondents herein are also not politicians. We have nothing against the Minister. We have no interest as to where the Minister is deployed or is not deployed. The prosecutors were not influenced by any politician to bring the charges.

31 The Minister is a politician. He is in the best position to tell the Court if there is anyone in politics who is politically against him and who would have influenced the bringing of charges against him. He has not mentioned any names nor has he himself stated under oath that the prosecutors were influenced by this. The applicants who purport to speak for the Minister must in their replying affidavit bring the evidence of political interference or withdraw the allegations.

32 In the 25 October 2016 application in the Gauteng Division, Pretoria (Case No. 83058/16), which is no longer being pursued following the

withdrawal of the charges, in which the applicants sought an order that the charges against GP&M be withdrawn, the applicants advanced similar contentions of political interference - based also upon media speculation.

Next move against the Minister

33 In paragraph 162 of their founding affidavit, the applicants say that I am "*already contemplating his next move against Min. Gordhan and, indeed, the economy and the already-shattered reputation of the NPA.*" There is no merit in this reckless allegation. This is the type of unfounded allegation which casts unnecessary doubt on the NPA. If the value of the Rand is affected by such speculations, then the applicants are themselves guilty of the very conduct of which they accuse us.

34 I am not contemplating any move against the Minister. The decision whether the Minister should be prosecuted would be made once the relevant investigation has been completed. The NPA is not going to be held to a ransom by civic organisations such as the applicants in order to prevent prosecution where there is a basis to prosecute.

35 If the investigation reveals that there is a basis to prosecute, I have no doubt that the relevant prosecutors will take the appropriate decisions and take public interest into account.

36 The Court should not be pressed into hearing this application on an urgent basis, simply because there is a fear that the Minister is or is not going to be charged. The Minister is not the only person in this country

who is the subject of an investigation. The fact that he is the Minister does not justify the hearing of this application on an urgent basis.

37 In the premises, the application ought to be struck-off the roll with costs including the costs consequent upon the employment of three counsel.

THE APPLICATION IS PREMATURE

38 I have made the point above that the application is premature and that the applicants must simply wait for the President to make the decision which they have requested him to make. It is only once the President has refused to make the decision that the matter would then be ripe to be brought to Court for adjudication. Until then, the matter is not ripe for judicial review.

39 The President has not been given a reasonable opportunity to apply his mind as to whether or not he should act in terms of section 12(6) of the NPA Act. The notice of motion, in paragraph 1 challenges the "the failures, *alternatively*, refusal by the first respondent" to take steps under section 12(6)(*a*) of the NPA Act. But the President has in no sense *refused* to invoke his section 12(6) powers. Nor can he properly be said to have *failed* to have exercised those powers. Effectively, the applicants are abusing the process by attempting to stampede the exercise of a weighty discretion without affording either the opportunity for those affected to make representation, nor for the President properly to apply his mind.

40 The applicants' demand to the President came on 1 November, stating:

"*Please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr Abrahams, JP Pretorius SC and S Mzinyathi from their office, pending enquiries into their fitness to hold office as contemplated in section 12(6)(a)", read with, inter alia, section 14(3) of the National Prosecuting Authority Act, 1998, and that you will forthwith institute such enquiries.*" (para 17)

41 The demand was acknowledged by way of a letter in which the Presidency stated that the demand required a proper investigation, that would take until 21 November.

42 A letter from the applicants, (a copy whereof is attached to the founding affidavit as Annexure **FA13**), rejected the extension request. This application was lodged on 9 November, setting the matter down to be heard on 22 November.

43 On 14 November, the President addressed letters (attached hereto together as **Annexure SA2),** to the Second, Third and Fourth Respondents, requesting that we make representations as to why we should not be suspended, by 28 November. We are in the course of preparing same.

44 It would be inconsistent with our rights to be subjected to suspension and enquiry without the opportunity properly to state our case. The consequences of suspension are not trivial. As has been recognized by the courts, detrimental reputational consequences will almost invariably

follow a suspension, more so when unfounded serious allegations are made such as in this case.

45 Moreover, the suspensions may persist for a long duration, especially if the outcome of the investigation is subject to judicial review and potentially subsequent appeals. Reference will be made at the hearing of this matter to a case that remains pending in the Pretoria High Court, in which FUL challenged the decision of the President not to suspend Ms Jiba as Deputy National Director of Public Prosecutions. Pending final relief, FUL sought to have her suspended and further prevented from discharging her functions as a member of the National Prosecuting Authority. Dismissing the application for interim relief, Prinsloo noted that it was not possible to anticipate when the main application would be finally determined, and that it might result in an appeal process years into the future:

> "The impact of such relief, if it were to be granted, on the lives and careers of [the individual Respondents], let alone the NPA, is obvious." (Freedom Under Law v NDPP (Case No. 89849/15) (19 Nov 2015), para 26.)

46 The applicants appear unaware of the disruption in prosecutorial functions that could result from the steps they are demanding. Significantly, they have accepted that we "occupy positions at the very heart of the NPA's ability to function effectively to fulfil its constitutional mandate." The applicants' suggestion that there would be no harm if I

were suspended because the previous NDPP, Mr Nxasana, has indicated that he is willing to return as NDPP (para 120), is entirely frivolous. It is frivolous because the second applicant, Freedom Under Law, is also the second applicant in Case No. 62470/15 in this Honourable Court. In that case they, together with Corruption Watch NPC seek to review a settlement agreement pursuant to which Mr Nxasana left office.

47 They have cited me as a respondent in that matter. I mention that I was not involved at all in the termination of Mr Nxasana's appointment as NDPP. However, what is pertinent here is that in the founding affidavit, the second applicant makes reference to an enquiry which was instituted by the President against Mr Nxasana under section 12(6), although he was not suspended. When the enquiry commenced, it was immediately terminated and the settlement agreement was entered into. However, in the founding affidavit, Freedom Under Law makes reference to the allegations against Mr Nxasana which prompted the section 12(6) enquiry. They are aware of these allegations and yet now support his reappointment as NDPP. Irrespective of the settlement agreement, they are invited to tell this Honourable Court whether they honestly support his reappointment, taking into account the allegations against him of which they are aware, notwithstanding the content of his settlement agreement.

SEPARATION OF POWERS

48 The relief which the applicants seek would violate the doctrine of separation of powers which this Court has consistently protected. Directing the President to suspend employees of a constitutional institution would clearly violate the doctrine of separation of powers.

49 As I have stated above, the position would have been different if the applicants were asking the Court to direct the President to consider the matter within a reasonable time which time allows the affected parties a reasonable opportunity to be heard before the decision is taken.

50 The Constitutional Court has observed:

> *"Although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."*

51 This caution is pertinent in this instance because the section 12(6) power is exclusively vested in the President, who necessarily exercises a wide discretion, with an irreducible political component in this regard.

52 There is nowhere to be found in the applicants' papers an allegation that the President's decision under section 12(6) of the NPA Act constitutes administrative action. That is because it is clear that the power, being a corollary of the power to appoint, is quintessentially executive action. As

the Constitutional Court has held: "*It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government.*" (Masethla v President of Republic of South Africa, 2008 (1) 566 (CC), para 77).

53 It was necessary for the President to apply his mind in similar fashion when in late 2015, the Democratic Alliance invoked section 12(6)(2), in demanding that he takes steps against Advocate Jiba. Ultimately the Cape High Court dismissed their application. Dolamo J's words in his judgment are apposite:

> "*Unwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution. While the President is empowered by section 12(6)(a) to take swift action when necessary to allay concerns about the integrity of the NPA or when the conduct of the DNDPP is called into question, he however, cannot do so without due consideration for all the relevant factors and circumstances. In this respect, he would call for, be guided by and rely on people who have intimate knowledge of the facts and their surrounding circumstances. He will be in a better position to exercise his discretionary powers on receipt of appropriate advice.*" [Citation para 88]

54 The judgment vindicates the President's decision *in casu* to await representations from the Respondents before exercising his decision. Dolamo J wrote that the President would also need to consider the other side of the story:

> "*Relevant factors which the President would consider would include inter alia, Adv Jiba's response to the criticism which had been levelled against her.*" [Para 89]

EQUALITY BEFORE THE LAW

55 The applicants are not incorrect in their contention that this matter implicates concerns of great political and legal import.

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

57 The applicants submissions regarding the adverse economic impact of the decision to charge the Minister is just another way of arguing that those holding high government positions must be treated with kid gloves.

The Respondents submit that a court should in any event give no weight to speculation about the effect of the prosecutorial decisions upon the aggregate capitalisation of the Johannesburg Stock Exchange ("JSE.") Prices on that exchange are notoriously volatile, and responsive to any number of social, economic, and political developments, both domestically and internationally.

58 The applicants tell us that some R50 billion was wiped off the Johannesburg Stock Exchange the day that the charges were announced, 11 October 2016. But, like the applicants' other apocalyptic allegations, this should be seen in context. Consideration of the total capitalisation of the JSE affords some context. I refer to a table (attached hereto as **Annexure SA3**), reflecting that the total market capitalisation of the JSE in 10 October was about R1 trillion. As intimated by the applicants, this fell to some R950 billion by close of business the next day, 11 October. What the applicants elide is that by the next week, the market had recovered all of its losses, and was back up at R1 trillion. But by 11 November, the market had dropped to R920 billion - significantly below where it stood prior to my announcement.

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

60 I return to the principle of equality before law. That principle is enshrined in section 9(1) of the Constitution, whereunder all are equal before the law and have the right to equal protection and benefit of the law. Section 32(1)*(a)* of the NPA Act provides:-

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

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

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

63 Advocate Downer SC has written:

> "*Rule of law proponents want decisions regarding prosecutions to be as fair as possible. They want everyone who commits a crime to be prosecuted or not prosecuted equally, according to the same criteria. This means that they do not want prosecutors to decide arbitrarily to*

prosecute some people who commit crime, but not others who also commit similar crimes. In particular, they do not want the politically or socially powerful, those who have connections to the right people or groupings and those who are simply rich, to escape prosecution either because of their status or because they have the means to influence or control prosecutors."

"Prosecuting the powerful for serious offences is almost without exception the strongest prosecutorial imperative that trumps the other considerations of public policy."

ALLEGED ULTERIOR PURPOSE

64 For the reasons set out *infra*, based on the circumstances which led to the charges being brought, the decision to prosecute is eminently justified when tested against the threshold of prospects of success. That being so, all that remains is applicants' allegation that the prosecution was animated by improper purpose. By implication, it would appear that the alleged purpose was to serve the interests of the political function within the ruling party who are aligned against the Minister, and wish to see him removed from the Cabinet. That motivation is alleged in oblique and indeterminate language by the applicants; it is respectfully submitted that the court can attach no weight whatsoever thereto. I have dealt with vague, open ended allegations of political interference elsewhere.

65 But there is a further point. Even if the prosecution was animated by an improper purpose, that would not suffice to render the prosecution bad in

law. What is required, according to Harms DP is that the prosecution has used its powers for ulterior purposes.

66 Harms DP wrote:

> "*A prosecution is not wrongful merely because it was brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.*" [National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA), Para 37.]

67 Harms DP added:

> "*This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in High stead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others, illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits - they had enough exhibits already - but to put Highstead out of business. In other words, the confiscation had*

nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction, the reliance on this line of authority is misplaced as was the focus on motive."

68 Although the applicants herein have not expressly alleged bad faith they suggest that there has been political interference in the decision making process. We deny this.

69 I take umbrage at the allegation that I was implacably committed to pursuing the prosecution, and relented only in the face of external pressure. In point of fact, as I told Parliament in my 4 November briefing, at the time I considered considering whether or not to withdraw the charges, I encountered resistance from Lieutenant-General Ntlemeza ("**Ntlemeza**"), Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**") who strongly contended that the charges should not have been withdrawn.

70 I wrote to Ntlemeza on **17 October 2016** (in a letter attached hereto as Annexure **SA4**), advising that Magashula and Pillay had made representations in which they requested me to review the decision to prosecute. I invited Ntlemeza to make representation by no later than 19 October 2016.

71 In a letter of **18 October 2016** (attached hereto as Annexure **SA5**), Ntlemeza responded by saying that the DPCI would not be making any representations, but would await my decision.

72 On 30 October, a letter attached as Annexure **SA6** was hand-delivered to me. (It will be noted that the signature line incorrectly reflects 31 October; the NPA date stamp was affixed only 31 October.) I had hand-delivered to me received a letter from Ntlemeza saying:

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

We mention all these issues of which you are aware to highlight one issue: that it would be improper for you as NDPP to stall or withdraw the prosecution of the accused persons in this matter."

73 On **31 October 2016** (in a letter attached hereto as Annexure **SA7**), I informed Ntlemeza that I had reviewed the decisions to prosecute Magashula, Pillay and the Minister, having concluded that it would be difficult to prove intent beyond reasonable doubt. I indicated further that I would thereafter be responding more fully to him, as indeed I did on 8 November.

74 On **8 November 2016** (in a document attached hereto as Annexure **SA8**), I wrote further:

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

THE STRUCTURE OF NPA

75 An overview of the structure of the NPA is useful in understanding the distinction between the power to institute a prosecution and the

subsequent exercise of the power to review and set aside, which is vested exclusively in the NDPP

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

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

78 A number of sections of the NPA Act deal with hierarchical appointments. Section 16 provides for the appointment of prosecutors. Section 20(1) states that the power to institute criminal proceedings contemplated in

s 179(2) of the Constitution "vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

79 Section 20 subsets (2)-(5) provide as follows:-

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

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

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

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

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

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

(b) such offences and in such courts, as he or she has been

authorised in writing by the National Director or a person designated by the National Director.

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

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

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

81 As will be argued at the hearing, this broad empowerment does not authorise or mandate the NDPP to continually insert himself into initial determinations to institute prosecutions.

THE NDPP'S POWERS OF REVIEW

82 Section 179(5)(d) of the Constitution, which empowers me as the National Director, when requested, to review a decision to prosecute or

not to prosecute. After consulting the relevant Director; and after taking representations, within a period as specified by me, from the accused persons, the complainant and any other persons or party whom I consider relevant.

83 This is in line with the provisions of section 179(5)(d) of the Constitution, read with section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 (the "NPA Act"), to review a decision to prosecute and to decide whether to continue or discontinue a prosecution.

84 The NPA receives representations from accused persons and/or their legal representatives in respect of matters in both the lower and High Courts, which are submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, the DPP Offices and/or to Special DPPs.

85 Since my appointment in June 2015, I have reviewed numerous cases. In giving effect to my constitutionally entrenched review powers I have overruled the original decisions of Directors of Public Prosecutions and/or Special Directors to prosecute or to discontinue prosecutions in more than 16 instances. I have also agreed with the original decisions of Directors of Public Prosecutions and/or Special Directors in 97 matters.

86 Whilst I have the power to institute a prosecution, I would only do so in very rare instances. If I made a decision to prosecute, it would not be competent for me to review my own decision in terms of the Constitution or the NPA Act. (In National Director of Public Prosecutions v Zuma 2009 (2) SCA 277 (SCA) at 305, para 70, Harms DP said: "Section

179(5)(d) does not apply to reconsideration by the NDPP of his own earlier decision but is limited to a review of a decision made by the DPP or some other prosecutor for whom a DPP is responsible.")

87 Section 24 of the NPA Act sets out the powers, duties and functions of Directors and Deputy Directors. Section 24(1) provides as follows:-

> "*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.*"

THE RELIEF WHICH APPLICANTS SEEK IS NOT COMPETENT

88 In this application, the applicants seek, in the main, an order in terms of which the alleged President's "*failures, alternatively, refusal*" are

reviewed and set aside. If this relief is granted, then in that event, the applicants seek certain mandatory relief against the President.

89 All of the relief which the applicants seek is not competent in law for the following reasons:

No failure to decide, or refusal to decide

90 In a letter dated 1 November 2016, the applicants requested the President to suspend me and to conduct an enquiry into my fitness to remain in office. In this letter, the applicants gave the President until 7 November 2016 to "*please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr. Abrahams …*"

91 It therefore appears that what the applicants want from the President is a decision to suspend me and the other Respondents and then conduct an enquiry into our fitness to remain in office. It is this decision which they say the President has failed to take or has refused to take. There is no merit in the applicants' suggestions in this regard. The suggestions are factually incorrect.

92 In a letter dated 7 November 2016 attached to the applicants' founding papers as **FA12,** the President requested the applicants to grant him "*an extension until 21 November 2016*" to respond to their letter.

93 The President further said that his extension would give him "*a proper opportunity to address what no doubt is a serious matter with the affected*

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

94 It is clear that the President has not failed to take a decision. Nor has he refused to take a decision. On the contrary, on the evidence attached to the applicants' own founding papers, the President has asked for more time to consider the applicants' request and to address the request, which even on the applicants' version is a serious matter, "*with the affected parties in anticipation of any action he may contemplate ...*"

95 In the light of the above, the President has not failed to take a decision and has not refused to take a decision. The review relief is therefore, premature. The applicants cannot in law seek to review a decision or a failure to take a decision whilst the relevant processes are still in progress. The applicants must wait for the President to say: I refuse your request or they must wait for a reasonable time to lapse before they contend that there has been a failure to take a decision (within a reasonable time).

Legality review is not competent

96 In their founding affidavit, the applicants seek to review the alleged failure and refusal to take a decision on the ground that the alleged failure and refusal "*are irrational and unlawful.*"

97 Insofar as the applicants rely on alleged irrationality, the relief which they seek can only be granted under what is now referred to as legality

review, i.e. judicial review other than in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

98 The decision which the applicants requested the President to take is a decision which they say must be taken in terms of the provisions of the NPA Act.

99 Insofar as the President is required to take a decision in terms of the NPA Act, such a decision would, once taken, constitute administrative action in terms of section 1 of PAJA. Similarly, the failure to take a decision in terms of the NPA Act would constitute an administrative action in terms of section 1 of PAJA. This being the case, judicial review of these administrative actions can only be conducted in terms of section 6 of PAJA and not under legality review.

100 In view of the fact that the decision and the failure to take a decision in issue would constitute an administrative action in terms of section 1 of PAJA, it follows that PAJA applies and legality review is not available in circumstances where PAJA applies.

101 The applicants cannot ignore PAJA and seek to rely on legality review where PAJA applies. In the premises, the relief which the applicants seek is not competent and the application ought to be dismissed with costs.

If relief is sought in terms of PAJA

102 Even if it may be assumed, in favour of the applicants, that the relief which they seek is sought under PAJA, the relief is still not competent in law for the reasons which I set out below.

102.1 Firstly, no administrative action has been taken. PAJA applies only if an administrative action has been taken. In this case, no administrative action has been taken.

102.2 The President has simply asked for more time to consider the applicants' request. This does not constitute an administrative action as defined in section 1 of PAJA and it is not reviewable. If that constitutes an administrative action, then in that event, that is what the applicants should be seeking to review – as it appears from their notice of motion, they do not seek to review the President's decision to request more time to deal with their request.

102.3 Secondly, the President has not failed or refused to take a decision for purposes of sections 1 and 6 of PAJA.

103 Section 6(2)(g) of PAJA of PAJA provides that a Court has the power to judicially review an administrative action if the action concerned "*consists of a failure to take a decision*." This is not what happened in this case.

104 Section 6(3) of PAJA provides that if a person relies on section 6(2)(g) as a ground of review, such a person may, in respect of a failure to take a decision, where there is a duty to take a decision but there is no time prescribed for taking the decision (such as in this case), institute judicial

review proceedings on the ground that there has been an unreasonable delay in taking the decision. This is not what happened in this case. There has not been an unreasonable delay on the part of the President.

105 The applicants' request for the President to take a decision and respond to them within a matter of three business days is not only unreasonable but it is also irrational. The time frame prescribed by the applicants suggests that the President only has the applicants' matters to deal with and does not have other matters of the State to deal with. It also suggests that I and the other Respondents do not have a right to make representations to the President before the decision in issue is taken.

106 The applicants' unreasonable time frame prescribed for the President to take a decision to respond to them fails to take into account that I and the other Respondents are entitled to make representations to the President as to why we should not be suspended and why an enquiry into our fitness should not be held. For this purpose, the President must give us a reasonable time to make such representations. We would object to the President giving me a mere two days to respond to such an important matter.

107 The applicants clearly only have themselves to blame for not having received a response from the President – they simply have not given him time to consider their request and for him to give me and the other Respondents a reasonable opportunity to make representations as to why the President should not take the decisions they want the President

to take. This process on its own may take its own time depending on the issues which the President may want the other Respondents and me to respond to.

108 The time for the President to make a decision or to refuse to make a decision is still to come. It is premature to pre-empt the President's decision in this regard because such a decision can only be taken after I and the other Respondents have exercised out rights to make representations and to show cause why we should not be suspended and why the President should not agree to the applicants' request.

109 In relation to the above, the applicants have attached to their request to the President, founding papers in an application to which the other Respondents and I have not yet filed answering papers. In such founding papers, they make allegations of political interference, political influence and the like. The allegations of "*sinister ulterior purposes*" and "*political agenda of others*" are repeated in the present application. We are preparing a full response to the applicants request to the President to invoke section 12(6) and this will be submitted to the President. However, the fact that the applicants have repeatedly raised the issue of "*ulterior purposes*", "*political agenda*", "*political interference*" and "*political influence*", means that it is important in the decision they want the President to make. These are assertions which have been made purely as conclusions but where there are no facts to support this. In order to respond to these allegations, we would request the President to obtain from the applicants the evidence upon which this is based, other than

media hype. We must be placed in the position to meaningfully respond thereto.

Suspension and enquiry relief

110 As far as this relief is concerned, the applicants seek an order in terms of which the President is directed to suspend me and the other Respondents and then hold an enquiry into our fitness to hold office. This relief is not competent.

110.1 Firstly, this relief is not competent due to the fact that it depends on the review relief referred to above and I have demonstrated that the review relief is not competent for the reasons stated above.

110.2 Secondly, this relief is not competent for the following reasons:

111 The relief would result in the Court violating the doctrine of separation of powers. The decision to suspend and to hold an enquiry is vested upon the President. The Court has no power to interfere with the President's decision making process in that regard. At best for the applicants, the Court is competent to direct the President to consider whether or not to suspend and then hold an enquiry.

112 Section 12(6) upon which the applicants rely does not impose a peremptory obligation upon the President to suspend and hold an enquiry. The section says that the President "*may provisionally suspend*"

which means that the President is entitled to consider whether on the facts before him, a suspension should be ordered.

113 The President cannot be divested of that power and should be allowed a reasonable opportunity to consider whether or not to suspend. The judiciary cannot step into the President's shoes and then decide for the President that a suspension and an enquiry should be held.

114 Section 12(6) also says that the enquiry which the President may direct is one which "*the President deems fit*" and not one which "*the Court deems fit.*" The relief which the applicants seek, as presently formulated, does not make any provision for the President to consider as to which type of an enquiry "*the President deems fit*" and the Court is also not asked to determine the type of an enquiry which "*the Court deems fit*".

115 Section 12(6)(e) deals with the question whether we should be paid a salary if we are suspended. The applicants are silent on this issue in the relief which they seek. This makes it even more impossible for the Court to grant the relief which the applicants seek because doing so would divest the President of the power to determine if we should be paid or not and if we should not be paid why we should not be paid.

116 On a proper interpretation of section 12(6) of the NPA Act, it does not prescribe the reasons for which the President may suspend. This being the case, the Court cannot prescribe reasons for suspension in circumstances where the Legislature left that issue to the President.

117 The fact that charges were brought against the three individuals and have been withdrawn does not mean that the prosecutors must be suspended. Otherwise, that would, for example, result in prosecutors being dismissed for not obtaining convictions on the argument that they should not have initiated prosecutions. That would result in an absurd situation.

118 In the premises, the application ought to be dismissed with costs including the costs consequent upon the employment of three counsel representing the second, third and fifth Respondents.

119 I now turn to deal with lack of urgency and then respond to the other allegations contained in the applicants' founding papers to the extent that it is still necessary to do so. Where necessary, I would expand on some of the issues dealt with above insofar as it concerns the basis on which I state that the relief which the applicants seek is not competent in law.

BACKDROP TO THE PROSECUTIONS

120 During September 2016, Sello Maema ("**Maema**"), a Deputy Director of Public Prosecutions in the National Prosecutions Authority ("**NPA**"), who is responsible for providing guidance for the investigation of the so-called Rogue Unit, briefed the NPA management on the alleged involvement of the Minister in the unlawful authorisation of the following:

120.1 Firstly, the payment by the SARS of Pillay's penalty to the Government Employee's Pension Fund ("**GEPF**"), which arose as a result of him taking early retirement. The penalty amount

was in excess of R 1.2 million. There is no dispute that this amount was paid by the SARS on behalf of Pillay in circumstances where Pillay ought to have paid this amount himself by way of reducing his pension benefits as provided for in the Rules of the GEPF.

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

120.3 Thirdly, the approval of Pillay's early retirement in circumstances where the intention behind such early retirement was to gain access to pension benefits for purposes of providing educational funding for Pillay's children and his reappointment at the same time – once the basis for him accessing the pension benefits had been created.

121 If there is nothing wrong with the above, there is no reason why the government does not allow all of its employees who are struggling to pay university fees for their children, to notionally take early retirement and then get reappointed at the same time so as to enable them to obtain access to their pension benefits to fund the university education of their children.

122 Maema's briefing revealed that:

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

122.2 In 2009 after Gordhan had been appointed as the Minister of Finance, Pillay submitted a memorandum dated 27 November 2009 to Magashula attached hereto as **SA9**, who was the Commissioner for SARS at the time ("**the first retirement application**").

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

"*PURPOSE*

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

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

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

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

RECOMMENDATION

My recommendations are that you please:

- *take note that I intend to take early retirement*
- *consider to approve that I be appointed in a different capacity in SARS on a contract basis; and*

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

123 What is clear from the above quoted memorandum is the following:

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

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

123.3 Pillay was fully aware that the ordinary consequences of his decision to take early retirement were, amongst others, that he himself would have to pay a penalty to the GEPF for his early retirement and it is for this reason that he then asked SARS "*to pay on behalf*" of himself the amount of R1 292 732,68 as opposed to him paying the penalty himself from his own personal funds by having his pension benefits reduced

124 Also, in 2009 Pillay wrote directly to the Minister where he made a different request to approve his application for early retirement for different reasons ("**the second retirement application**").

125 In his undated memorandum attached hereto as **SA10** motivating the first retirement application, Pillay said the following to the Gordhan:

"Dear Pravin,

PURPOSE

The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve/recommend certain related matters that will flow from my decision to take early retirement.

DISCUSSION

I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day and indications are that this situation will prevail for the foreseeable future.

In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am

of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you will consider to approve that immediately after my early retirement, appoint me to my current position but as a contract employee. No legal provision prevents you from making such an appointment.

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

Ministers can approve that employers (Departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF Rules.

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

126 In the above quoted memorandum:

126.1 Pillay states correctly that what "*I am doing … has nothing to do with my work at SARS*";

126.2 Pillay appreciates that "*there is a penalty payable in terms of the benefits*" for the early retirement which he has decided to take and that "*my pension benefits will be reduced by 14.4%*";

126.3 Pillay is wrong in saying that section 16(6) of the Public Service Act was amended to enable government employers to pay penalties on behalf of their early retirees. The correct position is that the penalty is imposed by the Rules of the GEPF and the relevant Rule has never been amended to do that which Pillay asked the then Commissioner at the time, Gordhan, to do;

126.4 Pillay further says that whatever decision he has taken (to take early retirement) is intended to provide him with funds for purposes of paying for the education of his children which funds "*can be raised by means of a bank loan, but which would be*

prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day ..." It is therefore clear from this that Pillay simply wanted the taxpayers to save him from the ordinary financial hardships which he was facing and to which all taxpayers were exposed.

126.5 The first retirement application was not approved. It is not clear why it was not approved.

127 The fact that Pillay was fully aware of the aforesaid financial implications of his decision to take early retirement is also apparent from the contents of the so-called Symington memorandum. In this memorandum, which is dated 17 March 2009 (which is a date long before the date of Pillay's above quoted memorandum dated 27 November 2009) Symington said the following:

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

...

... However, if the minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably all together be withdrawn." (own emphasis).

128 The following is apparent from the Symington memorandum:

128.1 It is dated 17 March 2009 and it is addressed to the Commissioner for SARS.

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

128.3 What Symington is saying in his memorandum is simply that Pillay's decision to take early retirement is not financially sound unless:

128.3.1 the Minister of Finance (at the time Trevor Manuel) approved the payment by SARS of the benefit penalty to the GEPF the payment of which would have been triggered by Pillay's early retirement; and

128.3.2 the Minister of Finance also approved that SARS should at the same time enter into a post-retirement contract of employment with Pillay.

128.4 Symington did not say that it was lawful for the Minister and Magashule to burden the taxpayer with Pillay's penalty in excess of R 1.2 million levied upon him as a result of his decision to take early retirement – which decision was clearly a ruse to enable him to access his pension benefits to fund the education of his children. At the end, the SARS ended up financing a big portion of Pillay's children's education as stated in the affidavits to which I refer below.

129 The effect of the above is simply that in order to ensure that Pillay's early retirement did not result in financial prejudice to him, SARS had to pay the benefit penalty to the GEPF. It then entered into a post-retirement employment contract with him, otherwise, according to Symington, Pillay's decision to take early retirement would not have been financially sound.

130 It is for this reason that Symington made it clear in his memorandum that unless the Minister of Finance approved the whole package, i.e. early retirement, payment of the benefit penalty by SARS on behalf of Pillay, and post-retirement employment of Pillay by SARS (without advertising the position), Pillay would have had to forget about taking early retirement and would have had to raise finance for the education of his children differently.

131 At the time when the prosecutors decided to charge GP&M they did not have the Symington memorandum in their possession. The Symington

memorandum was provided to me when the applicants wrote to me on 14 October 2016 and attached it as an annexure.

132 The other document which the prosecutors had in their possession is a letter dated 12 August 2010 from Magashula, (reflecting the third application from Pillay), who at the time was the Commissioner for SARS, addressed to Gordhan. In this letter, Magashula motivated the early retirement of Pillay with full retirement benefits as follows:

> *"1. PURPOSE*
>
> *The purpose of this memorandum is to request approval from the Minister for the early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits from the GEPF as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act, 1994…*
>
> *In addition, approval is requested to retain Mr. Pillay as Deputy Commissioner of SARS on 3 year contract with effect from 1 September 2010.*
>
> *2. BACKGROUND*
>
> *…*
>
> *Ivan has always excelled at his job and made a significant contribution towards the establishment of SARS as the highly respected organisation it is today.*

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

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

3. MOTIVATION FOR RETIREMENT WITH FULL BENEFITS

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

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

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

4. MOTIVATION FOR REAPPOINTMENT ON A 3 YEAR CONTRACT

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

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

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

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

5. FINANCIAL IMPLICATIONS

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

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

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

134 The recommendations were approved by the Minister on 13 October 2010. It is worth noting that the then Deputy Minister of Finance, Mr. Dhladhla Nene, did not approve the recommendation despite the fact that the memorandum made provision for his approval to be obtained. I understand that it is also part of internal requirements in government that a Minister approve a recommendation only after the Deputy Minister has applied his mind to it. This did not happen in this case.

135 The prosecutors also had in their possession the following documents which they considered when they made the decision to bring the charges in issue:

Affidavit of Nico Johan Coetzee

136 The affidavit deposed to by Nico Johan Coetzee who was previously employed by the South African Revenue Service is attached hereto as **SA11**. There are other documents attached to this affidavit and I refer to them individually below.

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

138 Coetzee further states that:

"

4

I awaited the approval by the Minister of the request by Mr. Pillay. In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the office of the Commissioner, Mr Oupa Magashula. The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr. Ivan Pillay's early retirement. The reasons on the revised memorandum were that Mr. Pillay wished to go on early retirement in order to enable him

to provide for his children's education and not as I have previously stated that he wished to pursue other interests. I raised concerns to the Commissioner through the e-mails dated the 8th and the 9th October 2009 respectively, that if the Minister should approve Mr. Pillay's application on the grounds of personal interest may create a precedent in terms of which, other employees might come forward with similar request for early retirement."

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

"Hi Oupa

Luckily for me I have dealt with this matter during June this year but I do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr. Pillay's latest request. It is not unusual that a retired employee is re-appointed after retirement in a contract capacity. <u>What may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement</u>. Ordinarily such a re-appointment will be to a different and a lower-graded position. It will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar applications for early retirement, both which were not

approved by the Minister as the Minister could not find sufficient reason to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has consider if SUFFICIENT REASON exists to approve Mr. Pillay's early retirement ..." (Own emphasis).

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

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

to assist him to be able to provide for his children's education, with a R340 000 "contribution" from SARS." (Own emphasis).

Pillay's contract of employment

140 Pursuant to Magashula's recommendation, the Minister approved Pillay's early retirement and re-appointment. The approved re-appointment was to be for a period of three years. The Minister also approved that Pillay's penalty to the GEPF be paid by SARS.

141 Despite the fact that the Minister approved Pillay's re-appointment to be for a period of three years, on 7 February 2011, Magashula and Pillay concluded a five year contract a copy of which is attached hereto as **SA12**. This contract was clearly not approved by the Minister and all the payments made in terms thereof were not lawfully authorised. Magashula and Pillay were fully aware of this illegality. They acted in contravention of the empowering approval given by the Minister to conclude a three year contract (even though that approval itself was unlawful).

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

143 Visser's affidavit which is attached hereto as **SA13** largely confirms that there was no business reason for SARS to pay Pillay's penalty.

144 Visser deals with other things in her affidavit, amongst others, the circumstances under which Pillay concluded an employment termination agreement with one Andries Petrus Janse Van Rensburg, referred to in the affidavit as Skollie. Of relevance for purposes of this application, Visser says the following:

> " *8*
>
> *Nic Coetzee and I were both uncomfortable with the request as it was for personal reasons and we could find no business reasons to pay the penalty on behalf of Mr. Pillay. We were requested to draft a memorandum to the Minister of Finance for his approval. Nic Coetzee and I both advised Mr. Oupa Magashula in the Commissioner's boardroom that it is not advisable to continue with the early retirement of Mr. Pillay because it was for personal reasons and not business reasons. We were also concerned that it could set a precedent whereby others could come and claim the same benefit. We informed him that no such case was recommended in the past as it was for personal reasons. He instructed us to continue with the memorandum.*
>
> ...
>
> *10*

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

11

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

145 Pillay's aforesaid contract was concluded in April 2014 – the very last year of the Minister's tenure as Minister of Finance. In view of the fact that Pillay's contract of employment signed in February 2011 was still valid and of full force and effect until February 2016, there was no lawful reason to conclude a new contract other than to unduly benefit Pillay with a further contract of employment for another period of two years after what would have been the end of his contract concluded in February 2011.

Statement of the Minister

146 In his own statement attached hereto as **SA14**, which statement was not made under oath, the Minister says the following about Pillay's early retirement and his approval thereof:

> "*15. Mr. Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.*
>
> *16. The then Commissioner of SARS, Mr. Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr. Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr. Pillay sought in this way to gain access to his pension fund to finance the education of his children. I understand that Mr. Magashula had established from enquiries made with the Department of Public Service and Administration that*

the terms of Mr. Pillay's early retirement and re-appointed were lawful and not unusual. I approved Mr. Magashula's proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr. Pillay had done in the transformation of SARS since 1995."

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

148 What the Minister does not say in his unsworn statement is the following:

148.1 The legal basis on which he approved the request that Pillay's penalty to the GEPF be paid by SARS;

148.2 The fact that the memorandum which he approved in 2010 does not say anything about Pillay wanting to access his pension benefits in order to provide for the education of his children;

148.3 That he became aware of Pillay's need for money to educate his children when he still worked with him whilst he was still the Commissioner for SARS;

148.4 Why he did not approve the request made to him by Pillay in 2008;

148.5 Why he considered it to be above board to approve the early retirement and re-appointment of Pillay in circumstances where he knew that upon early retirement, the position of Pillay had to be advertised to enable interested parties to apply to be considered for the position – and more so when Magashula resigned from the position of Commissioner for SARS pursuant to allegations that he offered a member of the public employment at the South African Revenue Service without following the prescribed recruitment procedures;

148.6 That he was in fact a party to the "*enquiries made with the Department of Public Service and Administration*" referred to in paragraph 16 of his statement. In this regard, in an e-mail dated 23 July 2010 attached hereto as **SA15** (and which was obtained only in the review process), addressed to the then Acting Director-General of the Department of Public Service And Administration, Magashula said:

"*Dear Kenny,*

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written

response to our discussion and the questions I posed yesterday …" (Own emphasis).

149 The reference to "*my Minister*" in the above quoted e-mail is a reference to Gordhan. It is clear from the above quoted e-mail that Gordhan was fully involved in the process leading to Pillay's early retirement. The enquiries referred to in his statement were made at his request, yet he does not say this in his statement.

150 In his aforesaid e-mail, Magashula did not enquire about the payment of Pillay's penalty to the GEPF or the legality of paying it. Of relevance for purposes of the charges in issue, he asked the following questions:

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

151 The response from the Acting Director-General of the Department of Public Service and Administration is attached hereto as **SA16** and it is silent on the question whether it was lawful for SARS to pay Pillay's

penalty to the GEPF. This response must necessarily be silent on this issue due to the fact that the issue was not raised. In fact, the response shows that what was asked in the discussion was the so-called Employee Initiated Severance Package, which is completely different from what Pillay wanted to do.

152 The Employee Initiated Severance Package was introduced into the public service in terms of a ministerial determination made by the Minister of Public Service and Administration. A copy of the relevant determination is attached hereto as **SA17** Paragraph 1 of this determination says that it is "*applicable to all employees appointed in terms of the Public Service Act, 1994, as amended.*" Pillay was employed in terms of the South African Revenue Service Act 34 of 1997 and the determination did not apply to him. Furthermore, the determination did not apply to Pillay due to the fact that in terms of paragraph 3 thereof, its purpose is to:

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

153 Pillay's application was in any event not made in terms of the ministerial determination referred to above.

154 What appears from the Minister's statement is that he was not a party to the process which led to Pillay's application for early retirement and re-appointment and that he only became involved in that process when he

was Minister of Finance. As demonstrated by the documents to which I have referred above, this is simply not true.

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

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

156 Section 16(4) of the Public Service Act, 1994 provides that an officer, other than a member of the services or an educator or a member of the State Security Agency who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service. Pillay had not reached the age of 60 years provided for in this section. This being the case, section 16(4) of the Public Service Act did not apply to him.

157 Section 16(6)(a) of the Public Service Act, 1994 upon which Pillay also relied in his aforesaid memorandum provides that an executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient

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

158 In his letter to the Minister referred to above, Magashula sought the Minister's approval in terms of section 16(2A)(a) of the Public Service Act 1994. This section provides that:

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

159 This section simply creates a right of a Public Service Employee to retire at the age of 55 years or after attaining that age. The executive authority's approval is not required for that purpose.

160 In his letter to the Minister, Magashula further relied on Rule 14.3.3(b) of the Rules of the GEPF. Rule 14.3.3 deals with members with 10 years and more pensionable service. Rule 14.3.3(b) provides that:

> "*(b) A member who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) and who has at least 10 years' pensionable service to his or her credit, shall be paid the*

benefits referred to in Rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date."(Own emphasis).

161 It is clear from Rule 14.3.3(b) that it only applies to a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e).

162 Rule 14.3.1(d) deals with a member who retires before his or her pension-retirement date but not on a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any Act which regulates his or her terms and conditions of employment. Pillay had a right to retire in terms of the provisions of the Public Service Act 1994 referred to above. Accordingly, Rule 14.3.1(d) is the one which applied to him.

163 Rule 14.3.3(b) to which reference has already been made above, provides that a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) shall be paid "*the benefits referred to in Rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date.*" This Rule applied to Pillay because in terms of Rule 14.3.1(b) he was retiring "*before his or her pension-retirement date in terms of the law governing his or her*

terms and conditions of service" being the Public Service Act to which reference has already been made above.

164 There is no provision in the Public Service Act, 1994, in particular in section 16 thereof, in terms of which provision is made for SARS to pay what Pillay himself described in his memorandum as "*the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules.*" Rule 14.3.3(b) of the GEPF Rules simply makes provision for the reduction of the pension benefits of a person who retires before his or her pension-retirement date and does not make provision for the employer of such a person to pay the penalty which is imposed in terms thereof.

165 When the prosecutors decided to bring charges, they clearly took into account that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement and education of his children.

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

167 In his aforesaid memorandum, a false impression is created that Pillay was to serve SARS in a "*different capacity*" where the demands of such a job will "*positively support the reasons why I am in the first instance*

taking early retirement." The reason given for early retirement is that "*my health condition is slowly deteriorating*" and "*my family responsibilities, for a long time, suffered on account of the dedication required by my job.*" Despite all of this, Pillay was at the very same time reappointed to the very same position from which he so desperately wanted to "*retire*".

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

169 In addition to the above, the fact that Pillay was reappointed at the same time that he went on early retirement clearly meant as far as the prosecutors were concerned, that the position of Deputy Commissioner of SARS, to which he was reappointed immediately was not advertised and other interested parties were not given an opportunity to apply to be appointed to that position. This would have been necessary due to the fact that at the very moment that Pillay took early retirement, his position of Deputy Commissioner became vacant and the position had to be advertised to give all interested parties an opportunity to apply for it. This was not done.

170 The applicants' reliance upon the provisions of section 17(4) of the GEPF Law, 1996; Rule 20 of the Rules of the GEPF; and the contents of the Government Employees Pension Fund Members Guide is not only incorrect, it is also misleading the public because the applicants' papers have been published for all to see.

Section 17(4)

171 Section 17(4) of the GEPF Law, 1996 deals with a situation where the employer or if any legislation adopted by parliament places an additional financial obligation on the GEPF. In that event, the employer or the government shall pay the financial obligation it has placed on the GEPF. This is not what happened in this case. The penalty obligation was imposed upon Pillay by the Rules of the GEPF and not upon the GEPF. The penalty obligation also did not arise from the employer's action or operational requirements – it arose from Pillay's early retirement.

172 Section 17 of the GEPF Law deals with the funding of the GEPF. The section does not deal with penalties which must be paid by employees who are taking early retirement. The section is clearly not concerned with penalties which the Rules of the fund impose upon retiring employees. The GEPF is not funded by penalties levied upon early retirees.

173 Section 17(4) makes it clear that it is concerned with any action taken by the employer or if any legislation adopted by parliament (places any additional financial obligation on the Fund) the person who places such an obligation on the Fund is then made responsible to pay the fund "*an amount which is required to meet such obligation.*"

174 In the case of Pillay, no obligation whatsoever was placed on the GEPF. On the contrary, the obligation was placed on Pillay to pay the penalty. In the premises, section 17(4) of the GEPF Law does not assist the applicants.

Rule 20

175 Rule 20 of the Rules of the GEPF similarly does not assist the applicants. Rule 20 deals with compensation to the GEPF on retirement or discharge of a member prior to attainment of the member's pension retirement date.

176 The Rule applies to a situation where a member "*becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement ... in terms of the Rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the Rules, and any of these actions result in an additional financial liability to the fund.*"

177 In this case, the GEPF did not attract *"an additional financial liability."* On the contrary, it is Pillay who attracted a penalty for himself. He, and not SARS, had to pay the penalty.

The Guide

178 The applicants' reliance on the Government Employees Pension Members Guide is completely wrong. The sentence quoted therefrom, is inconsistent with what is contained in the GEPF Law and the Rules of the GEPF.

179 It cannot be, as the applicants are suggesting that the guide supersedes the GEPF Law and the Rules. In any event, on any proper and rational interpretation of the guide upon which the applicants seek to rely, the

only situation which could be contemplated therein is where "*the employer granted permission for your early retirement*" for the employer's own operational reasons. There can be no basis on which the government should fund the early retirement of its employees in circumstances where that has nothing to do with the government's operational reasons.

180 In any event, the Minister, Pillay and Magashula did not rely for their actions on the provisions upon which the applicants now seek to rely. They did not rely on such provisions simply because they knew that such provisions did not apply. In addition, if these provisions were applicable, it would not have been necessary for Pillay and Magashula to motivate the payment of the penalty to the Minister – they would have told him that he must simply exercise his powers in terms of those provisions.

181 When regard is had to the above background and provisions of the GEPF Law and the GEPF Rules, it cannot be said that there was no rational basis to bring charges against the Minister, Pillay and Magashula. Furthermore, as demonstrated above, the applicants' reliance on Rule 20, section 17(4) and the GEPF Guide referred to above is clearly incorrect and cannot be used to justify the applicants' contentions that there was no rational basis to charge the aforesaid three individuals.

IN FRAUDEM LEGIS

182 When regard is had to the information which the prosecutors had in their possession, there was a rational basis to conclude that the early retirement transaction was *in fraudem legis* or that it was a classical simulated transaction.

183 A simulated transaction is one which is called by a name by which it is not. The parties thereto call it by a name which it is not and they do not implement it according to the terms which are communicated to the outside world – but it is implemented according to some terms that are kept between themselves.

184 In this case:

184.1 The outside world was told that Pillay took early retirement;

184.2 In fact and in truth, Pillay never retired;

184.3 Pillay remained in the very same position of deputy commissioner which, according to his first memorandum, he desperately wanted to retire from;

184.4 The GEPF was made to understand that Pillay was leaving the public service by way of an early retirement, when in fact he was not leaving the public service;

184.5 The transaction was concluded to enable Pillay to have access to his pension benefits to provide for the education of his children;

184.6 The early retirement transaction would not have been concluded if Pillay did not need to provide for the education of his children;

184.7 The Minister approved a three-year contract of employment; however, Pillay and Magashula concluded a five-year term contract commencing in February 2011 with the intended end date being in 2016;

184.8 The transaction was therefore, not a genuine, lawful and proper early retirement transaction because an early retirement transaction results in the retiree actually leaving the employment of the employer. It is common cause that Pillay did not leave the public service, nor was it intend that he would leave the public service.

185 Ordinarily, when a person retires and the position from which he or she retires requires to be filled, the position is advertised for interested parties to apply to be considered for it. When Pillay retired, if he retired at all, his position ought to have been advertised for interested parties to apply for it. The Minister as the custodian of public finances, ought to have satisfied himself that this was done. He did not because he knew that that is not what was intended to happen.

186 It is common practice that the charge of theft is always preferred as an alternative to a charge of fraud. I did not draft the charge sheet and I must admit that the charges could have been drafted more eloquently. The fact that the charges were not a model of clarity does not mean that

they were politically motivated or that there was no basis for them. Charges are in any event amended all the time and this cannot be excluded. Furthermore, the accused persons themselves could have raised this lack of clarity as an issue at the trial – it happens all the time and does not form a basis for the impeachment of the prosecutor, let alone the National Director of Public Prosecutions.

THE DECISION TO PROSECUTE

187 The final decision to prosecute was approved by the third and fourth Respondents.

188 The decision to prosecute was taken pursuant to a consideration of the available evidence at the time, which I have outlined above.

189 The applicants insinuate that I took the decision. I did not.

190 In my briefing to Parliament of 4 November, I made it clear that I was open to reconsidering the charges. In this regard, I said the following:

> *"I am more than willing to review any matter if somebody applies to me to review that matter. The decision to prosecute was made on the recommendation of prosecutors by the Special Director who heads the priority crimes investigation unit in consultation with the director of public prosecution is of North Gauteng."*

191 Oddly, the Applicants have mis-characterised this as *backpedalling*.

192 The argument that the non-availability of an opportunity to make representations prior to the institution of a prosecution indicates bias on the part of the decision-maker does not hold water. It is well within the discretion of a prosecutor to opt to consider representations after the institution of the prosecution. The provisions of s.179(5)(d) of the Constitution are unambiguous in this regard.

193 As we have seen, the Minister's attorney on 24 August demanded that he be informed of any future steps with respect to his client. I responded on 25 August that I would consider his request once the investigation was finalized. In a letter of 29 August (attached hereto as Annexure **SA18)** the Minister's attorney advised that he believed that the matter had now been finalized and stated that he wished to offer representations. To this, Pretorius on 5 September responded that it was he that would be making the decision, but that it was premature to make representations at that stage. However, Pretorius advised if the Minister did wish to interpose any comments, he should resort to a warning statement. This offer was never taken up by the Minister. Against that background, the allegation that anyone *reneged* on an undertaking to the Minister is not well taken.

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

195 In a 14 October 2016 letter (a copy of which is attached to the founding affidavit as **SA19**), the Applicants wrote:

> "*Should you not unconditionally withdraw the charges against the Minister or furnish the information sought [by 16:00 on 21 October 2016], our clients will assume that no reasons for the decisions, and no documents other than the documents annexed to this letter, exist in support of the charges*".

196 One of the documents attached to the applicant's letter was the Symington memorandum and this is the first time that this memorandum was brought to my attention and that of the prosecutions team.

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

198 The applicants' added:

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

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

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

201 The applicants' attorneys said that:

> "*The main reason for his decision [not to make representations] is that he does not have any confidence in the NDPP's ability or willingness to afford him a fair hearing.*
>
> *First, we repeatedly asked the NPA to afford the Minister an opportunity to make representations to them before they decided whether to prosecute the Minister but they spurned out request.*

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

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

202 Their conclusion that it would be futile for the Minister to offer representations is ill-founded. No reasons are offered for the Minister's lack of confidence in me. If the basis for his foreboding was that it was I who made the decision to prosecute in the first instance, that was, as shown herein, an erroneous assumption.

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

204 I responded to the applicants' letter on **17 October 2016**, (a copy of which is attached to the founding affidavit as **SA20**), confirming that the decision to prosecute was taken by Pretorius, not by myself; that I considered myself empowered to review the decision; that I had received

representations from Pillay and Magashula; and that the Minister should make representations by 18 October 2016.

205 By way of a letter to me dated **18 October**, (a copy of which is attached hereto as **SA21**) the Applicants reiterated that I had disabled myself from applying an independent and objective mind.

Representations Received

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

207 On 18 October 2016 those verbal representations were reduced to writing.

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

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

under the rules of the GEPF read together with the employment policies of SARS."

209 A copy of these written representations is attached hereto marked **SA22**.

210 On 18 October 2016 Magashula's legal representatives, Advocate PJJ De Jager SC reduced Magashula's representations into writing attached hereto as **SA23** and states the following concerning the Symington memorandum in particular:

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

211 As a result of these representations, I authorized further investigation of the matter, in particular because the import of the Symington memorandum was that Pillay, Magashula and similarly the Minister, lacked the necessary intention to commit an unlawful act. To that end, further statements were taken.

212 The Minister did not make representations, as Pillay and Magashula did. (The Minister, however, subsequently indicated that he aligned himself

with representations that had been included in the letter of the applicants of 14 October.)

Decision to Review the Charges

213 After affording all interested parties including the applicants in this matter, the DPCI, SARS, Pillay, Magashula and the Minister an opportunity to make representations, and considering the representations that were made by those who elected to do so, I then took the decision to review and set aside the charges on 30 October 2016.

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

215 I announced my decision at a press conference on 31 October; a copy thereof is attached as **SA24**. Once again, the essence of applicants' complaint is not so much that I decided to withdraw the charges, but the manner in which I made that decision known. My assessment was that, in light of the wide publicity the charges had attracted, coupled with the fact that they had been initially announced at a public event it was appropriate that the discontinuation of the prosecution be similarly made known to the public and the media.

216 The applicants disingenuously suggest that the withdrawal of the charges somehow vindicated their position and constituted an admission that the

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

AD SERIATIM

217 Prior to dealing with the allegations *ad seriatim* I wish to address the tone of the founding affidavit. It is somewhat difficult to answer, because so much is framed in language of high emotion and extravagant hyperbole.

218 There is also a great deal of *ad hominem* commentary that has no place in court papers. We are Respondents in this matter by virtue of the offices that we occupy at the NPA. We take our oath of office, our statutory obligations and our ethical requirements very seriously. We prefer not to descend into the arena, but instead to address the factual allegations at issue .

219 I would add that the urgency asserted by the applicants has compelled the Respondents to prepare their answering papers in considerable haste. It has not been possible to address all of the applicants many dubious contentions. Respondents hence reserve the right to seek leave of the court to interpose a further affidavit if necessary.

Ad paragraph 1

220 The content of this paragraph is noted.

221 His gender is irrelevant.

Ad paragraph 2

222 The content of this paragraph is noted.

Ad paragraph 3

223 I dispute that all of the facts alleged by the deponent are within his personal knowledge. The deponent, relies on media accounts for a large portion of his allegations.

Ad paragraph 4

224 The content of this paragraph is noted.

Ad paragraph 5

225 I admit that I announced the charges against Pillay, Magashula and Minister Gordhan at a press conference on 11 October 2016.

Ad paragraph 6

226 The decision to prosecute, which was taken by Pretorius, the third respondent, was guided by there being a *prima facie* case against Pillay, Magashula and Minister Gordhan which a prosecutor could prove beyond reasonable doubt. Pretorius was bound by the above considerations regardless of who the decision to prosecute pertained to. This is because everyone is equal before the law.

227 The emotive description that does not accord with the factual response set out herein, is denied.

Ad paragraph 7

228 The charges were sustainable in law. That is borne out by the contents of the affidavit. I do hold the view that if Magashula, Pillay and Minister Gordhan gave witness statements, the information provided at the review stage may have been provided then, which would have possibly rendered the charges unnecessary. This does not mean that I *"blame the accused"* for anything because they were simply exercising their right to remain silent, which they are at liberty to do.

229 Dr Pretorius' decision to prosecute was taken in consultation with Advocate Mzinyathi, the fourth respondent. It was the correct decision based on the evidence available at the time. I cannot fault the decision to prosecute.

230 My decision to review was similarly taken based on the evidence available at the time, which differed in comparison to the evidence before Pretorius as detailed above.

Ad paragraph 8

231 My decision to review the decision to prosecute may be viewed by some as an about-turn, but that is the very nature of the review process, if successful.

232 There was in fact no "about-turn". I simply exercised the statutorily vested power to provide an accused person with an opportunity to make representations as part of a review process. I submit that the fact that I did so reinforces my independent stance.

233 The remainder of this paragraph is denied.

Ad paragraph 9

234 I deny that I tried to distance myself from Pretorius' decision to prosecute. I maintain that it was the correct decision based on the evidence before him at the time.

235 The process followed has been ventilated at length and to avoid prolixity I reiterate it without repeating it here.

236 I deny that I am incompetent, unfit and improper for my office. To the contrary, I challenge the applicants to set out the exact prescripts of the law that I have allegedly contravened or breached.

237 It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above.

238 My decision to review, while met with some relief by the public, is equally an unpopular one or, put differently, makes me unpopular.

239 Fortunately Pretorius and I do not hold our office and exercise our duties in the hope that we become popular, nor do we wish to antagonise the

accused or the public at large. We simply do our jobs in accordance with our duties, regardless of the repercussions.

240 I deny any violation of rights, or that the decision to prosecute and the decision to review has been destructive of the integrity and reputation of the NPA. This affidavit attempts to rectify the record.

Ad paragraph 10

241 I again deny the allegation of incompetence, any ulterior motive, recklessness and that the charges were baseless to begin with.

242 Concerning the "*riots in the streets*" with reference to annexure "**FA1**", the article is dated 1 November 2016, the day after I announced my decision to withdraw the charges. The "*rioters*" were opportunistic looters who damaged property, stole stock, assaulted customers and threatened staff of businesses in the area, among other things. Even the business owners concerned are of the view that *nothing* can justify the looting.

243 To suggest that this relates to me is not in accordance with the practical realities and without merit.

244 In any event, pages 62 and 63 of "**FA1**" deal with what appears to be the real catalyst for the intended *march*, namely the narrative concerning "State Capture".

245 The balance of this paragraph is denied. The stock exchange fluctuates on a daily basis and is influenced by an array of factors. In particular, the applicants are put to the proof that R50 billion was "lost" on the stock

exchange, other than in a notional sense and that the stock exchange has not recovered since.

Ad paragraph 11

246 The content of this paragraph is denied. In particular the applicants are put to the proof concerning who Pretorius and I are *beholden* to and what ulterior purposes are alleged to be promoted or furthered by us.

247 I will be able to respond more fully to these allegations once I have the full details because these allegations, as they stand, are bald, unsupported and speculative.

Ad paragraph 12

248 The need for urgent judicial redress is denied, because at this stage, it is premature as reiterated above. The President should be allowed a reasonable opportunity to make a decision before that decision can be properly be tested by a Court, if need be.

Ad paragraphs 13-15

249 The nature of the relief sought is noted, but it is denied that the applicants are entitled to, or have made out a case for, the relief sought, whether on an urgent basis or at all.

Ad paragraph 16

250 The content of this paragraph is denied insofar as it relates to Pretorius and me.

Ad paragraph 17

251 It is admitted that Pretorius, Advocate Mzinyathi and I occupy high level positions at the NPA which comes with certain *power*, but it must be reiterated that such power is regulated by legislation.

252 I again deny the allegations of incompetence, any ulterior motive, recklessness, unfitness, impropriety and that a clear case concerning the aforementioned has been made out.

253 As stated above, I will respond to the allegations concerning the shattering effects on the economy once the information supporting this allegation has been provided.

Ad paragraph 18

254 The content of this paragraph is admitted. Any negative connotation intended to mean that Pretorius and I are not in keeping with this is denied.

Ad paragraph 19

255 I again deny the allegations of incompetence, any ulterior motive, recklessness, unfitness, impropriety and that a clear case concerning the aforementioned has been made out.

256 The applicant's premature assertion that we have committed misconduct is illustrative of the fact that the Applicants wish to deprive Pretorius,

Advocate Mzinyathi and me of an opportunity to ventilate our version, and have simply decided on this, without having it tested.

257 This accords with the prematurity that is endemic to this application, which presumes to pre-empt the President's decision. I submit that the Court's process is being abused by the Applicants.

Ad paragraph 20

258 Any impropriety, prejudice, damage to public perception, risk, recklessness, damage to the economy and our country's reputation is denied insofar as it relates to Pretorius and myself remaining in office. We do not accept any wrongdoing because we have complied with our obligations in terms of the NPA Act, among other things.

259 As an aside, I would mention that a country's reputation for upholding the rule of law may, if anything, be enhanced in the event that a Minister of State is prosecuted – provided, of course, the charges are good, which Respondents believed they were.

Ad paragraph 21

260 Regarding the allegation that a *failure* to remove Pretorius, Mzinyathi and myself poses an unacceptable risk to the functioning of the NPA, the opposite is true. Our precipitous removal would amount to the decapitation of the institution, and seriously impede ongoing prosecutions.

261 Once again, the import of this paragraph appears to be that my lack of repentance *ipso facto* renders me subject to suspension from office. That is an absurd claim.

262 Applicants effectively seek a permanent stay of prosecution. It is submitted that this is incompetent relief.

263 The fact that the door may have been left open to the prosecution of any of the accused on other charges can never be a legitimate cause of complaint.

Ad paragraph 22

264 The content of this paragraph is denied.

Ad paragraph 23

265 The content of this paragraph is denied, save that I admit that issues of national importance are implicated if this premature application is entertained. The President has neither failed nor refused to institute an enquiry or suspend any of us. He has yet to make a decision, and awaits representations from us by 28 November 2016 which we are in the process of compiling. We were of course also met with this application and have had to place our representations on hold until finalising our answer to this application. The applicants' insistence on rushing the President into precipitous action does not sit well with their insistence that this is a matter of great national importance.

Ad paragraph 24 - 25

266 The applicants correctly emphasise our central and essential roles within the NPA, which is difficult to reconcile with their demand that we should be immediately suspended.

267 Again, I will respond to the applicants' allegation that we are "*a proven severe threat to the economy*" once evidence of this nature has been provided.

268 Concerning my alleged "*threat*" which the applicants say *may* amount to "*misconduct by bringing further ill-conceived charges in the near future*", all interested parties are aware of ongoing investigations so there can be no mischief in what I have said.

269 It is admitted that the NPA and high level officers therein must be, and must be perceived to be, independent of executive and political interference. What the applicants are urging is that the President take precipitous action against high level officers without even affording them the opportunity to respond to the allegations against them. This does indeed threaten to compromise the independence of the NPA.

270 I deny that the offices of the Respondents have been abused or compromised. I deny that the actions of the Respondents indicate their unfitness to hold office.

271 There is no manifest lack of independence. I have pointed out, in fact, that my decision to withdraw the charges came in the face of strong pressure from the Hawks not to do so.

272 The President has not adopted an intransigent and supine attitude. He is obliged to hear the version of the Respondents before taking far-reaching action against them.

273 I would draw the attention of the Court to the decision of the House of Lords in the matter of R (on the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant) (Criminal Appeal from her Majesty's High Court of Justice) [2008] UKHL 60. Lord Bingham of Cornhill declined to set aside the withdrawal of a prosecution arising out of alleged corruption in an arms transaction with Saudi Arabia notwithstanding that the Attorney-General considered formal representations in a minute of the Prime Minister in which the latter contended that pursuing the prosecuting severally prejudice the public interest. [at paragraphs 17-18]

274 The applicants' contention that whenever the fitness and propriety of a senior office bearer is placed in doubt, the integrity of the entire institution is unsustainable, is without merit. One need only consider the case of the fourth respondent herein, Mzinyathi. He was accused of serious impropriety, only to have an application to strike him from the roll dismissed. The public may be presumed to be aware that serious allegations against senior office holders are not uncommon; they cannot be presumed to lose all faith in an institution of state whenever allegations against its officers, which may or may not be justified, are raised.

Ad paragraph 26

The contents of this paragraph are admitted

Ad paragraph 27

275 It is denied that the President has failed in his constitutional duty. He has not made a decision whether or not to invoke section 12(6) of the NPA against the Respondents. The applicants attempt to railroad the matter by demanding that he make a determination within a matter of days, without consulting those who stand to be most directly affected. It is denied that the President does not exercise a discretion.

Ad paragraph 28

The contents of this paragraph are denied.

Ad paragraph 29

The contents of this paragraph are admitted.

Ad paragraph 30

276 The contents of this paragraph are admitted.

Ad paragraph 31

277 The standing of the applicants is not for present purposes contested.

Ad paragraph 32

278 The standing of the applicants is not for present purposes contested.

Ad paragraph 33-36

279 The first sentence of these paragraphs are admitted. The second sentence is denied. The third sentence is noted.

Ad paragraph 37

The contents of this paragraph are admitted.

Ad paragraph 38

280 The standing of the applicants is not for present purposes contested. The implicit factual claims in this paragraph are denied.

Ad paragraph 39

281 The contents of this paragraph are denied.

Ad paragraph 40

282 The standing of the applicants is not for purposes of this Application denied.

Ad paragraph 41

283 The standing of the applicants is not for purposes of this application denied. The factual and legal claims in this paragraph are denied.

Ad paragraph 42

284 In so far as the quotation accurately reflects the text being quoted, it is noted.

Ad paragraph 43

285 The contents of this paragraph are admitted.

Ad paragraph 44

286 The contents of this paragraph are admitted, save the final sentence which is denied.

Ad paragraph 45

287 The contents of this paragraph are admitted.

Ad paragraph 46

288 The implicit factual claims in this paragraph are denied

Ad paragraph 47

289 The contents of this paragraph are denied

Ad paragraph 48

290 The contents of this paragraph are denied.

Ad paragraph 49-51

291 I can neither admit nor deny the vague and open-ended allegations in these paragraphs. It does not serve the applicants' cause to attach selected media articles, much of which reflect speculation, rumours and "leaks," garnished with political commentary and opinion.

Ad paragraph 52-3

292 My understanding is that the list of questions referred to were compiled by the Hawks regarding the so-called rogue unit. They are hence not relevant to the present proceedings. I would note that the Applicants have elected not to join the Hawks as Respondents. (Neither, indeed, did the Applicants join the Minister of Justice.)

Ad paragraph 54

293 The contents of this paragraph are admitted.

Ad paragraph 55

294 The contents of this paragraph are denied for the reasons set forth above. Although the charges were immediately connected to the Pillay retirement, they came to light in the course of the investigation into the rogue unit.

Ad paragraph 56

295 I know nothing of the so-called "*reference group*".

Ad paragraph 57

296 The contents of this paragraph are denied. The applicants' continuing use of extravagant adjectives is to be deplored.

Ad paragraph 58

297 I stand by what I said at the press conference of 11 October 2016.

Ad paragraph 59

298 It is true that I addressed the matter of the rogue unit at the press conference. Although allegations about the unit form no part of the charges that were laid on that day, the subject matter is not unrelated. I deemed it appropriate to address a subject as to which there has been much speculation. I deny that my intent was to attack the reputations of any person or that I acted with ulterior purpose.

Ad paragraphs 60-61

299 The contents of these paragraphs are denied.

300 The applicants will have their remedies in the event that charges relating to the rogue unit are preferred.

Ad paragraphs 62-66

301 I deny any impropriety or pre-judgment.

302 As head of the National Prosecuting Authority, I deemed to address the issue of the Rogue Unit, about which there had been much public speculation.

303 In the event that a decision is ever taken to prefer charges in connection with the Rogue Unit, anyone subject to such prosecution will have their remedies in law.

304 As to the charges relating to the early retirement of Pillay, I indicated that I had agreed with the decision that had been made by Pretorius to initiate

a prosecution, having been briefed by him in that regard. Nothing I said precluded me from reviewing the charges upon representations having been received.

Ad Paragraph 67

305 I deny then I manifested either incompetence or ulterior motive. The inferences relied upon for these unfounded allegations are based upon wrong facts and are in any event totally unfounded.

306 The start of the reference to 3000 requests of early retirement with full benefits arose from the memorandum sent by Magashula to the Minister (FA, page 100). Magashula stated:

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

307 The third and fourth Respondents endeavoured to obtain the appendix referred to but were informed that the no such document existed. It would be astonishing if the approvals referred to by Magashula were given on the same basis as that sought by Pillay. In fact, based upon the amount paid on behalf of Pillay, it would have cost SARS in the vicinity of R3 billion in unlawful payments on behalf of employees if this ever occurred.

Ad Paragraph 68

308 I deny that the NPA reneged on any undertaking to the Minister. The facts are the following:

308.1 On 24 August 2016 the Minister's attorneys, Gildenhuys Malatji, wrote a letter to me relating to the rogue unit investigation. In paragraph 4 of the letter, the Minister requested that when this matter is presented to me for a decision of whether to initiate a prosecution against him or not, he should be afforded the opportunity to make both written and verbal representations to me regarding my aforesaid decision.

308.2 I responded to this letter on 25 August 2016. I informed Gildenhuys Malatji in regard to paragraph 4 of the letter that "consideration will only be given thereto once the investigation has been concluded and the docket submitted to the National Prosecuting Authority for decision on whether or not to institute you to prosecution against any person(s)."

308.3 It would not be for me to make the decision as to whether or not to initiate a prosecution. Such decision would be made by Pretorius.

308.4 On 29 August 2016, Gildenhuys Malatji again wrote to me requesting the opportunity to make representations. I forwarded this letter to Pretorius,

308.5 On 5 September 2016 Pretorius wrote to Gildenhuys Malatji. Pretorius stated:

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

308.6 But when the Minister was invited to make a warning statement, he refused.

308.7 Accordingly, no undertaking was reneged upon.

Ad Paragraph 69

309 My responsibilities do not include making every prosecutorial decision. I have set forth above my responsibilities as head of the NPA. I, however, do have the responsibility to review decisions in appropriate circumstances where representations are made. Notwithstanding that the Minister refused to make representations in this matter, I exercised my discretion to do so, as a consequence of which the charges were withdrawn.

310 I deny the allegations made expressly or implicitly in this paragraph. I prefer not to engage with personal invective.

Ad Paragraph 70

311 As I have noted, to characterise my statement that I was prepared to review the charges as *backpedalling* betrays a fundamental misconception of the statutory scheme.

312 The applicants should be aware that if I took the decision to prosecute, I would not have been able to withdraw the charges - which would ironically entail that they would be reinstated with no review possible.

Ad Paragraphs 71 and 72

313 The contents of this paragraph are noted.

314 It is true that the applicants placed me "on terms" to withdraw the charges. I was reviewing them at that time and they were ultimately withdrawn within the process of review, and not as a result of the demands of the applicants. In fact, before the time limit imposed by the applicants, I informed them that I had prioritized the review and that I was dealing with it urgently. In the same way that they were not satisfied with the President's advice to them that he was dealing with their complaint and required further time, they were uncompromising in their attitude. They precipitously brought the applications to set aside the charges and the present application.

Ad Paragraph 73-74

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

316 Far from negating the decision to institute charges, documents that came to light in the review process, reinforced the assessment that the special arrangement made for Mr Pillay was unlawful.

Ad paragraph 75

317 I deny that there was no evidence warranting either the institution or the continuation of the prosecution. If the suggestion is that I should have withdrawn the charges earlier, before the completion of the investigation, that claims falls to be rejected. Once again, the implication appears to be that the Minister is entitled to special treatment. The refusal of the Minister to make representations did not accelerate the process. The allegation that my mind was closed, was unfair. My subsequent decision to withdraw the charges in fact demonstrates that I was open to being persuaded by what served before me.

Ad Paragraph 76

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

Ad Paragraph 77 - 78

319 I have already explained in detail the extensive steps taken before the prosecution was decided upon. Anyone familiar with the prosecution process would know that it would be entirely impractical to require that every possible source of exculpatory evidence be pursued before charges are instituted. The applicants should also know that that the

standard for the institution of prosecution is no higher than reasonable prospects of success in the prosecution. On the applicants' version, the scope of prosecutorial discretion would narrow to vanishing point.

Ad Paragraph 79

320 The contents of this paragraph are admitted.

Ad Paragraph 80

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

322 The applicants simply failed to appreciate that a decision to prosecute can only be reviewed if I did not take the decision. They accept the fact that I reviewed the decision and are pleased that the charges were withdrawn. Yet they want to persist in alleging that I took the decision, which I did not.

Ad Paragraph 81

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

Ad Paragraph 82

324 It is naïve of the applicants to believe that I should simply have withdrawn the charges once the Symington memorandum came to light. The

decision to prosecute was not haphazardly taken by Pretorius; nor are decisions to review done in this matter.

325 It was proper that I should make further investigations concerning the Symington memorandum, including obtaining confirmation from Symington himself. Further investigations were also necessary in terms of following proper process.

Ad Paragraph 83

326 I have stated that the charges were fully justified from the outset. I have dealt in detail with the justification for the charges. The applicants' contention that the charges were "unsupportable from the outset" is clearly wrong and I have explained in this affidavit the basis of the charges. It was only the question of intention which caused me to withdraw the charges on review.

327 I did not issue a subpoena.

Ad Paragraph 84

328 The first two sentences of this paragraph are admitted. I deny the second and third sentences of this paragraph.

Ad Paragraph 85.1

329 As set forth above, it is not standard practice for the head of the NPA to evaluate the credibility of charges before the institution thereof.

Ad Paragraph 85.2

330 I have stated that I relied upon the briefing of trusted senior prosecutors.

Ad Paragraph 85.3

331 I have already stated why it was not an error to issue the charges. Once again, the implication appears to be that I should have taken into account the status of the accused, as well as media speculation, in my assessment of the charges. That is denied.

Ad Paragraph 85.4

332 I have addressed this subject matter above.

Ad Paragraph 85.5

333 I have addressed this subject above.

Ad Paragraph 85.6

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

Ad Paragraph 86

335 Save for the final sentence, the contents of this paragraph are admitted.

Ad Paragraphs 87 - 88

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

Ad Paragraph 89

337 The adverse implications in this paragraph are denied. It is true that I primarily relied upon a briefing by the prosecutors, in whom I had full confidence. When it came to the review stage, I directed an extensive investigation, which led to the withdrawal of the charges. It is not necessary for me to engage in the contentions of law advanced by the applicants in this paragraph. The fact is, as I have already stated above, the charges were justified based on the information which the prosecutors had.

Ad Paragraph 90

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

Ad Paragraph 91

339 I do not know what is meant by the claim that I *adopted* the decision to prosecute. I did deem, based upon the briefing, that there was sufficient to meet the threshold for the institution of a prosecution. I have never reversed that position. Indeed, some of the material received post-hoc vindicated the initial assessment that the special privilege accorded to Pillay was unlawful. The applicants seem unable to distinguish between unlawfulness on the one hand and the element of intent on the other.

Ad Paragraph 92

340 I deny that the first sentence of this paragraph. As for the second sentence, I declined to enter into a debate with the Applicants as to the

public response to the charges. Suffice to say that the subject matter was, and remains, of great public interest. I would be derelict in my duty if I attached weight to the extent and scope of public opposition to the charges.

Ad Paragraph 93

341 The contents of this paragraph are admitted.

Ad Paragraph 94

342 I am aware that my visit to Luthuli House caused disquiet in some quarters. I deny that it is categorically excluded for me to attend a meeting at such venue. Such attendance may be justified in special circumstances, such as arose in this instance.

343 In this regard I say:-

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

344.2 Minister Masutha is a member of the Justice, Crime Prevention and Security Cluster ('*JCPS*'). The President had requested Ministers of the JCPS Cluster to urgently brief him on the interventions by their respective departments to bring stability to

an already escalating volatile situation. I understood that the President was leaving the country later that day. The President did not invite me to the meeting nor was the President aware that I would be in attendance until my arrival.

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

344.4 Minister Masutha was of the view that I could contribute much more than he could at the meeting and requested my attendance. I was best placed to explain the initiatives undertaken by the NPA in cooperation with its stakeholders in stabilizing a rather volatile situation around the escalating unrest at institutions of higher learning.

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

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

344.7 As head of the NPA and by virtue of the provisions of section 22(1) of the NPA Act nothing precluded me from attending an emergency meeting at the invitation of the Minister of Justice and Correctional Services with Ministers of the JCPS Cluster and the President.

344.8 As I recall, in places like Braamfontein, only a kilometre or two from Luthuli House, vehicles were burning, streets were barricaded, shops were being looted and buildings and vehicles were being vandalised.

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

344.10 In any event, decisions around these matters are ordinarily made under the jurisdiction of the provincial Directors of Public Prosecutions ('*DPPs*') concerned. To this end, section 20(3) of the NPA Act empowers DPPs to (i) institute and conduct criminal

proceedings on behalf of the State; (ii) carry out any necessary functions incidental to instituting and conducting criminal; and (ii) discontinue criminal proceedings in the area of jurisdiction for which he or she has been appointed.

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

345 It may be worth mentioning that, at the committee meeting attended by me on 4 November 2016, the Chairperson noted that the former Public Protector, Adv Thuli Madonsela had called on the offices of the Democratic Alliance ('DA') where she attended meetings. She had also attended official DA events.

Ad Paragraphs 95 and 96

346 I admit the interview with Eyewitness' News Mandy Wiener. I do not intend to respond to the offensive allegations contained in these paragraphs (and their sub-paragraphs), nor to the gratuitous insults and repetitive statements to disparage me.

346.1 I have emphasized that the conduct in making payment of Pillay's penalty was unlawful. I have explained that the charges were withdrawn after I have formed the view that the necessary criminal intention would not be proved.

346.2 The central issue is whether Pretorius was justified in making a decision to charge GP&M. In making the decision, adherence was paid to the rule of law and the Constitution. A detailed explanation has been furnished as to why the conduct was unlawful.

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

346.4 I have explained in detail the reasons for the charges and the reasons for the withdrawal on review in terms of section 179(5)(d) of the Constitution. I submit that my conduct and that of the third and fourth Respondents was absolutely in compliance with the powers vested in us and we at all times paid adherence to the rule of law and the Constitution. It is unfortunate that the applicants describe me as being arrogant, which I certainly believe not to be the case. It is an attitude which I decry and would avoid. I do however mention that the superior attitude adopted by the applicants in calling upon me to explain why I am fit and proper carries its own insolence.

346.5 I have dealt with the effects of the economy above. I have also addressed the question of chargers relating to high officials in relation to the economy and the public interest generally.

Ad Paragraphs 97 and 98

347 I was not "summoned" to attend Parliament. I was "invited" to attend to provide a briefing.

Ad Paragraph 98

348 The applicants again selectively refer to what was stated by the Chairperson. It is significant that they chose not to refer, for example, to the comments by the Chairperson which I have referred to above, relating to the Public Protector having attended the offices of the DA.

Ad Paragraph 99

349 I do not intend to respond once again to the unfounded criticisms and disparaging remarks. It certainly does not behove organisations such as the applicants, supposedly acting in the public interests to make gratuitous insults based on wrong facts, and to draw adverse for making inferences without evidence. They are clearly trying to create media hype but overlook the fact that the court is not a jury. Their motivation is purely political. Hence, a baseless statement, without evidence to support it, that I have "a seeming vendetta... with the perceived political rivals of President Zuma and his allies". On what possible basis is such an allegation made? Furthermore, I have explained the circumstances of my

visit to Luthuli House. Yet the applicants, without compunction, and without any evidence to the contrary, refer to the meeting as being "clandestine".

350 I do not intend to burden this Court with the details of my objection to the presence of Ms Breytenbach presence at the meeting of the Parliamentary Committee.

Ad Paragraph 100

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

Ad Paragraph 101 to 109

352 I dispute that any conduct on behalf of the third, fourth Respondents and myself provides any evidence that we are not fit and proper to continue to hold our positions. In fact, we have at all times fully and properly carried our duties and obligations, both in terms of the Act, the Constitution and prosecutorial policy.

353 The third, fourth Respondents and I were copied on the letter addressed to the President.

354 We assume that the President will respond to the remaining allegations contained in these paragraphs.

355 I nevertheless state that it is extraordinary that the applicants felt entitled to demand on 1 November 2016 that the President make a decision, based purely on their complaint and the voluminous documents furnished

to him, to suspend us and conduct and enquiry. Surely, the President would be entitled to hear from us. I add that the applicants clearly anticipated that the President would not be able to deal with their complaint within the short time prescribed. Once he had not given their desired response by 7 November, they launched this application just more than a day later, on 9 November.

Ad Paragraphs 110 to 116

356 In paragraphs 110 to 116, under the heading "*Other relevant conduct*", Mr Antonie, on behalf of the applicants, deems it relevant to the applicants' case to refer to the matters concerning the Deputy National Director of Public Prosecutions, Nomgcobo Jiba ("Ms Jiba"). His purpose in doing so is to contend that this is "further evidence" that I "cannot be entrusted with the office of NDPP" (para 116, page 47). Not only is this without foundation, but the essential facts he relies upon are untrue.

357 Two points arise out of Mr Antonie having thrown in "the Jiba matter" into the present application:

357.1 Firstly, the applicants cannot truly expect that this Court should engage in a consideration of the facts surrounding the Jiba matter, and then make a determination based on this concerning my suitability to hold the office of NDPP. If the applicants were of the view that I should be suspended and an enquiry held pursuant to the decision – (made by Marshall Mokgatlhe, a Deputy Director of Public Prosecutions and the regional head of

the SCCU) – to withdraw the charges against Ms Jiba, then an application to this end should have been brought by them. It was not brought.

357.2 Secondly, and more importantly, it is disturbing that Mr Antonie, in seeking to malign me, has not disclosed to this Court the sequel to the judgment of Gorven J as dealt with by the Full Bench in this Court in the matter of the **General Council of the Bar v Jiba & Others** [2016] ZAGPPHC 833 (15 September 2016) (referred to in paragraph 113 of Mr Antonie's affidavit).

358 It is inconceivable that Mr Antonie, who is a Director of the first applicant, would not have read the judgment of the Full Court in the matter of the **GCB v Jiba**, to which he refers. It is therefore astonishing, and cause for concern, that Mr Antonie states that Ms Jiba was struck off the roll for, *inter alia*, her "dishonesty" in the Booysen case. He has the temerity to state, after having read the judgment in the GCB v Jiba application, that the Jiba matter "furthers the perception that (I am) incompetent or prone to partiality". His remaining derogatory comments concerning me in these paragraphs are inexplicable. He has not apprised this Court of the actual findings of the Full Court in which that Court disagreed with Gorven J in the Booysen matter. On the basis of the Full Bench judgment it is absolutely clear that there was no basis whatsoever for the charges of perjury and fraud to have been brought against Ms Jiba in the first place. However, it is because I have not reinstated the charges against Ms Jiba,

that the applicants contend that I cannot be entrusted with the office of NDPP. It is puzzling to say the least.

359 With regard to the question of perjury, Legodi J, (writing the judgment for the Full Court) said:

> [61] I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

360 In regard to the authorisation of the POCA certificates, Legodi J said at [67]:

> [67] I cannot find any *mala fides* and/or ulterior motives in the authorisation by Jiba as contemplated in POCA
>
> And
>
> [68] It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the role of advocates.

361 Clearly, there was no finding by the Full Bench of dishonesty on the part of Ms Jiba. In the light of this judgment, there could be no basis whatsoever to reinstate the criminal charges against her.

362 I do not wish to engage in futile retaliatory allegations. Suffice to say that organisations such as the applicants, claiming to act on the public

interest, should be expected to be objective, fair and impassionate. Unfortunately, the opposite is evident in this matter, especially when regard is had to the plethora of hyperbole and extravagant exaggerated adjectival expressions, many of which have simply been copied and pasted from the Jiba matter.

363 I attach as Annexure **SA25** hereto the relevant portion of the judgment dealing with the Booysen matter. The entire judgment has not been attached to avoid prolixity but will be made available to this Court at the hearing of this matter.

364 Accordingly, the decision to withdraw the charges of fraud against Ms Jiba was totally justified. Yet, in the face of this judgment, which the applicants not only knew of, but in fact referred to, Mr Antonie failed to inform this Court of its contents relating to the Gorven J judgment and in fact misstated the relevant findings. It demonstrates, that the applicants will go to any lengths to have me removed.

365 On 19 September 2016, the first applicant's attorneys wrote to the President, as appears from Annexure FA15 (page 146). Despite the contents of the judgment of the Full Court concerning the Booysen matter, the first applicant's attorneys nevertheless demand that the prosecution against Ms Jiba for fraud and perjury be reinstated.

366 I respectfully submit there is no basis for any of the concerns expressed by the applicants should we continue in office; neither do they truly believe their concerns.

Ad Paragraph 117

367 The contents of this paragraph are denied

Ad Paragraph 118

368 The contents of this paragraph are admitted, save that it is denied that my conduct constituted a blunder. I have given a full account above.

Ad Paragraph 119

369 I deny the first sentence of this paragraph. As to the second sentence, I dispute that an apology is warranted, and even if it were, my failure to afford an apology could in no circumstances warrant the invoking of section 12(6) of the NPA Act.

Ad Paragraph 120

370 The contents of this paragraph are denied. For the Respondents to overnight be barred from exercising their functions would impact very seriously upon the day-to-day functioning of the NPA for the foreseeable future. The suggestion that the former NDPP can readily step into my shoes is absurd.

Ad Paragraph 121-123

371 The allegation that the prosecution of the charges was pursued for an ulterior purpose, is false and without substance. Nothing has been furnished by the applicants to support this allegation. The defamatory allegations of recklessness and incompetence are denied, as well as the

allegation that a proper investigation was not carried out. I refer to the detail furnished above relating to the extensive steps taken before the decision was made by the third respondent to institute the charges.

Ad Paragraphs 124 - 130

372 I refer to the accompanying affidavit of Pretorius and Mzinyathi.

373 I deny that I shifted responsibility to the third and fourth Respondents. The third respondent took the decision to institute the charges, with which I agreed, having been briefed by the third and fourth Respondents.

374 I deny in particular that no rational and conscientious prosecutor of integrity would have preferred the charges. That has been explained in detail above.

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

376 The powers referred to in section 20(1) relate to the institution and conducting of criminal proceedings on behalf of the state; carrying out any necessary functions incidental to instituting and conducting of such criminal proceedings; and discontinuing of criminal proceedings.

377 In the NPA, the normal practice of the interactions between Special Directors and Directors of Public Prosecutions is that, when the Special Director is seized with an investigation, the management of such an investigation and the engagements between the investigating authorities and the Deputy Directors and prosecutors under the control of the Special Director, happen without the involvement of the Director of Public Prosecutions.

378 It is only when such a Special Director is contemplating making a decision that he or she initiates discussions with the Director of Prosecutions concerned. It is the culmination of these discussions that will determine if the decision of the Special Director was taken in consultation with the Director of Prosecutions or not, in other words whether the Director of Prosecutions agrees with the decision or not.

379 Essentially, the agreement or otherwise of the Director of Public Prosecutions with the decision of the Special Director is on the basis of information provided by the Special Director working in conjunction with the prosecutors resorting under him.

380 In such instances, the Director of Public Prosecutions is not the original decision maker, nor is he accountable for the decision as in instances when decisions are taken by staff in his area of jurisdiction.

381 It is not the function of the Director of Public Prosecutions to review or substitute the role of the Special Director in managing the activities falling under the auspices of the Special Director.

382 Ordinarily, the Special Director would summarise what the decision entails. This is normally done either through personal engagements, or through the submission of memorandums summarising the facts of the decision. If there are aspects that the Director of Public Prosecutions is not clear about, he or she usually asks the relevant aspects to be clarified by the Special Director, and the Special Director would cause such clarifications to be made.

383 The Director of Public Prosecutions does not get involved in the normal day to day activities of the work of the Special Director, and for instance in the case of an investigation, he or she does not usually call for the dockets and to instruct which further investigations should be followed up, etc. This day to day running of the activities remains the responsibility of the Special Director.

384 It is not correct that there was no proper legal analysis. It further disproves the Applicants' assertion that the prosecutors failed in their constitutional and statutory duty to ensure that the charges were properly grounded, and to take an impartial, independent and objective view of all the facts that were presented before them.

Ad Paragraph 131 - 136

385 I admit paragraphs 132, 133 and 134.

386 I admit the remaining contents of these paragraphs insofar as they correctly repeat the terms of the relevant provisions of the Constitution and the Act.

Ad Paragraph 137

387 This is admitted.

Ad Paragraph 138

388 I do not understand in the distinction drawn by the applicants between subjective and on objective determinations in this regard

Ad Paragraph 139

389 This is a matter of legal argument that will be advanced in the heads of argument and at the hearing. I refer to what I have foreshadowed above regarding the standard of rationality.

Ad Paragraph 140

390 The underlining rationale for s.12(6) of the NPA Act will be the subject of argument.

391 I admit the balance of this paragraph.

Ad Paragraph 141-143.

392 The contents of this paragraph are denied.

Ad Paragraph 144

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

Ad Paragraph 145-148

394 The contents of this paragraph are matters for legal argument.

Ad Paragraph 149

395 The contents hereof are denied. Argument will be addressed to this Honourable Court in regard to the unreasonableness of the time periods the applicants sought to unilaterally impose upon the President. The fact is that no decision has been made.

Ad Paragraph 146

396 The contents of this paragraph are denied. If, the applicants wish to anticipate the potential lodgment of charges against the Minister, and to pre-empt same by obtaining a permanent stay, they are free to approach a court of law to seek such a remedy. I again emphasise that no decision has been made regarding the rogue unit and the investigation is at present incomplete.

397 I have already referred to the judgment of the Full Bench concerning the Booysen matter and the withdrawal of the charges against Ms Jiba. It is astounding that the applicants still contend that I should reinstate the charges against her in light of this judgment. I reiterate that the applicants incorrectly informed this Court of the finding of the Full Bench in the Booysen matter concerning Ms Jiba by stating that she was found to be dishonest when this was not the case at all.

398 No doubt the applicants in their replying affidavit would explain the misrepresentation to the Court.

Ad Paragraph 150

399 The politicization of this matter by the applicants is clear from this paragraph.

400 The contents of this paragraph are denied.

Ad Paragraph 151

401 The contents of this paragraph are denied.

Ad Paragraphs 152 - 164

402 The question of urgency has been dealt with above.

Ad Paragraph 165

403 This is disputed.

404 The third respondent and I dispute that the applicants are entitled to any relief. We submit that the application should be dismissed with costs, including the costs consequent upon the employment of three counsel.

COSTS

405 In the event that the application is struck-off the roll for lack of urgency, the costs should follow the event and such costs should include the costs consequent upon the employment of three counsel for the two Respondents. In this regard, the Court should take into account the following factors:

406 The applicants are not impecunious. They litigate just about everything which they do not like and with which they do not agree. The applicants do this because they can afford it. The fact that the applicants are so-called civil organisations does not exempt them from an adverse cost against them.

407 The application is premature, to the extent that it constitutes an abuse of process. The applicants knew that the President had not taken the decision which they have requested the President to take.

408 The applicants also knew that the President had requested them to extend the time frame within which he should take the decision which they requested the President to take. They unreasonably refused to give such an extension.

409 The refusal to give the President an extension to consider their request was unreasonable and calculated to justify the bringing of this application on an urgent basis. The application would clearly not have been brought if the applicants had given the President the extension which he asked for.

410 The refusal to give the President the extension requested was therefore for an ulterior motive, i.e. to bring this application on an urgent basis in circumstances where there was no justification to refuse the extension.

411 When regard is had to the fact that the President still had to give the affected parties an opportunity to make representations, the time frame prescribed for the President to respond was unreasonable and it too was

calculated to justify the bringing of this application as the applicants must have known that the processes which the President would have had to embark upon would not be completed in a matter of three days.

412 In the light of the above, the fact that the applicants may be raising a constitutional matter need not be taken into account in their favour due to the fact that they acted in bad faith in bringing this application and in giving the President an unreasonable time to respond to them. Similarly, I and the other Respondents were not given any time at all to engage with the President as to why the President should not grant the applicants their request.

413 In the premises, the application should be dismissed with costs of four counsel.

SHAUN KEVIN ABRAHAMS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on the 15th day of November 2016, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: **JAYSON JUDE REBELO**

BUSINESS ADDRESS: GROUND FLOOR, 33 FRICKER ROAD
ILLOVO, JOHANNESBURG
Commissioner of Oaths
Practising Attorney R.S.A

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: ____

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant
And	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

CONFIRMATORY AFFIDAVIT OF THE THIRD RESPONDENT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as follows:

INTRODUCTION

1 I am the Third Respondent in this application.

2 I am the Acting Special Director of Public Prosecutions and Head Priority Crimes Litigation Unit. I am the Third Respondent in this matter.

3 The facts contained in this affidavit are to the best of my knowledge true and correct, and within my personal knowledge, unless stated otherwise or indicated by the context.

4 I oppose the application brought against me and deny that the Applicants are entitled to any of the relief claimed.

5 I dispute that the application is urgent and submit that it should be struck from the roll for lack of urgency with costs.

6 I have read the answering affidavit of the Second Respondent, Shaun Abrahams. I oppose this application on the grounds set out in the affidavit of Shaun Abrahams and confirm the allegations in his affidavit insofar as they relate to me.

7 I submit that the application should be dismissed with costs, including the costs consequent on the employment of three counsel.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on the 15th day of November 2016, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

JAYSON JUDE REBELO
GROUND FLOOR, 33 FRICKER ROAD
ILLOVO, JOHANNESBURG
Commissioner of Oaths
Practising Attorney R.S.A

14 November 2016

Dear Adv. Abrahams,

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

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

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

14 November 2016

Dear Dr Pretorius,

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

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

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

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

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

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

14 November 2016

Dear Adv. Mzinyathi,

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

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

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

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

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(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."

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

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Sibongile Mzinyathi
Director of Public Prosecutions
Gauteng North
Pretoria
0001

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

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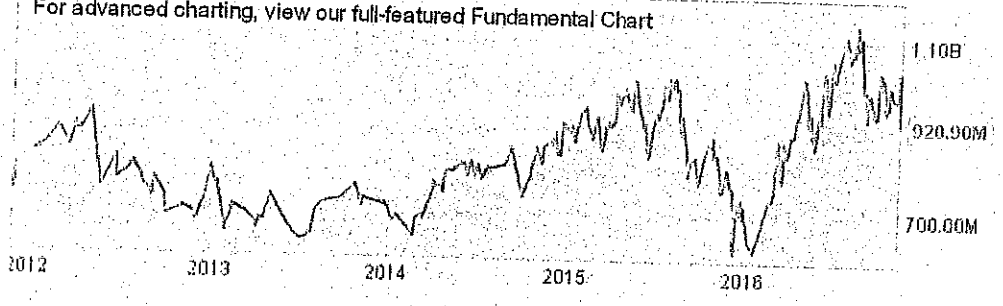

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Data for this Date Range				
Nov. 11, 2016	920.90M	Oct. 7, 2016	1.003B	
Nov. 10, 2016	1.040B	Oct. 6, 2016	1.025B	
Nov. 9, 2016	1.040B	Oct. 5, 2016	1.025B	
Nov. 8, 2016	976.50M	Oct. 4, 2016	1.003B	
Nov. 7, 2016	976.50M	Oct. 3, 2016	1.011B	
Nov. 4, 2016	976.50M	Sept. 30, 2016	1.038B	
Nov. 3, 2016	976.50M	Sept. 29, 2016	1.038B	
Nov. 2, 2016	976.50M	Sept. 28, 2016	1.038B	
Nov. 1, 2016	976.50M	Sept. 27, 2016	1.038B	
Oct. 31, 2016	976.50M	Sept. 26, 2016	1.026B	
Oct. 28, 2016	976.50M	Sept. 23, 2016	937.41M	
Oct. 27, 2016	983.89M	Sept. 22, 2016	937.41M	
Oct. 26, 2016	983.89M	Sept. 21, 2016	937.41M	
Oct. 25, 2016	986.06M	Sept. 20, 2016	937.41M	
Oct. 24, 2016	1.004B	Sept. 19, 2016	937.41M	
Oct. 21, 2016	1.004B	Sept. 16, 2016	937.41M	
Oct. 20, 2016	1.004B	Sept. 15, 2016	951.31M	
Oct. 19, 2016	1.004B	Sept. 14, 2016	960.00M	

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Companies
IntercontInental Exchang
CBOE Holdings
Investec

JSEJF Market Cap

Minimum
Maximum
Average

JSEJF Market Cap

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Oct. 18, 2016	958.26M	Sept. 13, 2016	949.88M
Oct. 17, 2016	958.26M	Sept. 12, 2016	955.65M
Oct. 14, 2016	958.26M	Sept. 9, 2016	987.97M
Oct. 13, 2016	950.44M	Sept. 8, 2016	987.97M
Oct. 12, 2016	950.44M	Sept. 6, 2016	987.97M
Oct. 11, 2016	952.18M	Sept. 1, 2016	929.59M
Oct. 10, 2016	1.003B	Aug. 31, 2016	930.46M

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months ended June 30, 2
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SEQ 19/2019-183

SA.4

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

Your ref: V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012607
Our ref: Summons No 574/16
CAS Brooklyn 427/05/2015

Webber Wentzel
P O Box 61771
MARSHALLTOWN
2107

Dear Sir

Email: vlad.movshovich@webberwentzel.com

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

1. Your letter dated 14 October 2016, the content of which is noted, refers.

2. As you are aware, the decision to prosecute Minister Pravin Gordhan was made by the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, Dr Torie Pretorius SC, in consultation with the Director of Public Prosecutions, North Gauteng, Adv Sibongile Mzinyathi in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

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

4. Earlier today Messrs Oupa Magashula and Visvanathan (Ivan) Pillay, through their legal representatives, made representations to me in which they

requested me to review the decision by the Acting Special Director of Public Prosecutions.

5. I am presently considering the aforementioned representations.

6. In giving effect to the provisions of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, I have further invited Minister Gordhan through his lawyers, to make representations to me by no later than 17h00 on 18 October 2016.

7. I will consider all these representations.

Yours sincerely

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

HAWKS

Privaatsak/Private Bag X 1600, SILVERTON

Reference
Enquiries Lt Gen B M Ntlemeza
Tel / Fax 012 846 4002
012 846 4400
E mail dpcihead@saps.gov.za

OFFICE OF THE NATIONAL HEAD
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE
PRETORIA

RECEIVED
2016 -10- 18

10 October 2016

National Director of Public Prosecutions
VGM Building
123 Westlake Avenue, Weavind Park
Silverton

ATT: Adv Abrahams

RE: THE STATE vs OUPA MAGASHULA, IVAN PILLAY AND PRAVIN GORDHAN

1. I refer to your letter dated 17 October 2016 for which I thank you for inviting me to make representations to you in terms of section 179(5)9d) of the Constitution, read with section 22(2)(c) of the NPA Act, regarding the representations which you say you have received from the above mentioned persons through their legal representatives.

2. Whilst I am at privy to the representations they have made to you, I am of the view that the DPCI has fulfilled its statutory obligation in terms of Chapter 6A of the SAPS Act by conducting an investigation and submitting the docket to the NPA for a decision. We will as the DPCI be bound by whatever decision that is taken by your office in this matter and will continue to cooperate with the NPA and to carry whatever instructions they give to us in guiding our investigating officers in carrying out their investigations.

3. For the above reasons, the DPCI will not be making any representations on the matter but will await your decision on the matter which will be respected by this office.

Yours sincerely

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
BM NTLEMEZA
DATE: 2016/10/18

5 A.6

HAWKS

Privaatsak/Private Bag X 1500, SILVERTON

Reference	Cas 427/5/2015
Enquiries	Lt Gen B M Ntlemeza
Tel / Fax	012 846 4002 012 846 4400
E mail	dpcihead@saps.gov.za

OFFICE OF THE NATIONAL HEAD
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE
PRETORIA

30 OCTOBER 2016

OFFICE OF THE DIRECTOR
2016 -10- 31
NATIONAL PROSECUTING AUTHORITY

Adv Shaun Abrahams
National Director of Public Prosecutions
VGM Building
SILVERTON

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

1. On 17 October 2016 you wrote to us asking if we had any representations to make with regard to this matter.

2. We informed you per our letter dated 18 October 2016 that we had no representations to make.

3. We learn through the media reports that at the time when you wrote this letter you had received representations from some of the accused in this matter, Mr Oupa Magashula and Mr Irvin Pillay.

4. In this regard we would like to enquire whether these media reports are true and if so why you did not:

   4.1 disclose to us that you received those representations;

4.2 request us to make our input as the investigative agency responsible for this matter and clearly a person relevant in terms of section 22 of the NPA Act,

4.3 furnish us with a copy of the representations you received to enable us to properly consider them when we make our input.

5. It is alleged that when Mr Oupa Magashula was called for fingerprint taking, he said it was not necessary to do so as the NDPP intends to withdraw the charges against them.

6. I am aware from the media reports that you intend to withdraw the charges when the accused appear in Court on the 02 November 2016.

7. Furthermore, the media reports of today 30 October 2016, state that you intend to make an announcement pertaining to your decision, which we believe would be to the effect that you will withdraw the charges.

8. It is our considered view that if this is true, your actions are contrary to the imperatives of section 41(1)(h) of the Constitution which you dealt with at length in announcing the decision that the accused are to be charged with fraud and theft some weeks ago. We do not expect the NDPP to do so.

9. Further it is our considered view that your decision is not made in good faith on evidence that we have gathered as an investigative agency in this matter. Rather it seems to us that you make this decision based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused.

10. These groups have falsely accused the Hawks and the NPA in the public domain of pursuing the case against the accused persons for political purposes on instructions from the political masters which is utter nonsense. This is the deliberate propaganda machinery that they have unleashed to gain public sympathy and support for the accused persons in their quest to discredit law enforcement agencies in the execution of their mandate.

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

11. It is our mandate to investigate crime and bring perpetrators to book where there is evidence, irrespective of who the perpetrator is, which office or station in society they occupy and whatever their popularity stake is, in giving effect to the principle of equality before the law.

12. We are extremely concerned about your reported prevaricating stance with regard to the prosecution of the accused persons in this matter and which will bring the administration of justice and the law enforcement agencies into serious disrepute in this country. We note with deep concern the overtures of offers you have made to the accused persons to make representations to you in this matter, after announcing the NPA decision to charge them, which is very much unusual in our experience.

13. We have handled many investigations of fraud and theft as you are aware. It is our considered view that we have a strong case against the accused, despite all contrary the views of the so-called opinion makers and legal experts in the media. If the accused have any defences to the charges or any issues with regard to their prosecution the place to ventilate that is an open court through a criminal trial and be cross examined to expose the truth.

14. We mention all these issues of which you are aware to highlight one issue: that it would be improper for you as a NDPP to stall or withdraw the prosecution of the accused persons in this matter. We do so without being privy to any information at your disposal which you may have received through representations as you opted not to share this with us though we are an investigative agency responsible for this matter.

15. In light of all the issues and considerations highlighted above we humbly request that:

15.1 you provide us with the representations that you have received from Mr Magashula and Mr Irvan Pillay in order to enable us to make a meaningful input as envisaged in section 22 of the NPA Act;

15.2 the decision on whether charges should be withdrawn or proceeded with be made once you have considered our views.

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

16. We trust that you will seriously consider our views and requests before reaching your decision in this matter. We hope to hear from you soon.

Kind regards

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
B. M. NTLEMEZA

DATE: 2016-10-31

SEQ 19/2019-190

5.A.7

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

General B Ntlemeza
Directorate for Priority Crime Investigation
Promat Building
1 Cresswell Road
Silverton
0186

Dear General

Email: Ntlemeza.berning@saps.gov.za
dpcihead@saps.gov.za

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

1. Your letters dated 18 October 2016 and 30 October 2016 refer.

2. For ease of reference, I attach hereto copies of self-explanatory letters between ourselves, dated 17 and 18 October 2016 respectively. Your assertion in paragraph 3 of your letter, dated 30 October 2016 is thus incorrect.

3. I do not intend to respond to each and every averment contained in your letter dated 30 October 2016 and will endeavour to respond thereto more fully at a later stage.

4. In giving effect to the provisions of section 179(5)(d) of the Constitution, I have reviewed the decision to prosecute Messrs Oupa Magashula, Visvanathan (Ivan) Pillay and Pravin Gordhan in respect of the charges listed in the summons.

5. After perusal of the matter I have decided to overrule the decision to prosecute the aforementioned persons and have directed that the summonses be withdrawn immediately. I am of the view that the prosecution will have extreme difficulty in proving the prerequisite knowledge of unlawfulness and intention in respect of all three accused persons. This decision was made yesterday afternoon after much consideration. Your letter dated 30 October 2016 was received after my decision had been made.

6. Under the circumstances it will no longer be necessary for any one of them to appear in court on the charges as listed in the summonses. Their legal representatives have been informed accordingly.

7. Members of the Priority Crimes Litigation Unit will continue to provide guidance to members of the investigating team in respect of the remaining investigations under Brooklyn CAS 427/5/2015.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 31 October 2016

SEQ 19/2019-192

S A. 8

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6750
Email: ndppx@npa.gov.za
www.npa.gov.za

8 November 2016

Lt Gen BM Ntlemeza
National Head
Directorate for Priority Crime Investigation
Head Office
Private Bag X1500
SILVERTON

Email: Ntlemeza.berning@saps.org.za
dpcihead@saps.gov.za

Dear General Ntlemeza

S v PRAVIN GORDHAN & 2 OTHERS

1. Your letters dated 18 and 30 October 2016, as well as my letters, dated 17 and 31 October 2016, have reference. Copies thereof are attached hereto for your convenience.

2. In my letter dated 31 October 2016, I communicated my intention to respond more comprehensively to your letter dated 30 October 2016, hence this communique.

3. I find the tone of your aforementioned letter extremely disconcerting and contrary to the spirit espoused in the provision of section 41 of the Constitution.

4. I deem it prudent to record that the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto is constitutionally entrenched and vested in the National Prosecuting Authority.

5. Further, the NPA Act provides that a member of the Prosecuting Authority shall serve impartially and exercise, carry out or perform his/her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

6. At the outset I deem it instructive to record that the powers of review, as enunciated in section 179(5)(d) of the Constitution, and which are replicated in section 22(2)(c) of the NPA Act, are vested in the National Director of Public Prosecutions. As such, I deemed your department to be a relevant party in terms of section 179(5)(d)(iii). To this end I informed you that I had received representations from Mr Pillay and

Mr Magashula's legal representatives in my letter dated 17 October 2016, which was clear and unambiguous. My letter dated 17 October 2016 also served as an invitation to you to make representations to me had you wished to do so. Under no circumstances am I obligated to provide you with a copy of any representations made to me by any party.

7. I take umbrage at the very serious allegations you levelled against me of not having acted in good faith. Speaking of good faith, kindly advise me how did it come about that the memorandum of Mr Symington, by way of example, only surfaced on 14 October 2016, when Freedom under Law and the Helen Suzman Foundation wrote to me?

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

9. To have proceeded with the matter after receipt of the representations and the additional investigative material would, with the greatest of respect, have been contrary to the rule of law and constitutional prescripts.

10. I am not in a position to respond to the allegations around Mr Magashula. I made the decision to withdraw the charges during the afternoon of 30 October 2016. You were informed of my aforementioned decision the very next day, on 31 October 2016.

11. In conclusion, your legal and constitutional mandate does not permit you to advise me when to withdraw matters and/or when to proceed with prosecutions. I insist that you refrain from any further communications or conduct to this effect, failing which will have serious repercussions.

12. Nevertheless, your recommendations in respect of concluded investigations, submitted to the National Prosecuting Authority, will as usual always be welcome.

13. Any omission not to comment on any other allegation as per your letter, dated 30 October 2016, should not be construed as acquiescence therewith.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 8 - 11 - 2016

CONFIDENTIAL

Internal Memorandum

"A"

Dear Oupa

PURPOSE

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

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

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

Should you favorably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732.68.

CONFIDENTIAL

RECOMMENDATION

My recommendations are that you please:

- Take note that I intend to take early retirement
- Consider to approve that I be reappointed in a different capacity in SARS on a contract basis; and
- Consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer.

Regards

Ivan Pillay

27/11/2009

Internal Memorandum

Dear Pravin

PURPOSE

The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve / recommend certain related matters that will flow from my decision to take early retirement

DISCUSSION

I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interests are the order of the day and indications are that this situation will prevail for the foreseeable future.

In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you will consider to approve that immediately after my early retirement, appoint me to my current position but as a contract employee. No legal provision prevents you from making such an appointment.

The third matter is slightly more technical and complicated and it concerns my early retirement benefits payable from the GEPF. Although the Rules of the GEPF provides that a member of the GEPF can elect to retire from the age of 55 years and onwards, there is a penalty payable in terms of the benefits. The specific Rules in this regard determines that both the lump sum and monthly pension will be reduced by 0.30% for each month before an early retiree reaches the age of 60 years. As I intend to take early retirement at age 56 years (48 months before reaching the age of 60 years), my pension benefits will be reduced by 14.4%.It was realized that the provisions of this particular GEPF Rule prevented many employees from early retirement and in many instances those were employees Departments would have liked to take early retirement. In an effort to address the situation, Section 16 (6) of the Public Service Act (which still applies to SARS) was amended to provide that where early retirement is applied for, Ministers can approve that employers (Departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF rules.

In view of this it will be appreciated if you, when I take early retirement, would recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R1 064 257.

Oupa Magashula
Commissioner: SARS
Date:

Comments: .....
.....
.....
.....
.....

APPROVED / NOT APPROVED

Pravin Gordhan
Minister: Finance
Date:

BROOKLYN CAS 427/05/2015

Nico Johan Coetzee states under oath in English

1.

I am an adult male, 68 years old with ID number 480428 5047 081 and a pensioner residing at number 23 Manfreya Mansions, 544 de Beer Street, Wonderboom-South, Pretoria, with cellular phone number 0721196823 and home telephone number 012- 3356402.

2.

I am a former South African Revenue Service Human Resource Specialist. I worked for South African Revenue Service for 29years. I retired from the employment of SARS on the 28th of February 2013. My duties entailed dealing with complex HR matters, drafting letters/memorandums to the Minister and the Commissioner. I was a member of SARS Bargaining Council, I was also responsible for drafting News Flashes regarding HR matters. I checked all legislations that may have had an impact on SARS matters. I was reporting to Mrs Susanna Visser .

3.

During December 2008, I was instructed by Susanna Visser to prepare a memorandum for the early retirement of the Deputy Commissioner of SARS, Mr Ivan Pillay to the Minister of Finance in terms of Section 16(6)(a)(b) of the Public Service Act, 1994.

I prepared the memorandum based on the fact that Mr Ivan Pillay wished to pursue other interests. The memorandum was submitted to Susanna Visser for Commissioner Pravin Gordhan to recommend to the Minister that he considers approving the early retirement of Mr Ivan Pillay in terms of the aforementioned provisions of the Public Service Act.

4.

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

MP

Nico Johan Coetzee continues under oath

4.

precedent in terms of which, other employees might come forward with similar request for early retirement.

5.

I have amended the two submissions I have received from the Commissioner's office to fit in with Pillay's latest request. On my e-mails to Oupa Magashula, I commented that it is not unusual that a retired employee is reappointed after retirement in a contract capacity. I also commented that what may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement. Ordinarily, such a re-appointment will be to a different and a lower graded position. I further commented that we had two similar applications for early retirement, both which were not approved by the Minister as the Minister could not find sufficient reasons to approve early retirement in terms of Section 16(6)(a) of the Public Service Act. The Minister only had to consider if sufficient reasons existed to approve Mr Pillay's early retirement.

6.

On the e-mail dated 09 October 2009, I stated that if Mr Pillay's application is duly recommended or approved, it could technically be construed that SARS is willing to contribute from its budget an amount of plus/minus R340 000.00 towards the education of his children. I also stated that it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself (Oupa Magashula) and the Minister of Finance in a tight spot, especially because Mr Pillay was reappointed in his present position. The argument may be that he was able to continue with his present functions but his early retirement and reappointment were purely to assist him to be able to provide for his children's education. The supporting document (e-mails) to the above effect is attached hereto as annexure NC1.

7.

I prepared the revised memorandum regarding this matter and forwarded it to the office of the Commissioner, Mr Oupa Magashula. After the 18th of October 2010, HR received a memorandum in which the Minister approved the early retirement of Mr Ivan Pillay. Human Resources started the process to ensure that Mr Pillay be paid his full retirement benefits as approved by the Minister.

MF

BROOKLYN CAS 427/05/2015

Nico Johan Coetzee continues under oath

8.

On the 6th of July 2012, the SARS Chief Financial Officer received a Revised Claim from the GEPF for the additional liability owing to the FUND. In respect of the liability of Mr Ivan Pillay SARS owed GEPF an amount of R1 141 178.11 in terms of the reduced benefit (penalty) that was due to be paid by SARS after the approval of the early retirement with full benefits. **See Annexure A.** I prepared a memorandum to Yolande van der Merwe (Finance SARS Own Accounts), see **annexure NC2**, to explain to her why the claim for the payment of R1 141 178.11 should be paid to the GEPF in respect of Mr Ivan Pillay. The payment of R1 141 178.11 was effected on the 06 July 2012. The payment was the amount that represented the penalty due to be paid by SARS in terms of Section 17(4) of the GEPF Act, 1996.

9.

I am unaware from which provision in the SARS budget this payment was made.

10.

During my time at SARS, I also dealt with two other applications for early retirement with full benefits. None of these applications were approved and I assume that insufficient reasons existed for the Minister not to approve those applications. At some stage, I and Susanna Visser had a meeting with Mr Oupa Maghashula to discuss the implications of Mr Ivan Pillay's possible early retirement with full benefits. We advised Mr Magashula that it was not advisable to continue with the early retirement application of Mr Pillay because it was for personal reasons and not business reasons.

This is all I can say

11.

I know and understand the contents of the above statement.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience.

N.J. Coetzee

Deponent's signature

MF

2016-09-14.

BROOKLYN CAS 427/05/2015

I certify that the deponent has acknowledged that he knows and understand the content of this statement. This statement was sworn to before me and the deponent's signature was placed thereon during my presence at Pretoria on the 2016-09-14 at about 20:00

Signature of Commissioner of Oaths

COMMISSIONER OF OATHS

MAGEZI FREDDY SEWELE

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION (CATS)

CAPTAIN

218 VISAGIE STREET, PRETORIA

Annexure NC-2

SARS

South African Revenue Service
Suid-Afrikaanse Inkomstediens
Uphiko lwezimali Ezingenayo eNingizimu Afrika
Tirelomatlotlo ya Afrika-Borwa

Memorandum

Human Resources

TO ◦ Yolande van der Merwe

FROM ◦ Nic Coetzee TEL ◦ (012) 422-

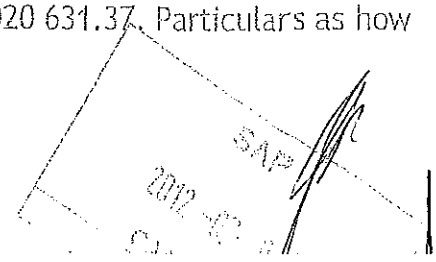
DATE ◦ 05 July 2012

SUBJECT ◦ Revised claim: ADDITIONAL LIABILITY OWING TO THE GOVERNMENT EMPLOYEES PENSION FUND (GEPF).

Yolande

The attached revised claim (Annexure A) for the additional liability owing to the GEPF refers

As to the background of this claim by the GEPF, your attention is invited to Section 17 (4) of the GEPF Law which reads as follows:
"17 (4) If any action taken by the employer or if any legislation adopted by Parliament places any additional obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation."
The aforementioned section of the Law thus places an obligation on SARS to pay to the GEPF an amount that is equal to the amount of the additional costs that accrued to the GEPF on account of a discretionary decision made by SARS in terms of the retirement of employees who were members of the GEPF.
In terms of the amount of R1,333,460.91 as indicated on the revised claim by the GEPF (Annexure A), SARS approved that only one employee between the ages of 55 and 60 years retire with SARS paying the penalty as provided for in Rule 14.3.3(b) of the GEPF Rules for early retirement on their behalf to the GEPF. This discretionary approval by SARS is provided for in terms of the provision of Section 16(6)(b) of the Public Service Act, 1994. In this regard you are referred to the attached Annexure B and in particular to Annexure B9. You are requested to pay only the original claim amount of R1,141,178.11 in respect of Mr Pillay SARS has never approved the retirement of Ms G van den Heever in terms of the aforementioned provision of the Public Service Act and the interest amount is currently also in dispute.
With reference to the second claim amount of R4, 020,631.37 on the revised GEPF claim (Annexure A) the President of the Republic of South Africa approved that Mr S Soni, a former SARS employee, be appointed as the South African Ambassador to Kazakhstan. Rules 14.1.1(e) and14.1.2 read with Rule 14.2.4(b)(AA) of the GEPF Rules determine that where the President granted approval for this appointment the pensionable service of the employee/member of the GEPF be increased by 1/3 of his/her contributory service limited to a maximum of 5 years. The increase of the pensionable service of the former employee by 5 years lead to the additional liability by SARS to the GEPF of R 4 020 631.37. Particulars as how this figure has been arrived at is indicated in Annexure C 3 - 7.



In view of the aforementioned it will be appreciated if the attached EFT Application Form for the amount of R5,161,809.48 can be processed as soon as possible according to the attached EFT instructions by the GEPF. Please also ensure that proof of payment is forwarded to the GEPF as per the EFT instructions. SARS's employer code to be used as a reference number of the deposit slip is 000146.

Nic Coetzee.
Operational Specialist
Human Resources.

SEQ 19/2019-204

SARS

NEW TRADE CREDITOR REQUEST FORM

Request by	NIC COETZEE	Checked by	
Tel	012 422 4185	Tel	
Date	2012-06-28	Date	

REASON FOR REQUEST:

CREATE VENDOR		VENDOR ON HOLD		OTHER REASON	X

Note: ADDITIONAL LIABILITY OWING TO THE GEPF
FOR THE PERIOD 01/04/2011-30/06/2011 (FIRST QUARTER CLAIM)
FOR THE PERIOD 01/01/2012-31/03/2012 (FOURTH QUARTER CLAIM)

Creditor ID (Head Office use only)	
Creditor Name	GOVERNMENT EMPLOYEES PENSION FUND
Trading as ...	GEPF
Class ID	
VAT Registration number	

	Current information	New information (Change)
Address (Postal and Physical)	PRIVATE BAG X63	34 HAMILTON STREET
City	PRETORIA	ARCADIA, PRETORIA
Postal code	0001	0007

Contact Person	MR MS MASANGO	
Phone number(s)	(012) 319 1237	( )
Additional contact number(s)	( )	( )
Fax number	(012) 325 0220	( )
E-mail address	simon.masango@gepf.co.za	

BANKING DETAILS

Account name	GOVERNMENT EMPLOYEES PENSION FUND (GEPF)
Bank	ABSA BANK
Account number	405 419 7798
Type of account (savings or cheque)	CURRENT/CHEQUE
Branch code	632005

NB: Please attached a cancelled cheque, if applicable.

SAP Bank stamp 20-07-06 CAPTURED APPROVED

Authorised by	

SEQ 19/2019-205

GOVERNMENT EMPLOYEES PENSION FUND

Contact: Mr MS Masango, Tel no.: (012) 319-1237, Fax no.: (012) 325-0220, Ref.: Bank Details (96)

Date: June 20, 2012

BANKING DETAILS FOR THE GOVERNMENT EMPLOYEES PENSION FUND (96 FUND)

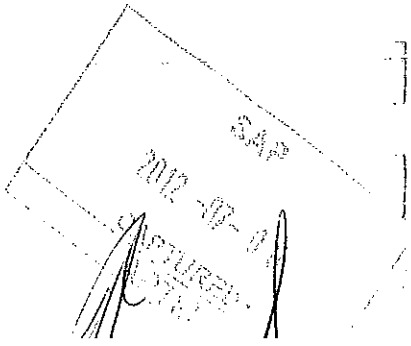
All deposits and electronic transfers in respect of the Government Employees Pension Fund (GEPF) should be deposited into the following bank account:

Bank:	ABSA
Account Name:	Government Employees Pension Fund (GEPF)
Account Number:	40-5419-7798
Account Type:	Current
Branch:	Voortrekker Road
Branch Code:	63-20-05

Proof of deposit must be sent to the Government Employees Pension Fund by fax to Mr MS Masango (012) 325-0220 or e-mail to simon.masango@gepf.co.za. Please ensure that you quote your Departments' employer code as a reference number (~~GEPF193~~ SARS 000146) on your deposit slip.

Thank you for your co-operation.

MS Masango
ASSITANT MANAGER: CONTRIBUTION MANAGEMENT
GOVERNMENT EMPLOYEES PENSION FUND



REPUBLIC OF SOUTH AFRICA
GOVERNMENT EMPLOYEES PENSION
ADMINISTRATION AGENCY

Private Bag X63, Pretoria, 0001, 34 Hamilton Street, Arcadia, Pretoria

Ref: 000146

Chief Financial Officer
NAT: SA REVENUE SERVICES
LEHALE LA SARS BUILDING
299 BRONKHORST STREET
NEW MUCKLENEUCK
PRETORIA
0001

21 June 2012

ATTENTION:

Revised claim: ADDITIONAL LIABILITY OWING TO THE GOVERNMENT EMPLOYEES PENSION FUND

URGENT

Reference is hereby made to the letter dated **19 June 2012** with regard to Additional Liability Claim(s) for the period **01 April 2011 to 30 June 2011 and 01 January 2012 to 31 March 2012** for which an amount of **R 5,431,718.19** is still outstanding and payable to GEPF on or before 7th of July 2012. *(Refer to Annexure B)*

Should an employer fail to pay the additional liability as it becomes due, interest will be charged at the prescribed rate (repo rate plus 3%) and the employer will also be obliged to pay the capital amount plus interest raised.

Also note that the GEPF debt collection Policy requires the following escalation procedures to be adhered in the event of nonpayment. Escalating to your **Chief financial Officer (CFO), Accounting Officer** and **Executive Authority;** should this not have the desired effect the issue will then be escalated to the office of the **Accounting General** within **the National Treasury** for the necessary intervention(s).

If the amount has already been paid, please forward proof of payment or queries in this regard to theresa.neethling@gpaa.gov.za or by fax to the following number (086) 690-0068.

SAP
2012 -06- 21
CAPTURED

You are reminded that actuarial interest will accrue on the outstanding balance; therefore contact must be made with our department to make payment arrangements.

Annexure B

Description	Issue Date	Claim Amount	Receipts	Total
First Quarter Claim: 2011/04/01-2011/06/30	23-Aug-11	1,333,460.91	-	1,333,460.91
Payment Received:		-	-	-
Balance		1,333,460.91		1,333,460.91
Fourth Quarter Claim: 2012/01/01 to 2012/03/31	15-June-12	4,020,631.37	-	5,354,092.28
Payment Received:		-	-	-
Late payment interest:		77,625.91		77,625.91
Amount Outstanding		4,098,257.28	-	5,431,718.19

Your co-operation is urgently required with regard to this matter

I trust that you will find this in order

MR. MS MASANGO
Assistant Manager: Contribution Management: EB - Finance Section
Enquiries: T .Neethling
Tel: (012) 319 1101
Fax: (086) 690-0068
E-mail: theresa.neethling@gpaa.gov.za

Annexure "A"

Nic Coetzee

From: Nic Coetzee
Sent: 09 October 2009 05:57 AM
To: Oupa G. Magashula
Subject: FW: HIGHLY CONFIDENTIAL


Early retirement application l...


Early retirement Ivan Pillay m...

Hi Oupa

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

Thanks

Nic.

-----Original Message-----
From: Nic Coetzee
Sent: 08 October 2009 03:24 PM
To: Oupa G. Magashula
Subject: RE: HIGHLY CONFIDENTIAL

Hi Oupa

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

Thanks

Nic.

-----Original Message-----
From: Tania Kirby On Behalf Of Oupa G. Magashula
Sent: 08 October 2009 01:12 PM
To: Nic Coetzee
Cc: Tania Kirby
Subject: HIGHLY CONFIDENTIAL

Dear Nic,

SA-12

Employment Contract between SARS and Mr Visvanathan Pillay

EMPLOYMENT CONTRACT

entered into between:

THE SOUTH AFRICAN REVENUE SERVICE
("the Employer")

and

Visvanathan Pillay
Identity number: 530418 5734 085
("the Employee")

1. APPOINTMENT

1.1 The Employer employs the Employee and the Employee accepts the appointment and shall render services to the Employer in the capacity set out in Annexure A to this contract, or any other similar capacity required by the Employer from time to time. Any change in capacity will be set out in a letter, which letter will then form an Addendum to this agreement and will replace Annexure A.

1.2 The Employee shall commence employment on 1 January 2011 (the "Commencement Date") for a period of Five (5) years and shall terminate on 31 December 2015. Notwithstanding the date on which this contract of employment is signed, the Commencement Date is as stated.

1.3 The Employee will perform his functions and duties in terms of this agreement at SARS Head Office in Pretoria or such other place as the Employee may reasonably be required by the Employer from time to time for the effective performance of the Employee's functions and duties in terms of this agreement.

2. FUNCTIONS AND DUTIES OF EMPLOYEE

2.1 The Employee will perform functions and duties in a professional manner and to the best of his ability as referred to in the role profile/ job description. Any change in role profile /job description will communicated as may be necessary.

2.2 In addition to the functions and duties contained in the job description, the Employee will:

2.2.1 perform such duties as the Employer or its duly authorised representative may from time to time assign to him;

2.2.2 perform his duties in a timely, professional and responsible manner as the Employer or other authorised representative of the Employer may direct from time to time;

2.2.3 in the discharge of his duties, observe and comply with all resolutions, directives, rules, orders, polices and procedures as the Employer may give from time to time;

2.2.4 devote all his time and attention to his duties under this agreement during normal working hours;

2.2.5 not communicate, publish or distribute to any person outside the Employer's employ, either during the continuance of his employment under this agreement or thereafter, any official documents, reviews, research results, articles and/or publications whether produced by the Employee or not, without the prior written permission of the Employer or other duly authorised representative of the Employer;

2.2.6 at such intervals as the Employer may direct, report fully on the results obtained and knowledge acquired by him in any research work done by him both during and outside working hours;

2.2.7 use his best endeavours to properly conduct, improve, extend, promote and protect and preserve the interests and reputation of the Employer; and

2.2.8 not engage in activities that would detract from the proper performance of his functions and duties.

2.3 The Employer may, after consulting with the Employee, change or amend the Employee's duties and responsibilities from time to time in accordance with the Employer's operational requirements.

3. REMUNERATION

3.1 The Employee will be paid an all inclusive remuneration package as set out in Annexure A to this contract of employment.

3.2 The Employee agrees that his remuneration package will be reviewed annually in line with the Employer's guaranteed pay policy and procedures, as applicable from time to time, copies of which are available to the Employee from the HR department. The Employee agrees to access the Employer's Pay Policy and Procedures and to familiarise himself as to the content thereof. A key element of this annual review will be the measurement of the Employee's performance against the standards of performance agreed to with the Employer represented by the Employee's line manager. The Employee will be advised of any increase to his remuneration package by means of a letter, which letter will then form an Addendum to this agreement and will replace Annexure A.

3.3 The Employer shall provide the Employee during his employment with the benefit of membership of a Medical Aid Scheme selected from time to time, unless the Employee furnishes proof that he is a dependant on his spouse's or partner's scheme. The Employee shall be subject to such Medical Aid Scheme's rules as amended from time to time.

3.4 The Employee is excluded from membership of the Government Employees Pension Fund in accordance with section 5 (d) of the Government Employees' Pension Law, 1996 (Proclamation 21 of 1996).

3.5 The Employer shall make contributions to the Employee's medical aid on behalf of the Employee and at the Employee's request, monthly in arrears, the cost of which shall form part of the Employer's remuneration package reflected in Annexure A to this contract of employment.

3.6 The Employee will receive his remuneration in twelve equal monthly payments on the 15th of every month. Should the 15th fall on a weekend or public holiday the Employee will be paid on the day immediately preceding such weekend or public holiday.

3.7 The Employer does not provide any post retirement medical aid benefits.

4. PERFORMANCE BONUS

4.1 The Employee will report to the Commissioner: SARS or a delegate who will discuss and conclude a performance contract with the Employee within the first six weeks of employment.

4.2 By concluding and signing such a performance contract, the Employee will be eligible to participate in the Employer's Performance Bonus/Incentive Scheme. In the event that the Employee refuses or is unwilling to participate in the Employer's Bonus/Incentive Scheme, then in such an event the Employee agrees that he will not be entitled to any additional remuneration save that as detailed in the agreed Employee's remuneration.

4.3 The terms and conditions of the Employee's participation on the above scheme are set out in more detail on the Employer's Performance Management and/or Incentive Scheme Policies, as applicable from time to time and available to the Employee, who agrees to access such policies, from the HR department..

5. WORKING HOURS AND OVERTIME

5.1 The Employee's ordinary hours of work are 8am to 5pm Mondays to Fridays, both days inclusive, with an entitlement to a 60 minute meal interval. However the Employee will be required to work such additional time as is necessary to properly perform all the functions of the job.

5.2 Overtime is paid only to those employees who are entitled to overtime in terms of the Overtime Policy.

6. LEAVE

6.1 Annual leave, sick leave, family responsibility leave and study leave is regulated by the Employer's Leave Policy, applicable from time to time, a copy of which is available from the HR department.

7. ALLOWANCE

7.1 Allowances payable to the Employee are regulated by the Employer's Allowances policy, applicable from time to time, a copy of which is available from the HR department.

8. CONFIDENTIALITY

8.1 The Employee agrees not to divulge or discuss his remuneration package with colleagues, as the Employer regards such matter as confidential.

8.2 The Employee shall not, either during the continuance of his employment under this agreement or thereafter, use for his own benefit or otherwise to the detriment or prejudice of the Employer, except in the proper course of his duties, divulge to any person any trade secret or any other confidential information concerning the business or affairs of the Employer which may come to the Employee's knowledge during his employment.

8.3 In particular, the Employee shall not at any time during or after termination of his employment, reveal to any person, firm or corporation, any of the trade secrets, technical know-how and data, drawings, systems, methods, software, processes, lists, programs, marketing and/or financial information, confidential information, or any information concerning the organisation, functions, transactions or affairs of the Employer, and shall not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Employer or may be liable to do so.

8.4 The Employee agrees that it is a condition of this contract that he signs the SARS Oath of Secrecy on or before the Commencement Date.

9. EMPLOYER RESOURCES

9.1 The Employee acknowledges and accepts that the Employee's resources, including but not limited to servers, computers, printers, telefax machines, telephones, postal services, e-mail facilities and internet facilities ("the resources") are for conducting the Employer's business.

9.2 The Employee shall have no expectation of privacy in relation to the use of the resources provided by the Employer.

9.3 The Employee understands and accepts that the Employer may, subject to relevant legislation, at its discretion, monitor the Employee's use of the resources and intercept, acquire, read, view, inspect, record and/or review any and all communications created, stored, transmitted, spoken, sent, received or communicated by the Employee on, over or in the resources or otherwise. The Employee hereby consents to the Employer doing so.

10. SECURITY

10.1 The Employee agrees to submit his person, personal belongings and office or workstation to a search by any person designated by the Employer whenever the Employer deems it necessary and reasonable.

11. EMPLOYER PROPERTY

11.1 All catalogues, correspondence, letters, memoranda, note books, order books, documents, papers, goods, samples, equipment and any other articles of any kind whatsoever that may be made available to or come into the possession of the Employee during the period of his employment under this agreement, shall belong to and remain the property of the Employer, both during the Employee's employment and after termination of his employment, at which time the Employee shall deliver to the Employer all such items in his possession with the assurance that no such articles remain in his possession.

11.2 Upon the termination of the Employee's employment, he must return to the Employer all property, of whatsoever nature, in his possession which belongs to the Employer.

11.3 In addition, the Employee must return to the Employer all other material containing information relating to the affairs of the Employer, regardless of whether or not such material was orginally supplied by the Employer to the Employee, including but not limited to: records, discs, accounts, letters, notes or memoranda.

12. INTELLECTUAL PROPERTY

12.1 Intellectual property rights include, but are not limited to, trade marks, service marks, trade names, domain names, designs, patents, petty patents, utility models and like rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing, copyright (including, without limitation, rights in computer software and data bases, and moral rights), rights in inventions, designs, know-how, confidential information, trade secrets, other intellectual property rights and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist in any country in the world.

12.2 Any intellectual property rights of whatsoever nature arising out of the performance by the Employee of his obligations in terms hereof are, to the extent that they do not vest automatically in the Employer, hereby irrevocably ceded and assigned in perpetuity to the Employer, it being further recorded that the Employer shall be entitled to cede and assign all such rights to any other person without limitation.

12.3 The Employer and/or such other person, as the case may be, shall be entitled to dispose of any and all intellectual property rights in their sole discretion, anywhere in the world, without the payment of any additional consideration to the Employee.

12.4 The Employee undertakes to sign all documents and to do all things necessary, at the cost of the Employer, to obtain or to record such intellectual property rights at any intellectual property rights registry in the world.

13. TERMINATION OF EMPLOYMENT

13.1 The Employee's employment shall automatically terminate as indicated in paragraph 1.2.

13.2 Notwithstanding 13.1 above either party may terminate this contract by giving the other party one (1) month's written notice of termination or such longer period for disengagement as agreed to in good faith with due regard to operational continuity of the Employer's business and the period it would take to replace the Employee.

13.3 The Employer may also terminate this contract by paying the Employee the amount of salary he would have received during the required period of notice in lieu of giving him that period of notice.

13.4 If the Employee is incapable of performing his duties under this contract because of mental or physical illness or injury, the Employer may terminate his employment for incapacity. To assist the Employer in deciding whether to terminate employment on these grounds the Employer may require the Employee to undergo (at the Employer's expense) a medical examination by a registered medical practitioner. The Employer may rely on any report or recommendations made available to the Employer as a result of that examination, along with any other relevant medical reports or recommendations received.

13.5 Nothing in this contract prevents the Employer from exercising its right to dismiss the Employee without notice at any stage for misconduct, incapacity, poor performance or the operational requirements of the Employer, or for any other reason justified in law and in accordance with the Employer's Disciplinary Code and Procedure.

13.6 On termination of employment, the Employee must return all the equipment and property of the Employer in a satisfactory condition before his final remuneration shall be paid.

14. CONFLICT OF INTEREST

14.1 Employees are required to ensure at all times that they do not put themselves in a situation where their own personal interests conflict or may potentially conflict with the interest of the Employer.

14.2 Conflicts of interest are regulated by the Employer's Declaration of Private Interests Policy applicable from time to time, a copy of which is available from the HR department.

15. COMPANY POLICIES AND PROCEDURES

15.1 All the Employer's policies and procedures as applicable from time to time form part of the terms and conditions of employment. The Employee undertakes and agrees that on signing this agreement, he will abide by such policies.

15.2 The Employee further agrees and undertakes to comply with all other Employer's policies, rules, regulations and procedures applicable from time to time. Copies of the Employer's policies and procedures are available from the HR department. It is the Employee's responsibility to familiarise himself therewith.

15.3 Transgression or non-compliance with any of the provisions of any of the Employer's policies and procedures may result in disciplinary action being taken against the Employee which may result in termination of the Employee's employment relationship with the Employer.

15.4 The Employer reserves the right to amend its policies at its discretion, from time to time.

SIGNED BY THE EMPLOYER AT Brooklyn ON THIS 7th THE DAY OF February 2011.

AS WITNESSES:

1. _____

2. _____

For and on behalf of:
The South African Revenue Service, duly authorised

SIGNED BY THE EMPLOYEE AT PRETORIA ON THIS 7th THE DAY OF February 2011.

AS WITNESSES:

1. _____

2. _____

The Employee

ANNEXURE A

1. CAPACITY

1.1 The Employee is employed in the capacity of Deputy Commissioner, SARS in terms of this agreement.

2. JOB DESCRIPTION OF EMPLOYEE

2.1 The Employee will perform the set functions and duties in a professional manner and to the best of his ability.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states under oath in English

1.

I am an adult white female 53 years of age id number 6210020074083 residing at 53 Ninow Road Valhalla Pretoria and employed by the South African Revenue Service as an Executive Remuneration and Employee Services with our offices situated at no.570 Fehrsen Brooklyn Linton house with cellphone no.0824602493 officeno.012-4224182.

2.

I am employed in SARS since January 1992 in the HR Division. My current duties include centralised HR and payroll administration for all employees in SARS.

3.

During March 2008 I was invited to a meeting at a Guest House in Brooklyn together with Ms Rita Hayes. During this meeting I was introduced to a group of employees who I knew worked for SARS as a group of employees whose duties it was to investigate the illicit economy. I was told to accompany Mr Pillay and Rita Hayes to the meeting as they wanted to regularise the appointment of these employees. During this meeting mentioned was made to "surface" these employees. Discussions was also taking place about who they will report as Andries Janse van Rensburg referred as "Skollie" was no longer going to be in charge as he was becoming a problem. I did not know who "Skollie" was.

4.

As per my recollection, a couple of days later, I was requested by Mr Pillay and Rita Hayes to meet them at the SARS Offices at Hatfield Gardens to assist them in trying to reach an agreement with "Skollie". It was the first time that I met "Skollie". We met in a separate room from where Mr Pillay was sitting. "Skollie was a threatening character and made threatening remarks to me. He said things like "hijackings can be arranged". I was very scared of him and knew that I was out of my depth. I went to Mr Pillay and informed him that I was not prepared to deal with this matter on my own. I requested that we inform Mr George Nkadimeng, the head of the SARS Employment Relations Division in HR, to assist with the process of obtaining a settlement agreement with "Skollie". He agreed and we briefed George Nkadimeng. From that point forward I met with "Skollie" only in the presence of Mr George Nkadimeng.

5.

During these talks George Nkadimeng and I would go back and forth between Mr Pillay in the other office and "Skollie" who we sat with in the other office. At some point during these talks, "Skollie" informed us that he had information that he is prepared to take to the

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

5.

media if we do not agree to pay him the balance of his employment contract. We informed Mr Pillay that he is threatening with information that he would leak to the media, however Mr Pillay told us that "he just thinks he still has it".

6.

At some point during these negotiations we were informed to pay Skollie the full balance of his employment contract. I then insisted that we draft a memorandum to obtain a mandate from SARS to enter into the separation agreement. See annexure CSV 01. Once this memorandum was signed by Mr Oupa Magashula (the then Head of Human Resources) in SARS and Mr Ivan Pillay, George Nkadimeng and I continued to draft the separation agreement.

7.

The separation agreement is a standard template that was used in the Employment Relations section. I then inserted "Skollie's" details into the agreement. This agreement was then signed by Mr Oupa Magashula on behalf of SARS. I signed as the witness for Mr Magashula. Skollie signed the agreement See annexure 02. I then continued to make payment to "Skollie" based on the signed separation agreement and memorandum approved by SARS officials. The payment was made up of a settlement of 36 month's remuneration that amounted to R3 063 937.68 and his leave pay due to him to the amount of R86 957.13. I never met or spoke to "Skollie" since.

8.

I was informed in 2010 via the Office of the Commissioner that Mr Ivan Pillay wanted to retire prior to the normal retirement age of 60, however he wanted to invoke a clause in the Government Employment Pension Fund Law that allows the Executive Authority (Minister of Finance in this case) that allows the Employer to pay the penalty in terms of the rules on behalf of him. I was presented with a document that he signed and addressed to Mr Oupa Magashula in his capacity as the Commissioner. See annexure CSV 03. Mr Nic Coetzee who reported to me dealt with all the difficult pension cases in my Unit and he discussed this request with me.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

8.

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

9.

The memorandum stating the clauses that SARS will invoke to pay the penalty and to re-employ Mr Ivan Pillay, was forwarded to the Office of the Commissioner. At some point during the process, Mr Magashula requested to have a list of such cases approved in Government. I informed him that I do not have access to such a list. According to my knowledge, Mr Magashula obtained such a list from the head of the Government Employmee Pension Fund. The memorandum marked annexure CSV 04 was then amended by Mr Marco Granelli who reported into Mr Oupa Magashula as the Commissioner.

10.

I was presented with the signed approved memorandum by the Minister and I initiated the process of the exit of Mr Ivan Pillay from the Pension Fund and his re-employment on a contract basis. Part of this process was to sign a contract of employment with Mr Ivan Pillay. I drafted a three year contract of employment to be signed by Mr Oupa Magashula as the Commissioner and Mr Ivan Pillay as the employee. The contract document was however amended to five years. See annexure (CSV 05). Mr Oupa Magashula requested that I sign as a witness for him. I queried the matter of the contract that was amended to five years. Mr Oupa Magashula indicated that they decided that it will be five years and not three and continued to sign the contract. I signed as witness as I believed it was merely to indicate that it was Oupa Magashula who signed the contract. I advised but the advice was cast aside and not taken.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

11.

In 2014 a new contract of employment annexure (CSV 06) was requested from my Office via Rita Hayes who was employed by Mr Ivan Pillay. I enquired why a new contract was needed as the previous employment contract was still valid however I was just advised that the Minister Mr Pravin Gordhan and Mr Ivan Pillay wanted to conclude a new contract. I then continued to e-mail a draft contract to her office. I was presented with a new contract of employment to implement for Mr Ivan Pillay.

12.

I know and understand the contents of the above statement.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience.

CS Visser

(Signature of the deponent)

Date: 2016-08-10

I certify that the deponent has acknowledged that she knows and understand the content of this statement. This statement was sworn to before me and the deponent's signature was placed thereon in my presence at Pretoria on the 2016-08-10 at about 13:31.

Capt

Signature of Commissioner of oath

COMMISSIONER OF OATH

MAGEZI FREDDY SEWELE

DIRECTORATE FOR PRIORITY CRIME INVESTIGATIONS

CAPTAIN,

218 GENERAL PIET JOUBERT BUILDING, PRETORIA

CONFIDENTIAL

Internal Memorandum

Dear Oupa

PURPOSE

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

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

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

Should you favorably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(d) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF. Indications are that the penalty will amount to about R1 064 257.

RECOMMENDATION

My recommendations are that you please:

- Take note that I intend to take early retirement
- Consider to approve that I be reappointed in a different capacity in SARS on a contract basis; and
- Consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer.

Regards

Ivan Pillay

5A.14

DRAFT STATEMENT OF MINISTER PRAVIN GORDHAN

INTRODUCTION

1. I make this statement in response to the request for a "*warning statement*" made by Major General Ledwaba of the Directorate for Priority Crime Investigation in her letter of 21 August 2016. As I understand the letter, I am required to deal with two issues. The first is my role as the Commissioner of SARS in the establishment of an investigation unit in 2007. The second is my approval, as Minister of Finance, of Mr Ivan Pillay's early retirement and re-appointment to SARS in early 2010.

2. I shall deal with both these matters. I am advised that my conduct was at all times entirely lawful. I will however not address matters of law because I have requested my attorneys to do so.

THE SARS INVESTIGATION UNIT

3. I was the Commissioner of SARS from November 1999 until May 2009. I was Minister of Finance from May 2009 to May 2014, Minister of Co-operative Governance and Traditional Affairs from May 2014 to December 2015 and again Minister of Finance from December 2015.

4. Your questions relate to an investigation unit in SARS. This unit was part of the broader enforcement division of SARS – similar to the enforcement capabilities required in any tax and customs administration in the world. In the South African societal and economic context, SARS had developed a compliance approach which consisted of good service to the compliant taxpayers, increased education about the importance of paying tax to those entering the economy, and different types of

enforcement being utilised on the non-compliant taxpayers depending on the level of non-compliance. Non-compliance could include non-submission of a tax return, incorrect information on a tax return, different types of debt collection, aggressive tax avoidance, abuse of trusts, tax evasion, smuggling across borders, cigarette and other forms of illicit trade, trafficking of drugs, round-tripping to avoid excise duties and VAT etc.

5. A few thousand staff could be engaged in these forms of enforcement activity. Enforcement actions are more effective when they are guided by good risk assessments and information from various stakeholders. Relatively few staff are engaged with risk assessments – some twenty-odd in the instance of the unit in question.

6. The unit did not initially have a name but was later successively known as the Special Projects Unit, the National Research Group and the High-Risk Investigations Unit. I participated in the decision to establish the Unit in February 2007. The manager of the Unit reported to Mr Ivan Pillay in his capacity as General Manager: Enforcement and Risk. Mr Pillay in turn reported to me for as long as I was Commissioner of SARS until May 2009.

7. I believed that the Unit was lawfully established to perform very important functions for and on behalf of SARS. As far as I was aware, the Unit lawfully performed its functions. If it or any of its members engaged in unlawful activities then they did so without my knowledge or consent.

8. SARS was established by the South African Revenue Service Act 34 of 1997. Section 3 provides that its objectives are *"the efficient and effective (a) collection of revenue; and (b) control over the import, expert, manufacture, movement, storage or use of certain goods"* including those subject to customs and excise duty.

9. Section 4(1)(a) of the SARS Act provides that SARS must *"secure the efficient and effective, and widest possible, enforcement"* of the tax laws listed in Schedule 1. Those tax laws have always vested SARS with wide powers for the investigation of tax matters including the investigation of crimes with tax implications. The wide scope of these powers is apparent from:

- sections 4 and 4A to 4D of the Customs and Excise Act 91 of 1964;
- sections 74 and 74A to 74D of the Income Tax Act 58 of 1962 (before its amendment by the Tax Administration Act);
- sections 57 and 57A to 57D of the Value-Added Tax Act 89 of 1991 (before its amendment by the Tax Administration Act); and
- sections 40 to 66 of the Tax Administration Act 89 of 1991.

10. SARS has thus always had its own investigation and enforcement units engaged in a wide range of investigations including criminal investigations with tax implications.

11. The Unit was established against the background of government's commitment to crack down on crime generally and organised crime in particular. President Mbeki mentioned this commitment in his state of the nation address on 9 February 2007 when he said that government would, amongst other things,

> "• *start the process of further modernising the systems of the South African Revenue Services, especially in respect of border control, and*

improve the work of the inter-departmental co-ordinating structures in this regard;

- *intensify intelligence work with regard to organised crime, building on the successes that have been achieved in the last few months in dealing with cash-in-transit heists, drug trafficking and poaching of game and abalone".*

12. It became apparent to SARS that it had to enhance its capacity to gather intelligence of and investigate organised crime. It decided in about February 2007 to set up the Unit to penetrate and intercept the activities of tax and customs related crime syndicates. Its initial intention was to employ and train the members of the Unit and then to transfer them to the NIA where they would continue to function as a unit dedicated to SARS. The NIA, however, lost appetite for the project as a result of which SARS decided to retain the Unit within its Enforcement Division.

13. I was, in my capacity as Commissioner, the chief executive officer of SARS. Its staff complement at the time was about 15 000. The Unit with a staff complement of only 26 odd, was a miniscule part of SARS. My knowledge of its establishment, functions and operations was consequently very limited. Your questions moreover enquire about events of many years ago. My recollection of the detail of those events is inevitably patchy.

14. I firmly believed at all times that the establishment of the Unit was an entirely lawful extension of SARS's long-standing capacity to investigate tax-related crime. I still hold that belief and am advised that those who contend otherwise are mistaken.

MR PILLAY'S EARLY RETIREMENT AND RE-APPOINTMENT

15. Mr Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.

16. The then Commissioner of SARS, Mr Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr Pillay sought in this way to gain access to his pension fund to finance the education of his children. I understood that Mr Magashula had established from enquiries made with the Department of Public Service and Administration that the terms of Mr Pillay's early retirement and re-employment were lawful and not unusual. I approved Mr Magashula's proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995.

CONCLUSION

17. I have nothing further to say in relation to these matters. If the Hawks however require any further assistance in good faith, I would be happy to assist.

Pravin J Gordhan
Minister of Finance
23 August 2016

Thembani Mokhari

From: Oupa G. Magashula
Sent: 23 July 2010 09:03 AM
To: kenny@dpsa.gov.za
Subject: Early retirment

Dear Kenny

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday. For the sake of refreshing both our memories the questions were:

- Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?
- If authorised, what is the impact of Cabinet's decision to recognise NSF service at a 100% on the retirement benefits of the Deputy Commissioner (assuming the approval is granted immediately). ? You mentioned the only outstanding decision to give effect to the cabinet's decision, is to develop/find a funding model for the 100% recognition of NSF service? If you could kindly give me an indication of how long you expect the process to take and who can do the estimates to assess the impact of this decision on the Deputy Commissioners retirement which is anticipated to happen in a month's time.
- Related to the first bullet point- do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?

Thank you again for your assistance and I will await your soonest response in the above matter.

Kind regards,

Oupa Magashula
Commissioner: South African Revenue Service

Lehae la SARS, 299 Bronkhorst Street, Nieuw Muckleneuk, PRETORIA 0181
Private Bag X923, PRETORIA, 0001
Tel: +27 12 422 5017 | Fax +27 12 422 5199
E-mail for official correspondence: omagashula@sars.gov.za

SA.16

Thembani Mokhari

From: Kenny Govender <Kenny@dpsa.gov.za>
Sent: 03 August 2010 06:14 PM
To: Oupa G. Magashula
Subject: RE: Early retirment

Dear Oupa

1. Employee initiated severances packages (EISP) are granted to employees that are generally in excess of the organization as a result of a restructuring exercise. It includes changing the content of the job or the abolishment of the post.
2. There is no restriction in the appointment to the public service or to the same department on a person who has left on a EISP. Any new appoint will be to a new post with a new set of conditions.
3. I do not have figures on how many were re-employed, but I aware of a few that were.
4. Cab Memo 8 of 2009 recognised full NSF service as pensionable service ito the GEPF rules for department of defence personnel. Dpsa together with dod and the gepf are currently preparing a cab memo to extend this decision to cover all public service employees and secondly to approve the funding associated with the recognition of this period has pensionable service. In light of this matter from SARS, we need to include other employers, outside the public service, that are contributing employers to the gepf – I will make sure it is included. The intention is to get this memo to cabinet before the end of this month. Once a decision is taken, the gepf will need to put in place systems to give effect. Its difficuly to give a clear indication of timeframes.
5. Finally, if the DC is granted an EISP his package will be calculated ito his current contribution to the gepf and amended once the NSF decision is obtained and implemented.

I hope the above assists and my apologies for the delay in responding. Please feel free to follow-up if necessary.

Kenny

From: Oupa G. Magashula [mailto:OMagashula@sars.gov.za]
Sent: 23 July 2010 09:11 AM
To: Kenny Govender
Subject: Early retirment

Dear Kenny

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday. For the sake of refreshing both our memories the questions were:

- Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?
- If authorised, what is the impact of Cabinet's decision to recognise NSF service at a 100% on the retirement benefits of the Deputy Commissioner (assuming the approval is granted immediately). ? You mentioned the only outstanding decision to give effect to the cabinet's decision, is to develop/find a funding model for the 100% recognition of NSF service? If you could kindly give me an indication of how long you expect the process to take and who can do the estimates to assess the impact of this decision on the Deputy Commissioners retirement which is anticipated to happen in a month's time.
- Related to the first bullet point- do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?

Thank you again for your assistance and I will await your soonest response in the above matter.

Kind regards,

Oupa Magashula
Commissioner: South African Revenue Service

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5A.17

DETERMINATION ON THE INTRODUCTION OF AN EMPLOYEE-INITIATED SEVERANCE PACKAGE FOR THE PUBLIC SERVICE (REVISED)

1 JANUARY 2006

MADE BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION

DETERMINATION ON THE INTRODUCTION OF AN EMPLOYEE-INITIATED SEVERANCE PACKAGE FOR THE PUBLIC SERVICE

1. SCOPE

1.1 This Determination is applicable to all employees appointed in terms of the *Public Service Act*, 1994, as amended.

1.2 For purposes of this Determination, the term "employees" means persons who are appointed permanently, but excludes persons who are appointed temporarily or on a fixed term contract.

2. AUTHORISATION AND DATE OF EFFECT

This Determination has been made by the Minister for the Public Service and Administration in terms of section 3(3)(c) of the Public Service Act, 1994, as amended and is effective from 1 January 2006.

3. PURPOSE

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

4. APPLICATION

4.1 Only employees who are affected by transformation and restructuring may voluntarily apply to his/her executing authority (or delegate) to be discharged from the public service in terms of section 17(2)(c) of the Public Service Act, 1994, as amended on the basis of the employee-initiated severance package set out in paragraph 6 or 7 of this Determination, as the case may be.

4.2 The application is subject to the approval of the relevant executing authority (or delegate).

4.3 The application must be made on the application form attached as Annexure A. An electronic copy of the application form is available on the DPSA website (http://www.dpsa.gov.za).

5. PROCEDURE FOR CONSIDERING THE APPLICATION

5.1 When an application is received by the executing authority (or delegate), he/she must decide whether or not to support the application.

5.2 In considering the application, the following must, as a minimum, be taken into account:

(a) The impact of the employee's exit from the department on its service delivery capabilities.

(b) The employee's competence and suitability for continued employment.

(c) The manner in which the employee's exit will support the transformation and restructuring of the department.

(d) The specific reasons for the employee's request.

(e) The ability of the department to finance the costs related to the payment of the severance package (e.g. refunding the Pension Fund, severance pay, leave pay, etc.).

(f) The impact of the granting of the severance package on the morale of other employees.

(g) Whether the employee occupies a post on the department's establishment or whether the employee is held additional to the establishment.

5.3 If misconduct or incapacity (due to poor performance) proceedings are underway against an employee, the decision regarding his/her application must be postponed until such proceedings have been finalised.

5.4 If the executing authority (or delegate) **does not support** the application, the employee must, in writing, be informed that the application is not approved. The employee must also be provided with adequate reasons for the decision and be informed of any right of review.

5.5 If the executing authority (or delegate) **supports** the application, the application form, with section B completed, must be submitted to the Minister for the Public Service and Administration (MPSA) for comment.

5.6 The MPSA's comments will be provided (in section C of the application form) to the relevant executing authority (or delegate) for a final decision.

5.7 Taking into account the MPSA's comments, the relevant executing authority (or delegate) must finally decide whether or not to approve the application.

5.8 If the application **is approved**, the employee must be notified in writing of the decision and his/her exit from the public service, must take effect not later than two months after the date of such notice.

5.9 If the application **is not approved**, the employee must be notified in writing of the decision, must be provided with reasons for the decisions and informed of any right of review.

5.10 Due care must be taken to ensure compliance with the provisions of the *Promotion of Administrative Justice Act*, 2000, with regard to decisions not to approve applications made in terms of Determination.

6. SEVERANCE PACKAGE PAYABLE: EMPLOYEES ON SALARY LEVELS 1-10

If the executing authority or delegate approves the employee-initiated severance package application, the following measures shall apply:

6.1 Pension benefits (in accordance with rules 14.8 and 20 of the Rules made in terms of the *Government Employees Pension Law*, 1996 (as amended) and Part B of the Annexure to the said Rules, as amended, with effect from 1 July 2005)

The following pension benefits are payable:

(a) Members of the Government Employees Pension Fund who have attained the age of 55 years and who have completed at least 10 years' pensionable service, on written choice of the member:

(i) A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice; OR

(ii) A gratuity and annuity determined in terms of the formula that applies to the member;

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

(b) Members of the Government Employees Pension Fund who have not yet attained the age of 55 years, and members who have attained age 55 but have less than 10 years pensionable service:

A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice,

without scaling down of pension benefits in terms of Rule14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

6.2 Severance pay

Two weeks basic salary for every full year of the qualifying period of service will be paid with a minimum payment of R15 000. The following formula will be used:

Step 1:
Calculate the following:

$$\frac{\text{Basic annual salary} \times \text{qualifying period of service.}}{26}$$

Step 2:
If the result of the calculation is less than R15 000, an amount of R15 000 must be paid. If the result of the above calculation exceeds R15 000, the calculated amount must be paid.

Service that may be recognised for severance pay purposes include the following service periods:

(a) Service in statutory bodies provided the affected employees were transferred to the Public Service in terms of section 15 of the *Public Service Act*, 1994 or a similar legislative provision.

(b) Service in former Development Boards provided the affected employees were transferred to the Public Service in terms of the *Abolition of Development Bodies Act*, 1986, or similar legislation.

(c) Service under a former provincial ordinance provided that the affected employees were transferred to the Public Service in terms of the *Provincial Government Act*, 1986, as amended.

(d) By virtue of section 2(5)(b) of the *Public Service Act*, 1994, as amended, service in institutions referred to in section 236(1) of the Interim Constitution must be recognised for severance pay purposes.

In determining the qualifying period of service, the provisions of section 84 of the *Basic Conditions of Employment Act*, 1997, apply. For this purpose, previous employment with the State as employer must be taken into account if the break between the periods of employment is less than one year **and occurred after 1 December 1998**, i.e. the date of implementation of section 41 (severance pay) of the *Basic Conditions of Employment Act*, 1997, in respect of the public service.

Example:

Mr A was in service from 1 January 1997 until 31 December 1999 (a full three years) when he resigned. He was re-appointed on 1 July 2000 (a break in service of 6 months) and will leave the service with a severance package on 30 September 2005. Since the break in service was less than 12 months, the three year period until 31 December 1999 must be added to the period of service that commenced on 1 July 2000 to calculate his severance pay. Note that only full years may be used and the severance pay due to Mr A will be calculated on eight years.

6.3 Leave pay

All unused days accumulated until 30 June 2000 (capped leave) as well as all unused days in respect of leave due to employees under the leave dispensation that became effective on 1 July 2000 must be paid according to the formulas contained in paragraphs 7.4 and 8.4 of the Directive on Leave of Absence in the Public Service issued by the Minister for the Public Service and Administration.

Leave must be audited before any leave payments may be made to an employee. In respect of capped leave, the Head of Department shall determine whether there are periods that cannot be audited due to a lack of records. In

such instances, an affected employee's leave payout shall be on the basis of 6 working days per completed year of service up to a maximum of 100 days in respect of unaudited periods.

6.4 Compensation for medical and housing benefits

(a) Employees aged 55 and older on the date of service termination who have been members of registered medical schemes for the year ending with service termination, will qualify for post retirement medical assistance as follows:

(i) Employees with less than 10 years of actual service: An amount equal to 12 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(ii) Employees with at least 10 but less than 15 years of actual service: An amount equal to 36 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(iii) Employees with at least 15 years of actual service: Employees who continue to be members of registered medical schemes will qualify for a continued employer contribution. The employer contribution will be two-thirds of membership fees limited to a maximum employer contribution of R1 014 per month. The employer contribution will be paid directly to the medical scheme by Pensions Administration.

(b) All other employees, namely-

- all employees who are younger than 55 at the date of service termination; and

- employees who are 55 and older who do not qualify for the above post retirement medical assistance benefits, e.g. they are not members of registered medical schemes,

must be paid a once-off all-inclusive amount of R9 000 by departments directly. This amount is in lieu of medical and housing benefits regardless of an employee's participation in the benefits before service termination. These employees do not qualify for post retirement medical assistance in future.

6.5 Service bonus

A pro rata service bonus calculated according to the formula in paragraph 1.2 of the Financial Manual for Purposes of the Calculation and Application of Remunerative Allowances and Benefits will be paid.

6.6 Contractual obligations

Employees are to be released from contractual obligations that require from them to remain in service.

Payments to third parties under the State Guarantee Scheme as well as other departmental debt will be recovered from pension benefits in terms of section 21(3) of the *Government Employees Pension Law*, 1996, if employees do not make suitable arrangements to settle their debt.

6.7 Official housing

Employees must be given one month's notification to vacate official housing, unless a different period is specified in an individual contract of employment.

6.8 Notice of termination of service

The employee's termination of service by the department must take effect within two months after the date of the notice of the approval of his/her application.

6.9 Subsidised car scheme

Subsidised motor vehicles must be dealt with in terms of the policy of the Department of Transport on subsidised motor vehicles.

6.10 Resettlement benefits

Employees who are 55 years and older on the date of service termination must be compensated according to provisions as set out in PSCBC Resolution 3 of 1999 and existing departmental policies.

7. SEVERANCE PACKAGE: EMPLOYEES IN THE MIDDLE MANAGEMENT SERVICE (LEVELS 11–12) AND SENIOR MANAGEMENT SERVICE (LEVEL 13 -16)

If a department grants a severance package on application to an employee remunerated according to the provisions for the Senior Management Service or Middle Management Service, the following measures shall apply:

7.1 Pension benefits (in accordance with rules 14.8 and 20 of the Rules made in terms of the *Government Employees Pension Law*, 1996 (as amended) and Part B of the Annexure to the said Rules, as amended, with effect from 1 July 2005)

The following pension benefits are payable to employees who are members of the Government Employees Pension Fund:

(a) Members who have attained the age of 55 years and who have completed at least 10 years' pensionable service, on written choice of the member:

(i) A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice; OR

(ii) A gratuity and annuity determined in terms of the formula that applies to the member;

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition to pensionable service in terms of Rule 14.2.4(b).

(b) Members of the Government Employees Pension Fund who have not yet attained the age of 55 years, as well as those who have attained age 55 but have less than 10 years pensionable service:

A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice.

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

7.2 Severance pay

The salary to be used for purposes of calculating severance pay is 100% of the inclusive remuneration package. Two week's salary for every full year of the qualifying period of service will be paid according to the following formula:

$$\frac{\text{Inclusive package} \times \text{qualifying period of service}}{26}$$

Service that may be recognised for severance pay purposes include the following service periods:

(a) Service in statutory bodies provided the affected employees were transferred to the Public Service in terms of section 15 of the *Public Service Act*, 1994 or a similar legislative provision.

(b) Service in former Development Boards provided the affected employees were transferred to the Public Service in terms of the *Abolition of Development Bodies Act*, 1986, or similar legislation.

(c) Service under a former provincial ordinance provided that the affected employees were transferred to the Public Service in terms of the *Provincial Government Act*, 1986, as amended.

(d) By virtue of section 2(5)(b) of the *Public Service Act*, 1994, as amended, service in institutions referred to in section 236(1) of the Interim Constitution must be recognised for severance pay purposes.

In determining the qualifying period of service, the provisions of section 84 of the *Basic Conditions of Employment Act*, 1997, apply. For this purpose, previous employment with the State as employer must be taken into account if the break between the periods of employment is less than one year **and occurred after 1 December 1998**, i.e. the date of implementation of section 41 (severance pay) of the *Basic Conditions of Employment Act*, 1997, in respect of the public service. (Note the example in paragraph 6.2).

7.3 Leave pay

All unused days accumulated until 30 June 2000 (capped leave) as well as all unused days in respect of leave due to employees under the leave dispensation that became effective on 1 July 2000 must be paid according to the formulas contained in paragraphs 4(d) and 5(d) of Chapter 3 of the SMS Handbook (SMS) and paragraph 7.4 and 8.4 of the Directive on Leave of Absence (MMS) as issued by the Minister for the Public Service and Administration.

Leave must be audited before any leave payments may be made to an employee. In respect of capped leave, the Head of Department shall determine whether there are periods that cannot be audited due to a lack of records. In such instances, an affected employee's leave payout shall be on the basis of 6 working days per completed year of service up to a maximum of 100 days in respect of unaudited periods.

7.4 Compensation for medical benefits

Employees aged 55 and older on the date of service termination who have been members of registered medical schemes for the year ending with service termination, will qualify for post retirement medical assistance as follows:

(a) Employees with less than 10 years of actual service: An amount equal to 12 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(b) Employees with at least 10 but less than 15 years of actual service: An amount equal to 36 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(c) Employees with at least 15 years of actual service: Employees who continue to be members of registered medical schemes will qualify for a continued employer contribution. The employer's monthly contribution will be two-thirds of membership fees limited to a maximum employer contribution of R 1 014 per month. The employer contribution will be paid directly to the relevant medical scheme by Pensions Administration.

7.5 Service bonus

(a) Employees who have structured a service bonus: A pro rata service bonus calculated according to the formula in paragraph 1.2 of the Financial Manual for Purposes of the Calculation and Application of Remunerative Allowances and Benefits will be paid.

(b) Employees who have not structured a service bonus: No payment will be made.

7.6 Contractual obligations

Employees are to be released from contractual obligations that require from them to remain in service.

Payments to third parties under the State Guarantee Scheme as well as other departmental debt will be recovered from pension benefits in terms of section 21(3) of the *Government Employees Pension Law*, 1996, if employees do not make suitable arrangements to settle their debt.

7.7 Official housing

Employees must be given one month's notification to vacate official housing, unless a different period is specified in an individual contract of employment.

7.8 Notice of termination of service

The employee's termination of service by the department must take effect within two months after the date of the notice of the approval of his/her application.

7.9 Resettlement benefits

Employees who are 55 years and older on the date of service termination must be compensated according to the provisions as set out in PSCBC Resolution 3 of 1999 and existing departmental policies.

ANNEXURE A

PROCESS FORM: APPLICATION FOR EMPLOYEE-INITIATED SEVERANCE PACKAGE

SECTION A *(TO BE COMPLETED BY THE EMPLOYEE)*

I, _____ (full first names and surname), herewith apply to be discharged (in terms of section 17(2)(c) of the Public Service Act,1994) from the public service on the basis of the employee-initiated severance package as determined by the Minister for the Public Service and Administration, in a dpsa circular 1/16/21 dated 16 January 2006. I declare that this request is made voluntarily and that I accept the conditions and severance benefits set out in the aforementioned determination by the Minister. I acknowledge that my application is subject to approval by the executing authority (or delegate).

The reasons for my request are the following (Please make use of a separate sheet if the allocated space is inadequate):

_____

_____

_____

_____

_____

SIGNATURE

DATE:

SECTION B *(TO BE COMPLETED BY THE RELEVANT DEPARTMENT)*

Department: _____

Rank of Employee: _____

Occupational classification code _____

Salary notch: R_____

Salary scale: R_____

Age: _____

Race: _____

Prescribed retirement age: _____

Amount of severance package (excluding pension benefits): _____

Reasons for supporting/not supporting the application (Please use a separate sheet if the allocated space is inadequate):

_____

_____

_____

_____

_____

EXECUTING AUTHORITY (OR DELEGATE)

DATE:

(NOTE: *If the application is **supported**, submit the process form to the Minister for the Public Service and Administration for comment.*

*If the application is **not supported** (and therefore not approved), <u>do not</u> submit to the Minister for the Public Service and Administration, but inform the employee in writing of the decision, provide him/her with adequate reasons for the decision and inform him/her of any right of review.)*

SECTION C *(TO BE COMPLETED BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION OR DELEGATE)*

Comment:

_____

_____

_____

_____

_____

_____

MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION (OR DELEGATE)

DATE:

SECTION D *(TO BE COMPLETED BY EXECUTING AUTHORITY OR DELEGATE)*

The application is approved/not approved

EXECUTING AUTHORITY (OR DELEGATE)

DATE:

(**NOTE:** *If the application is approved, the employee must submit a completed pension withdrawal form (Z102).*

*If the application is **not approved**, the employee must be informed in writing of the decision, be provided with adequate reasons for the decision and be informed of any right of review.*)

SEQ 19/2019-248

5A.18

GILDENHUYS MALATJI
INCORPORATED
REG NO 1987/002114/21
VAT NO 4400102861

GILDENHUYS MALATJI
ATTORNEYS

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THE NATIONAL PROSECUTING AUTHORITY OF SA
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29 August 2016

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ATTENTION: ADV S ABRAHAMS

Dear Adv Abrahams,

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

1. We refer to the above matter and to our letters exchanged on 24 and 25 August 2016.

2. Our client has come to learn through Media reports that the Hawks had completed their investigations and have also handed the docket pertaining to the above matter to your office. We again reiterate our request and in light of your letter of 25 August 2016 request that you urgently confirm whether our client will be afforded the opportunity to make both written and verbal representations to you regarding a decision whether he should be prosecuted or not.

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

Yours faithfully

GILDENHUYS MALATJI INC

Per: *Tebogo Malatji*

(Transmitted electronically and thus not signed)

SEQ 19/2019-249

5-A-19

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URGENT

OFFICE OF THE NATIONAL DIRECTOR
± 12h15
2016 -10- 14
NATIONAL PROSECUTING AUTHORITY

By hand
By email: skabrahams@npa.gov.za; kbenjamin@npa.gov.za
By fax: 012 843 2220

Your reference	Our reference	Date
Summons No 574/16 CAS: Brooklyn 427/05/2015	V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012607	14 October 2016

Dear Sirs

Summons in criminal case against, *inter alios*, the Honourable Minister of Finance Mr Pravin Gordhan: Summons 574/16; CAS: Brooklyn 427/05/2015

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation, non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project ("**our clients**").

2. We address this letter on behalf of our clients acting in their own and in the public interest.

3. On 11 October 2016, summons no. 574/16 was served on, *inter alios*, the Honourable Minister of Finance, Mr Pravin Gordhan, MP. In terms of annexures A, B and E thereto ("**the charge sheet**"), the Honourable Minister is charged with:

3.1 fraud, alternatively theft, in relation to the alleged payment by the South African Revenue Service ("**SARS**") to the Government Employees' Pension Fund ("**the Fund**") of R1,141,178.11 on behalf of Mr Visvanathan Pillay, where such sum was allegedly a penalty payable by Mr Pillay to the Fund (count 1 and the alternative to count 1 of the charge sheet); and

3.2 fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet);

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

4. As prefaced in our previous correspondence, your conduct in pressing baseless charges against the Minister of Finance has, and continues to have, devastating consequences for the Republic and its economy. This is a matter of paramount public interest and our clients intend to review and set aside your decisions to institute the charges against the Minister of Finance, under the constitutional principle of legality and otherwise, unless you withdraw the decisions or furnish a cogent basis for the actions taken. It has been held in a long line of cases that our clients have standing and an interest to bring such proceedings.

5. The charges, such as they are, are unsustainable in law and fact, and may be actuated by conscious recklessness or ulterior purposes on the part of the National Prosecuting Authority ("**NPA**").

6. In respect of charge 1 (fraud, alternatively theft), we note the following:

6.1 Mr Pillay was clearly entitled under the relevant legislation governing public servants' retirement to retire from the age of 55. This was an integral part of his employment relationship with the South African Revenue Service ("**SARS**").

6.2 In terms of the Rules of the Government Employees Pension Fund ("**GEPF**"), however, a retirement before 60 years of age constitutes retirement prior to the

pension retirement date and a penalty (by way of a deduction) would normally be applicable to the payout on such early retirement.

6.3 All the relevant legislation, however, provides for that penalty or deduction to be paid by SARS or the Government of the Republic of South Africa:

6.3.1 Rule 20 of the Rules to the Government Employees Pension Fund Law, 1996, ("**GEPF**") states that "***Compensation to the fund on retirement or discharge of a member prior to attainment of the member's pension retirement date.*** *Without detracting from the generality of section 17(4) of the Law, the Government or the employer or the Government and the employer shall, if a member, except for a reason in rule 14.1.1(a), retires, becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement, entitlement or discharge in terms of the rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the rules, and any of these actions result in an additional financial liability to the Fund,* ***pay to the Fund the additional financial obligations as decided by the Board acting on the advice of the actuary.*** *Such payment to the Fund, with interest to account for any delay in payment, shall be in accordance with a schedule approved by the Board.*"

6.3.2 Section 17(4) of the Government Employees' Pension Fund Law, 1996, which states that: "*If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be* ***shall pay to the Fund an amount which is required to meet such obligation***";

6.3.3 Government Employees Pension Fund Members' Guide, page 34, which reads "*Where the employer granted permission for your early retirement, your benefits will not be scaled down. However,* ***your employer will pay an additional liability.***"

6.4 In light of the above alone, the charges are unsustainable.

6.5 The position is simply reinforced by the following contemporaneous documentation related to the retirement of Mr Pillay:

6.5.1 The interoffice memorandum dated 27 November 2009 from Mr Pillay to the then Commissioner of SARS (annexed marked "**A**");

6.5.2 The Legal and Policy Division memorandum dated 17 March 2009 (annexed marked "**B**");

6.5.3 The memorandum dated 12 August 2010, and approved by the Minister on 18 October 2010 referred to in count 1 (annexed marked "**C**").

6.6 The above correspondence not only references the relevant legislation, but also:

6.6.1 sets out cogent reasons for Mr Pillay's circumstances; and

6.6.2 cites the fact that over 3000 government employees have taken early retirement with full benefits.

6.7 It is plain from the legislation that the retirement of Mr Pillay did not require the Minister's approval at all: SARS and the government would be liable to pay any early retirement penalty. But to the extent that the Minister gave his approval, it was clearly in line not only with a raft of legislation but also ample precedent.

6.8 The allegation that the NPA could ever prove fraud or theft in those circumstances in relation to the payment of the penalty is preposterous.

7. In respect of charge 4 (fraud), we note the following:

7.1 The charge is inchoate and incomprehensible.

7.2 It is initially alleged that SARS was not authorised to employ Mr Pillay as Deputy Commissioner for a period of four years from 1 April 2014 to 31 December 2018. The alleged issue is thus authority. There is nothing in law or fact, however, which states that SARS was not empowered to hire Mr Pillay as Deputy Commissioner for this period.

7.3 Under the relevant legislation, SARS is, in fact, empowered to employ its Deputy Commissioner. Section 5(1)(a) of the SARS Act empowers SARS to "*determine its*

own staff establishment, appoint employees and determine their terms and conditions of employment in accordance with section 18".

7.4 In respect of senior management SARS employees, the Minister of Finance is statutorily charged with approving the terms and conditions of their employment (under section 18(3) of the SARS Act).

7.5 That is precisely what happened in this case. SARS appointed Mr Pillay and the Minister of Finance approved his terms and conditions. The employment agreement is attached marked "**D**".

7.6 Thus the alleged representation (if it occurred at all) is correct in law and is in no way unlawful.

7.7 There is also no basis for the alleged prejudice. Mr Pillay, with a proven track record and years of exemplary service to SARS, would be rendering services as the Deputy Commissioner for the amounts which would be paid to him under the employment agreement. In any event, Mr Pillay's employment with SARS could be cancelled on one month's written notice - accordingly, if SARS ever felt aggrieved or prejudiced by Mr Pillay's employment, this could have been remedied on one month's notice.

7.8 The fraudulent intention is allegedly grounded in the fact that the Minister of Finance knew that SARS was under no obligation to enter into a new employment agreement. But the alleged misrepresentation is that the Minister of Finance stated that SARS was empowered (not obliged) to hire Mr Pillay, and so this intention is irrelevant to the alleged fraudulent conduct.

7.9 Ultimately, the charge of fraud is nonsensical, is bad in fact and law, and cannot be sustained.

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

9. Indeed, in previous correspondence from the Directorate for Priority Crime Investigation, it has never been alleged that Minister Gordhan [illegible]

allegations were breaches of the Prevention and Combating of Corrupt Activities Act, 2004, Public Finance Management Act, 1999 and National Strategic Intelligence Act, 1994.

10. In light of the above, please confirm, in writing and by no later than 16:00, 21 October 2016, that the charges against Minister Gordhan will be withdrawn.

11. Should you refuse or fail to withdraw the charges as set forth above, then, for the purposes of assessing their position and the breaches of your constitutional and statutory obligations, our clients require you to furnish the following information and reasons, by no later than 16:00, 21 October 2016:

11.1 the record of decision in respect of the decision to issue the summons and prefer the charges against Minister Gordhan (**"the Decisions"**);

11.2 full written reasons, and substantiating documents, which support the Decisions;

11.3 without derogating from the above, all reasons explaining why, despite the factual matrix in relation to the charges being known (and being in the public realm) for many years, the Decisions were taken now;

11.4 without derogating from the above, the evidence (alternatively a summary thereof) proving:

11.4.1 the unlawful intention required successfully to prosecute the charges;

11.4.2 that Minister Gordhan made any misrepresentation as required for the purposes of establishing fraud and that such misrepresentation induced the persons cited in counts 1 and 4 of the charge sheet to act to their prejudice;

11.4.3 the act of appropriation (or *contrectatio*) attributed to Minister Gordhan in respect of the alternative charge of theft.

11.5 whether any other instances of State employees taking early retirement with full pension (without any penalty payment being paid by the employee) are / have been investigated and are being considered for criminal prosecution on the basis of fraud or theft;

11.6 whether any other instances of State employees being hired after taking early retirement are / have been investigated and are being considered for criminal prosecution on the basis of fraud;

11.7 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement with full pension (and no penalty payment by such employee); and

11.8 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement and being rehired.

12. Should you not unconditionally withdraw the charges against the Minister or furnish the information sought within the time periods set forth above, our clients will assume that no reasons for the Decisions, and no documents other than the documents annexed to this letter, exist in support of the charges.

13. Our clients may then, without further notice, seek to exercise their rights in law on an urgent basis.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

SEQ 19/2019-256

5.7.20

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
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Your ref: V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012607
Our ref: Summons No 574/16
CAS Brooklyn 427/05/2015

Webber Wentzel
P O Box 61771
MARSHALLTOWN
2107

Dear Sir

Email: vlad.movshovich@webberwentzel.com

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

1. Your letter dated 14 October 2016, the content of which is noted, refers.

2. As you are aware, the decision to prosecute Minister Pravin Gordhan was made by the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, Dr Torie Pretorius SC, in consultation with the Director of Public Prosecutions, North Gauteng, Adv Sibongile Mzinyathi in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

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

4. Earlier today Messrs Oupa Magashula and Visvanathan (Ivan) Pillay, through their legal representatives, made representations to me in which they

requested me to review the decision by the Acting Special Director of Public Prosecutions.

5. I am presently considering the aforementioned representations.

6. In giving effect to the provisions of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, I have further invited Minister Gordhan through his lawyers, to make representations to me by no later than 17h00 on 18 October 2016.

7. I will consider all these representations.

Yours sincerely

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

SEQ 19/2019-258

5A.21

WEBBER WENTZEL
In alliance with > Linklaters

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National Director of Public Prosecutions
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URGENT

Your reference	Our reference	Date
Summons No 574/16 CAS: Brooklyn 427/05/2015	V Movshovich / P Dela / D Cron / D Rafferty / W Timm / T Dye 3012607	18 October 2016

Dear Sirs

Summons in criminal case against, *inter alios*, the Honourable Minister of Finance Mr Pravin Gordhan, MP ("Min. Gordhan"): Summons 574/16; CAS: Brooklyn 427/05/2015 ("the Summons")

1. We refer to your letter dated 17 October 2016 ("**your letter**").

2. We note that Min. Gordhan has publicised his intention not to make representations on the basis that he believes you are capable neither of being independent nor of objectively considering his representations concerning the charges put to him in the Summons ("**the Charges**").

3. There is much to be said for Min. Gordhan's position. The conduct of the National Prosecuting Authority, including yours, has not been characterised by anything approximating the necessary objectivity or due care. From the circumstances, it appears that you may well have been the person who took the decision to institute the Summons. In any event, it was you who announced and specifically justified, with much fanfare, the Charges being brought against Min. Gordhan last week. There is no basis to suppose that you are capable of exercising, or may be entrusted to exercise, an independent discretion in this matter.

4. We point out that section 179 of the Constitution and section 22(2)(c) of the National Prosecuting Authority Act, 1998 ("**the Act**") contemplate representations by "*any other person or party whom the National Director considers to be relevant.*" Without in any way acknowledging that you have not disabled yourself from making an unbiased and legitimate decision and without prejudice to any review grounds to be pursued by our clients, our clients have made submissions to you in our letter dated 14 October 2016 as to why the Charges are insupportable and must be withdrawn ("**our 14 October letter**"). We accordingly assume that they will be considered by you alongside the other representations, which in paragraph 7 of your letter you indicate you will be considering.

5. Should we not receive your decision to withdraw the Charges by 16h00 on Friday, 21 October 2016, our clients may, without further notice, seek to exercise their rights in law on an urgent basis. We also remind you of the need to furnish our clients with the information set forth in our 14 October letter, should the Charges not be withdrawn. For ease of reference, we reiterate that the information sought is the following:

5.1 the record of decision in respect of the decision to issue the summons and prefer the charges against Minister Gordhan ("**the Decisions**");

5.2 full written reasons, and substantiating documents, which support the Decisions;

5.3 without derogating from the above, all reasons explaining why, despite the factual matrix in relation to the charges being known (and being in the public realm) for many years, the Decisions were taken now;

5.4 without derogating from the above, the evidence (alternatively a summary thereof) proving:

5.4.1 the unlawful intention required successfully to prosecute the charges;

5.4.2 that Minister Gordhan made any misrepresentation as required for the purposes of establishing fraud and that such misrepresentation induced the persons cited in counts 1 and 4 of the charge sheet to act to their prejudice;

5.4.3 the act of appropriation (or *contrectatio*) attributed to Minister Gordhan in respect of the alternative charge of theft.

5.5 whether any other instances of State employees taking early retirement with full pension (without any penalty payment being paid by the employee) are / have been

investigated and are being considered for criminal prosecution on the basis of fraud or theft;

5.6 whether any other instances of State employees being hired after taking early retirement are / have been investigated and are being considered for criminal prosecution on the basis of fraud;

5.7 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement with full pension (and no penalty payment by such employee); and

5.8 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement and being rehired.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
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Email: vlad.movshovich@webberwentzel.com

ADV NAZEER CASSIM SC
MEMBER OF THE JOHANNESBURG BAR

MAISELS CHAMBERS 3

MEMORANDUM

DATE: **18 OCTOBER 2016**

TO: **MR S ABRAHAMS**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

RE: **STATE v OUPA MAGASHULA, IVAN PILLAY, PRAVIN GORDHAN**

1. We appreciate the opportunity afforded to us to make representations on behalf of Accused No. 2, Mr Ivan Pillay ("Pillay"), in accordance with the provisions of section 179 of the Constitution of the Republic of South Africa.

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

3. A copy of Symington's opinion dated 17 March 2009 was furnished to you.

4. We also drew your attention to the provisions of section 16(4) read together with 16(6)(a) and (b) of the Public Service Act which contemplated that under the appropriate circumstances, Pillay would not be penalised in terms of pension fund benefits should he take early retirement. We accept that the

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circumstances itself is a value judgment, but hardly, with respect, a matter, on the facts of this case, where it can be suggested that the Accused would not satisfy the test of a reasonably possibly true version (**Rex v Difford** 1937 AD 370).

5. We also addressed you on some length on public policy considerations as to why, in the exercise of the discretion vested in you in law, that you take a decision not to prosecute this case.

Regards

NAZEER CASSIM SC

AFZAL MOSAM
Electronic transmission and therefore unsigned

Instructed by: **Mr A Patel**
Cliffe Dekker Hofmeyr Inc

SA 23

ADV PJJ DE JAGER SC

Advokaat van die Hooggeregshof van Suid-Afrika / Advocate of the High Court of South-Africa
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Datum/Date:	18 October 2016
U verw/Your ref:	

Adv Shaun Abrahams
The National Director of Public Prosecutions

IN RE THE STATE v GEORGE (OUPA) MAGASHULA & 2 OTHERS

Our consultation at your chambers on 17 October 2016 refers. My learned attorney, Mr Michael Tilney, instructed me to afford you, as we had undertaken yesterday, with a short résumé of our views on the facts and the law in respect of the charges laid against our client, Mr Oupa Magashula (Accused No 1).

It is obvious that we cannot speak on behalf of the other accused, however, the actions taken by the three accused which forms the basis of the charges proffered against them are interwoven and/or all the charges are based on the actions taken by the three accused in securing Mr Ivan Pillay's early retirement and reappointment on contract as Deputy Commissioner of SARS.

As was indicated to you by Mr Tilney and myself we foresee almost no factual dispute. It is a question of law whether the facts on which your good offices rely can ever sustain any criminal charge of whatsoever nature. The legal basis on which we rely can thus be shortly summarised as follows:

1. Not a single act performed by either of the accused can ever be defined as unlawful. When functionaries and/or a Minister acts strictly within their empowering statute(s) and merely execute a discretion which they are empowered to do in terms of the laws of the Republic of South Africa it is unthinkable that unlawfulness can ever come into play. Not even to mention any inference of criminal intent.

2. At all material times and specifically in terms of Section 16(2A)(a) an officer such as Mr Pillay had the right to retire from the public service on the date on which he attained the age of 55 years or at any date after that date.

3. This should, however, be read with Section 16(6)(a) which specifically provides that retirement before the age of 60 years, i.e. older than 55 but younger than 60 requires the permission of the Executive Authority. In terms of the definitions set out in Section 1, that is the Minister of his or her department, i.e *in casu* Accused No 3 and permission may be given if sufficient reasons exist for retirement. This is purely a discretional function which the Minister has and which falls clearly within his sole discretion. You mentioned that you doubted whether personal circumstances of an official constitutes sufficient reason for granting such permission. There is absolutely no provision in the act or in any other act that creates a *numerus clausus* of reasons or that restricts the Minister's discretion in this regard.

4. Section 16(6)(b) creates a deeming provision with reference to subsection 16(4). In terms of this deeming provision the moment that the Minister accedes to the request in terms of subsection 16(6)(a), the employee shall be entitled to such pension as he or she would have been entitled to if he or she retired from the public service in terms of subsection 4. That means at the age of 60. The provision is couched in peremptory terms and the Minister's discretion actually does not go beyond the permission that he gives for early retirement. It thus follows that any shortfall or "penalty" should of necessity be paid by the State. This happens every day and

according to our information thousands of employees of various departments went on early retirement in terms of this section.

5. Our submissions set out *supra* are further strengthened by the provisions of Section 17(4) of the Government Employees' Pension Fund Law 1996, as well as Rule 20 of the Rules promulgated in terms of that Act. Furthermore, the Government Employee's Pension Fund Members' Guide states clearly that:

> *"Where the employer granted permission for your early retirement your benefits will not be scaled down. However, your employer will pay an additional liability."*

As for the facts, you have access to all the documentation pertaining to same and it clearly appears that the written and transparent procedure that was followed is not tainted by any illegality and cannot warrant the slightest inference of criminal intent.

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

We are not going to deal with the separate charges. If all the actions referred to *supra* were lawful and untainted with any criminal intent it is unnecessary to analyse any further.

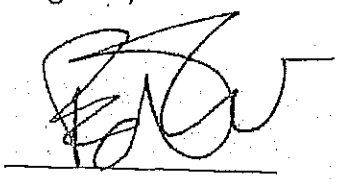
In the light of the foregoing, we humbly submit that neither Mr Magashula, Mr Pillay nor Minister Gordhan did anything untoward, let alone committing a crime.

It is unnecessary to deal with the reappointment of Mr Pillay. This happens daily in various different government departments. No new pension benefits were afforded in

the contract eventually concluded. Mr Pillay had a track record, did not get his new appointment for free, and had to render services for it. His contract could have been terminated with one month's notice, if ever it was required by SARS.

We hope that the foregoing may assist you in taking your final decision in this regard.

Regards,



PJJ DE JAGER SC

Instructed by: Michael Tilney
Tilney Incorporated Attorneys
JOHANNESBURG

"B"

SARS

Memorandum	South African Revenue Service Suid-Afrikaanse Inkomstediens Uphiko lwezimali Ezingenayo eNingizimu Afrika Tirelomatlotlo ya Afrika-Borwa
Legal and Policy Division	Pretoria Head Office 299 Bronkhorst Street, Nieuw Muckleneuk, 0181 P O Box 402, Pretoria, 0001 Telephone (012) 422-4000 E-mail: vsymington@sars.gov.za

TO	COMMISSIONER		
FROM	Vlok Symington	TEL	(012) 422-4929
2009 march 17	2009 March 17	FAX	(012) 422-4952
SUBJECT	EARLY RETIREMENT: MR IVAN PILLAY		

Dear Commissioner,

Background

Mr Ivan Pillay requested me to consider certain elements that form part of his decision to apply for early retirement from the Government Employees Pension Fund (the GEPF). These elements are:

1. His application for early retirement from the GEPF;
2. His application to the Minister of Finance to waive the early retirement penalty; and
3. His request to be appointed on contract after his early retirement from the GEPF.

The technical position

Approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age for early retirement, he is entitled to request the Minister to "waive" the early retirement penalty, and no technicality prevents SARS from appointing him on a contract after his retirement from the GEPF.

Financial risk

I am not a registered financial advisor and my views in this document is therefore not intended to be financial advice and should not be construed as such.

Mr Pillay opted for the early retirement package to be paid in the form of a monthly pension and a once-off gratuity. Because of the current global financial turmoil and his personal adversity to risk his choice in favour of a pension and gratuity split is prudent.

However, the financial soundness of his decision to apply for early retirement is dependent on whether the Minister approves the SARS payment of the benefit penalty to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-à-vis his projected life expectancy. If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and my advice then would be for him to review his application for early retirement and to possibly withdraw it.

Summary

Mr Pillay's application for early retirement should be considered together with his application for the Minister to approve the benefit penalty payment by SARS as well as his request for post retirement contract employment at SARS. If his application is approved as a package the financial risks in the context of his circumstances are probably minimal. However, if the Minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably altogether be withdrawn.

Kind regards

Vlok Symington

MEDIA ANNOUNCEMENT

By

ADV SHAUN K ABRAHAMS

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

11h00, 31 October 2016: VICTORIA AND GRIFFITHS MXENGE BUILDING, PRETORIA

Good morning!

I would like to acknowledge the presence of:

Dr Silas Ramaite SC, a Deputy National Director of Public Prosecutions;

Adv Thoko Majokweni, an Acting Deputy National Director of Public Prosecutions;

Adv Sibongile Mzinyathi, the Director of Public Prosecutions, North Gauteng;

Dr Torie Pretorius SC, the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit;

Ms Bulelwa Makeke, the Head of Communications;

Adv Luvuyo Mfaku, my Spokesperson;

Members of the media;

Ladies and Gentlemen;

This morning's announcement relates to the review of the decision to prosecute Mr Oupa Magashula, Mr Ivan Pillay and Minister Pravin Gordhan

A: INTRODUCTION

1. On 11 October 2016 I announced the decision of the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit ('PCLU') made in consultation with the Director of Public Prosecutions:

North Gauteng, that Mr Pillay, Mr Magashula and Minister Gordhan must be prosecuted and arraigned on various charges.

2. At the outset of that briefing I alluded to the provisions of section 179(5)(d) of the Constitution, which empowers me as the National Director, when requested, to review a decision to prosecute or not to prosecute:

   (i) after consulting the relevant Director; and,

   (ii) after taking representations, within a period as specified by me, from the accused persons, the complainant and any other person or party whom I consider relevant.

3. When I made the announcement I extended an invitation to Mr Magashula, Mr Pillay and Minister Gordhan to make representations to me as the National Director.

4. This is in line with the provisions of section 179(5)(d) of the Constitution, read with section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act'), to review a decision to prosecute and to decide whether to continue or discontinue a prosecution.

5. The receipt of representations and requests to review decisions is a daily occurrence. The NPA receives representations from accused persons and/or their legal representatives in respect of matters in both the lower and High Courts, which are submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, The DPP Offices and/or to Special DPPs. This serves as checks and balances in the criminal justice system. So too do my constitutionally enshrined powers of review.

6. Since my appointment in June 2015 I have reviewed numerous cases. In giving effect to my constitutionally entrenched review powers I have overruled the original decisions of Directors of Public Prosecutions and/or Special Directors to prosecute or to discontinue prosecutions in numerous instances. I have also agreed with the original decisions of Directors of Public Prosecutions and/or Special Directors in many instances.

7. I believe that there is a general public misconception as to my role as the National Director and not a full appreciation of the structure of the National Prosecuting Authority.

8. Whilst I have the power to institute a prosecution, I would only do so in very rare instances. This matter was certainly not one of those rare instances.

9. Thus, if I made a decision to prosecute, it would not be competent for me to review my own decision in terms of the Constitution or the NPA Act.

10. I am vested with and retain the power to review a decision to prosecute after complying with the provisions of the Constitution and the NPA Act as already mentioned.

11. Hence my invitation to make representations if they wished to do so.

12. I have always been mindful of the constitutionally entrenched rights that everyone is equal before the law and everyone has the right to equal protection and benefit of the law.

B. <u>THE DECISION TO PROSECUTE</u>

13. Before I speak on the Review and prior to informing you of my decision, I deem it relevant to first speak of the initial decision to prosecute.

14. The decision by the Head of the PCLU to prosecute Mr Magashula, Mr Pillay and Minister Gordhan on, *inter alia*, charges of fraud are premised on the following brief set of facts:

14.1 Mr Magashula was employed at SARS from 2006 to 2009 as the Head of Human Resources and Corporate Services and as the Commissioner from 2009 to 12 July 2013.

14.2 Mr Pillay joined SARS in 1999. He was the General Manager of the Enforcement & Risk Unit until his appointment as Deputy Commissioner in 2009, in which capacity he served until his resignation with effect from 31 December 2010. He continued to serve as the Deputy Commissioner of SARS on contract until the termination thereof in 2015. He also served as the Acting Commissioner of SARS from 12 July 2013 until the appointment of Mr Tom Moyane in 2015.

14.3 Minister Gordhan served as the Commissioner of SARS from November 1999 to May 2009 and as the Minister of Finance from May 2009 to May 2014 and again from 15 December 2015 to date. From May 2014 to December 2015 Minister Gordhan served as the Cabinet Minister responsible for Co-operative Governance and Traditional Affairs.

December 2008 Memorandum

14.4 Mr Pillay first applied to go on early retirement in December 2008, when a vastly experienced Human Resource Specialist in the employ of SARS was requested to prepare a memorandum for the early retirement of Mr Pillay.

14.5 The memorandum was for the attention of the Commissioner, (who was Mr Gordhan at the time), to recommend to the then Minister to consider approving the early retirement of Mr Pillay in terms of the provisions of Section 16(6)(a) and (b) of the Public Service Act.

14.6 At that stage, the reasons advanced by Mr Pillay to retire early were to the effect that he wished to pursue other interests.

14.7 This memorandum was never approved. Instead, the self-same Specialist received a revised version of the memorandum in October 2009 from the office of the Commissioner, (who was now Mr Magashula), which contained different reasons as to those advanced by Mr Pillay in the original memorandum for the Minister to approve his early retirement.

14.8 The revised memorandum now advanced that Mr Pillay wished to retire early to enable him to provide for his children's education.

14.9 The self-same Specialist raised concerns to Mr Magashula via e-mails dated 8 and 9 October 2009 to the effect that:

(i) In the event the Minister approves Mr Pillay's application on the grounds of personal interests it may create a precedent in terms of which other employees may submit similar requests for early retirement;

(ii) Further, that should Mr Pillay's application be approved, it could technically be construed that SARS contributed approximately R340 000 towards the education of Mr Pillay's children;

(iii) That approving Mr Pillay's request may put both he and the Minister of Finance in a tight spot, especially if Mr Pillay is reappointed in the very same position; and

(iv) That the argument could be advanced that Mr Pillay was able to continue with his present functions as his retirement and reappointment was purely to assist him to provide for his children's education.

14.10 He further confirmed that whilst at SARS, he dealt with two other applications for early retirement with full benefits. Neither of the two were approved as insufficient reasons existed for the Minister to have approved those applications.

14.11 He is largely corroborated by his supervisor, a Remuneration and Employee Services Executive. He along with his supervisor further advised Mr Magashula against continuing with Mr Pillay's early retirement as it was for personal reasons and did not advance SARS' business interests.

14.12 Another SARS official, a Remuneration and Benefits Executive made a statement to the Hawks in which he, *inter alia*, states that after diligently perusing SARS policies he expressed the view that there is no framework that governs SARS' payment of penalties imposed by the GEPF in respect of SARS officials and that issues relating to the retirement of SARS officials' retiring early and the penalty imposed by the GEPF Law are governed by that law.

14.13 During 2009 Mr Pillay successfully purchased pensionable service for the period 28 February 1980 to 27 April 1994, to enhance his

retirement benefits, through the Government Employees Pension Fund ('GEPF').

August 2010 Memorandum

14.14 In August 2010, Mr Pillay, who was 56 years old at the time, submitted separate internal memoranda to Mr Magashula, and to Minister Gordhan, in which he, *inter alia*:

(i) Informed them of his decision to retire early;

(ii) Explained that the decision to retire early is largely informed by his deteriorating medical condition and family responsibilities, which he had suffered as a result of his dedication to his job at SARS;

(iii) Requested to be reappointed in SARS in a different capacity on contract after having taken early retirement;

(iv) Further requested Mr Magashula to recommend to the Minister Gordhan, to approve his early retirement '*subject to the provisions of section 16(6)(d) of the Public Service Act, in terms of which the Minister approves that the penalty imposed*' on his pension benefits as envisaged by Rule 14.3.3(b) of the Government Employment Pension Fund (GEPF) Rules, '*be paid by SARS to the GEPF*' on his behalf.

14.15 It is clear that regard was had to sections 16(6)(a) and (b) of the said Act, which read as follows:

"*(6)(a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years,*

notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient reason exists for the retirement.

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

14.16 It is evident from the aforementioned subsections:

(i) That an executive authority is vested with the discretion to allow an employee to retire early subject to, *inter alia*, the request from the employee and where sufficient reasons exist for such a retirement;

(ii) That should the above criteria be met, an employee will be entitled to such pension as he or she would have been entitled to where the retirement is in terms of the relevant subsection, and in reference to the early retirement age.

14.17 The aforementioned subsection does not waive the requirements of the Government Employees Pension Law of 1996 (*'the GEPL'*) and its Rules, nor does it vest the executive with the discretion to wave the requirements of the Government Employees Pension Law and its Rules.

14.18 The Government Employees Pension Law provides for the payment of pensions and other benefits to persons in the

employment of Government, certain bodies and institutions, and to the dependents and nominees of such persons.

14.19 The Government Employees Pension Law further provides for Rules which are binding on Government, The Government Employment Pension Fund ('*GEPF*'), its members, pensioners and their beneficiaries or any person who has a claim against the GEPF.

14.20 Section 2 of the South African Revenue Services Act 34 of 1997 ('*the SARS Act*') establishes SARS as an organ of state within the public administration, but as an institution outside of the public service.

14.21 Section 19 of the SARS Act however reads as follows:

"(1) Subject to the Government Employees' Pension Law, 1996) Proclamation No. 21 of 1996), a person appointed by SARS as an employee –

becomes a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996; and
is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service..." [My emphasis]

14.22 Hence, the GEPL and its Rules are applicable to persons appointed as SARS employees.

14.23 Mr Pillay was a SARS employee during the period in question, hence the GEPL and its Rules were applicable to his application for retirement.

14.24 Rule 14.3.1 reads as follows:

> *"If a member retires –*
> *(a) ...*
> *(b) before his or her pension-retirement date in terms of the law governing his or her terms and conditions of service;*
> *(c) ...*
> *(d) before his or her pension-retirement date, but not a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment;*
> *(e) ...*
>
> *Such member shall be entitled to the benefits indicated in rule 14.3.2 or 14.3.3, as the case may be."*

14.25 Rule 14.3.2 is only applicable to members with less than 10 years' pensionable service and finds no application to Mr Pillay's matter as Mr Pillay had in excess of 10 years pensionable service.

14.26 Rule 14.3.3 applies to members with 10 years or more pensionable service, as in Mr Pillay's instance and, *inter alia*, reads that:

> *"(a) a member who retires on account of a reason mentioned in rule 14.3.1(a), (b) or (c) and who has at least 10 years' pensionable service to his or her credit, shall be paid the benefits referred to in rule 14.2.1 or 14.2.2: Provided that rules 14.2.3(a) and 14.2.2 shall apply to members referred to in those rules, where applicable;*

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

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

12 AUGUST 2010 MEMORANDUM

14.28 In a memorandum dated 12 August 2010, titled *EARLY RETIREMENT OF DEPUTY COMMISSIONER IVAN PILLAY WITH FULL RETIREMENT BENEFITS*, Mr Magashula requested Minister Gordhan's approval for:

(i) The early retirement of Mr Pillay with full benefits with effect from 1 September 2010, i.e. whereby SARS pays the penalty to the GEPF '*as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law Act 69 of 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act 103 of 1994*';

(ii) To retain Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 September 2010;

(iii) Informs Minister Gordhan that Mr Pillay has decided to take early retirement *'for personal reasons'*;

(iv) Motivates that the GEPF had approved in excess of 3000 requests for early retirement from various government departments for staff members to retire before the age of 60 with full benefits and that the former Minister of Finance, (in reference to Mr Trevor Manuel), and Minister Gordhan himself had approved at least five (5) such requests over the past two years; (v) Informs Minister Gordhan that advice was sought from the Acting Director-General of the Department of Public Service and Administration ('DPSA'), who confirmed that there is no restriction on the appointment to the public service or the same department of a person who has retired on an Employee Initiated Severence Package ('EISP'); (vi) Advises Minister Gordhan that the financial implications to SARS would be *'an amount of R1 141 178.11, which SARS will be liable to pay to the GEPF in terms of the provisions of section 17(4) of the GEPF Law, 1996.'*

14.29 Section 16(2A)(a) of the Public Service Act 103 of 1994 (*'the PS Act'*) provides that:

"... an officer, other than a member of the service or an educator or a member of the State Security Agency, shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or on any date after that."
[My emphasis]

14.30 In terms of Section 17(4) of the GEPF Law, 1996:

> *"If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation."* [My emphasis]

14.31 It is evident that Section 17(4) only places a financial encumbrance on the employer or Government in circumstances **where the employer has taken action or where legislation**, as adopted by Parliament, **places any further financial obligations on the GEPF**. [My emphasis]

14.32 It would with respect amount to an absurdity where an employee applies to be released from his her responsibilities to enjoy early retirement where an executive authority exercises his or her discretion to permit such an employee to be released prior to his/her actual date of retirement and the employer or government has to carry the bill (without any criteria having been applied).

14.33 In practice this would mean that all officials who retire early, at their request, would benefit financially in the absence of the employer taking any action.

14.34 The words '*where the employer has taken action*', it is submitted required some act which would be to the benefit of the department concerned either by way of transformation initiatives or restructuring. It certainly cannot be the mere

authorization by an executive authority of a request by an employee to take early retirement.

14.35 The Minister of the Department of Public Service and Administration ('*DPSA*') issued a '*Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service*' in terms of the provisions of section 3(3)(c) of the Public Service Act, with effect from 1 January 2006 as per DPSA circular 1/16/21 dated 16 January 2006.

14.36 In terms of its scope, the Determination is applicable to all employees appointed in terms of the Public Service Act.

14.37 The purpose of the Determination is to allow employees affected by transformation and restructuring who wish to exit the public service, to apply for an Employee-Initiated Severance Package ('*EISP*').

14.38 In terms of the Determination:

(i) It is only applicable to employees who are affected by transformation and restructuring who may apply voluntarily to the executive authority (or delegate) of his or her department to be discharged from the Public Service;

(ii) The application is subject to the approval of the executive authority;

(iii) The application must be made on an application form marked Annexure A, tilted: '*Process Form: Application for Employee-Initiated Severance Package*' which is available from the DPSA website.

14.39 In consideration of the application the executive must as a minimum take the following into account:

(i) The impact of the employee's exit from the department on its service delivery capabilities;

(ii) The employee's competence and suitability for continued employment;

(iii) The manner in which the employee's exit will support the transformation and restructuring of the department;

(iv) The specific reasons for the employee's request;

(v) The ability of the department to finance the costs related to the payment of the severance package (e.g. refunding the GEPF, severance pay, leave pay, etc);

(vi) The impact of the granting of the severance package on the morale of other employees;

(vii) Whether the employee occupies a post on the department's establishment or whether the employee is held additional to the establishment;

(viii) (viii) That the following benefits are payable to employees who are members of the GEPF who have attained the age of 55 years and who have in access of 10 years' service: A gratuity and annuity determined in terms of the formula that applies to the member; Without scaling down of pension benefits in terms of Rile 14.3.3(b) and without an addition to pensionable service in terms of Rule 14.2.4(b).

14.40 In an affidavit by the then Acting Director General ('*DG*') of the Department of Public Service and Administration ('*DPSA*'), he, *inter alia*, states the following:

i) He advised Mr Magashula in relation to the Employee Initiated Severance Package ('*EISP*')and the applicable criteria as previously outlined;

ii) That in respect of Mr Magashula's enquiry whether employees exiting the public service on an EISP can be re-employed into the public service, he advised, generally, *inter alia*, that there was no restriction on the re-employment of such employees;

iii) That he further explained that in the event that the employee concerned left on a Voluntary Severance Package ('VSP'), the employee concerned would only be permitted to be reappointed if the relevant department was unable to recruit suitable candidates, and that the reappointment of such former employee would only be on a fixed term contract limited to a maximum period of three years;

iv) That he, in addition, advised that such fixed term could be further extended for a period of not more than three years.

14.41 It is clear from the above that the reasons advanced by Mr Pillay do not fall within the qualifying criteria of EISP.

14.42 Whilst the memorandum dated 12 August 2010 is not signed by the erstwhile Deputy Minister of Finance, Mr Nhlanhla Nene

('Mr Nene'), Minister Gordhan's approval is only obtained on 18 October 2010.

14.43 As a result, Mr Pillay's early retirement, with full benefits, as approved by Mr Gordhan, was only implemented with effect from 31 December 2010.

14.44 In this regard, Mr Pillay also entered into a five (5) year employment contract with SARS as the Deputy Commissioner of SARS, with effect from 1 January 2011 to 31 December 2015, instead of a three (3) year contract as approved by Minister Gordhan, and instead of in a different capacity.

14.45 In addition, a new employment contract was entered into between Mr Pillay and Mr Gordhan, with effect from 1 April 2014 to 31 December 2018, whereby Mr Pillay would serve as a Deputy Commissioner for SARS for a further period of four (4) years. This is 9 months prior to the initial contract being due to expire and a month before Minister Gordhan was appointed as the Minister of Cooperative Governance and Traditional Affairs. There was no supporting documentation submitted in the ordinary course for Minister Gordhan to apply his mind to the approval of the renewal of the contract.

14.46 This was done contrary to advice from a Remuneration and Employee Services Executive, which was disregarded, including advice on the issue of the renewal of a contract between Minister Gordhan and Mr Pillay in 2014 when there was still a valid contract still in existence.

14.47 In their Warning Statements to the Hawks, both Mr Pillay and Mr Magashula elected to remain silent.

14.48 Minister Gordhan did not subject himself to the taking of a warning statement but did provide his version to the Hawks, through his lawyers, and in which Minister Gordhan stated that he approved Mr Pillay's early retirement with full benefits on the strength of the recommendation by Mr Magashula.

14.49 Minister Gordhan is further recorded to have approved Mr Pillay's early retirement with full benefits, being mindful that Mr Pillay wanted to gain access to his pension fund to finance the education of his children; and that he believed it to be entirely above board; and because he thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995.

REVIEW

15. I now would like to address the review in terms of section 179(5)(d) of the Constitution.

16. On Friday, 14 October 2016, Freedom Under Law ('*FUL*') and the Helen Suzman Foundation ('the *HSF*'), submitted a communication to me through their lawyers in which they requested me to withdraw the charges against Minister Gordhan unconditionally on or before a specified date, failing which they would exercise their right to seek urgent recourse to review and set aside the decision to prosecute Minister Gordhan.

17. On Monday 17 October and Tuesday 18 October 2016, both Mr Magashula and Mr Pillay requested me to review the decision to prosecute them by way of representations to me in terms of section 179(5) of the Constitution through their legal representatives.

18. The gist of Mr Magashula's representation was the following:

(i) He supported the application of Mr Pillay and placed much reliance on the advice of Mr Symington.

(ii) That he had regard to the provisions of sections 16(2A)(a), 16(6)(a) and (b) and 16(4) of the Public Service Act, Section 17(4) of the GEPF Law and Rule 20 of the Rules to the GEPF law.

(iii) That he lacked the requisite criminal intent as he genuinely believed that the aforementioned empowering provisions permitted the authorising of the application by Mr Pillay.

(iv) That Minister Gordhan acted within the scope of the executive discretion extended to him by virtue of the position he holds and the law.

(v) That in the event Minister had exercised his discretion wrongly, it does not amount to criminal intent.

(vi) That there was an e-mail communication between Mr Magashula and the DG, which confirms the engagement between them in relation to Mr Pillay.

19. The gist of Mr Pillay's representations is much the same as that advanced by Mr Magashula. Mr Pillay also produced a memorandum from a Mr Vlok Symington.

20. Minister Gordhan chose not to make representations to me. In a communication dated 18 October 2016, through his lawyers, he aligned himself with the submissions made to me by FUL and the HSF.

21. I am aware of media reports which attribute to Minister Gordhan as his reasons for not making representations, his belief that he could not expect to receive a fair hearing. If these media statements are true, then it is indeed distressing that Minister Gordhan had this perception, which was unfounded. In a letter dated 5 September 2016 from the Head: PCLU, addressed to the legal representative of Minister Gordhan, the latter was, *inter alia*, informed:

(i) That the decision will be made by the Head: PCLU in consultation with the DPP: Pretoria.

(ii) Of the provisions of section 179(5)(d) of the Constitution.

(iii) That it will be premature to invoke reviewing provisions of section 179(5)(d) of the Constitution prior to a decision having been made to prosecute or not.

(iv) That it would be advisable for him to incorporate his further comments, views and version in a warning statement.

22. Mr Pillay and Mr Magashula were accorded a fair and dignified hearing and there is no reason why Minister Gordhan would not have received the same.

23. I also extended an invitation to the Commissioner of SARS, as the complainant, and to the Head of the Hawks as the investigating authority to submit representations to me. Both parties elected not to make any further submissions.

24. I further obtained the views of the prosecuting team and the Acting Special Director.

25. Section 17(4) of the GEPF Rules and the relevant legal prescripts has been addressed above. I have however noted the omission of FUL and the HSF to comment on Rule 14.3.3.(b) of the Rules to the GEPF Law.

26. Rule 20 of the Rules to the GEPF, in so far as it is relevant, obligates the employer and/or Government to pay an annuity and/or a gratuity and/or both. It does not waive the penalty to be paid by the employee or the scaling down of benefits requirement provided for in Rule 14.3.3.b. of the Rules to the GEPF Law.

27. FUL and the HSF also, *inter alia*, place reliance on a memorandum from a SARS Legal and Policy Division employee, Mr Vlok Symington, dated 17 March 2009.

28. This document only came to the attention of the prosecutors for the first time by way of the submissions by FUL and the HSF and is advice to the Commissioner of SARS as a result of Mr Pillay having requested him to consider: (i) His application for early retirement from the GEPF;(ii) His application to the Minister of Finance to waive early retirement penalty; and (iii) His request to be reappointed on contract after his early retirement from the GEPF.

29. Mr Symington, *inter alia*, advised as follows:

(i) Approached individually, all three requests are technically possible under the Rules of the GEPF, read with SARS' employment policies;

(ii) Pillay is entitled to request the Minister to waive the early retirement penalty;

(iii) No technicality prevents SARS from appointing Mr Pillay on contract after his retirement;

(iv) That Mr Pillay's decision to apply for early retirement is dependent on whether the Minister approves that SARS pays the early retirement penalty to the GEPF and that SARS re-employs him on a contract basis after his retirement;

(v) Should the Minister decide not to approve Mr Pillay's request and SARS does not contract Mr Pillay after his retirement that his decision to apply for early retirement be withdrawn altogether.

30. It is clear from the above that if Mr Pillay's requests could not be met, he would withdraw his application to retire early altogether.

31. As a result of the representations by Mr Magashula and Mr Pillay and the submissions by FUL and the HSF I directed further

investigations to be conducted, which I deemed necessary and relevant to assist me in reaching a decision in the matter.

31.1 I, *inter alia*, required the following:

31.1.1 Confirmation from Mr Symington that he is the author of the document submitted by FUL, the HSF and Mr Pillay.

31.1.2 [Mr Symington, who is now employed in the Legal Counsel Division at SARS, submitted an affidavit dated 20 October 2016 in which he amplified his views when he advised the Commissioner in 2009].

31.1.3 An affidavit from SARS clarifying why Mr Pillay's early retirement was processed differently to that of others where early retirement had been refused by the Minister. [a SARS Remuneration and Employee Services Executive submitted a further affidavit dated 25 October 2016 in which she expressed the view that SARS had suffered actual prejudice by the early retirement of Mr Pillay as a result of SARS paying the GEPF penalty which should have been paid by Mr Pillay and Mr Pillay's salary, albeit on contract, from the date of his retirement until he reached the age of sixty (60)].

31.1.4 An affidavit from the GEPF in which it, *inter alia*, explains the anomaly between what is contained on page 34 of its Member's Manual and the provisions of Rule 14.3.3(b) of the GEPF Law Rules; clarification around the circumstances under which an employer and/or executive authority may exercise a discretion to waive the penalty imposed on the employee by Rule 14.3.3(b); and the information around the alleged 3000 approvals for early retirement with full benefits from various government departments. [Two affidavits were obtained from the Chief Executive Officer of the Government Pensions Administration Agency ('*GEPFAA*'), The affidavits were unhelpful to say the least. In this regard, The information around

the 3000 approvals with full benefits could not be supplied. He did however confirm that action taken by an employer places an additional financial obligation on the Fund, which needs to be made good by the employer; The GEPAA processes various exits from the Fund with full benefits, where the employer is liable for the additional liability; There is no contradiction between on page 34 of the Members Guide where approval has been granted by an Executive Authority for early retirement with full benefits]. The affidavits failed to explain Rule 14.3.3(b).

31.1.5 E-mail communications between the Acting DDG of the DPSA and Mr Magashula as alleged by Mr Magashula. [In an email communication dated 23 July 2010, Mr Magashula refers to a discussion the previous day between Mr Gordhan, Mr Govender and himself regarding the early retirement of the Deputy Commissioner of SARS, in reference to Mr Pillay. Mr Magashula asks the following questions in the mail which were raised during their discussion:

(i) Whether there is a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?

(ii) Should same be authorised, what would the impact of Cabinet's decision to recognise NSF service at 100% on the retirement benefits of the Deputy Commissioner?

(iii) To indicate how long he expects the process to take and who can do the estimates to assess the impact of the decision on the Deputy Commissioner's retirement which is anticipated to happen in a month's time?

(iv) Whether he has any statistics of how many of early retirement cases without re-engagement have been processed to date?

The Acting DDG responded to the aforementioned e-mail on 3 August 2010 in the following terms:

(i) Employee Initiated Severance Packages ('EISP') are granted to employees that are generally in excess of the organization as a result of a restructuring exercise. It includes changing the content of the job or the abolishment of the post.

(ii) There is no restriction in the appointment to the public service or to the same department on a person who has left on an EISP. Any new appointment will be to a new post with a new set of conditions.

(iii) That he did not have figures on how many persons were reemployed but is aware of a few that were.

(iv) That Cabinet memo 8/2009 recognised full NSF service as pensionable service in terms of the GEPF rules for the Department of Defence personnel.

(v) That DPSA, in conjunction with the Department of Defence and the GEPF, were presently preparing a Cabinet memorandum to extend this decision to cover all public service employees and to approve the funding associated with the recognition of this period as pensionable service.

(vi) That in light of this matter from SARS, there is a need to include other employers outside the public service that are contributing to the GEPF, that the intention is to get this memorandum to Cabinet before the end of August 2010 and that once a decision had been taken, it will be incumbent upon the GEPF to put systems in place to give effect thereto.

(vii) That in the event that the Deputy Commissioner is granted an EISP, his package will be calculated into his current contribution into the GEPF and amended

once the NSF decision has been obtained and implemented.

32. It is evident that Minister Gordhan and Mr Magashula were both uncertain as to whether Mr Pillay requested early retirement with full benefits and his immediate reemployment into SARS could be approved. This much is clear from the engagement with both Mr Symington and the DDG DPSA. In this regard Minister Gordhan in hindsight should have consulted his Deputy Minister of Finance, Mr Nhlanhla Nene who could have provided crucial guidance and clarity.

33. The advice of Symington appears to have largely influenced Mr Pillay and Mr Magashula.

34. I foresee great difficulty in proving the requisite animus.

35. In order to sustain a conviction, it is necessary to prove what is known as *animus*, namely, knowledge of unlawfulness and intention to act unlawfully.

36. In **S v Barketts Transport (Pty) Ltd and Another 1986 (1) 706 (C)**, the Second Appellant had acquired shares in the First Appellant, which possessed a permit, authorising it to convey upholstering materials, carpets, floor mats, curtains, cushion and other soft furnishings. The appellants had been convicted in the Magistrate's Court for contravening section 31(1)(b) of the Road Transportation Act, 74 of 1977 in that they had unlawfully conveyed 302 cartons of yarn, destined for various factories in the Cape Peninsula. Six months before the commission of the offence the Second Appellant had obtained an opinion from his legal advisors to the effect that the conveyance of the yarn fell within the definition of conveyance of upholstering materials and as such was authorised by the permit. The Court found that where an accused places reliance on legal advice or counsel's opinion taken as a precautionary measure in order to obviate a finding of *culpa*, the opinion should relate to a single transaction or act about to be entered into or about to be carried out and not to a course of conduct extending over a considerable time in future. That said, the Court held that the appellants had not acted with the requisite degree of circumspection and lacked the requisite *mens rea*.

37. In **S v Claasens 1992 (2) SACR 434 (T),** the Court noted that it largely depends on the specific circumstances of each case whether or not a client should place a question mark over the legal advice having been obtained. In this matter the appellant was convicted in a Regional Court on 16 counts of contravening section 2(10) of the Usury Act and sentenced. In an appeal against the conviction, it appeared that the appellant, a financial consultant and broker, had been unaware of the provisions of section 2(10). It appeared further that he had consulted his attorney and an advocate and had discussed his business with them. He had also had his client mandate form checked by them when he had started his business. He had however never instructed his attorney to investigate the provisions of the Usury Act. The appellant had been informed by his attorney that there could be no legal problems in the way he conducted his business. He had never been informed by any of the lawyers he had consulted that he was contravening the Act. The Court ultimately held that the appellant had not exceeded the bounds of reasonableness and that he had not been negligent under the circumstances.

38. As a result and in the absence of any other evidence to the contrary, I am satisfied that Mr Magashula, Mr Pillay and Minister Gordhan did not have the requisite intention to act unlawfully.

39. I am of the view that this matter could easily have been clarified had there been proper engagement and cooperation between the Hawks and Mr Magashula, Mr Pillay and Minister Gordhan.

40. In the circumstances I have decided to overrule the decision to prosecute Mr Magashula, Mr Pillay and Minister Gordhan on the charges listed in the summonses.

41. As such, I have directed the summonses to be withdrawn with immediate effect and there would thus no longer be any need for Mr Magashula, Mr Pillay and Minister Gordhan to appear in court in respect of the charges listed in the aforementioned summonses.

Thank you

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 23576/2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

DATE ..... SIGNATURE .....

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Applicant

and

NOMCGOBO JIBA 1st Respondent

LAWRENCE SITHEMBISO MRWEBI 2ND Respondent

SIBONGILE MZIYATHI 3RD Respondent

JUDGMENT

LEGODI J;

HEARD ON: 30 May - 1 June 2016

JUDGMENT HANDED DOWN ON: 14 September 2016

Admission of Advocates Act. Counsel for GCB was quizzed as to why the agreement and expenditure thereof if any should not be referred to the Audit-General to investigate possible contraventions of Departmental Financial Instruction (DFI) and the provisions of Public Finance Management Act. To this enquiry, the court was assured by Adv. Burger SC on behalf GCB that no cent of public funds was spent or is intended to be spent or recouped by GCB for having instituted the present proceedings based on the alleged agreement with the NPA. Consequently, the intended referral to the Audit-General will not be made. I now turn to deal with the complaints raised as the basis for the present proceedings.

BOOYSEN CASE AND COMPLAINTS AGAINST JIBA IN CONNECTION THERETO

[41] '...Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5) of the Constitution. Allowing such litigation will often place prosecutor between a rock and a hard place. They must, on the one hand, resist preliminary challenges to investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure that prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court deciding the pertinent issues is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard; however. The courts' doors should never be completely closed to litigants... But in ordinary course of events, and where the purpose of the litigation appears merely to be avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interest of all concerned. If that approach is generally followed the state would be sufficiently constrained from acting unlawfully by the application of section 35(5) and by the possibility of civil and criminal liability'[16].

[42] The office of the National Director of Public Prosecutions is closely related to the functions of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice[17]. Courts are not overly eager to limit or interfere with the legitimate exercise of prosecuting authority. However, a prosecuting authority's

[16] Thint (Pty) Ltd v National Director of Public Prosecution & Others 2009 (1) SA 1 CC para 64.
[17] Democratic Alliance V President of the Republic of South Africa & Others 2013(1) SA 248 (CC) at [26]

discretion is not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised[18].

[43] Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted[19]. Courts do not interfere with the prosecuting authority's bona fide exercise of its discretion because prosecuting authority has the power to decide to prosecute and, once the accused is on trial, he or she will have the fullest opportunity to put his defence to the court, cross-examine prosecution witnesses and to reply on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable based on admissible evidence and prevented in terms of a regular procedure[20]. Courts can intervene where mala fide is alleged, or where it is alleged that the prosecuting authority never applied its mind to the matter or acted from ulterior motive [21]. (My emphasis).

[44] The complaints against Jiba, in her capacity as the then Acting National Director of Public Prosecutions in Booysen case, arose from the exercise of her statutory power to authorise the charging of Major-General Booysen (Booysen) with contravention of section 2(1) (e) and (f) of the Prevention of Organised Crimes Act no.121 of 1998 ("POCA"). A person shall only be charged with committing an offence contemplated in subsection (1) of section 2 POCA if prosecution thereof is authorised in writing by the National Director[22]. Any person who whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participated in the conduct, directly or indirectly, of such enterprise affairs through a pattern of racketeering activities shall be guilty of an offence[23].

[45] On 18 August 2012 Jiba, Acting as a National Director of Public Prosecutions, issued written authorisation to have Booysen charged with contraventions of section 2(1) (e) and (f) referred to in paragraph 44 above. Booysen successfully challenged the

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[18] Minister of Police & Another V Du Plessis 2014 (1) SACR 217 (SCA) at [31]
[19] S v F 1989 (1) SA 460 (ZH), S v Bester 1971 (4) SA 281(T)
[20] Commentary on the Criminal Procedure Act by Du Tiot, De Jager, Paizes, Skeen and Van Der Merwe at 1-29.
[21] Mitchell V Attorney-General, Natal 1992 (2) SACR 68 (N)
[22] Section 2(4) of POCA
[23] Paragraph (e) and (f) of the section 2(1) of POCA.

authorisation in Kwa-Zulu Natal Division before Govern J. In his replying affidavit, before Govern J, Booysen stated that Jiba was: *"mendacious" when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the 'docket' before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision".*

[46] What is quoted above is the gist of the complaint against Jiba in the handling of Booysen case. In its founding papers, GCB articulates the conduct complained of as follows:

> "*On the evidence of her conduct in the Booysen matter as (with respect, correctly) described by Govern J in this judgment, Jiba signally failed to comply with the NPA's Code of Conduct. More pertinent to this application, the statements made by Jiba under oath is seeking to justify her decision to issue the POCA authorisations, were evidently untruthful. As such her conduct indicates that she is not a fit and proper person to practice as an advocate.*"

[47] These averments seem to be based on the finding by Govern J which inter alia, included:

> *"[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets. [Jiba] says that they are all statements made under oath. [Jiba] says in addition that they implicate Mr Booysen in one or more of the offences in question".*

[48] Then in paragraphs 31 and 34 of his judgment, Govern J made adverse remarks against Jiba as follows:

> *"[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows: two of the annexures are sworn statements made under the name of one Colonel Aiyer. They are annexures NJ2 and NJ4 respectively. Mr Booysen described these statements which concern 'office politics and submit that they in no way implicate him in any of the offences with which he has been charged. The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The documents referred to as a statement by Mr Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it could be attributed to the named person and even if it was sworn statement as claimed by the NDPP, the contents do not cover the period clearly in the indictment except for one event which does not relate to Mr Booysen…*

[34] *Mr Booyen was clearly within his rights to deal with in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is after all an officer of the court, she must be taken to know how important it is to ensure that her affidavit is entirely accurate. If is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and if appropriate correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken by the NDPP by way of a request or application to deliver further affidavit. In response to Mr Booysen's assertion mendacity on her part, there is deafening silence. In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her own version, the NDPP did not have before her annexures 4 at the time. In addition it is clear that annexure NJ3 is not a sworn statement. Most significantly the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offence in question..."*

[49] Before dealing with information placed before Jiba for written authorisation in terms of section 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Govern J were based on correct evaluation and understanding of Jiba's answering affidavit. The challenge or invitation by Booysen to Jiba, was contained in the replying affidavit and at the risk of prolonging this judgment, I repeat the contents thereof in part:

"...She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision."

[50] The invitation was made after having made allegations of 'mendacity' in the same paragraph with reference to paragraph 21 of Jiba's answering affidavit in Booyesen matter and because of the relevance thereto, paragraphs 16.6, 16.7 and 17 of Jiba's answering affidavit in that case are repeated hereunder:

"*16.6 The information under oath which was placed before me also indicated that the applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.*

16.7 The information further revealed that unlawful activities of killing suspects and\or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary award and\or

certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim document as "NJ1" in which inter alia, the Applicant is recommended for such an award resulting from the death of suspects.

17. *Particular reference is made in this regard to the statement made by Colonel Rajendran Sanjeevi, Mr Aris Danikas and Mr Ndlondlo from which it is apparent that the applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on You-Tube. I annex copies of these statements as NJ2, NJ3, NJ4 and NJ5, respectively."*

[51] Having regard to what is quoted above, it does not seem the statement: *"Jiba says that they are all statements made under oath"*, is correct. Nowhere in Jiba's answering affidavit did she make such a statement, neither did she say any of annexures, NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information were made only in paragraphs 16 and 16.6 of the answering affidavit without suggesting that all of the annexures referred to in paragraph 17 of the answering affidavit in Booysen matter were made under oath. Therefore the statement: '*The documents referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement*', as stated in paragraph 31 of Govern J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred particularly reading in the context of paragraph 16.7 of her answering affidavit in Booysen case quoted in paragraph 50 above.

[52] The fact that Jiba did not avail herself to the invitation to deal with the allegation of being "mendacious", meaning "not telling the truth", should also be seen in context. The allegation was made in the replying affidavit. This too, Govern J was mindful of. For the purpose of these proceedings, the criticism by Govern J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen has raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a

memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that supplementary affidavit would be filed to explain the criticism against Jiba with regards to the annexures. On 19 August 2013 an email by Adv Mosing of NPA was sent to Adv Chauke Director of Public Prosecutions Johannesburg, enquiring what progress had been made with regard to filing of further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv. Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of "mendacious" made by Booysen. By seeking to file further affidavit to explain the annexures after the replying affidavit was filed, is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement: '*Despite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request or application to deliver a further affidavit, in response to Mr Booysen's ascertain of mendacity on her part, there is a deafening silence*', made by Govern J in paragraph 34 of his judgment ought to be seen in the context of what is explained in paragraph 53 above.

[55] Similarly, the statement that *'as regards the inaccuracies, the NDPP referring to Jiba), is after all an officer of the court, she must be taken to know how important it is to ensure that her affidavit is entirely accurate…'*, should be seen in the context of what is stated in paragraph 53, but even most importantly, in the context of her explanation now offered in the present proceedings.

[56] On 17 August 2012 Jiba approved the application for authorisation in terms of section 2(4) of POCA for contravention by Booysen of section 2(1)(e) and (f) of POCA. The provisions of section 2(1) (e) and (f) were referred to in paragraph 44 of this judgment. The information and advice that was placed before Jiba for the purpose of granting or refusing authorisation was prepared and compiled by Adv. Raymond K Mthenjwa and Adv. Gladstone Sello Maema, both deputy directors of public prosecutions, Adv Anthony Mosing, a senior deputy director of public prosecutions and the head of the special Projects Division, who acted as the liaison between Jiba and the prosecuting team.

[57] At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and

she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo and Annexure 6 being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booysen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Danikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booysen.. The drafted statement of Danikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booysen. Danikas was a police reservist in the Durban Organised Crime Unit based in Carto Manor and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Maema asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual legal assistance legislation, that is, sections 2 and 3 of International Cooperation in Criminal Matters Act 75 of 1996 be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolise Ntasana) at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was however intended to corroborate the evidence in possession of the prosecution team that Booysen was involved in the various activities giving rise to the charges against him of similar facts evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement, *'the document referred to as a statement by Mr Danikas annexure NJ3... is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was sworn statement as claimed by the NDPP the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen'*, as

stated by Govern J ought to be seen in the context of the explanation given by Jiba in these proceedings and the fact that Jiba never said annexure NJ3 was a sworn statement as stated earlier in this judgment. I need to caution. I should not be understood as seeking to review or upset Govern J's judgment. At the time, he did not have Jiba's responses as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the authorisation was made, the explanation by Jiba in these proceedings is as follows:

> *"217. There were also two statements by Colonel Aiger (reference to as Annexure NJ2 and NJ4). One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interferences in the activities of a section of Durban Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Aiger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Aiger at the consultation."*

[61] Therefore the statement: '*The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April 2012, some two weeks after the first impugned decision was taken'*, in paragraph 31 of Govern J's judgment, inasmuch as GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of explanation quoted in paragraph 60 above. I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislature framework, what was placed before Jiba and the core function of the prosecuting authority is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (2) of section 2 of the Act notwithstanding that such evidence might otherwise be inadmissible, provided that such

evidence would not render a trial unfair[24]. This should be seen in the context of the Preamble under POCA which inter alia, reads:

> *"AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular case, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of and related conduct in connection with enterprises which are involved in the pattern of racketeering activity.*
>
> *AND WHEREBY THE SOUTH AFRICAN common law and statutory law fail to deal effectively with organised crimes ... criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime ... and criminal gang activities.*
>
> *AND WHEREAS pervasive presence of criminal gangs in many communities is harmful to well-being of these communities, it is necessary to criminalise participation in or promotion of criminal activities."*

[63] In my view the provisions of section 2(1) (e) and (f) referred to in paragraph 44 of this judgment are meant for the criminalisation of such activities. The point I am making is this: Courts for the purpose of an exercise of its discretion in terms of section 2(2) referred to in paragraph [62] of this judgment, may rely on hearsay evidence, information and or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jiba in Booysen's case) be entitled to rely on hearsay and similar facts evidence for the purpose of authorisation as contemplated in subsection (4) of section 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities and resultantly pose harm to the well-being of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue however is whether in granting authorisation in terms of section 2(4), Jiba was mala fide or had ulterior motive, in which event, the requirements of "*fit and proper person*" to remain on a roll of Advocates becomes relevant. For this purpose, further provisions of POCA are necessary to consider, also taking into account offences under section 2(1) (e) and (f).

---

[24] See section 2 (2) of POCA

[65] 'Pattern of racketeering activity' means 'the planned, on-going, continues or repeated participation or involvement in any offence referred to in Schedule 1 and included at least two offences referred to in Schedule 1'. On the other hand, "enterprise" 'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'[25].

[66] The essence of the information before Jiba, can be summed up as follows: In addition to what is stated in paragraphs 56, 57 and 60 of this judgment, Booysen was the head of Carto Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of serious nature including murders against suspects who were sometimes framed in the commission of offences. Booysen knew, approved and or ought to have known of the commission of these offences. In reward to the members' unlawful activities, Booysen motivated for incentive of R10 000.00 for each of the 26 members of the Carto Manor Crime Unit including Booysen himself. Booysen was also commended for outstanding services rendered in that he 'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.

[67] I cannot find any mala fides and or ulterior motive in the authorisation by Jiba as contemplated in POCA. POCA is like a cry out loud for declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority in the exercise of their legislative power to investigate through members of their Investigating Directorate and under the watchful eye of a special director so appointed to prosecute without fear, favour and prejudice those implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede on this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of Section 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[68] You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an

[25] See definition under Section 1 of POCA

application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution. It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba.

SPY TAPES CASE

[69] The listening of telephone conversation recorded on tapes between Bulelani Nqcuka, the then National Director of Public Prosecutions and Mr McCarthy, the then Director of Public Persecutions for Durban and withdrawal on 1 April 2009 of several of criminal charges against Mr Jacob Zuma, (currently the President of the Republic of South Africa), became to be known in South Africa as a "Spy tape case." It was a case instituted by Democratic Alliance Party against the National Prosecuting Authority in terms of which the latter's decision to withdraw several charges against Mr Zuma was challenged. It is the handling of that case by Jiba in her capacity as the then Acting National Director of Public Prosecutions which forms the basis of the application and dispute in these proceedings. The case in question is also referred to in these proceedings as a "Spy tapes case."

[71] On 6 April 2009, the then acting National Director of Public Prosecutions, Adv. Mokotedi Mpshe, after having listened to the conversation aforesaid recorded on tape publicly announced the withdrawal of corruption and other several related charges against Mr Zuma.

[72] During April 2009 and subsequent to the withdrawal of the charges, the Democratic Alliance (DA), a registered political party and official opposition in South African national parliament instituted review proceedings in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision to discontinue the prosecution against Mr Zuma and declaring the decision to be inconsistent with the Constitution of the Republic of South Africa. DA further required Mr Zuma and NPA to deliver to the registrar of the High Court, in terms of rule 53(1) of the Uniform Rules, the record on which the impugned decision was based, which included representations made by Mr Zuma for the withdrawal of the charges. The prosecuting authority, as the

SEQ/19/2019-307

Annexure CJ
Work shop

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park, Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

INTERNAL MEMORANDUM

TO: ADV N. JIBA

COPY TO: DR: J.P. PRETORIUS, SC
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS: PCLU

FROM: ADV S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

REFERENCE: NDPP/JL/01/2016

DATE: 18 NOVEMBER 2015

SUBJECT: REFERRAL OF CASES TO THE PRIORITY CRIMES LITIGATION UNIT

Dear Adv Jiba,

1. By virtue of the appointment of Dr. J.P. Pretorius, SC as the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit (PCLU) with effect of 1 October 2015, he is enjoined to manage and direct investigations and prosecutions relating to all the offences specified in the Prosecution Policy Directives relating to the PCLU, which came into effect on 1 June 2015 and any other matter(s) which the National Director refers to the PCLU.

2. In addition to the above, the Acting Special Director, PCLU is mandated to manage and direct investigations and prosecutions relating to:

   2.1 The Implementation of the Geneva Conventions Act, No 8 of 2012; and,

   2.2 The Prevention and Combating and Torture of Persons Act, No 13 of 2013 (limited solely to offences committed outside the territory of the Republic of South Africa as contemplated in section 6 of the Act).

3. I have now referred the following matters to the PCLU, which investigations and prosecutions must be managed and directed by the Acting Special Director:

3.1 S v On-Point and Others;
3.2 S v McBride & Others (Defeating the ends of justice);
3.3 S v McBride
3.4 The SARS 'Rogue Unit' investigations;
3.5 The Nkandla investigation;
3.6 S v Breytenbach and Another (Deletion of information)
3.7 S v Breytenbach & Another (Corruption)
3.8 S v Booysen & Others (Cato Manor matter)
3.9 The South African Airways (SAA) matter
3.10 Investigations into alleged impropriety by NPA officials (SARS complaint re Selebi and Papparas matters).

4. The PCLU should deal with all other offences in relation to the above as well as all prosecutorial functions incidental to the management of investigations and prosecutions relating to the above contraventions and specified matters.

5. There are other matters that I am contemplating to refer to the PCLU as well. In this regard, I endeavor to advise you hereof in due course.

Yours sincerely,

ADV. S. K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS:
DATE: 18 - 11 - 2015

SEQ 19/2019-309

MINISTRY OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
CAPE TOWN
2003 -03- 25
KAAPSTAD
MINISTERIE VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING

PROCLAMATION
BY THE
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

No. ....., 2003

NATIONAL PROSECUTING AUTHORITY ACT, 1998

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

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

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

(a) in particular, to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982(Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director; and

(b) generally, giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.

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

T. M. MBEKI
President

P. M. MADUNA
Minister of the Cabinet

No. 46, 2003

NATIONAL PROSECUTING AUTHORITY ACT, 1998

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

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

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

(a) In particular to head the **Priority Crimes Litigation Unit** and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982(Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director;

(b) generally giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.

Given under my Hand at **PRETORIA** on this 24TH day of March Two Thousand and Three.

T. M. MBEKI
President

P. M. MADUNA
Minister of the Cabinet

Annexure "D"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

The Acting Special Director of Public Prosecutions, Priority Crimes Litigation Unit who prosecutes for and on behalf of the State throughout the country, hereby informs the Honourable Court that:

VISVANATHAN PILLAY

a sixty four (64) year old male residing at 261 Muckleneuk Street Nieuw Muckleneuk, Pretoria in the district of Pretoria;

(hereinafter referred to as accused no.1)

ANDRIES PETRUS JANSE VAN RENSBURG

a fifty three (53) adult male residing at Weltevrede farm, Breerivier, Worcester in the district of Worcester.

(hereinafter referred to as accused no.2)

JOHANN HENDRICK VAN LOGGERENBERG

a forty nine (49) year old male residing at 6 Peckan Place, Napandran road, Pretoria in the district of Pretoria.

(hereinafter referred to as accused 3)

are guilty of the following crimes:-

1. CONTRAVENTION OF SECTION 49(1) READ WITH THE PROVISIONS OF SECTION 2 AND SECTION 51 (1) (b) AS WELL AS SECTION 1 OF THE REGULATION OF INTERCEPTION OF COMMUNICATION AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT 70 OF 2002 (RICA) – UNLAWFUL INTERCEPTION OF COMMUNICATION (ACCUSED 1 AND ACCUSED 2)

2. CONTRAVENTION OF SECTION 10 READ WITH THE PROVISIONS OF SECTIONS 1, 2, 24, 25 AND 26 (1) (a) OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT 12 OF 2004 – UNAUTHORISED GRATIFICATION BY A PARTY TO AN EMPLOYMENT RELATIONSHIP (ACCUSED 1 AND 3)

ALTERNATIVE TO COUNT 2

CONTRAVENTION OF SECTION 3 READ WITH THE PROVISIONS OF SECTIONS 1, 2, 24, 25 AND 26 (1) (a) OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT 12 OF 2004 – GENERAL CORRUPTION (ACCUSED 1 AND 3)

PREAMBLE

WHEREAS

Section 2 of the **South African Revenue Services Act, Act 34 of 1997** (hereinafter referred to as the SARS Act) establishes the South African Revenue Service (SARS) as an organ of state within the public administration, but as an institution outside the public service.

And whereas

Section 3 of the **SARS Act** determines the mandate and objectives of the South African Revenue services (SARS) as the efficient and effective:-

(a) collection of revenue; and

(b) control over the import, export, manufacture, movement, storage, or use of certain goods.

And

The long title of the **SARS Act** states that the purpose of the Act is to provide for the efficient and effective administration of revenue collecting system of the Republic

And whereas

Section 4 of the **SARS Act** provides for the functions of SARS as

(1) to achieve its objectives SARS must:-

(a) secure the efficient and effective, and widest possible, enforcement of :-

(i) the national legislation listed in Schedule 1 of the SARS Act

(ii) any other legislation concerning the collection of revenue or the control over the import, export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and an organ of State or institution concerned

(2) SARS must perform its function in the most cost-efficient and effective manner in accordance with the values and principles mentioned in section 195 of the Constitution.

And whereas

Accused 1 and 3 were employees of SARS, Accused 1 as a General Manager of the Enforcement and Risk Division of SARS and Accused 3 as a Special Officer in the office of the General Manager of the Enforcement and Risk Division of SARS. They were both in an employment relationship together with witness 13, within the provisions of section 10 of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004. Witness 13 is in the employment of SARS as a Manager Technical Physical Security within SARS. At the relevant time referred to in Count 2, he was employed as a "Specialist Agent" within the Enforcement and Risk Division, reporting to Accused 2.

And whereas

Section 195 of the **Constitution Act 108 of 1996 (herein referred to as The Constitution)** provides for the basic values and principles governing the public administration:

(1) Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) a high standard of professional ethics must be promoted and maintained

(b) efficient, economic and effective use of resources must be promoted

(c) .....

(d) .....

(e) .....

(f) public administration must be accountable

(g) transparency must be fostered by providing the public with timely accessible and accurate information

(h) good human resource management and career development practices to maximize human potential , must be cultivated

(i) .....

(2) The above principles apply to:

(a) administration in every sphere of government

(b) organs of state; and

(c) public enterprise.

And whereas

Section 199 of the Constitution establishes the structure and conduct of security services:-

(1) the security services of the Republic consist of a single defense force, single police service and any intelligence services established in terms of the Constitution

(2) the defense force is the only military force in the Republic

(3) other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation

(4) the security services must be structured and regulated by national legislation

(5) the security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic

(6) no member of any security service may obey a manifestly illegal order

(7) neither the security forces, nor any of their members, may in the performance of their functions:-

(a) Prejudice a political party interest that is legitimate in terms of the Constitution

(b) Further, in a partisan manner, any interest of a political party

(8) To give effect to the principles of transparency and accountability, multiparty parliamentary committees must have oversight of all security services in a

manner determined by national legislation or the rules and orders of parliament.

And whereas

Section 1 of the **National Strategic Intelligence Act 39 of 1994 (herein referred to as the NSI Act)** established National Intelligence Structures as:-

(a) the intelligence division of the National Defence Force;

(b) the intelligence division of the South African Police Service;

(c) the Agency

And

defines the Agency as the State Security Agency as referred to in section 3(1) of the Intelligence Services Act 65 of 2002. SARS is not mentioned as one of the National Intelligence Structure established in terms of the NSI Act and can only work with other law enforcement agencies within the principle of co-operative government in achieving its objectives as outlined in section 4 and 5 of the **SARS Act.**

And whereas

Section 2(1) of the **NSI Act** provides for the functions of the State Security Agency as being to:-

(a) gather, correlate, evaluate, and analyse domestic and foreign intelligence...

(b) fulfil the national counter-intelligence responsibilities... and to co-ordinate counter-intelligence and to gather, correlate, evaluate, analyse and interpret information regarding counter-intelligence...

(c) gather departmental intelligence at the request of any interested department of State and without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned and to NICOC (National Intelligence Co-ordinating Committee).

And section 2(2) (f) enjoins the State Security Agency to co-operate with any organization in the Republic or elsewhere to achieve its objective.

And whereas

Section 3 of the **NSI Act** provides for the functions of other department of State, with reference to national security intelligence.

(1) If any law expressly or by implication requires any department of State, other than the State Security Agency, to perform any function with regard to the security of the Republic or the combatting of any threat to the security of the Republic, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function: Provided that such department of State

(a) Other than the National Defence Force...

(b) Other that the police service

shall not gather departmental intelligence within the Republic **in a covert manner**.

And whereas

Section 1 of the **NSI Act** defines

- **departmental intelligence** as intelligence on any threat or potential threat to national security, which falls within the function of a department of State and includes intelligence needed by such department in order to neutralize such a threat. Intelligence is further defined as any information obtained and processed by a National Intelligence Structure for the purpose of informing any government decision or policy-making process carried out in order to protect or advance the national security.

- **covert collection** as the acquisition of information which cannot be obtained by overt means and for which complete and continuous secrecy is a requirement.

And whereas

Approval to fund a special capability within NIA (the National Intelligence Agency) to supply SARS and law enforcement with the necessary information to address the illicit economy was sought and obtained from the Minister of Finance on 22 February 2007. Illicit economy is understood to include the importation of counterfeit goods, the illegal harvesting of abalone, the smuggling of cigarettes and the importation and exportation of drugs. SARS recognized that it lacked the capability including the legislative mandate to manage and to partake in clandestine activity. This special capability was being created within NIA to focus on SARS work. SARS informed the Minister of Finance in February 2007 that discussions were taking place with the National Intelligence Agency to supplement SARS intelligence capability with a view to formalize the arrangement into a memorandum of understanding, yet took no steps to even make contact with NIA, nor was there a memorandum of understanding concluded.

SARS under the guidance and management of **Accused 1** in his capacity as **General Manager** of the **Enforcement and Risk Division of SARS** and **Accused 2** as a **line manager** of the Special Projects Unit (SPU) or the National Research Group (the NRG), later named the High Risk Investigation Unit (HRIU), established the HRIU without any involvement of NIA. The recruitment, interviews and assessment of the members of the Unit commenced around June 2006 without any involvement of NIA. Most of the members of the unit commenced their employment on 1 March 2007. The **Special Project Unit** forms part of the **Enforcement and Risk Division** and both accused 2 and 3 reported to Accused 1,

And whereas

The Prevention and Combatting of Corrupt Activities Act 12 of 2004 (hereinafter referred to as POCA) creates a spectrum of crimes of corruption that includes general, broad and all-encompassing offence of corruption where various corrupt activities are criminalized into different categories.

And whereas

Section 1 of POCA

defines gratification to include

(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, ... or any other similar advantage;

(c) ...

(d) ...

(e) ...

(f) ...

(g) Any other service or favour or advantage of any description ...

(h) ...

(i) ...

(j) Any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

And whereas

Accused 1 and 2 did not secure an interception direction from the office of the designated judge in terms of sections 16, 17 or 18 of the RICA Act, they authorized members of the Special Projects Unit and or National Research Group of SARS to install surveillance equipment at the offices of the erstwhile Directorate of Special Operation (DSO) and the National Prosecution Authority (NPA) and to intercept communication within the NPA in contravention of the RICA Act and thereby made themselves guilty of offences mentioned hereunder. Conversations amongst members of the DSO during the period 3 October to 6 November 2007 were monitored, recorded and transcribed without an authorization from the designated judge issued in terms of the RICA Act 70 of 2002. The recorded conversations amongst members of the DSO were handed to both Accused 1 and 2 at their insistence.

And whereas

Accused 3 knew, when he managed the HRIU, that the process that was used to procure the transcripts of the conversation amongst members of the DSO was unlawful. Accused 3 , together with Accused 1 authorized witness 13, an

employee of SARS, to retain an amount of One Hundred thousand rands (R100 000 .00) which remained after the surveillance equipment was fitted, for himself thereby giving him unauthorised gratification which was not due to him.

NOW THEREFORE the accused are guilty of the following offences:-

COUNT 1:

Contravention of Section 2 read with 49 and 51(b) as well as section 1 of the Regulation of Interception of Communications & Transactions Act (RICA), Act 70 of 2000 (Unlawful Interception of Communication) AGAINST ACCUSED 1 AND 2 ONLY

IN THAT during the period **June 2007 until November 2007** and at or near **Silverton, Pretoria** in the district of Pretoria within the Republic, Accused 1 and Accused 2 unlawfully and intentionally procured Mr Helgard Lombard and/or authorize Mr Lombard to intercept communication within the offices of the Directorate of Special Operations (DSO) and those of the National Prosecution Authority (NPA) without an interception direction issued by the designated judge in terms of the Regulation of Interception of Communications and Provision of Communication – Related Information Act, Act 70 of 2002.

COUNT 2

Contravention of Sections 10 (b) read with sections 1, 2, 24, 25, 26(1) of the Prevention & Combating of Corrupt Activities (POCA) Act 12 of 2004 (Corruption relating to public officers – Offering a Benefit) AGAINST ACCUSED 1 AND 3 ONLY

IN THAT on or about **August to September 2008** and at or near **SARS offices, Brooklyn in Pretoria**, within the area of jurisdiction of this court, Accused 1 and 3 whilst being in the employ of the South African Revenue Services (SARS), an organ of state within the public administration (although outside the public service), directly or indirectly and unlawfully gave or agreed to give Mr Lombard gratification, to wit cash in the amount of one hundred thousand rands (R100 000, 00) whether for the benefit of himself or for the benefit of another person, to act in a manner that amounts to the illegal, dishonest, unauthorized, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other obligation, designed to achieve an unjustified result; or that amounts to any other unauthorized or improper inducement to do or not to do anything

ALTERNATIVE TO COUNT 2

Contravention of Section 3 read with read with sections 1, 2, 24, 25, 26(1) of the Prevention & Combating of Corrupt Activities (POCA) Act 12 of 2004
(General Corruption – Offering a Benefit) AGAINST ACCUSED 1 AND 3 ONLY

IN THAT on or about **August to September 2008** and at or near **SARS offices, Brooklyn in Pretoria**, within the area of jurisdiction of this court, Accused 1 and 3, directly or indirectly and unlawfully gave or agreed to give Mr Lombard gratification, to wit cash in the amount of one hundred thousand rands (R100 000, 00) whether for the benefit of himself or for the benefit of another person, to act in a manner that amounts to the illegal, dishonest, unauthorized, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other obligation, designed to achieve an unjustified result; or that amounts to any other unauthorized or improper inducement to do or not to do anything

In the event of a conviction, the said Acting Special Director of Public Prosecutions requests that the accused be sentenced in accordance the law.

_____

ADV J P PRETORIUS SC
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT
DATE:

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

THE STATE

VERSUS

VISNAVATHAN IVAN PILLAY AND TWO (2) OTHERS

SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144 ACT 51 OF 1977 (CRIMINAL PROCEDURE ACT)

1. The accused persons were members of the Enforcement and Risk Division within the South African Revenue Services (SARS) and were managed by accused 1, who was the General Manager of the division within SARS. Accused 1 reported to the Commissioner of SARS and Accused 2 and 3 reported to Accused 1. Accused 2 was employed as a Specialist Officer in the office of the General Manager, accused 1.

2. The Enforcement and Risk Division of SARS under the leadership of Accused 1 produced a memorandum, which was signed by Accused 1 on 2 February 2007. The Memorandum was directed to the then Minister of Finance, Mr Trevor Manuel and was requesting funding of intelligence capability within NIA in support of SARS. The purpose of the memo was to seek approval from the Minister to fund a special capability within NIA to supply SARS and the law enforcement with the necessary information to address the illicit economy. Illicit economy refers to the importation of counterfeit goods, the illegal harvesting of abalone, the smuggling of cigarettes and the importation and exportation of drugs. The memo was recommended by the then Commissioner of SARS, Pravin Gordhan on 8 February 2007 and approved by the then Deputy Minister of Finance, Jabu

Moleketi on 22 February 2007. The then Minister of Finance signed his approval to the request on 22 February 2007.

3. The memo recognized that collecting tactical intelligence invariably meant that Organised crime syndicates had to be penetrated to unearth their activities from which SARS was losing a lot of revenue. This was an activity for which SARS did not, at the time have the capability (including the legislative mandate to manage clandestine activity). The memo also informed the minister that discussions were taking place with the National Intelligence Agency to supplement SARS intelligence capability. It further stated that NIA was willing to create a ring-fenced capability, provided that funds were made available to cover personnel costs. It indicated that NIA was willing to formalize these arrangements into a Memorandum of Understanding (MOU). The Enforcement and Risk Division of SARS never commenced any discussions or negotiations with NIA to pursue these arrangements until the engagement was initiated by NIA. No Memorandum of Understanding was concluded with the NIA and SARS. Accused 1 and 2 commenced with the recruitment of staff in June 2006 and appointments were made in March 2007 without any involvement of NIA.

4. In July 2007 a member of the High Risk Investigation Unit of SARS with the assistance of accused 2, commenced installation of equipment at the offices of the Directorate of Special Operations (DSO) and the National Prosecution Authority (NPA). In September 2007, Accused 2 instructed that the meetings of the DSO and NPA should be monitored. This happened with the knowledge and approval of Accused 1. Both Accused 1 and 2 placed members of the High Risk Investigation Unit under the impression that the authorization required in Act 70 of 2002 was obtained from the then President Mbeki. Various communications and meetings in the DSO were

intercepted without the interception direction issued by the designated judge in terms of the RICA Act 70 of 2002. Conversations amongst members of the DSO during the period 3 October to 6 November 2007 were monitored, recorded and transcribed without an authorization from the designated judge issued in terms of the RICA Act 70 of 2002. These recorded conversations amongst members of the DSO were handed to both Accused 1 and 2 at their insistence. Accused 1 even gave witness 13 an assurance that if these interceptions were discovered, he will take full responsibility for having given the necessary authorisations and guaranteed the members involved legal assistance that will arise therefrom.

5. After the security and surveillance equipment were fitted at the offices of the DSO and NPA, an amount of one hundred thousand rands (R100 000,00) remained and accused 1 and 3 authorized the member of the High Risk Investigation Unit to keep the money as if it was a private installation, thereby giving him gratification which was not due to him. Accused 3 also gave the member an authorization to perform private work after the work was completed in order to make the gratification to appear regular.

LIST OF WITNESSES IN TERMS OF SECTION 144 (3) (a) (iii) ACT 51 OF 1977

1. Mr Thomas Swabihi Moyane
   South African Revenue Services
   Pretoria

2. Mr Mashudu Jonas Makwakwa
   South African Revenue Services
   Pretoria

3. Mr Vusumzi Patrick Pikoli
   Cape Town

4. Mr Lukas Johannes Bartell Pieterse
   Security Management Services
   National Prosecution Authority

5. Mr Walther Peter Rhoode
   557 Birzoi Street
   Garsfontein
   Pretoria

6. Adv Menzi Simelane
   240 Govan Mbeki and Justice Mohamed Street
   Department of Human Settlement
   Sunnyside
   Pretoria

7. Mr Laurence Smith
   4 Dion Road
   Sandown Extention 18
   Johannesburg

8. Mr Christopher Basil Compton- James
   18 Lynnwood Road
   Kloof
   Kwazulu Natal

9. Mr Paul Andre Rossouw
   135 Rivonia Road

Sandown
Johannesburg

10. Mr Pieter Lesley Jonker
4 Brits Avenue
Wierda Park
Centurion

11. Mr Casper Jonker
Directorate of Priority Crime Investigation
228 Visagie Street
Arcadia

12. Adv John Izak Welch
330 Du Toit Street
Wierda Park
Centurion

13. Mr Helgard Lombard
Riverwalk Office Park, Block A
Corner Garsfontein and Matroosberg Road
Ashlea Gardens
Pretoria

14. Mr Johannes Daniel De Waal
Rieverwalk Office Park
Corner Garsfontein and Matroosberg Road
Ashlea Gardens
Pretoria

15. Captain Reinette Coetzee
Digital Forensic Laboratory
Forensic Science Laboratory
Opera Plaza Building
Corner Pretorius and Bank Lane streets
Pretoria

16. Ms Jeannee Eleanor Padiachy
299 Bronkhorst Street
Brooklyn
Pretoria

17. Mr Michael Peega
Soweto

18. Mr Edward Chieffer Kotze
Pretoria

19. Colonel Mafemane Patrick Tshabalala
Detective Co-ordinator
Tshwane East Cluster
S A Police Service
Pretoria

20. Warrant Officer Bandile Bright Bain Mlumbi
National Crime Scene Management
S A Police Service
Pretoria

Ref: NCSPT CR 06/2016

21. Captain Lesiba Joseph Mokoena
Tactical Operation Management Section
Directorate of Priority Crime Investigations
Silverton Pretoria

22. Sergeant Winchester Khan Baloyi
Tactical Operations Management Section
Directorate of Priority Crime Investigations
Silverton
Pretoria

23. Constable Ntsoloko Solomon Moloto
Tactical Operations Management Section
Directorate of Priority Crime Investigations
Silverton
Pretoria

24. Mr Lekgalake Kenneth Mphahlele
Riverwalk Office Park
Matroosberg Street

SARS
Pretoria

25. Mr Francois van Niekerk
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

26. Mr Danie Le Roux
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

27. Mr Itumeleng Leeuw
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

28. Mr Jappie Tshabalala
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

29. Mr Humbulani Gene Ravele
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

30. Mr Daniel Dillo Nyapudi
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

31. Mr Ndabezinhle Simon Nyembe
NPA Head Office
VGM Building

123 Westlake Avenue
Weaving Park
Pretoria

32. Colonel Izak Johannes Fisher
Technical Support, Head Office
Crime Intelligence
S A Police Service
Pretoria

33. Mr Gerrit Jute
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

34. Mr Anton Herman van'T Wout
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

35. Mr Pieter Gabriel De Bod
Riverwalk Office Park
Matroosberg Street
SARS
Pretoria

36. Colonel Lucase Mahawayi
National Office
Office for the Control and Interception & Monitoring
Pretoria

37. Mr Manala Elias Manzini

38. Mr Trevor Andrew Manuel

39. Adv Gerrie Nel

40. Mr Andrew Leask

41. Ms Joanne Scott

SEQ 19/2019-333

Annexure "E"

Priority Crimes Litigation Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

Head Office

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Victoria & Griffiths
Mxenge Building
123 Westlake Avenue
Weavind Park
Silverton, Pretoria

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0001
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TO: ADV SIBONGILE MZINYATHI
ACTING DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS NATIONAL PROSECUTION SERVICES

TO: ADV RC MACADAM (SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS)

FROM: DR J P PRETORIUS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
PCLU

RE: CATO MANOR DELEGATION ISSUED TO ADV MAEMA BY ADV JIBA

---

1. **INTRODUCTION:**

The NDPP has requested advice as to how the request of the Deputy Director Maema for written confirmation that he has been removed of the Cato Manor matter may be correctly dealt with given the sensitivity thereof. Adv. Macadam provided an opinion regarding this matter. I differ from the opinion provided and in my memorandum I follow mostly the seriatim paragraphs that were provided by Adv. Macadam.

2. **RELEVANT LEGAL FRAMEWORK:**

In regard to 2.1

2.1 Not only has there been a letter written by Ms Jackie Lepinka to the DPP: North West referring to Deputy Director of Public Prosecutions (DDPP) Maema forming part of a "*National Project*" ("*Subject: **CATO MANOR KZN***") and a delegation issued by Adv Jiba as the ANDPP to Maema authorising him to perform the powers set out in section 20(1) of the **National Prosecuting Authority Act 32 of 1998** (the Act) in respect of all offences committed by SAPS in KZN, but:

2.1.1 an opinion by Adv. Maema regarding the delegation; and (attached hereto as Annexure "A")

2.1.2. a number of delegations that have been provided to the prosecutors involved. (Attached hereto as Annexures "B 1- 4")

Ad 2.2

Over and above the review of a decision to prosecute or not to prosecute by the NDPP, in the preamble to the NPA Act it is stated clearly "*AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the*

prosecution process ... and may review a decision to prosecute or not to prosecute. [Own emphasis] This is more specifically and clearly set out in Section 22 (2) (b) of NPA Act in a separate provision to the provision regarding review *per se.* Thus the NDPP may intervene in the prosecution process if the Policy directives are not complied with and not just on a review basis. By and large I agree with the statement: "*When regard is had to the powers of the NDPP as a whole it is clear that the Act contemplated that the NDPP should exercise oversight over the NPA and intervene only in the decisions of the DPPs on a review basis and should not be the primary decision-maker in individual cases*" but qualify it in this respect that in extra-ordinary cases the NDPP can intervene in the prosecution process in certain cases (and not just in a case of review). The NPA Act makes specific provision that the NDPP can remove a specific case or category of cases from the DPP jurisdiction. I agree that the issue arises as to what can legally be done with any cases so removed.

DISCUSSION

- The Office of the National director shall consist of not only the NDPP, Deputy Nationals but also Special Directors (and Investigating Directors) and other members of the prosecuting authority appointed at or assigned to the Office of the National Director for instance and especially prosecutors who may be appointed to the Office of the National Director (See Section 16 (2) of NPA Act).

- The Cabinet member responsible for the administration of justice-
  (a) Must establish an Office for the prosecuting authority at the seat of each Division of the High Court provided for in terms of section 6 (1); ....

- It is however also stated in subsection (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.*" From this it is clear that a "different" Director (from another area) can control and direct a Deputy Director if he is appointed as head of an Office at a seat of a specific High court.

- Section 17 stipulate that the :
  "(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.* Thus a Director may be transferred and appointed to an Investigating Directorate or as a Special Director.

- It is also clear that a Deputy Director may be specifically appointed in relation to such offences and in such courts as he or she has been authorised in writing by the NDPP. See section 20 (4) (1) (b):
  "(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-
  .....

(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.*

- One might must ask why a Deputy Director (that has been appointed to a specific area of jurisdiction), would need a further authorisation from the NDPP for specific offences and appearing in such courts as stipulated by the NDPP. These provision and words are with respect not superfluous. Specific provision has thus been made that the NDPP can in certain circumstances refer such offences and appearing in specific courts, to a particular Deputy Director. In given circumstances where the NDPP deems fit, the NDPP may thus authorised the above in writing. That is with exactly what happened in this instance. Obviously the then NDPP must have felt that the situation was serious enough (especially after a women was killed by the Police, notwithstanding the fact that she obtained - not just an interim order - but a permanent order from the court that the police should not kill her and she was still killed), to justify attention from the National Office and for the NDPP to intervene in the prosecution process. Thus the then NDPP appointed a Deputy Director in writing for a specific area and for specific offences.

- The National Director, as the head of the prosecuting authority, 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.[See Section 22 (1) of the NPA Act]

<u>Centralisation:</u>

- Section 22 (3) of the NPA Act makes provision that the National Director if s/he 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. The NDPP may 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.

- The National Director has the power to exclude any offence expressly from the jurisdiction, either generally or in a specific case from a Director who has been appointed to an area of jurisdiction [See Section 20 (3) (b) of the NPA Act]. The National Director may also authorise any competent person in the employ of the public service or local authority to conduct prosecutions in respect of statutory offences including municipal laws [Vide :Section 22 (8) (b) of the Act]

- The National Director (or Deputy National Director) have the power to institute and conduct a prosecution in any court in the Republic. [Compare Sect 22 (9)]. This would however be in extremely rare circumstances and an extra ordinary situation.(for instance High Treason trial).

- It is obvious that a Deputy Director can conduct a prosecution. This happens in our courts every day and is done in ordinary cause of events. It is also competent for the NDPP to assign a specific case and category of cases to a Deputy Director. A removal of these

cases from DPP's jurisdiction, could therefore not only result in a prosecution "personally by DPP or a DNPP" but a prosecution by a specialist unit like the PCLU for instance could have taken place (obviously after section 24 (3) have been complied with) or the Deputy Director special appointed for this purpose.

- In regard to the statement by adv. Macadam: *"If in fact the matter in hand was a "National Project" then it was strange not to have referred the matter to a Special Directorate which would have permitted direct oversight by the NDPP."* This is exactly what happened later on when this matter was referred to the PCLU. The matter was referred to a special directorate which permitted direct oversight by the NDPP.

- I don't know why the following statement is made: *"However from the documents provided it is clear that none of these provisions were applied when providing a DDPP from the North West with a delegation to exercise the powers in terms of section 20(1) in respect of all offences involving SAPS in KZN."* The delegation by the NDPP (Annexure A from previous correspondence) set out that the following provisions were applied: "section 20 read with sections 21, 22 and 24 of the National Prosecuting Authority Act." (See delegation by the then NDPP)

Ad 2.10

- With respect I see no reason why adv. Maema should have been reappointed or be appointed afresh to the KZN office. He was already appointed by the Minister for the North West. He has taken the oath. The legislation makes specific provision that the NDPP can allocate certain offences in certain courts to him. (Section 20) This was done. Why he should be reappointed or appointed afresh is not clear.

Ad 2.11

- Nowhere in the act is there a stipulation that an official ex abundantly cautela have to take a further oath or affirmation if he is assigned to specific task the NDPP allocated to him or her. With respect that is reading something into the Act that is not required.

3. **RECOMMENDATIONS:**

3.1 I differ from the opinion that the initial appointment was illegal. My respectful submission is that the team had a valid title to prosecute. With respect the then NDPP must have regarded this matter as serious enough to intervene. Apparently this was also on advice of Adv. Mlotswa to General Mabula. It is the respectful submission that in given circumstance, the NDPP can appoint a Deputy Director in respect of certain offences and in certain courts to handle a matter and there is specific legislative provision for this. The delegation of the advocates was also a matter of concern at that time, and it was discussed and opinions provided. (See the opinion hereto attached hereto as well as all the delegations) The people at that time tried to accommodate the situation as best they could. It would seem that the opinion of Gerhard S Nel was also obtained.

- In regard to recommendations it is with respect not needed to establish whether the Minister appointed the officials involved to Kwa Zulu Natal. That interpretation is with respect not supported by me. Obvious that has not been done. I am of the opinion that the Deputy Directors were legally entitled to deal with cases involving the SAPS in KZN. Specifically the Cato Manor/Booysen matter. I am of the opinion that the proceedings were not unlawful.

- I do not think the integrity of the Cato Manor prosecution is the question here. The Deputy Director that was appointed in writing in this case, merely wants the fact that the appointment is rescinded in writing. The reference in Lepinka letter to "*National Project* "can also lend credibility that the management and team regarded the matter as serious and requiring the attention of the National Office and not one or other nefarious meaning.

- As this matter was investigated by the Mokgoro enquiry and all probability would serve before the Zondo Commission on state capture, it is with respect not needed to re enquire into whole matter and that all documentation is obtained. This with respect is a simple request from a prosecutor, a Deputy Director that in the light that he was appointed in writing and seized with the matter for more than 5 years, requesting his re allocation to be in writing. I can see no harm in providing same to the prosecutor, which must inform a number of interested parties, - like the Judge for more than 5 years - and the investigating officer in the Police and the witnesses under witness protection, that his situation has changed.

Regards

DR J P PRETORIUS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT

APPROVED / NOT APPROVED
COMMENTS:

_____

_____

_____

ADV S MZINYATHI
ACTING DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

HEAD: NPS

Date:

Annexure B1

National Prosecuting Authority

THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

9/2/1/2 (52) – 105/2012

AUTHORITY TO INSTITUTE AND CONDUCT CRIMINAL PROCEEDINGS

I, CYRIL SIMPHIWE MLOTSHWA

Acting Director of Public Prosecutions for the area of jurisdiction of the Natal Provincial Division of the High Court of South Africa, duly designated by the National Director of Public Prosecutions in terms of section 20(5) of Act 32 of 1998, do hereby authorize

MAHLUBI NTLAKAZA

to exercise, on behalf of the Republic, the powers mentioned in section 20(1)(a), (b) and (c) of Act 32 of 1998 in all courts within my area of jurisdiction, in respect of all offences

with effect from **1st JUNE 2012**

ADV. C. S. MLOTSHWA
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

5 JUNE 2012

B2

National Prosecuting Authority

THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

9/2/1/2 (52) – 104/2012

AUTHORITY TO INSTITUTE AND CONDUCT CRIMINAL PROCEEDINGS

I, CYRIL SIMPHIWE MLOTSHWA

Acting Director of Public Prosecutions for the area of jurisdiction of the Natal Provincial Division of the High Court of South Africa, duly designated by the National Director of Public Prosecutions in terms of section 20(5) of Act 32 of 1998, do hereby authorize

PATIENCE MOLEKO

to exercise, on behalf of the Republic, the powers mentioned in section 20(1)(a), (b) and (c) of Act 32 of 1998 in all courts within my area of jurisdiction, in respect of all offences

with effect from **1st JUNE 2012**

ADV. C. S. MLOTSHWA **5 JUNE 2012**
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

B3

National Prosecuting Authority

THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

9/2/1/2 (52) – 103/2012

AUTHORITY TO INSTITUTE AND CONDUCT CRIMINAL PROCEEDINGS

I, CYRIL SIMPHIWE MLOTSHWA

Acting Director of Public Prosecutions for the area of jurisdiction of the Natal Provincial Division of the High Court of South Africa, duly designated by the National Director of Public Prosecutions in terms of section 20(5) of Act 32 of 1998, do hereby authorize

PHUMEZA FUTSHANE

to exercise, on behalf of the Republic, the powers mentioned in section 20(1)(a), (b) and (c) of Act 32 of 1998 in all courts within my area of jurisdiction, in respect of all offences

with effect from **1st JUNE 2012**

ADV. C. S. MLOTSHWA **5 JUNE 2012**
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

B4

National Prosecuting Authority

THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

9/2/1/2 (52) – 102/2012

AUTHORITY TO INSTITUTE AND CONDUCT CRIMINAL PROCEEDINGS

I, CYRIL SIMPHIWE MLOTSHWA

Acting Director of Public Prosecutions for the area of jurisdiction of the Natal Provincial Division of the High Court of South Africa, duly designated by the National Director of Public Prosecutions in terms of section 20(5) of Act 32 of 1998, do hereby authorize

JABULANI MLOTSHWA

to exercise, on behalf of the Republic, the powers mentioned in section 20(1)(a), (b) and (c) of Act 32 of 1998 in all courts within my area of jurisdiction, in respect of all offences

with effect from **1st JUNE 2012**

ADV. C. S. MLOTSHWA **5 JUNE 2012**
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

Annexure "F"

Torie Pretorius (JP)

From: Torie Pretorius (JP)
Sent: 20 March 2019 10:50 AM
To: Sibongile Mzinyathi
Subject: Opinion on appointment of Cato Manor Team: adv Torie Pretorius
Attachments: 20190320095736748.pdf

Dear Sibongile

Attached my opinion in answer to Adv Chris Macadam opinion. I would communicate to him once I have discussed the matter with you

I will also resend the previous opinion

Regards
Tori

Adv J P Pretorius
Acting Special Director of Public Prosecutions Priority Crimes Litigation Unit +27 12 845 6482 National Prosecuting Authority

-----Original Message-----
From: nashua@npa.gov.za [mailto:nashua@npa.gov.za]
Sent: 20 March 2019 10:58 AM
To: Torie Pretorius (JP); Torie Pretorius (JP)
Subject: Message from "RNP0026738FFFB4"

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SEQ 19/2019-344

Annexure "G"

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TO: ADV SIBONGILE MZINYATHI
ACTING DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS NATIONAL PROSECUTION SERVICES

TO: DR J P PRETORIUS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV RC MACADAM (SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS)

RE: CATO MANOR DELEGATION ISSUED TO ADV MAEMA BY ADV JIBA

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1. INTRODUCTION:

The NDPP has requested advice as to how this matter may be correctly dealt with given the sensitivity thereof.

2. RELEVANT LEGAL FRAMEWORK:

2.1 I have been provided with a letter written by Ms Jackie Lepinka to the DPP: North West referring to Deputy Director of Public Prosecutions (DDPP) Maema forming part of a "*National Project*" ("*Subject: **CATO MANOR KZN***") and a delegation issued by Adv Jiba as the ANDPP to Maema authorising him to perform the powers set out in section 20(1) of the **National Prosecuting Authority Act 32 of 1998** (the Act) in respect of all offences committed by SAPS in KZN.

2.2 The reference to a "*National Project*" raises a number of issues. Section 20(3) of the Act makes the DPPs responsible for the prosecution of all cases committed in their areas of jurisdiction unless the NDPP expressly removes a specific case or category of cases from them. The issue arises as to what can legally be done with any cases so removed. When regard is had to the powers of the NDPP as a whole it is clear that the Act contemplated that the NDPP should exercise oversight over the NPA and intervene only in the decisions of the DPPs on a review basis and should not be the primary decision-maker in individual cases.

2.3 Section 22(9) of the Act authorises the NDPP or a DNDPP authorised by her to conduct a prosecution **in person**. [Own

emphasis] There is nothing in the Act which enables the NDPP to further delegate this responsibility to any other member of the NPA e.g. a DDPP or State Advocate. A removal of cases from the DPPs could therefore result in a prosecution personally by the NDPP or a DNDPP under this provision.

2.4 Section 5 of the Act however makes provision for the appointment of Investigating or Special Directors in the Office of the NDPP. For the purpose of this advice it is not necessary to deal with the issue of Investigating Directors. As far as Special Directors are concerned they perform their duties as assigned by the President subject to the directions of the NDPP (section 24(3)). They may perform the powers referred to in section 20(1) but when so doing must consult with the DPP where the crime was committed. The NDPP could therefore in terms of these provisions remove a case or category of cases from a DPP and refer them to a Special Director. If in fact the matter in hand was a "*National Project*" then it was strange not to have referred the matter to a Special Directorate which would have permitted direct oversight by the NDPP.

2.5 However from the documents provided it is clear that none of these provisions were applied when providing a DDPP from the North West with a delegation to exercise the powers in terms of section 20(1) in respect of all offences involving SAPS in KZN.

2.6 Having served in the DPP's Office: KZN from 1984 to 1996 I find it extraordinary that a DDPP from another province would be required to be the decision-maker of all cases involving the SAPS in KZN. From personal knowledge I am aware that the process was that all complaints against SAPS were referred to a SDDPP in Pietermaritzburg for decision. All decisions whether or not to prosecute would be taken by State Advocates working under the authority of the SDDPP. In sensitive matters the DPP would be personally appraised before any controversial decision was implemented.

2.7 Section 20(4) of the Act provides as follows in respect of DDPPs:

> "*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.*"

2.8 Section 24(9) of the Act provides further:

> "*(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."*

2.9 Since a DDPP is deemed to be exercising the powers of the DPP him-/herself section 15(1)(b) of the Act makes provision for the Minister and **not the NDPP** to appoint DDPPs to the Offices of DPPs. [Own emphasis]

2.10 Although it was legally permissible for Adv Jiba to give Adv Maema the delegation to prosecute all SAPS-offences in KZN, this would have had to be preceded by an appointment by the Minister in terms of section 15(1)(b) appointing him as a DDPP in the Office of the DPP: KZN. This is all the more the case where he was now being given responsibility of a whole category of offences committed in the province.

2.11 Due to the fact that he had now been assigned to a new DPP's Office section 32(2)(a) applied and required that he "***must***" then have taken an oath or affirmation "***before commencing*** *to exercise, carry out or perform his or her powers, duties or functions in terms of this Act*". [Own emphasis] In terms of section 32(2)(b)(i) this oath had to have been taken before the Judge President of the KZN High Court or, in his absence, the next most senior Judge.

2.12 It is trite that a prosecutor must have a valid title to prosecute. In fact section 106(1)(h) of the **Criminal Procedure Act 51 of 1977** enables an accused to raise as a special plea that the prosecutor "*has no title to prosecute*". There are numerous decided cases dealing with situations where prosecutors prosecute matters without having a proper delegation. In such cases the convictions are set aside.

3. **RECOMMENDATIONS:**

3.1 It therefore has to be established whether the Minister appointed Adv Maema as a DDPP in the Office of the DPP: KZN and whether he took the prescribed oath of office. Non-compliance with either one or both of these provisions would mean that he was not legally entitled to deal with cases involving SAPS in KZN and any proceedings he conducted would have been unlawful.

3.2 Due to my involvement in the Mokgoro Inquiry I have had sight of an affidavit deposed to by the ADPP of KZN, Adv Mlotshwa. A copy of this affidavit is attached herewith. In essence he alleges that in respect of the Cato Manor case the prosecution would be conducted by prosecutors in Adv Chauke's Office i.e. DPP: Johannesburg. It would appear that Adv Chauke was playing a leading role in the matter although he is not the DPP where the crimes were committed. Finally he alleged that Adv Jiba told him that the indictment would be signed by himself i.e. Mlotshwa. He indicated that he would only sign the indictment if he was provided

with a report detailing the evidence implicating the accused. Although he was provided with the indictment he did not receive the prosecutor's report despite several attempts by him to obtain it. His acting appointment was cancelled without him ever having seen the requested report.

3.3 If Adv Mlotshwa's allegations are true this raises extremely serious questions regarding the integrity of the Cato Manor prosecution as it would appear that he was being used simply as a rubberstamp to issue the indictment and being deprived of his obligation to satisfy himself as to the cogency of the evidence justifying the arraignment of the accused. Such conduct flies in the face of section 20(4) which placed Adv Mlotshwa in charge of all offences committed in KZN. It would appear that the driving force of the prosecution was in fact Advocates Jiba and Chauke who had no authority under the **NPA Act** to manipulate the DPP: KZN. The reference in Lepinka's letter to a "*National Project*" also lends credibility to Adv Mlotshwa's allegations.

Kind regards

ADV R. C. MACADAM
SENIOR DEPUTY DIRECTOR OF
PUBLIC PROSECUTIONS:
PRIORITY CRIMES LITIGATION
UNIT (PCLU)

Date: **6 MARCH 2019**

APPROVED / NOT APPROVED
COMMENTS:

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_____
DR J P PRETORIUS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS

Date:

APPROVED / NOT APPROVED
COMMENTS:

ADV S MZINYATHI
ACTING DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
HEAD: NPS

Date: