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

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INDEX: SEQ 33/2020

No.	Description	Pages
Condonation application of **George Baloyi** for the late-filing of his Rule 3.4 Application		
1.	Notice of Motion dated 22 September 2020	001 to 002
2.	Founding Affidavit of Advocate George Baloyi dated 21 September 2020	003 to 009
3.	Explanatory Affidavit and Annexures of Luyanda Kopman dated 22 September 2020	010 to
	3.1 Explanatory Affidavit of Luyanda Kopman	010 to 021
	3.1 Annexure LK 1 to LK 7 to the Explanatory Affidavit of Luyanda Kopman	022 to 043
4.	**Application by George Baloyi for leave to cross-examine:** - Robert McBride - Innocent Khuba - Matthews Sesoko	**044 to 147**
	4.1 Filing Sheet dated 21 September 2020	044

No.	Description	Pages
	4.2 Supporting Affidavit of Advocate George Baloyi dated 21 September 2020	045 to 147
5.	Annexures voluminous, available to print on request.	148 to 362

IN THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE CAPITAL, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT JOHANNESBURG

***IN RE*: APPLICATION OF GEORGE BALOYI ("THE APPLICANT"), FOR THE CONDONATION OF THE LATE FILING OF THE APPLICATION TO CROSS-EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 11.2 AND THE GRANTING OF LEAVE TO CROSS- EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 3.3.6.3 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT that the abovementioned Applicant intends making an application in the following terms:

1. The late filing of the application to cross-examine **ROBERT McBRIDE, HUMBULANI INNOCENT KHUBA** and **MATTHEWS SESOKO** be and is hereby condoned;

2. The Applicant be granted leave to cross-examine **ROBERT McBRIDE, HUMBULANI INNOCENT KHUBA** and **MATTHEWS SESOKO**.

3. Further and/or alternative relief.

KINDLY TAKE FURTHER NOTICE THAT the affidavit of **GEORGE BALOYI** attached hereto will be used in support of this application.

DATED at Pretoria on the 22 day of SEPTEMBER 2020

STATE ATTORNEY PRETORIA
ATTORNEYS FOR G BALOYI
316 SALU Building,
Francis Baard and Thabo Sehume Street,
Pretoria
Tel: +27 (12) 309 1564 (Direct Line) or
Tel: +27 (12) 309 1566 (Secretary Line)
Fax +27 (12) 309 1649/50
Email: LKopman@justice.gov.za
Ref: 5857/2019/Z16/mp

TO:

MS KB SHABALALA
ACTING SECRETARY
JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

***IN RE*:** **APPLICATION OF GEORGE BALOYI ("THE APPLICANT"), FOR THE CONDONATION OF THE LATE FILING OF THE APPLICATION TO CROSS-EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 11.2 AND THE GRANTING OF LEAVE TO CROSS-EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 3.3.6.3 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

FOUNDING AFFIDAVIT

IN SUPPORT OF APPLICATION FOR CONDONATION AND THE CROSS-EXAMINATION OF McBRIDE, KHUBA AND SESOKO

I, the undersigned,

GEORGE BALOYI

do hereby declare under oath and state that: -

1. I am an adult male advocate employed at the National Prosecuting Authority (*"NPA"*) as Deputy Director Public Prosecutions and attached to the office of

NSGB

the Director of Public Prosecutions, Gauteng Division, Pretoria, situated at no. 28 Church Square, Pretoria.

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

3. Where I rely on facts and/or statements made by third parties, I do so based on the belief that same is true and correct and I annex to this affidavit the explanatory affidavits of Luyanda Kopman (*"Kopman"*) and Marco Voller (*"Voller"*), respectively marked as annexures **"GB1"** and **"GB2"**, and other annexures.

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

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

PURPOSE OF THE APPLICATION

6. The purpose of this application is to seek the relief as more fully set out in the Notice of Motion to which this affidavit is attached.

7. I am advised, and verily believe, that condonation is not there for the mere taking. A litigant should make out a case setting out full reasons as to why condonation should be granted.

8. I received the Rule 3.3 notice on the _____ and I gave it to Voller on _____. When the issues and matters which form the subject matter of this Commission, occurred, I was acting within the course and scope of my employment with the NPA. It is on that basis that I requested legal assistance at the expense of the NPA. I was advised that it is prudent that all the implicated NPA officials with certain exceptions, should be represented by the same legal team. The interrelatedness of some of the issues and matters affects most of the implicated NPA officials, if not all.

CONDONATION

9. I have filed a substantive affidavit, clearly setting out and addressing the allegations imputed to me, on which reliance is sought to be placed, to demonstrate that I am one of those captured NPA officials who did not properly, lawfully and professionally carry out my statutory duties and obligations. For the purpose of this application, I respectfully request the Chairperson to read the contents of my main affidavit, as if specifically incorporated herein.

10. In my main affidavit, I fully demonstrate that in carrying out my statutory duties and obligations, I do so fearlessly, without fear, favour or prejudice, having considered all the facts placed before me.

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

12. Below I address the relevant principles relating to condonation applications. I am advised that the reasons and grounds advanced in this regard should not be considered separately, but together with the objective facts.

IN THE INTEREST OF THE WORK OF THE COMMISSION

13. I am advised that it is in the interest of the work of the Commission that the truth be revealed, as the Chairperson has repeatedly stated during the hearings. I respectfully submit that it will be a miscarriage of justice that persons such as myself, who are incorrectly brushed with the same generalised brush of state capture on the basis of generalised hearsay, which is not supported by any credible, objective or independent evidence and/or documents, not be granted an opportunity to correct the miscarriage or even risk adverse finding being made by the Commission, in the absence of statements to gainsay the allegations levelled against me.

14. The allegation of the so-called core group of advocates who are at the forefront of enabling capture of the criminal justice cluster, is a serious allegation that ought to be made backed by concrete evidence, and not some smear campaign against individuals. It is, in fact, libellous and ought not to have received audience, lest it brings the important task of this Commission into disrepute.

IMPORTANCE OF MY EVIDENCE

15. It is in the interest of the Commission, myself and the public at large, that I should place my version before the Commission. Such will enable the Chairperson, after hearing all the necessary and relevant evidence, to make proper, well-informed findings and recommendations for remedial actions, if any. It is my considered view that, were I not permitted to put my version before the Commission, then the Chairperson will make findings based only on the versions of persons who are implicating me in alleged wrongdoing.

16. The purpose of this application is exactly aimed at putting my version before the Commission and contradicting the unsubstantiated allegations levelled against me.

PREJUDICE

17. The granting of the relief prayed for in the Notice of Motion to which this affidavit is attached, will not, in any way, prejudice the workings of the Commission, or McBride who implicates me of alleged wrong-doing. To the contrary, in the event that I am not afforded the opportunity to cross-examine McBride, I will be severely prejudiced, which may result in adverse findings being made against me by the Chairperson.

GOOD CAUSE

18. In establishing good cause for the granting of the relief prayed for in the Notice of Motion, I refer to the contents of the explanatory affidavits of Kopman and Voller, attached hereto, respectively marked as annexures **"GB1"** and **"GB2"**.

19. The contents of annexures **"GB1"** and **"GB2"** fully set out the process that unfolded since I received the Notice in terms of Rule 3.3, the internal processes that ensued in the NPA regarding instructions to the State Attorney, the appointment of the State Attorney, the internal processes that ensued in the State Attorney, which lead to the appointment of Counsel, the various consultations that took place and the reasons why the application for cross-examination of McBride and the condonation is only launched at this stage.

CONCLUSION

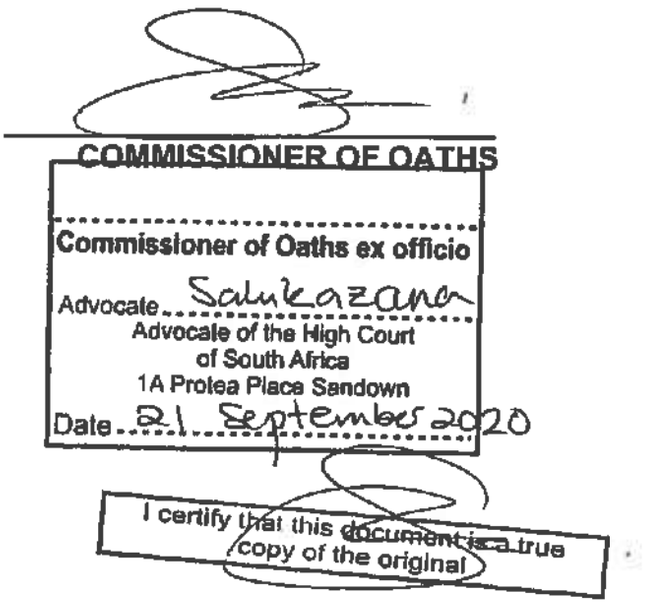
20. Having read the contents of this affidavit together with the annexures thereto, it is my respectful submission that a case is made out for the relief prayed for in the Notice of Motion to which this affidavit is attached.

G BALOYI

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at SANDTON on this 21st day of **SEPTEMBER 2020** and the Regulations

MC

contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.



GB

GB1

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

***IN RE*: APPLICATION OF GEORGE BALOYI ("THE APPLICANT"), FOR THE CONDONATION OF THE LATE FILING OF THE APPLICATION TO CROSS-EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 11.2 AND THE GRANTING OF LEAVE TO CROSS- EXAMINE WITNESSES OF THE COMMISSION IN TERMS OF RULE 3.3.6.3 OF THE RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE RULES OF THE COMMISSION")**

EXPLANATORY AFFIDAVIT

I, the undersigned,

LUYANDA KOPMAN

do hereby declare under oath and state that: -

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

M.M
LK

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

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

PURPOSE OF THIS EXPLANATORY AFFIDAVIT

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

5. The Pretoria State Attorney received a letter of instruction on the 01 October 2019. After receipt of the letter of instruction, administrative processes were followed and office files were open on the 02 October 2019. The office file was allocated to me on 21 October 2019.

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

M.M
LK

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

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

9. The draft responses were forwarded to Counsel for consideration with the view to settling the necessary affidavits.

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

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

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

M.M
LK

11.2. Adv September, who was leading the evidence of Booysen indicated that the document is not yet available to implicated persons because the evidence in that affidavit has not yet been led and therefore not yet made public. Pretorius stated that as soon as it implicates any NPA official, they will furnish us with a copy of the affidavit.

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

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

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

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

14. On various occasions, I wrote letters to Marco Voller ("Voller") as Mathibedi wanted to know as to what is happening to the other implicated NPA

MM
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officials, as they have not yet submitted their responses. I attach hereto copies of such letters, marked as annexures **"LK2.1"** to **"LK2.2"** respectively.

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

16. A consultation was held with Mosing by the legal team on the 28th of May 2020. The purpose of this consultation was to address a letter from the evidence leaders dated the 22nd of May 2020. Mosing presented the legal team with 19 arch lever files which Counsel had to peruse, in order to identify matters to be addressed in Mosing's affidavit. A perusal and analysis of the 21 files took up a considerable time.

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

LK

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

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

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

21. On the 9th of July 2020, I received an e-mail from the evidence leaders, indicating that Torie was granted permission to cross-examine McBride and Khuba, and the hearing would take place on Wednesday, the 29th of July 2020. I provided Counsel with this e-mail. A copy of this e-mail is attached hereto, marked as annexure **"LK3"**.

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

LK

shelved in the meantime, to enable the legal team to fully concentrate on the matter of Torie.

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

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

25. Mathibedi SC informed Hulley SC that Torie had not applied to cross-examine Khuba because he was served with Rule 3.3 notices indicating that he was implicated by Booysen and McBride. As such, he had not perused or considered the affidavit and evidence of Khuba that allegedly implicated him. Mathibedi SC informed Hulley SC that the evidence of McBride is

intricately linked with that of Khuba and Sesoko, and therefore they will need to be cross-examined. In order for Torie to cross-examine Khuba and Sesoko, an application to cross-examine has to be prepared. The telephone conversation that Mathibedi SC had with Hulley SC was confirmed in a letter that I addressed to the evidence leaders. I attach hereto such letter, marked as annexure **"LK5"**.

26. Counsel therefore had to leave the affidavits of Baloyi and Mokgathle in abeyance, in order to draft Torie's application to cross-examine Khuba and Sesoko. In order to draft the application to cross-examine Khuba and Sesoko, a substantive application for postponement of the date of hearing had to be drafted.

27. Due to the fact that Torie's matter was already set down, it was decided that Torie's matter should take preference over the drafting and settling of the affidavits of Baloyi and Mokgathle, which Counsel had already commenced.

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

29. Having noted the nature, extent and load of the work involved in this regard, a request was made to me for the briefing of legal team by appointing

LK M.M

another Counsel. Adv L Vilakazi ("Vilakazi") was briefed on the 31st of July 2020.

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

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

32. The preparations for the drafting and settling of the supplementary affidavit commenced on the 1st of August 2020 and the papers were settled on the 16th of August 2020, and deposed to on the 17th of August 2020. It is critical to indicate that in between, some members of the legal team had commitments from which they could not extricate themselves from.

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

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LK

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

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

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

37. Consultations were held with Baloyi on the following day:

37.1. 19 September 2020

37.2. .

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

39. On the 9th of September 2020, a meeting was held with Hulley, at which stage Hulley indicated that the Commission was under pressure due to time constraints to finalise the proceedings. He further indicated that, in order to finalise the functions of the Commissions, there is that possibility that the Commission may adopt an approach akin to motion proceedings and that if

that happens, the Chairperson will determine the issues on the papers submitted to the Commission. As such, whoever is implicated, is expected to set out detailed information in the affidavit, even those not referred to in the Rule 3.3. notices, as long as such information is germaine to the issues to be decided by the Commission.

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

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

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

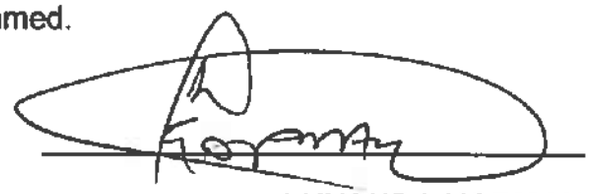
43. All such matters have been fully addressed in Baloyi's main affidavit. Time frames were discussed and proposed for the delivery of various affidavits for the implicated NPA officials.

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

LR
M.M

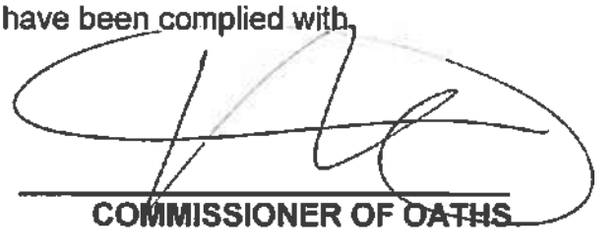
45. I am further advised by Mathibedi that he telephoned Hulley on the 19th of September 2020, with a request that the condonation application of Baloyi be delivered during the course of the week of the 21st of September 2020, due to time constraints. Hulley agreed to the request.

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



LUYANDA KOPMAN

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **Pretoria** on this **22** day of **SEPTEMBER 2020** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS

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

LK 2.1

Kopman Luyanda

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

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

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

Good day Mr Kopman

The following people have confirmed their attendance.

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

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

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

I trust that this assists.

Regards

Marco Voller

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

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

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

Good day Kopman

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

I will let you know how many are available.

Regards.

Marco Voller

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

Morning Mr Voller

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

Thank you

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

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

Good day colleagues

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

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

Regards.

Marco Voller

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

Good day Adv. Pretorius SC

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

Sincerely

Marco Voller
Legal Adviser
Leal Affairs Division

Tel: 012 845 6747

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Kopman Luyanda

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

Dear Marco
Noted and thank you

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

Good day Mr Kopman

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

Regads.

Marco Voller

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

Morning Mr Voller

Please find herewith our letter for your urgent attention.

Thank you

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

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LK2.2

Kopman Luyanda

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

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

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

Good day Mr Kopman

The following people have confirmed their attendance.

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

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

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

I trust that this assists.

Regards

Marco Voller

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

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

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Good day Kopman

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

I will let you know how many are available.

Regards.

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

Morning Mr Voller

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

Thank you

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

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Tel: 012 845 6747

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Kopman Luyanda

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

Thank you

From: Marco MP. Voller [mailto:MVoller@npa.gov.za]
Sent: 23 January 2020 10:58 AM
To: Kopman Luyanda
Subject: Re: Rule 3(3) Notices iro National Prosecuting Authority Officials

Good day Mr Kopman

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

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

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

Regards.

Marco Voller

From: Kopman Luyanda <LKopman@justice.gov.za>
Sent: Thursday, 23 January 2020 8:55:05 AM
To: Marco MP. Voller
Subject: RE: Rule 3(3) Notices iro National Prosecuting Authority Officials

Morning Mr Voller
Can you please call me urgent.
I tried to call you and there was no answer
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LK3 ~~JP5~~

Brenda Mdakane

From: luyanda kopman <kopmanluyanda@gmail.com>
Sent: Sunday, 26 July 2020 11:02 AM
To: Brenda Mdakane
Subject: Fwd: J. P. PRETORIUS, SC
Attachments: image001.jpg

Also print this email pls

---------- Forwarded message ---------
From: **Garth Hulley** <GarthH@commissionsc.org.za>
Date: Thu, 09 Jul 2020, 17:13
Subject: J. P. PRETORIUS, SC
To: Kopman Luyanda <LKopman@justice.gov.za>, kopmanluyanda@gmail.com <kopmanluyanda@gmail.com>, mathibedi@thulamelachambers.co.za <mathibedi@thulamelachambers.co.za>, zuko.madlanga@gmail.com <zuko.madlanga@gmail.com>
Cc: William Nicholson <WilliamN@commissionsc.org.za>, Susan Wentzel <SusanW@commissionsc.org.za>

Dear Mr Kopman / Adv. Mathibedi SC

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

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

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

Yours faithfully,

Garth I. Hulley, SC

LK 4

17 Empire Road
Hillside House
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2193
Tel (International): +27 (10) 214-0651
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION")

NOTICE OF SET DOWN

ADVOCATE JACOBUS PETRUS PRETORIUS

---

13 July 2020

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

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

Dear Sir

1. Please be advised that:

Wednesday, 29 July 2020 at 10h00

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

LK6 JPP

Tebogo Mathibedi

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

Hi Frank

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

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

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

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

Against this backdrop, what I propose is the following:

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

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

I trust this is of assistance to you.

Best regards,

Garth I. Hulley, SC

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

LK 7 J[redacted]

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20 July 2020

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

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

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

Dear Ms. Brigitte Shabalala

RE: HEARING OF 29 JULY 2020- DR PERTORIUS SC

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

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

1.1 To determine the truth,

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

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

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

1.5 The application of the principle audi alteram partem rule.

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

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

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

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

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

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

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

IN THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE CAPITAL, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT JOHANNESBURG

FILING SHEET

WITNESS STATEMENT IN TERMS OF RULE 3.4 of **GEORGE BALOYI** filed herewith.

DATED at JOHANNESBURG on the 21st day of SEPTEMBER 2020

STATE ATTORNEY PRETORIA
ATTORNEYS FOR G BALOYI
316 SALU Building,
Francis Baard and Thabo Sehume Street,
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Ref: 5857/2019/Z16/mp

TO:

MS KB SHABALALA
ACTING SECRETARY
JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE
2nd Floor, Hillside House
17 Empire Road,
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

WITNESS STATEMENT IN TERMS OF RULE 3.4

I, the undersigned,

GEORGE BALOYI

do hereby declare under oath and state that: -

1. I am an adult male Advocate employed at the National Prosecuting Authority (*"NPA"*) as Deputy Director Public Prosecutions and attached to the office of the Director of Public Prosecutions, Gauteng Division, Pretoria, situated at no. 28 Church Square, Pretoria

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

3. Where I rely on facts and/or statements made by third parties, I do so based on the belief that same is true and correct and I annex to this affidavit the confirmatory affidavit of Luyanda Kopman (*"Kopman"*), respectively marked as annexure **"GB1"**.

MSGB

4. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept to be true and correct.

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

SHORT RESUMé

6. I was admitted as an Advocate of the High Court of South Africa, in November 1993.

7. I have been a prosecutor since 1 May 1987. I joined the Office of the Director of Public Prosecutions on 1 May 1994.

8. I was a Junior State Advocate from 1 May 1994 to 1995 and thereafter appointed Senior State Advocate until 31 December 1999. I currently hold the position of Deputy Director of Public Prosecutions, Gauteng Division, Pretoria since 1 January 2000.

9. I have acted as the Director of Public Prosecutions, Gauteng Division, Pretoria, at different periods, from 5 May 2017 to June 2018 and the last acting stint was from 25 February 2019 until 31 May 2020.

10. I have appeared in all levels of Courts in South Africa except the Constitutional Court. I have prosecuted various high-profile cases, including the Eugene

Terreblanche murder. I was a junior in the prosecution of the serial killer/rapist, Moses Sithole.

PURPOSE OF AFFIDAVIT

11. The purpose of this affidavit is:

11.1. To support my application for leave to cross-examine Robert McBride, (*"McBride"*), Innocent Humbulani Khuba (*"Khuba"*) and Matthew Sesoko (*"Sesoko"*).

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

11.3. To respond to the allegations made by McBride against me as provided for in Rule 3.4 of the Rules of the Commission (*"the Rules"*); and

11.4. To deal with matters raised by the evidence leaders at the first meeting with the team of my legal representatives on 9 September 2020, as well as the second meeting with the evidence leaders on 16 September 2020 at which I was present and answered questions and gave clarity on some matters, as was required by the evidence leader.

12. Prior to responding to the unfounded and malicious allegations levelled against me, I have been advised, that I should first deal with the legal and

regulatory prescripts applicable to the functions of the NPA prosecutorial functionaries.

MANDATE OF THE NATIONAL PROSECUTING AUTHORITY (*"NPA"*)

13. Before dealing with the various allegations that were made against me by McBride, Khuba and Sesoko expressly or by implication, it is important that the purpose, functioning and mandate of the NPA is clarified, to demonstrate that the averments made against me, are unsubstantiated and unfounded.

14. The NPA obtains its mandate in terms of Section 179 of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*). Section 179(1) establishes the NPA as a single prosecuting authority in the Republic of South Africa and structured in terms of an Act of Parliament. The Act of Parliament referred to is the National Prosecutions Authority Act, 1998 (*"NPA Act"*).

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

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

17. The National Director of Public Prosecutions (*"NDPP"*) is the Head of the NPA and is appointed by the President. In such capacity, the NDPP shall have the

authority over the exercising of all the powers and the performance of all the duties and functions conferred, imposed or assigned to any member of the NPA by the Constitution, the NPA Act, or any other law.

18. In terms of Section 32(1)(a) of the NPA Act, a member of the NPA shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith, without fear, favour or prejudice and subject only to the Constitution and the law. The NPA has, as its core values, independence, accountability, credibility, professionalism and service excellence.

19. Section 32(1)(b) provides that:

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

20. Section 41 provides that:

> *"41. Offences and penalties*
>
> *(1) Any person who contravenes the provisions of Section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."*

MS GB

21. It follows from the above that the NPA has the sole preserve in instituting criminal proceedings against any person suspected of having committed an offence. Therefore, any person, regardless of his or her profile or standing, should be prosecuted if there is a reasonable prospect and/or *prima facie* evidence that such a person has committed an offence, without fear, favour or prejudice.

22. As I have already indicated, McBride has brought before the Commission unsubstantiated averments which seek to project me as an officer of the Court who abuses his position and authority with regard to prosecutions, to advance purposes that are ulterior to the mandate, functioning and purpose of the NPA. What is quite disturbing is that the averments are not only unsubstantiated, but they also have been made without giving regard to the constitutional imperatives that define how the NPA is to be structured and operated. Also, these averments are made without giving regard to the legal and regulatory imperatives that govern the NPA prosecutorial functionaries.

23. It is important that one should guard against the NPA being hamstrung by popular sentiment canvassed, especially in the media, from executing on its constitutional mandate. Whilst McBride complained, among others, that part of the strategy for state capture is that the targeted persons are paraded in the media as bad and corrupt persons, or that their institutions are inefficient, he is the one who actually went to the media and also came to this Commission, making serious allegations against me without any substantiation whatsoever. The allegations made to the media have a potential to have a negative effect

MS GB

on the decisions in issue, as shall be indicated hereafter. Nothing in his submissions tells this Commission exactly in which respect my prosecutorial decisions under attack, deviated from the legal and constitutional mandate of the NPA.

24. Furthermore, in his position, McBride ought to know of avenues available to anyone who is aggrieved by any prosecutorial decision, to test whether such decision complies with all the applicable legal prescripts.

25. McBride knew that the Courts are available to review prosecutorial decisions where it is necessary, but he did not approach the courts specifically for the review of the prosecutorial decision that he suggests I unfairly or unlawfully took.

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

27. All my decisions that he is complaining of have been endorsed by the Head of the National Prosecuting Service, who is the ultimate authority for all prosecutorial decisions. Those decisions were also endorsed by the NDPP. The relevant annexures have been attached in this regard and are discussed in detail below.

28. Having regard to McBride's past and present working environment as well as his experience, he should have a clear understanding of the operation of the law and, in particular, the prosecutorial decision making process.

POWERS OF A DIRECTOR OF PUBLIC PROSECUTIONS

29. The authority to institute criminal prosecutions in a specific High Court Division vests in the Director of Public Prosecutions (*"DPP"*) appointed for that particular Division. The DPP delegates this authority to the prosecutors, but the DPP remains ultimately responsible and accountable for every prosecutorial decision that is taken.

30. Section 20 of the National Prosecuting Authority Act 32 of 1998 provides that:

> *"20 Power to institute and conduct criminal proceedings*
>
> *(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-*
>
> *(a) institute and conduct criminal proceedings on behalf of the State;*
>
> *(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and*

(c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

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

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

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

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

31. The powers of the DPP are further set out in section 24(1) of the NPA Act, which reads as follows:

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

MS GB

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

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

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

(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."

PROCESS FOR PROSECUTORAL DECISION

32. Paragraph 6 of the Prosecuting Policy of the NPA provides that:

MS GB

"The primary responsibility for instituting and conducting prosecutions vests in the DPP's in respect of offences committed within their areas of jurisdiction."

33. The decision-making process which has been in place at this office ever since I joined it 26 years ago is the following:

33.1. A case is allocated to an Advocate (first Advocate) who takes a decision;

33.2. A checking officer is allocated by a Deputy Director of Public Prosecutions allocating work for that period. The checking officer is normally a senior state Advocate or a Deputy Director of Public Prosecutions who is senior to the first Advocate who took the initial decision. The checking officer may either agree with the decision and sign off on it, or may refer it back to the first Advocate with suggestions as to the decision that need to be made or discuss his/her views with the first Advocate as to the decision that should be made;

33.3. Office notes are made on the file for every decision taken and reasons for the decision by both the first Advocate and the checking officer. This process is to ensure quality control of the decisions that are taken;

33.4. The decision goes out in the name of the DPP who is ultimately responsible for all the prosecutorial decisions taken in the office, in the

US GB

form of a letter which conveys that the person must be prosecuted on specific charges in a specified forum, or that the DPP declines to prosecute; and

33.5. This shall be so reflected, even though the decision was taken by the first Advocate and the checking officer as explained above.

34. In contentious or high profile matters the view of the DPP will be sought or the matter will be referred to him/her for a final decision.

35. In deciding whether or not to institute a prosecution, a prosecutor is guided, among others, by the Code of Conduct of Members of the National Prosecuting Authority ("the Code of Conduct"). The pertinent Sections thereof are set out below:

35.1. Article C provides:

> *"Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should –*
>
> *(c) take into consideration the public interest as distinct from media or partisan interests or concerns, however vociferously these may be presented;*
>
> *(f) act with objectivity and pay due attention to the constitutional right to equality;*

US GB

(i) assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented."

35.2. Article D provides:

"1. Prosecutors should perform their duties fairly, consistently and expeditiously and –

(d) in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence."

"2. Prosecutors should, furthermore –

(a) preserve professional confidentiality"

36. To the extent that McBride was in possession of the NPA's confidential memoranda, this is of concern. This leads to the irresistible inference that such memoranda were illegally leaked to McBride at the DPP's office. McBride is challenged to take the Commission into his confidence by revealing the source of the memoranda that came in his possession. This is a clear demonstration that the so-called "Crime Busters" committed at least one

crime. It is on the basis of the contents of the illegally obtained memoranda, that the complaints were laid by McBride at the Commission.

37. In terms of the Prosecution Policy of the NPA a prosecution can only be instituted where there are reasonable prospects of a successful prosecution. The final product of the decision-making process will go out as the decision of the DPP.

38. I have made it my duty in my career, as I am enjoined, not to allow any prosecution that is not in line with the Constitution, the NPA Act and the Prosecution Policy of the NPA or based on irrelevant considerations.

39. The matters that McBride complained of were referred to me in my capacity as the acting DPP for a final decision. In each case I explained my views to the Advocates who were working on the matters and the reasons for my decisions. Where a certificate *nolle prosequi* was requested I issued such a certificate and no private prosecution has been instituted in any of the matters. As explained above, all my decisions that McBride has complained of have been endorsed by the Head of the National Prosecuting Service, who is the ultimate authority for all prosecutorial decisions. Those decisions were also endorsed by the NDPP.

40. In the Zimbabweans renditions matter, IPID's first report dated 22 January 2014 implicates Dramat, Sibiya and Maluleke, but IPID's second report dated 18 March 2014 exonerated Dramat and Sibiya. I did not read the two reports before taking a prosecutorial decision in the matter as I wanted to make an

MJ GB

independent decision without being influenced by the contents of the reports, but one that is informed only by admissible and relevant evidence in the docket. I perused the docket, applied my mind and came to the conclusion that there was a *prima facie* case against Dramat and Sibiya.

41. This is the view that, according to Khuba, was held by the Senior Counsel that IPID asked for an opinion on the case. As previously indicated, McBride does not refer to the view of the Senior Counsel at all in his report or during his evidence at the Commission,

42. In the matter relating to Sarah-Jane Trent *("Trent")* and Paul O'Sullivan *("O'Sullivan")*, there was a memorandum prepared by Adv F W van der Merwe *("Van der Merwe")*, a senior state Advocate and Adv H E van Jaarsveld *("Van Jaarsveld")*. In the memorandum, Van der Merwe and Van Jaarsveld indicated that there was a *prima facie* case for kidnapping, theft of cell phone and intimidation against Colonel Dawood *("Dawood")*, Brigadier Kgorane *("Kgorane")* and Brigadier Ncube *("Ncube")*. They referred the matter to me for a final decision.

43. I considered the evidence in the docket, applied my mind to the matter and my view was that there were no prospects of a successful prosecution. I decided not to prosecute Kgorane and Ncube for the reasons which I discussed and explained to them. My reasons were also placed on the file. My decision was endorsed by the then Head of the NPS and the then NDPP. I attach hereto a letter dated the 19th of December 2017 in which Mr Shaun

MS GB

Abrahams (*"Abrahams"*) responded to complaints from McBride. A copy of such letter is attached hereto, marked as Annexure **"GB2"**. I will further below more fully deal with the contents of **"GB2"**.

44. I have also issued *nolle prosequi* certificates in some of the matters and no private prosecution has been instituted by such parties

BASES FOR ALLEGATIONS THAT I AM CAPTURED

45. The allegations that I am captured for political and corrupt reasons, and generally, are without any factual or legal basis. Such allegations are merely made to attack my professional integrity, reputation and good name. In all my 33 years as a prosecutor, I have pursued only justice for the victims of crime and have always acted with fairness to accused persons.

46. I have followed the Prosecution Policy, the Code of Conduct and observed the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, from 27 August to 7 September 1990 ("the Guidelines"). These Guidelines, which have also been adopted by the NPA, article D ("the role of prosecutors in the administration of justice"), under item1(d) requires of a prosecutor that:

> *"in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and*

admissible, and not continue a prosecution in the absence of such evidence."

47. As indicated above, McBride might not like the decisions that were taken, but a prosecutor is guided by the evidence in the docket, which is relevant, reliable and admissible. I, as the DPP, have to review and correct decisions that are brought to my attention and the decisions complained of, were also corrected in the normal course.

48. The prosecutors that McBride refers to have not dealt with cases of the complexity that I have had to.

49. A careful perusal and analysis of the evidence presented before the Commission and documentation reveals that the alleged bases for insinuating that I was captured, are, *inter alia*, the following:

49.1. Suspensions;

49.2. Initiation of disciplinary process against officials in the employment of IPID, *inter alia*, McBride, Khuba, Sesoko, Viceroy Maoka ("*Maoka*") and Moses Dhlamini ("*Dhlamini*");

49.3. Political agenda;

49.4. Smear campaigns in the media;

MS GB

49.5. The preferring of criminal charges against, *inter alia*, McBride, Khuba, Sesoko, Ivan Pillay (*"Pillay"*), Minister P Gordhan (*"Gordhan"*), General Johan Booysen (*"Booysen"*), Dramat and Sibiya.

49.6. The failure to prosecute persons who allegedly have political connections, where the merits for prosecution are strong. These aspects are extensively addressed in this affidavit under the relevant section.

50. Below, I separately address the various allegations set out above.

50.1. **Suspensions**

50.1.1. This is a labour relations issue between employer and employee, which does not fall within the domain of prosecution.

50.1.2. The objective evidence, be it oral or documentary, presented before the Commission, did not demonstrate or establish that I was involved in the suspension of any of the officials, be it in the employment of IPID or SAPS.

50.2. **Disciplinary Process**

50.2.1. This is a labour relations issue between employer and employee, which does not fall within the domain of prosecution.

MS GB

50.2.2. I was not involved in the disciplinary process of any person in the employment of IPID.

50.3. **Political Agenda**

50.3.1. No evidence was tendered before the Commission setting out the names of the politicians on whose behalf a political agenda was allegedly driven. Such details are not set out in the main and supplementary affidavits of McBride, Khuba, Sesoko and also not in their oral evidence.

50.3.2. I was not involved at all in the Booysen matters.

50.4. **Smear Campaign In The Media**

50.4.1. No evidence was tendered before the Commission that I am one of those persons that ran a smear campaign in the media against any of the witnesses that testified before the Commission.

RULE 3.3 NOTICE

51. On 15 April 2019 I received a Rule 3.3 notice, dated 8 April 2019, notifying me that the Commission's legal team intends to present to the Commission the evidence of McBride during the proceedings of 16 April 2019, or soon thereafter as his evidence may be led, which evidence may implicate me in unlawful, illegal or improper conduct.

MS GA

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

53. I was further notified, that in terms of Rule 3.3.6.1 to 3.3.6.3 should I wish, I may give evidence or call any witness to give evidence in support of my case, or even cross-examine McBride.

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

COMPLAINTS REFERRED TO ABRAHAMS REGARDING MY CONDUCT

55. I deal with the complaints that were referred to Adv Shaun Abrahams (*"Abrahams"*), and the outcome of the investigation, with regard to my conduct hereinbelow. This is to demonstrate that there is no merit whatsoever in the allegations levelled against me that I have the tendency of protecting criminals when there is sufficient evidence for a prosecution, or that I persecuted certain persons,

56. In this affidavit I will further indicate that Abrahams responded to the three letters which McBride wrote, setting out the complaints against various officials.

57. The contents of the three letters will be discussed fully below, under the headings as set out in McBride's letters.

Request for revision of decision pertaining to Pretoria Central CAS 868/11/2016

58. Anthony Sehas, an Assistant Director: NSIT of IPID, addressed a letter to Abrahams dated 26 July 2017. A copy of such letter is attached hereto, marked as annexure **"GB3"**.

59. This letter deals with complaints relating to mismanagement of funds and an irregular appointment by the former Acting Executive Director of IPID, Israel Kgamanyane (*"Kgamanyane"*). This letter also indicates that a criminal case was opened by McBride when the irregularity was discovered.

60. After the investigation, IPID submitted the docket to the DPP: North Gauteng for a decision without the warning statement of Kgamanyane, as he was unwilling to co-operate. His unwillingness was indicated in the investigating officer's statement.

61. This letter also indicates that the case was discussed with one of the senior Advocates at the DPP: North Gauteng who said that there was a strong case against Kgamanyane. The matter was assigned to Adv Elbie Leonard SC at

the office. She decided not to institute a prosecution and set out her reasons in a memorandum which is attached hereto as **"GB4"**, I concurred with her decision.

Defeating the ends of justice: General Phahlane

62. McBride addressed a letter dated 11 August 2017, a copy of which is attached hereto, marked as annexure **"GB5"**.

63. This letter deals with the following complaints:

63.1. Defeating the ends of justice investigation against General Phahlane;

63.2. Investigation against Kgamanyane;

63.3. Torture investigation against the Mabula Team;

63.4. Investigation against the Mabula Team on charges of kidnapping, defeating the ends of justice and contempt of Court;

63.5. Investigation of kidnapping and assault against Brigadier Xaba and others: Symington matter;

63.6. Perceived double standards by some members of the NPA in dealing with IPID cases, compared to how they deal with SAPS cases. Some of the cases where this allegedly occurred, are as follows:

MS GA

63.6.1. Decision to prosecute IPID Investigators and issuing of J175;

63.6.2. Failure by AFU to launch a preservation order;

63.6.3. Refusal by the NPA prosecutors to assist IPID in applying for Section 205 subpoena,

64. These complaints will be addressed below.

Request for review of the decision of the DPP: Sandton CAS688/02/2017 and Lyttelton CAS309/02/2017

65. A letter from Mantsha Raphesu, a senior Investigator at IPID, signed by Sesoko, dated 5 September 2017, was addressed to Abrahams. A copy of this letter is attached hereto, marked annexure **"GB6"**.

66. This letter was addressed with the purpose of dealing with the above cases and the possible revision of my decision in these cases.

67. This letter indicates that IPID investigated the above cases and forwarded the dockets to me for a decision. After consideration of the dockets, on 24 August 2017, I declined to prosecute and addressed a letter to IPID to advise them of my decision. A copy of my letter is attached hereto, marked as annexure **"GB7"**.

MS GB

68. The letter further states that my decision not to prosecute was taken despite the memorandum dated 31 May 2017, prepared by Van der Merwe and Van Jaarsveld, confirming the existence of evidence to sustain a *prima facie* case against the suspects. A copy of this memorandum, is attached hereto, marked as annexure **"GB8"**.

69. The letter of Raphesu, dated 5 September 2017, further states that the IPID is concerned that my decision not to prosecute appears to be solely based on the version of the suspects. In conclusion, the letter states:

> *"After careful consideration and memorandum by two Advocates from your office, IPID is of the opinion that there are sufficient grounds for prosecution in both cases. The IPID request review of the decision of the Acting Director of Public prosecution in both matters."*

MY RESPONSE TO McBRIDE'S COMPLAINTS TO ABRAHAMS

70. Abrahams referred for my input, the complaints levelled against me. My responses are as follows:

70.1. Investigation against the Mabula Team on charges of Kidnapping, Defeating the Ends of Justice and Contempt of Court (Lyttleton CAS309/02/2017 and Sandton CAS 688/02/2017)

In this matter, O'Sullivan and his legal advisor, Trent were arrested by the police pursuant to a valid warrant of arrest. Two prosecutors from

my office who worked on the matter, Van der Merwe and Van Jaarsveld, decided that the police officers who arrested O'Sullivan and Trent, must be prosecuted. The matter was referred to me for a final decision. I was of the view that there were no reasonable prospects of a successful prosecution and the decision was glaringly incorrect as the State would not have been able to prove the elements of unlawfulness, knowledge of wrongfulness as well as intention. I explained the rationale for my prosecutorial decision in a memorandum, dated 6 September 2017, addressed to the then Acting Deputy NDPP (the Head NPS), Mzinyathi. A copy of this memorandum is attached hereto and marked "**GB9**". The Chairperson is requested to read same as if specifically incorporated herein. The NDPP endorsed my decision. Such endorsement is reflected in annexure "**GB2**" hereto.

70.2. <u>Investigation of Kidnapping and Assault against Brigadier Xaba and Others: Symington matter (Brooklyn CAS 790/10/2016)</u>

70.2.1. This case relates to an incident that took place at South African Revenue Service ("SARS") offices when three members of the Directorate for Priority Crime Investigation (*"DPCI"),* also known as the Hawks, went to the offices of SARS on 16 October 2016 to obtain a statement from a SARS legal officer, Vlok Symington (*"Symington"*),

MS GB

regarding a legal opinion that he wrote pertaining to the early retirement of another SARS official, Pillay.

70.2.2. From my perusal of the docket I gleaned the information set out below:

70.2.2.1. The memorandum of the Priority Crimes Litigation Unit ("PCLU") dated, 17 October 2016, raised issues which Brigadier Xaba and the investigation team had to obtain clarity on from Symington. On the same day, the then Acting Head of PCLU, Dr JP Pretorius ("Pretorius") e-mailed the PCLU memorandum to Brigadier Xaba. The PCLU memorandum is attached hereto as **"GB10"**.

70.2.2.2. On the same day, Brigadier Xaba in turn e-mailed it to the attorney who was contracted to SARS, David Maphakela ("Maphakela"). On 17 October 2016, Maphakela forwarded the memorandum to the SARS Commissioner, Thomas Swabihi Moyane ("Moyane"). On 18 October 2016, Moyane then handed the memorandum to SARS Chief Legal Officer and Symington's

MS GB

immediate supervisor Kosie Louw ("Louw") to discuss it with Symington, which he duly did.

70.2.2.3. On 18 October 2016, the investigating team proceeded to SARS offices and had an initial consultation with Symington, explaining to him the aspects that he needed to canvass in his statement. Symington indicated to them that he was familiar with those aspects, they gave him two additional aspects that he needed to cover in his affidavit.

70.2.2.4. The investigating team then went to obtain the affidavit of Louw and proceeded to the Commissioner's office. They enquired from him how Symington happened to know the issues that they want him to canvass in his affidavit. He then informed them that he handed the PCLU memorandum and accompanying documents to Louw to hand to Symington. They wanted the PCLU memorandum to be retrieved as they were concerned that it might be leaked to the press. Moyane asked his bodyguard, Thabo

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Titi ("Titi") to accompany them to Symington's office to retrieve the PCLU memorandum.

70.2.2.5. Moyane was informed that Symington is refusing to hand over the PLCU memorandum. Moyane then called Louw and requested him to intervene. Louw proceeded to the building where Symington, Titi and the investigating team were. Before Louw's arrival, there was a stand-off between Symington, Titi and members of the investigating team resulting from Symington's refusal to hand over the PCLU memorandum, whereupon Symington was prevented from leaving the boardroom. Symington then called the police emergency line to complain that he was held hostage.

70.2.2.6. Louw then arrived at the boardroom with two other SARS officials, namely Erich Smith (*"Smith"*) and Mark Kingon (*"Kingon"*) and tried in vain to persuade Symington to hand over the PCLU memorandum. In attempting to persuade Symington to hand over the PCLU memorandum, Symington was made

MS GB

an offer of a document with the same questions *in lieu* of the PCLU memorandum. Symington rejected the offer and tried to leave the boardroom. A member of the investigating team grabbed the memorandum from his hand as he was walking out, and they left.

70.2.2.7. Some seven days later, on 25 October 2016, Symington reported the matter to the police and deposed to an affidavit. A day later, on 26 October 2016, he made a second affidavit.

70.2.3. After a perusal of the two affidavits deposed to by Symington, it was clear to me that the two affidavits were self-contradictory and thus negatively impacted on the prospects of a successful prosecution. I brought these contradictions to the attention of my two colleagues who worked on the matter and they informed me that they did not detect the contradictions. I am certain that had they spotted these contradictions from the onset, it might have impacted on their decision. I then wrote a letter to the IPID explaining the reasons for my decision not to institute a prosecution. A copy of that letter, dated the 24th of October 2017, is attached hereto marked "**GB11**".

70.2.4. Before I considered this matter, Symington brought an urgent application in the High Court to interdict SARS from instituting disciplinary action against him arising from that incident. A copy of the relevant judgment is attached hereto, marked as annexure **"GB12"**. Fabricius J remarked as follows when dismissing the application:

> *"In my view those events ought to have been settled with a handshake and a discussion over beer. Mr Titi was prepared to accept an apology, whilst Applicant demanded his dismissal. Respondent's comment that Applicant is inclined to melodrama is borne out by his assertion that he was "subjected to unlawful kidnapping". The person on that day in the boardroom conducted themselves in a less than dignified manner but that was about it."*

70.2.5. My reading of Fabricius J's remarks indicates that even the Judge was of the view that there was no threat to Symington.

70.2.6. Symington's attorneys, Werksmans Attorneys (*"Werksmans"*) applied for a *nolle prosequi* certificate, which I duly issued. The said certificate is attached hereto marked **"GB13"**.

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70.2.7. Subsequently, Werksmans enquired whether the certificate included Moyane's protector, Titi. I wrote a letter, dated 19 January 2018, confirming that the certificate includes all suspects including Titi. A copy of this letter is attached marked **"GB14"**.

70.2.8. The fact that no private prosecution was pursued, in my view, confirms that my decision not to prosecute was correct.

70.2.9. Based on the aforesaid, particularly in comparison to the lack of detail in McBride's affidavits, the evidence during the Commission and the generalised hearsay statements I respectfully submit that the allegations levelled against me are completely unfounded.

ABRAHAM'S RESPONSE TO IPID'S COMPLAINTS

71. As indicated above, on 19 December 2017, Abrahams responded to the above complaints from IPID, as set out in annexure **"GB2"** hereto. He addressed each complaint individually, as follows:

71.1. Defeating the ends of justice investigation against General Phahlane

Abrahams indicated that, after perusal of the available information, he confirmed my decision not to prosecute the matter. A decision in this

matter was taken by Advocates P W Coetzer and K van Rensburg of my office.

71.2. Investigation against former Acting Executive Director General Kgamanyane

Abrahams indicated that the decision not to prosecute was indeed correct. This decision was taken by a Deputy Director of Public Prosecution ("DDPP") who is a senior counsel, Adv Elbie Leonard.

71.3. Torture Investigation against the Mabula Team

Abrahams indicated that the matter will be prosecuted by a State Advocate stationed at the DPP: North Gauteng office and no further review of these matters are required.

71.4. Investigation against the Mabula Team on charges of kidnapping, defeating the ends of justice and contempt of court

Abrahams indicated that after consideration of the representations in the above matters and consultation with me, he agreed with my decision to decline to prosecute the above matters.

71.5. Investigation of kidnapping and assault against Brigadier Xaba and others: Symington matter

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Abrahams indicated that he supported my decision not to prosecute members of the Hawks and Titi and that their actions should rather be dealt with internally by SAPS and SARS, respectively.

71.6. Perceived double standards in dealing with IPID cases

71.6.1. Decision to prosecute IPID investigators and issuing of J175

Abrahams indicated that he was satisfied, following consultation with me, that the swiftness in handling of the said matter is to be expected, as it was handled by the Organised Crime Component with dedicated resources, and nothing sinister could be found in this regard.

71.6.2. Failure by AFU to launch a preservation order

Abrahams indicated that the AFU preservation order application in respect of Phahlane showed evidential gaps and that further investigations were necessary. This was conveyed to IPID and, at the date of the response by Abrahams, feedback from IPID was still awaited.

71.6.3. Refusal by NPA prosecutors to assist IPID in applying for Section 205 subpoena

MSGB

Abrahams indicated that following a perusal of the explanations supplied by the relevant prosecutors, he was satisfied that no sinister or inconsistent conduct can be attributed to them.

RESPONSE FROM IPID TO ABRAHAM'S LETTER

72. In response to annexure **"GB2"** referred to above, McBride addressed a letter to Abrahams dated 23 of February 2018. A copy of this letter is attached hereto, marked as annexure **"GB15"**.

73. In this letter, McBride individually responds to each of Abrahams' responses, as follows:

73.1. Defeating the ends of justice against General Phahlane (Kameeldrift, CAS123/11/2016)

McBride indicated that IPID does not agree with Abrahams' decision and that they question the rationality thereof. IPID requested that the NDPP issue a *nolle prosequi* certificate. The decision in this matter was taken by the two Advocates as shown in the attached memorandum, Annexure **"GB16"** hereto.

73.2. Investigation against former Acting Executive Director, General Kgamanyane (Pretoria Central CAS 868/11/2016)

McBride indicated that IPID does not agree with Abrahams' decision and that they question the rationality thereof. IPID requested that the NDPP issue a *nolle prosequi* certificate.

73.3. Torture investigation against the Mabula Team

McBride indicated that IPID does not understand why the other accused members were not charged, given the evidence, including the additional statements obtained as per Adv van der Westhuizen's instructions. McBride further indicated that Abrahams' decision was irrational and IPID requested that the NDPP issue a *nolle prosequi* certificate.

73.4. Investigation against the Mabula Team on charges of kidnapping, defeating the ends of justice and contempt of court (Lyttleton CAS309/02/2017 and Sandton CAS 688/02/2017)

McBride indicated that IPID disagrees with Abrahams' decision and that the complainant in the matter indicated that they intend pursuing private prosecution.

73.5. Investigation of kidnapping and assault against Brigadier Xaba and others: Symington matter (Brooklyn CAS 790/10/2016)

McBride indicated that IPID disagrees with Abrahams' decision and that the complainant in the matter indicated that they intend pursuing a private prosecution.

DOUBLE STANDARDS

73.6. Decision to prosecute IPID Investigators and issuing J175 (Kameeldrift CAS 12/01/2017)

McBride indicated that IPID still holds the view that the investigation against IPID is for an ulterior motive, which is to interfere with IPID investigations, and that continuing with such prosecution is irrational. McBride requested, as there is litigation pending in the North Gauteng High Court, that before any decision is taken on this matter, IPID should be informed to enable them to make representations.

73.7. Failure by AFU to launch preservation order

McBride indicated that they have moved forward, in consultation with the SCCU prosecutors and that there is an agreement on how to move forward.

73.8. Refusal by NPA prosecutors to assist IPID in applying for Section 205 subpoenas (Kameeldrift CAS 123/11/2016)

MS GB

McBride indicated that IPID is not able to engage further on this issue, as IPID is not privy to the explanation given to Abrahams. See paragraph 8 of Annexure **"GB2"** referred to above.

RULE 3.4 STATEMENT

74. In order to place my response to the allegations levelled against me in their proper context, it is necessary that I deal with the evidence as set out in the affidavit of McBride and to the extent necessary, his oral evidence before the Commission. To the extent I do not deal with each averment contained in the affidavit or oral testimony, such failure should not be construed as an admission thereof.

THE DISPUTED PARTS OF MCBRIDE'S STATEMENT AND TESTIMONY

75. The relevant paragraphs in the affidavit of McBride where he makes averments about me are paragraphs 64, 125, 126, 127 and 128 where he, amongst others, state that:

75.1. Maoka, a Director: Litigation Services at IPID lodged a complaint regarding my conduct, during a consultation with Khuba and Maoka, which consultation related to the rendition prosecution. For some inexplicable reason, after this complaint was lodged, Maoka accused me of leaking information to the media. Further, Maoka accused me of being responsible for his transfer together with other officials of the

IPID to other provincial offices of the IPID.[1] No evidence was placed before the Commission to corroborate such unfounded allegations levelled against me.

75.2. That a core group of Advocates in the NPA under the leadership of Abrahams working with Advocates Tori Pretorius (*"Pretorius"*), Mosing, Sibongile Mzinyathi (*"Mzinyathi"*), Sello Maema (*"Maema"*), Molatlhwa Mashuga (*"Mashuga"*), Raymond Mathenjwa (*"Mathenjwa"*) and I have been at the forefront of enabling capture of the criminal justice cluster through the persecution of corruption fighters, and protection of criminal suspects by declining and/or delaying decisions to prosecute suspects investigated by the IPID in cases where their subordinates, who are experienced prosecutors had recommended prosecution based on sufficient evidence.[2]

75.3. That this alleged core group of Advocates interfered with the IPID's oversight function and worked against the independence of the Hawks by instituting prosecutions against Dramat, Sibiya and Booysen and have thus attempted to destabilise both the Hawks and IPID through malicious prosecutions due to politically driven actions. These Advocates impeded the work of IPID by declining to prosecute suspects investigated by IPID.[3]

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1 Paragraph 64 McBride's affidavit
2 Paragraph 125, Ibid.
3 Paragraph 126 and 127, Ibid.

MSGB

75.4. That McBride wrote to Abrahams, requesting that he review Mzinyathi' and my decisions, which undermine the decisions of Senior Public Prosecutors and Abrahams, in turn, simply agreed with our actions.[4]

THE GROUNDS UPON WHICH MCBRIDE'S EVIDENCE IS DISPUTED AND DENIED

76. I wish to place it on record that insofar as Khuba and Sesoko implicate me in wrongdoing, I do not deal with such allegations as I was specifically directed to address the allegations levelled against me by McBride. In this regard, I reserve my rights to respond in due course should it become necessary.

77. Below, I deal with the contents of the paragraphs previously mentioned, in which I am implicated, as directed by the evidence leaders in the Rule 3.3 notice.

78. I take note that in terms of Rule 6, the Commission has a discretion to receive "*any evidence that is relevant to its mandate that might otherwise be inadmissible in a court of law*" and that the rules of evidence applicable in a court of law need not be strictly applied to the determination of the admissibility of evidence before the Commission. It is my submission that the interest of justice and prejudice are amongst the most important factors that the Commission should take into account in this regard.

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4 Paragraph 128, Ibid.

MS GB

79. However, I respectfully submit that the degree of hearsay and sometimes double hearsay in McBride's affidavit and evidence is so egregious that it ought not to be admitted in terms of the Rules. I demonstrate the egregious nature of the evidence below about the averments in the respective paragraphs.

80. Ad paragraph 64

80.1. McBride alleges that Maoka raised a complaint to McBride regarding my conduct in the rendition matter. No specific details are furnished about this complaint, other than the hearsay nature of the averments in this paragraph. In the event that the Chairperson admits the hearsay evidence, despite Maoka not having submitted an affidavit, such evidence should be weighed against my uncontroverted version.

80.2. The averments refer to:

80.2.1. Maoka allegedly being transferred together with other officials to the Gauteng, Limpopo and KwaZulu-Natal offices of IPID;

80.2.2. Maoka and others were accused of leaking information to the media but charged for different misdemeanours.

80.3. It is unclear to me how all of this is connected to my conduct as no nexus was established.

MS GB

80.4. Despite such shortcomings, due to the potential reputational damage such unfounded allegations have to my standing in the community, society and my profession as an officer of the Court, in the absence of any concrete evidence, I am compelled to speculate as to what the actual bases of such allegations are, in order to clear my name.

80.5. On the 1st of June 2020, my legal team addressed a letter to the Acting Secretary of the Commission, enquiring whether, amongst others, Maoka will be testifying before the Commission and if so, whether an affidavit have been prepared on his behalf. My legal team further requested that if indeed there is such an affidavit, that they be furnished with same. My legal team has subsequently been advised that Maoka has not deposed to an affidavit. Should Maoka, however, in future depose to an affidavit, I reserve my right to supplement my response to this paragraph.

80.6. My interactions with Maoka relate to the rendition case. I was allocated the rendition case to consider and take a prosecutorial decision thereon. I thus invited the investigating officer in the case, Khuba, to my office for a consultation on 3 March 2015. The invitation was extended to Khuba only, as the investigating officer, as is the standard procedure. However, on the arranged date he arrived with Maoka without prior notice of such company. Despite the unannounced company, I permitted Maoka to attend the consultation

MSGB

with Khuba as he was an official of the IPID and I had nothing to hide from him.

80.7. Subsequent to the aforesaid consultation, it became apparent to me that Maoka and Khuba had little to no understanding of my approach of playing "devil's advocate" in the consultation. This is buttressed by Khuba's e-mail dated 10 March 2015, and my response thereto. I attach the e-mail stream hereto, marked as annexure "**GB17**".

80.8. In my response, I explained to Khuba that a final decision was not yet made and my discussions with him and Maoka were debates of various scenarios based on the evidence at hand and what other evidence was outstanding. I made it clear to Khuba that once a decision was made, it would be communicated to him through proper channels.

80.9. It is correct that Maoka raised a complaint against me to the then NDPP, Nxasana, about how I conducted the consultation. I responded to the allegations made by Maoka and Khuba in my memorandum, addressed to Mzinyathi, dated 9 April 2015. A copy thereof is attached and marked as annexure "**GB19**".

80.10. Mzinyathi considered the complaint lodged against me. Mzinyathi made a finding, indicating that there is no merit in the complaint lodged against me, in a memorandum dated 13 April 2015 addressed to Nxasana. Mzinyathi's memorandum is attached hereto and marked

"**GB19**. Annexure **"GB18"**, with annexure **"GB19"** were submitted to Nxasana. As there was no further feedback from Nxasana, it can be inferred that he accepted my explanation. This interaction between myself and Maoka and Sesoko is referred to in the portion referring to my involvement in the rendition.

80.11. As stated above, the rendition case is proceeding against Maluleke only, and is pending in the High Court for trial. I deal fully with the case against Maluleke later in the relevant section in the affidavit.

81. Ad paragraphs 125-128

81.1. I deny that I am and/or was at the forefront of enabling the capture of the criminal justice cluster by not prosecuting where it is established that there is sufficient evidence to prosecute, by persecuting crime busters and by overturning decisions of junior advocates when there is sufficient evidence to prosecute.

81.2. As the Acting DPP at the time, I carried the final responsibility for all the prosecutorial decisions that emanate from the office. I exercised those prosecutorial functions independently, impartially and subject only to the Constitution and other prescripts referred to previously.

81.3. In the execution of my duties as such, I have made decisions on the strength of the evidence in those dockets on all matters referred to me by members of staff who reported to me. These included IPID cases

and cases investigated by other law enforcement agencies. The dockets are available for scrutiny by anyone who wants to challenge the decisions made in them.

REQUEST BY EVIDENCE LEADERS OF MATTERS THAT I SPECIFICALLY HAVE TO ADDRESS

82. I have previously alluded to two meetings held with evidence leaders. In the first meeting with Adv Hulley SC (*"Hulley"*), attended by my legal representatives, including Kopman, the instructing attorney, on 9 September 2020, Hulley requested that I address in my affidavit the following issues:

82.1. How I interpret the effect of the judgment of the High Court of South Africa, Gauteng Division, Pretoria, in the matter of *Freedom Under Law vs NDPP and Others* case number 89849/2015 dated 21 December 2017 ("FUL judgment");

82.2. With regard to the phrase "*bite the bullet*" related to the complaint of Maoka and Khuba, did I use the phrase and if so, what I meant by it.

83. I attended the second meeting held on 16 September 2020 between the evidence leaders and my legal team, as well as colleagues from the NPA who are either implicated persons or are referred to in documents before the Commission. In the meeting, Hulley requested that I address a number of issues. I addressed the following issues raised:

81.1 Since the meeting I had with Khuba and Maoka occurred a while after the second report (dated 18 March 2014) had been issued by the IPID, whether Khuba had expressed any views with regard to the second report.

81.2 What my view is regarding the status of the IPID reports.

81.3 Besides the rendition matter whether I dealt with matters emanating from IPID.

81.4 Whether my conclusion was that there was a case made out in the docket against Maluleke, Dramat and Sibiya, and if so, on what information or pieces of evidence did I find that there was a case against Dramat and Sibiya?

81.5 When I made the decision to prosecute, how did I decide- whether it was based in the facts in the docket, and to what extent I compared the pieces of evidence, contradictions and how I came to that conclusion.

81.6 Whether I had prepared a report after studying the docket.

81.7 How many statements Madilonga made. Whether Madilonga made two or three statements.

81.8 Whether, by allowing Zimbabwean Police entry into South Africa, Dramat had committed an offence, because in his evidence at the Commission July said such was an offence.

81.9 How the rendition docket was put back into the system, in that the docket had been lying, filed somewhere, alone, and yet, it was resuscitated and who the investigating officer was.

81.10 Whether I used the phrase "bite the bullet" relating to the complaint of Maoka and Khuba, and if so, what I meant by it.

84. In spite of the answers I provided to the above questions, Hulley requested that I specifically address the following in my affidavit, also giving full details:

84.1. Whether my conclusion was that there was a case made out in the docket against Maluleke, Dramat and Sibiya, and if so, on what information or pieces of evidence did I find that there was a case against Dramat and Sibiya?

84.2. When I made the decision to prosecute, how did I decide- whether it was based in the facts in the docket, and to what extent I compared the pieces of evidence, contradictions and how I came to that conclusion.

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84.3. How the rendition docket was put back into the system, in that the docket had been lying, filed somewhere, alone, and yet, it was resuscitated and who the investigating officer was.

EVIDENCE I RELIED ON IN MY DECISIONS IN RESPECT OF THE RENDITION MATTERS

85. The evidence I relied on my decision making in respect of the rendition matter is summarised below.

86. Before I give a summary of the facts, I deal briefly with my involvement in the matter. The Director of Public Prosecutions (Advocate Mzinyathi ("DPP") handed me the matter on a date that I cannot recall, but I surmise that it was in early 2015. My office is next to his and he uses me as a sound board on most of the matters that he deals with, in light of my seniority. In fact, he asked me to relocate to an office next to his, for this purpose.

87. He asked me to go through the docket in order to give him my views as to whether there is a prosecutable case or not. I could not immediately commence reading the docket due to other work commitment. After several weeks, probably mid to late February 2015, he asked me how far I was. I told him that I had not commenced reading the docket and he was very disappointed. I assured him that I will commence with the of reading the docket immediately.

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88. In order for me to get to grips with the facts quickly, I telephoned Khuba on the 23rd if February 2015 to arrange for a consultation with him, I have ascertained this date from the memo I sent to Mzinyathi on the 9th of April 2015 regarding the complaint by Khuba and Maoka, attached hereto as "**GB18**". During the telephone conversation, I introduced myself and informed him that I am seized with the case and need to discuss my views on the matter with the DPP. I informed him that I had not read the docket, safe for following the reports in the media during the litigation between McBride and the Minister of Police. I asked him whether or not there is a prosecutable case. He mentioned that IPID has obtained the opinion of Advocate Barry Roux SC, who was of the view that there was a case against all three accused, based on the success reports. We agreed that he will come to our office on the 3rd of March 2015 at 09:00. I have ascertained this date from annexure **"GB2"** mentioned above. He then came to the office as arranged in the company of Maoka and took me through the evidence in the docket.

SUMMARY OF FACTS

THE FACTS IN THIS MATTER CAN BE SUMMARIZED UNDER THE FOLLOWING MAIN THEMES:

THE EXTRADITION PROCEDURE

89. The Extradition Procedure of the Republic of South Africa is regulated by the Extradition Act 67 of 1962 ("*the Extradition Act*") and the SADC Protocol on Extradition (*"the Protocol"*). The relevant Sections provides as follows:

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89.1. **The Extradition Act, as amended**

89.1.1. Section 4(1) provides:

"4. (1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State."

89.1.2. Section 5 provides:

"5. (1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-

(a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a

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foreign State has been received by the Minister; or

(b) upon such information of his being a person liable to be surrendered to a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he committed an offence in the Republic.

(2) Any warrant issued under this section shall be in the form and shall be executed in the manner as near as may be as prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure."

89.2. **The SADC Protocol on Extradition**

89.2.1. Section 3 provides:

"EXTRADITABLE OFFENCES

1. For the purpose of this Protocol, extraditable offence are offences that are punishable

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under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty. Where the request for extradition relates to a person wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition may be refused if a period of less than six months of such sentence remains to be served.

2. *For the purposes of this Article, in determining what constitutes an offence against the laws of the Requested State it shall not matter whether:*

(a) *the laws of the State Parties place the conduct constituting the offence within the same category of offence or describe the offence by the same terminology; and*

(b) *the totality of the conduct alleged against the person whose extradition is sought shall be taken into account*

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and it shall not matter whether, under the laws of the State Party, the constituent elements of the offence differ.

3. *Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters. extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the Requesting State.*

4. *An offence is extraditable whether or not the conduct on which the Requesting State bases its request occurred in the territory over which it has jurisdiction. However, where the law of the Requested State does not provide for jurisdiction over an offence in similar circumstances, the Requested State may, in its discretion, refuse extradition on this basis.*

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5. *Extradition may be granted pursuant to the provisions of this Protocol in respect of any offence provided that:*

(a) *it was an offence in the Requesting State at the time of the conduct constituting the offence; and*

(b) *the conduct alleged would, if it had taken place in the Requested State at the time of making the request for extradition, have constituted an offence against the law of the Requested State.*

6. *If the request for extradition relates to several separate offences, each of which is punishable under the laws of both State Parties, but some of which do not meet the other requirements of paragraph 1, the Requested State may grant extradition for such offences provided that the person is to be extradited for at least one extraditable offence."*

89.2.2. Section 4 provides:

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"MANDATORY GROUNDS FOR REFUSAL TO EXTRADITE

Extradition shall be refused in any of the following circumstances:

(a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;

(b) if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;

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(c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;

(d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;

(e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;

(f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and

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(g) *if the judgment of the Requesting State has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence."*

89.2.3. Section 5 provides:

"OPTIONAL GROUNDS FOR REFUSAL

Extradition may be refused in any of the following circumstances:

(a) *if the person whose extradition is requested is a national of the Requested State. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;*

(b) *if a prosecution in respect of the offence for which extradition is requested is pending in the Requested State against the person whose extradition is requested;*

(c) *if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;*

(d) *if the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the Requested State does not provide for jurisdiction over such an offence committed*

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outside its territory in comparable circumstances;

(e) if the offence for which extradition is requested is regarded under the laws of the Requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the Requested State shall, if the other State Party so requests submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested; and

(f) if the Requested State, while also taking into account the nature of the offence and the interest of the Requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person."

89.2.4. Section 6 provides:

"CHANNELS OF COMMUNICATION AND REQUIRED DOCUMENTS

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties. 2. A request for extradition shall be accompanied by the following:

(a) in all cases,

(i) as accurate as possible, a description of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

(ii) the text of the relevant provision of the law creating the offence and, where necessary, a statement of the law relevant to the offence and

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a statement of the penalty that can be imposed for the offence;

(b) *if the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission;*

(c) *if the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the*

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sentence is enforceable, and the extent to which the sentence remains to be served;

(d) *if the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of this Article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;*

(e) *if the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence; and*

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(f) the documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the Requested State or in another language acceptable to that State."

89.2.5. Section 10 provides:

"PROVISIONAL ARREST

1. In all cases, the competent authority of the Requesting State may apply by any means which allows for a written record for the provisional arrest of the person sought.

2. A request for provisional arrest shall be sent to the competent authority of the Requested State either through the diplomatic channel or directly by post or telegraph or through the International Criminal Police Organisation (INTERPOL) or by any other means affording evidence in writing or accepted by the Requested State.

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3. An application for provisional arrest shall include the following:

(a) such information, as may be available, about the description, identity, location and nationality of the person sought;

(b) a statement that a request for extradition will follow;

(c) a description of the nature of the offence and applicable penalty, with a brief summary of the facts of the case, including the date and place the offence was committed;

(d) a statement attesting to the existence of a warrant of arrest or a statement of the punishment that can be or has been imposed for the offence to which this Protocol applies; and

(e) any other information which would justify provisional arrest in the Requested State.

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4. *The Requested State shall decide on the application in accordance with its laws and communicate its decision to the Requesting State without delay.*

5. *(a) Provisional arrest shall be terminated if the Requested State has not received the request for extradition and supporting documents through the channel provided for in Article 6 within thirty (30) days after the arrest. The competent authorities of the Requested State, insofar as it is permitted by the law of that State, may extend that delay with regard to the receipt of the documents. However, the person sought may be granted bail at any time subject to the conditions considered necessary to ensure that the person does not leave the country; and*

(b) The provisions of paragraph (a) shall be without prejudice to the right of the person so arrested to be released in

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accordance with the domestic law of the Requested State.

6. *The release of the person pursuant to paragraph 5 of this Article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received."*

90. I first deal with the Extradition Procedure as the case turns on it. In the event that there is a need to extradite a person sought in connection with a suspected commission of a crime, there are four scenarios that may unfold, depending on the circumstances of the particular case.

91. The scenarios are:

91.1. In terms of the Extradition Act 67 of 1962 ("Extradition Act");

91.2. An international treaty which may be bilateral or multilateral;

91.3. The SADC Protocol;

91.4. On the basis of comity between the Requesting State and the Host State.

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92. In none of the four scenarios would there be an instance where police officials of a Requesting State arrive without the necessary official documentation stating the purpose of their visit as well as confirmation that arrangements for their arrival has been made.

93. Neither in the statements of Maluleke, Dramat or Sibiya, nor in their representations, are averments made that any of the four possible scenarios are followed.

94. This is buttressed by the fact that the Zimbabwean Police Officials arrived at the Beitbridge Border Post without any documentation and with no confirmation that arrangements for their arrival have been made. Consequently they had to have their entry into the Republic enabled by Dramat.

95. When a fugitive is sought in a foreign country, a letter of request must be submitted to the hosting country, in this case of South Africa, through INTERPOL or Department of Justice via Department of International Relations (DIRCO). If authorized, a warrant of arrest will be applied for and authorised by the police of the hosting country.

96. Once the fugitive is arrested, a Section 11 process of the Extradition Act 67 of 1962 is followed where an enquiry is held before a magistrate in whose area the accused was arrested, with a view to surrender of such person to the foreign state.

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97. If the order is granted, the charge sheet and order are taken to the Minister of Justice for a section 11 order. In terms of article 4 of the Protocol in respect of Co-operation and Mutual Assistance in the Field of Crime Combating, a police official of a foreign state *"who wishes to enter into and be present in,...the territory of another state, shall obtain the approval of the officials in charge of the central office*" (i.e South African office of INTERPOL) and in terms of article 3(3), *"only the police official of the hosting country shall be responsible for tracing, arresting, detaining, guarding or keeping in custody of any person suspected of having committed any offences..."*. I attach hereto a copy of the SADC Protocol on Extradition, marked as annexure **"GB20"**.

SUMMARY OF THE EVIDENCE IN THE RENDITION MATTER

The visit to Zimbabwe by Dramat, Sibiya and Brigadier Basi

98. Itineraries and trip authorities that are attached in the docket indicate that on 5 August 2010 meetings were held in Harare between South African police officials and representatives of the Zimbabwean Police Commissioner and also the Head of the Regional Bureau in Harare, Mr Zimfukwe Dramat (head of the DPCI), the then Brigadier Sibiya (who was at the time the sectional head of National TOMS) and Colonel Basi (staff officer) (*"Basi"*). I refer to the meeting as the Zimbabwe meeting.

99. The meetings related to general policing issues including drug trafficking in the region, the extradition process of the Republic and the handling of fugitives

between the countries were also discussed. A fugitives committee was established and Sibiya was to head the committee.

100. As indicated by Basi, apparently prior to the Zimbabwe meeting, Dramat had a meeting with Colonel Hilton Mendez (*"Mendez"*), the head of Extradition/Fugitive Section of the Fugitives Desk of INTERPOL South Africa, to discuss issues around extradition. Mendez indicated to Dramat that Zimbabwe had complained that South Africa was not assisting with fugitives, and that INTERPOL was to be the nodal point for dealing with fugitives. Mendez indicated further that the procedure to be followed around extraditions and the tracing of fugitives were to be dealt with by Sibiya, hence Dramat took him along to the Zimbabwe meeting.

Killing of Superintendent Chatikobo of the Zimbabwean police

101. Chief Superintendent Chatikobo ("*Chatikobo*"), a senior police officer of the Zimbabwe Republic Police (*"ZRP"*) was killed in Bulawayo on 18 September 2010. The victims mentioned in the kidnapping charges, who are all Zimbabwean citizens were suspected to have been involved in his murder and robbery of his official CZ pistol. The Zimbabwean Police suspected that the victims in kidnapping charges have fled Zimbabwe and sought refuge in Diepsloot Squatter Camp near Randburg. They enlisted the help of Dramat to trace and apprehend the suspects.

Entry of Zimbabwean police into South Africa on 4 November 2010

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102. A delegation of about eight ZRP led by one Colonel Ncube entered South Africa *via* the Beightbridge border post on the evening of 4 November 2010 after making arrangements with Dramat. Dramat was telephoned by the Acting Unit Commander of Beightbridge police station, the late Lieutenant Colonel Madilonga ("*Madilonga*"), about the visit. Dramat confirmed that he has knowledge of the visit and the delegation was allowed to enter South Africa. The delegation of ZRP then headed to Promat Building in Pretoria for the purpose of tracing suspects believed to have been involved in the murder of Chatikobo in Bulawayo.

Meeting of Zimbabwean delegation with Dramat

103. The contingent of ZRP arrived at Promat Building where Dramat was based and met with Maluleke on the night of 4 November 2010.

104. Colonel Leonie Verster ("*Verster*") saw them under a tree during the same night around midnight when she returned from her operation. She spoke to Maluleke who introduced her to the head of the ZRP delegation, who was also a colonel. Maluleke informed Verster that the ZRP delegation is in South Africa in connection with the investigation regarding a murder. She saw the same Zimbabwean colonel the following day in captain Maluleke's office drinking tea.

105. Dramat's personal assistant, Ms Pumla Mphothulo ("*Mphothulo*") received Maluleke and the ZRP delegation on 5 November 2010 and took them to

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Dramat's office, who directed her to take them to his boardroom where he met the delegation.

106. Colonel Neethling, of DPCI AND a member of Gauteng THOMS, subsequently told Verster that they helped Maluleke to arrest the Zimbabwean suspects at the request of Sibiya.

Operations to trace, arrest, detain the Zimbabwean nationals

107. According to an information note dated 4 February 2011 and signed by Verster, found on the laptop of Maluleke, ZRP visited the offices of DPCI on 5 November and held a meeting with Dramat about five (5) of their nationals that were sought for killing Chatikobo and robbing his CZ pistol. The note also mentions that Maluleke was tasked to trace the suspects, who were arrested after three sleepless nights and that the suspects was later successfully taken to Zimbabwe.

First operation on 5 November 2010 involving the arrest of Messrs Shepard Tshuma, Witness Ndeya/Nkosi, Nelson Ndlovu and Maqhawe Sibanda

108. Members of the Gauteng Tactical Operations Management Unit ("TOMS") were assembled at Fourways Crossing in Randburg during the late afternoon/early evening on 5 November 2010 to receive a briefing about an operation that was going to be conducted in Diepsloot to look for the abovementioned suspects. Some witnesses alleged that Sibiya was present

at this meeting point but seated in his car, a dark BMW. It is also alleged that three ZRP officers were also present there.

109. Three South African police officers were sent to Diepsloot to monitor the movements of the suspects, who later became victims in the kidnapping charges. The suspects, Shepard Tshuma ("*Tshuma*"), Witness Ndeya/Nkosi ("*Ndeya/Nkosi*") lived in the same shack and Maqhawe Sibanda ("*Sibanda*") stayed in his own shack but they all lived in the same premises. The other suspect, Nelson Ndlovu ("*Ndlovu*") was visiting them, he lived in Johannesburg.

110. The three police officers monitored a car belonging to Ndeya/Nkosi, which was parked outside his shack in the street. When Sibanda, Ndlovu and Ndeya/Nkosi went to the latter's car, they were arrested and made to lie down in front of the car. Ndlovu was fetched from the shack he was in and made to lie down with the other three. It is alleged that they were assaulted.

111. The three police officers then summoned their colleagues who had been waiting at Fourways Crossings. All the police officers who were at Fourways Crossings and the three Zimbabwe police officers then drove to Diepsloot where the four victims and the three police officers were.

112. Maluleke checked the identities of the four victims who were still lying down in front of Ndeya/Nkosi's car against the list of names that he had in his possession and also confirmed their identities with the three ZRP officers. Maluleke confirmed that these are the suspects that were sought in connection

with the murder of Chatikobo. The suspects were allegedly assaulted in the process and captain Maluleke took their money and cell-phones.

113. The four suspects were then arrested. Ndlovu and Sibanda were placed in the same vehicle and the other two were placed in a separate vehicle. They were then taken to Orlando police station at the instruction of Sibiya where they were booked in as illegal immigrants.

114. Sibiya sent a series of SMS's to Dramat and the then Colonel Lebeya ("*Lebeya*"), Dramat's deputy, presumably updating them on developments regarding the arrest and detention of the suspects. Ndeya/Nkosi was then taken away the same night by the police to Meadowlands, SOWETO, to point out another suspect, Mr John Nyoni ("*Nyoni*"). Ndeya/Nkosi was allegedly severely assaulted.

115. On November 2010, Maluleke visited the four suspects at Orlando police station and took photos of the suspects as well as their fingerprints. When the suspects asked him why they were arrested, he informed them that they were arrested for identity documents and being without documents. When they requested their cellphones and money, he informed them they will get them at a later stage.

116. The four suspects were fetched by Maluleke from Orlando police station on Monday, 8 November 2010 between 12h00 - 13h00, and Maluleke asked two police officers from Orlando police station to place them in a marked police vehicle. Maluleke told a female police officer who was on duty at the client

service centre ("CSC") to make an entry that they were being taken to Beitbridge. Maluleke was driving a white Nissan NP 200 van. The two police officers from Orlando police station climbed in the marked police vehicle and followed Maluleke's van until at certain offices, presumably Maluleke's offices in Pretoria at Promat Building.

117. Maluleke informed Sibanda and Ndlovu that the two police officers from Orlando police station would take them back to inspect their documents. The two police officers took Sibanda and Ndlovu back in the marked police vehicle but dropped them off along a freeway. They allegedly walked back to Diepsloot.

118. Maluleke placed Ndeya/Nkosi and Tshuma in a white sedan and handcuffed them. He (Maluleke) placed his personal luggage in the sedan, and an unidentified colleague of Maluleke occupied the front passenger seat. Ndeya/Nkosi and Tshuma were driven to Beightbridge border post. When they arrived in Musina, Maluleke made a call. He (Maluleke) parked on the side of the road in Musina town and another unidentified person boarded the vehicle and sat next to Ndeya/Nkosi and Tshuma in the rear seat of the car. Maluleke informed Ndeya/Nkosi and Tshuma that the unidentified person who had just taken a seat with them was a police officer, and would ensure that they pass through the border quickly. Their car stopped near Home Affairs offices at Beitbridge, where Maluleke and the person who had just boarded their vehicle went inside the said offices. Maluleke had some files with him.

119. It is alleged that Maluleke and the unidentified person came back to their car, and Maluleke then went to drive the sedan, but the other person was driving in front of them and they were driving in the wrong lane, against the flow of traffic. Upon arrival on the Zimbabwe side of the border the Zimbabwe police arrived and handcuffed Ndeya/Nkosi and Tshuma. It is alleged that Maluleke removed the handcuffs he had cuffed the suspects with. It is further alleged that the suspects were assaulted by the ZRP officers and taken to Bulawayo Central police station where they were tortured for several days. Tshuma was later released but Ndeya/Nkosi died in custody.

120. It is alleged that after a few weeks, subsequent to the burial of Ndeya/Nkosi, Tshuma returned to South Africa and met Maluleke. Tshuma is said to have informed Maluleke what happened to him and Ndeya/Nkosi in Zimbabwe. It is alleged that Maluleke then remarked that he knew what was awaiting them in Zimbabwe because, according to Maluleke, when you kill a police officer in Zimbabwe you will meet a similar fate.

Second operation involving the arrest of Pritchard Tshuma on 22 November 2010

121. A second operation was conducted on 22 November 2010 to arrest the remaining suspects in the murder of Chatikobo. Members of TOMS assembled at Diepsloot Shoprite mall. It is alleged that General Sibiya was also present at the assembly point, driving a black BMW, but later left.

122. Maluleke briefed the police officers who were to conduct the search before the operation commenced. The search party first went to to Diepsloot, a particular house situated at a corner, where they found a woman who took them to another house where Tshuma was found in the company of his girlfriend. He was arrested and taken to Alexander police station.

123. A member of DPCI, Warrant Officer Selepe ("*Selepe*") was requested to report at Alexander police station on 23 November 2010 where he met Maluleke, who was driving a white Nissan hardbody double cab. Selepe then booked out Pritchard Tshuma on behalf of Maluleke and he (Maluleke) then handcuffed Pritchard Tshuma. Selepe drove Pritchard Tshuma to Silverton police station and Maluleke escorted Selepe. Pritchard Tshuma was then booked in the cells at Silverton police station. Maluleke informed Selepe that Pritchard Tshuma was going to be escorted to Musina the following day, 24 November 2010.

124. On 24 November 2010 Selepe reported at Maluleke's office in Silverton, where he found Maluleke in the company of Pritchard Tshuma, who was already handcuffed. Maluleke then put Pritchard Tshuma in Selepe's car and put leg irons on Pritchard Tshuma. It is alleged that Pritchard Tshuma and Selepe then left for Musina, and Maluleke escorted them in another car.

125. It is alleged that after arriving into Musina, Selepe signaled to turn to Musina police station but Maluleke flashed his headlight to indicate to Selepe that he must drive on. Maluleke called Selepe on his cellphone and informed Selepe that they are going to Beitbridge border post. Selepe drove up to Beitbridge

police station, where Maluleke came to their car, removed Pritchard Tshuma from Selepe's car and also removed the leg irons. Maluleke allegedly left Pritchard Tshuma handcuffed. Selepe returned to Polokwane. It is alleged that Prichard Tshuma has since not been seen alive again.

Third operation involving the arrest of Gordon Gordi Dube on 12 January 2011

126. Maluleke caused the name of Mr Gordon Gordi Dube ("Dube") and other suspects to be circulated as a wanted person(s) and had also requested Crime Information Office at Wierdarbrug police station to help trace them. Dube was also wanted for crimes committed in the Wierdabrug area.

127. Crime Information Gathering ("CIG") at Wierdabrug police station went to look for Dube on 12 January 2010 and he was subsequently arrested together with two other persons near a bottle store in Diepsloot after a shoot-out with the police. A firearm was recovered where he was seated in the car. Dube and other two persons were charged for possession of fire-arm and ammunition as per Diepsloot CAS 93/1/2011 and appeared in the Atteridgeville regional court on 14 January 2011 and 21 January 2011.

128. The firearm, CZ pistol, that was confiscated during their arrest was subsequently forwarded to the Ballistic Section of the Forensic Science Laboratory for examination ("*Ballistics*"). Maluleke telephoned the ballistics expert assigned to the case, Warrant Officer I Dlamini ("*Dlamini*"), during January 2011 and requested him to bring the case docket relating to possession of a firearm and ammunition. It is alleged that Maluleke further

informed Dlamini that the Hawks were investigating other suspects and that the firearm recovered was used to kill Chatikobo. Maluleke, mentioned to Dlamini that the INTERPOL wanted the accused to be extradited to Zimbabwe to face charges there and he was going to facilitate that process.

129. The case against Dube and the others was withdrawn on 28 January 2011 at the request of Maluleke. It is alleged that Maluleke took Dube along, informing the investigating officer in the Wierdabrug cases, constable L. Meyer ("*Meyer*"), that Dube was going to be handed over to the Zimbabwean Government through immigration related matters.

130. Maluleke also arranged for the firearm to be collected from Ballistics and he handed it to Superintended Ncube of the ZRP on 26 January 2011 at DPCI/Hawks offices in Silverton, Pretoria.

Operation conducted on 26 January 2011 to arrest Johnson Nyoni

131. CIG from Wierdabrug police station continued to search for persons on the list of wanted persons referred to above. Again, they went to Diepsloot on 26 January 2011 and arrested Johnson Nyoni ("*Nyoni*") with the assistance of members of Tactical Response Team ("*TRT*"). He was taken to the offices of Maluleke at Promat Building in Silverton.

132. It is alleged that Maluleke's camera was used to take several photos of TRT members who took part in the last operation, Wierdabrug CIG who participated in the last two operations and the three ZRP officers who monitored the

operation, to celebrate the end of the operations. A celebratory braai was also organized for at Promat Building in Silverton. Maluleke also handed the CZ pistol to Ncube of the ZRP. Photographs of the handing over of the CZ pistol were also taken.

133. It is alleged that Dramat came to address them during the celebratory braai and thanked everyone who participated in the operation, but cautioned them to keep the operations a secret.

134. It is alleged that on 26 January 2011, Maluleke arranged with Constable Meyer ("Meyer"), the investigating officer in the Wierdabrug cases, to collect Dube from Kgosi Mampuru prison where he was detained and hand Dube over to Maluleke.

135. It is further alleged that Maluleke detained Dube and Nyoni at Pretoria Moot police station on 26 January 2011. Maluleke then illegally deported Dube and Nyoni to Zimbabwe via the Beitbridge border on 28 January 2011. When Maluleke arrived at the Beitbridge border he handed Dube and Nyoni to the ZRP on the Zimbabwean side of the border and they have allegedly never been seen alive again and are suspected to have been killed.

The deportation of the arrested Zimbabwean nationals

136. The removal of the Zimbabwean nationals mentioned above from the Republic of South Africa by, amongst others, Maluleke, and their being handed over to ZRP officials under the guise that they are being "deported" for being illegal

immigrants was in truth, not a "deportation" but an extradition. I say so because a deportation in the South African legal system is conducted by officials of the Department of Home Affairs ("*Home Affairs*") in terms of legislation administered by Home Affairs.

137. In the rendition docket, there were statements deposed to by Home Affairs officials who amongst others stated that:

137.1. There was non-compliance with the procedures when "deporting" the four Zimbabwean nationals;

137.2. SAPS members are not allowed to deport any person without the involvement of Home Affairs;

137.3. There was no record to the effect that verification of the identity of the suspects was conducted by an Immigration officer and a high commissioner or embassy (of the person's country of origin) regarding the four suspects;

137.4. There was a Dispensation for Zimbabwean Programme ("*DZP*") from 20 September 2010 to 31 December 2010, in terms of which no Zimbabwean was supposed to be deported on the basis of illegal documents during that period. The period was extended to 2011

137.5. Maluleke visited the Soweto Home Affairs office and Maluleke showed Home Affairs documents with signatures, and Maluleke asked an

official from the Office whether the officer could identify any signature on the documents. Maluleke was told that the signature did not belong to any of the Home Affairs staff stationed at the Soweto office;

137.6. The form BI-1725 had been discontinued in 2008, and the Notification of deportation form must be accompanied by fingerprints of suspects;

137.7. The custodian of the stamp used on the deportation documents was an Immigration officer who was on leave on the date indicated on the said documents, and the Officer had locked the stamp in a safe during her absence.

138. From the available evidence, the said removal and handing over was an extradition. It is clear from the facts sketched above that in actual fact, the arrested persons were extradited to Zimbabwe, where they were sought for various criminal activities. This extradition was conducted without following extradition procedures in various legislative, international treaties and agreements applicable in the circumstances.

139. Further, Maluleke, Dramat or Sibiya do not in their statements and representations aver that they had followed any extradition procedure.

140. The extradition of persons without following procedures set out in the various instruments described above is a serious constitutional breach which renders not only the persons involved in the unlawful extradition, but also the administration of the country guilty, of unconstitutional conduct. For persons

involved in the unlawful extradition, charges of rendition are valid against them. I am advised by my legal representatives that an application for leave to make submissions to the Commission will be sought, in terms of Rule 3.9, in order to put forth legal arguments pertaining to the constitutional breach that resulted from such unlawful extradition.

141. Below I set out what evidence was available against Maluleke, Dramat and Sibiya and why ultimately, charges were preferred against them. I also set out the bases on which charges against Dramat and Sibiya were withdrawn provisionally.

EVIDENCE AGAINST MALULEKE, SIBIYA AND DRAMAT

142. I set out individually below evidence extracted from the above summary of facts, which I considered against each of the above officials

Captain Maluleke

143. As appears from the summary of facts above, Maluleke led the first operation the evening of 5 November 2010 at Diepsloot, and four suspects Chuma, Sibanda, Ndlovu and Ndeya/Nkosi were arrested. Some witnesses claim that Sibiya was present at this operation – others are adamant that he was not. Dramat was not present.

144. These suspects were detained at Orlando police station as illegal immigrants and were escorted to Beitbridge border post by Maluleke on 7 November

2010. Two of them, Sibanda and Ndlovu, were released along the way and they returned to their places of abode in Diepsloot. Only Chuma and Ndeya/Nkosi were handed over to ZRP at the Beitbridge border post.

145. Chuma was released some eleven days later by the ZRP and he returned to South Africa. By then, Ndeya/Nkosi had been killed by the Zimbabwean police. According to a copy of Ndeya/Nkosi's death certificate published in newspaper excerpt, attached and marked A35 in the docket, the cause of death was multiple gunshot wounds. His date of death is not visible.

146. A second operation was held on 22 November 2010. Again, the operation was led by Maluleke. The suspect, Pritchard Tshuma, was arrested and detained at Alexandra SAPS on charges indicated as robbery and murder with CAS 348/11/2010 – no station mentioned. An Occurrence Book page on which he is booked out from Alexandra to Silverton has a different date. On 23 November 2010 Selepe booked Pritchard Tshuma in at Silverton as a "Prisoner in transit – Bulawayo CR 1337/11/2010". On 24 November 2010 Maluleke booked Tshuma out at Silverton as aforesaid. Tshuma was then escorted by Selepe and Maluleke to Beitbridge border post and also handed over to the Zimbabwean police. Selepe alleges that he turned around at the Beitbridge border post, and therefore cannot say who Pritchard Tshuma had been handed to. Tshuma was never seen alive again. Neither Dramat nor Sibiya was present at his arrest. Their arrest and detention are recorded in the excerpts of Alexandra and Silverton Occurrence Books which are attached and marked as "A57" and "A58" in the docket.

147. On 12 January 2011 Dube was arrested at Kalkfontein in Thembisa by Crime Intelligence members Warrant Officer Mokgobu ("*Mokgobu*"), Constable Rikhotso ("*Rikhotso*"), Constable Mgwenya ("*Mgwenya*") and Constable Mkasibe ("*Mkasibe*") assisted by Ivory Park police officials. However, the statements of the Ivory Park police officers were not made and or included in the docket.

148. Dube was arrested together with two other suspects where a bottle store robbery was about to take place according to Rikhotso's informer. All four crime intelligence members say that the name of Dube was given to Rikhoso by Constable Sombhane ("*Sombhane*") at Wierdabrug as being on the list of most wanted suspects. As a result of information from Rikhotso's informer Dube was arrested. All three arrested individuals were first taken to a satellite police station in Diepsloot and from there to Wierdabrug police station where they were sought on several cases investigated by Meyer.

149. Evidently Maluleke had no prior knowledge of the "operation" during which Dube was arrested. He was informed only afterwards of Dube's arrest as it was known that he was also looking for Dube. Dube was detained at Wierdabrug at 07:15 on 12 January 2011 by constable Mahlangu.

150. On 14 January 2011 at 03:10 Dube together with Sthimusi Dumani ("*Dumani*") and Andrew Dube were charged by warrant officer Dlamini with possession of unlicensed firearm and attempted murder and the docket was registered as

Diepsloot CAS 93/1/2011. The matter was subsequently transferred to Wierdabrug in January 2011, as per the occurrence book, "A71".

151. They appeared in the Atteridgeville magistrate's court until the prosecutor withdrew charges against them on 28 January 2011. The prosecutor states, in a document marked A118 in the docket, that he cannot remember or establish why he withdrew the charges as the docket is now missing.

152. The firearm allegedly found in possession of Dube was said to have been linked to the murder of Chatikobo. Maluleke directed a letter to the station commander Randburg stating that the firearm was identified by the Zimbabwean police and that it had been handed to him "*to be taken to Zimbabwe permanently*". A copy of this letter is marked A86 in the docket

153. Maluleke arranged that the case against Dube be withdrawn by the prosecutor. On 28 January 2011, the investigating officer of the Wierdabrug cases, Meyer, booked Dube out from prison and handed him over to Maluleke who advised that he would be transporting him to Zimbabwe. It is alleged that Dube has since not been seen alive and is said to have also been killed by the Zimbabwean Police.

154. It is alleged that save for Mgwenya, the same Crime Intelligence members arrested another suspect, Nyoni, on 26 January 2011 at Diepsloot with the help of TRT. This operation was headed by Maluleke. However, the TRT members have not been disclosed by these members who requested them to assist Maluleke with the operation.

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155. On the day of the arrest of the last Zimbabwean "suspect" Nyoni, he was taken to the Promat building before being detained at Moot police station on instruction of captain Maluleke. At Promat a braai was held on direction of Maluleke and all the police officials present were thanked for their hard work. Zimbabwean police officials were also present and commended the South African police officials for their work. A firearm said to be the one found in possession of Dube and linked to the Zimbabwean case was on this occasion handed over to the Zimbabwean police by Maluleke.

156. Two witnesses allege that general Dramat briefly attended at the braai and also commended the members. The two witnesses differ about in whose company Dramat was, when he arrived. Other witnesses claim to have heard that Dramat had been there, although they did not see him themselves and still others make no mention that Dramat was there.

157. Nyoni was detained for fraud at 18:06 on 26 January 2011 at Moot SAPS by Constable Moatshe ("*Moatshe*"), with contact telephone number of Captain Maluleke given as a reference. Nyoni was booked out by Maluleke at 18:15 on 28 January 2011 and transported as a prisoner transfer to Beitbridge. This statement is recorded in Moot police station occurrence book and an excerpt thereof is attached and marked A66 in the docket.

General Sibiya

158. Basi stated that Sibiya was present at the meetings in Harare on 5 and 6 August 2010 and that there was a discussion on the handling of fugitives

amongst other things. Basi further stated that it was decided that Sibiya, apparently in his capacity as head of TOMS, would deal with the tracing of fugitives. Basi drafted an information note for the information of the Commissioner of Police, General Cele, upon their return from Zimbabwe. According to the information note, a copy thereof marked as A119 in the docket, several issues were discussed in the meeting at the Regional Bureau.

159. In the meeting with ZRP the following day the issue of fugitives topped the agenda and was discussed at length. According to the information note the meeting agreed that fugitive teams were to be formed in each country and that the South African team would be led by Sibiya. Verster alleged that Neethling subsequently told her that they helped Maluleke to arrest the Zimbabwean suspects at the request of Sibiya.

160. The following witnesses implicate Sibiya:

160.1. Shepard Chuma:

In his statement, commissioned by Lieutenant J J Mahlangu ("*Mahlangu*") on 4 May 2012, he alleged that after the arrest of the four of them the police officials were arguing about where they should be detained. Someone then said they should ask Sibiya. He later saw a person he presumed to be Sibiya coming out of a black BMW and then Sibiya said that they should be detained at Orlando police station.

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160.2. Maqhawe Sibanda:

In his statement, commissioned by Mahlangu on 4 May 2012, he said that after the four of them were arrested, police officials were arguing about where they should be detained. Someone then said they should ask Sibiya. He then saw Sibiya coming out of a black BMW and the Sibiya then said that they should be detained at Orlando Police Station.

160.3. Nelson Ndlovu:

In his statement, commissioned by Colonel A B Moukangwe ("*Moukangwe*") on 4 May 2012, he said that during their arrest Nkosi assaulted Ndeya/Nkosi because Ndeya/Nkosi also used the surname Nkosi. After the arrest of the four of them, the police officials were arguing about where they should be detained. One called Sibiya to enquire where to detain them and Sibiya said they should take them to Orlando police station.

160.4. Sergeant Yende (TOMS Gauteng under Sibiya):

160.4.1. In his statement commissioned by Moukangwe on 2 May 2012, he stated that Makoe phoned him on 5 Nov to say that Sibiya wanted them to meet at Fourways to search for

suspects that killed a police Colonel in Zimbabwe. At Fourways Sibiya was sitting in a navy BMW talking on his cell phone. He never got out of the car. After the arrest of the four suspects, Maluleke said they must be detained at Orlando. Maluleke worked under Sibiya's command and Sibiya always encouraged them to assault suspects. It is alleged that Sibiya enjoyed it when suspects were tortured.

160.4.2. Maluleke got out of the car and shouted that they should go. They then left to the scene of arrest. Makoe's car was in front with Sibiya still being the passenger. At the arrest Makoe and Nkosi assaulted the victims. Leburu did not do anything. Sibiya never came out of the car. Someone said they must ask the general where the suspects must be detained and Maluleke walked to the car and came back and said they must be detained at Orlando as illegal immigrants.

160.5. Warrant officer Jawuke (TOMS Gauteng under Sibiya):

160.5.1. In his statement commissioned by Moukangwe on 2 May 2012, he stated that he was called by Makoe on 5 November 2010 and told that Sibiya wanted them to meet at Fourways. They went there. He stated that he saw Sibiya's black BMW X5. In a further statement, he stated

that Makoe and Maluleke kicked and clapped the victims during the arrest and that he saw Sibiya in the second operation. He also heard that he was present in the first one.

160.5.2. At the second operation he saw Makoe and Sibiya sitting and talking in Sibiya's car. Sibiya was sitting in the driver's seat. Jawuke went into the mall while they were waiting for Maluleke. When Jawuke returned from his shopping in the mall, Sibiya had left. Thereafter the operation followed during which Pritchard Tshuma was arrested.

160.6. Sgt Campbell (TOMS Gauteng under Sibiya):

In his statement commissioned by Moukangwe on 2 May 2012 he stated that Makoe phoned and said Sibiya wanted them at Fourways to investigate murder of police colonel. At Fourways, Makoe introduced the Zimbabwean police officials saying they are from Dramat and Dramat wanted them to assist the Zimbabwean police. Sibiya was present leading the team. No further mention of Sibiya at either first or second operation.

160.7. Warrant officer Ndobe (TOMS Gauteng under Sibiya):

In his statement commissioned by Moukangwe on 2 May 2012 he stated that Sibiya arranged with Makoe to call them for an operation

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in Diepsloot pertaining to the murder of a colonel. At Fourways, Maluleke introduced Zimbabwean police officials to them, saying they are coming through Dramat and had been given to Sibiya to be assisted. Sibiya was present but left Maluleke "to run the show". At the scene of arrest the suspects were assaulted by Sibiya as well as Maluleke and Makoe.

160.8. Col Neethling (DPCI, TOMS, Organized Crime Tactical Commander):

In his statements commissioned by Colonel Nthlamu ("*Nthlamu*") on 1 Dec 2011 and Khuba on 27 June 2013 he mentions in his second statement that he "must have reported these arrests to Sibiya".

160.9. Captain Boonstra (DPCI, TOMS, Organized Crime Tactical support):

160.9.1. In his statement commissioned by Khuba on 28 June 2013 he claims not to remember most of what had transpired at operation of 5 November 2010 and to not really have been involved, but merely back up, but does not mention Sibiya.

160.9.2. There was a large concentration of cell phone messages sent around the time of first operation to 5 individuals from Sibiya's cell phone. This appears to be sms' sent to a group consisting of Dramat, General Petros ("*Petros*"), General Lebeya ("*Lebeya*"), General Mailila ("*Mailila*") and one

other individual. Then contents of the sms' cannot be retrieved.

Lieutenant General Dramat

161. The evidence of Basi pertaining to the visit to Zimbabwe as set above is equally applicable to Dramat.

162. In the docket there is a copy of the Beitbridge occurrence book in which Madilonga recorded that Zimbabwean police entered South Africa on the evening of 4 November 2010 and advised that they were on their way to see Dramat and that Dramat confirmed same telephonically.

163. Madilonga has since passed on, but his affidavit, coupled with the occurrence book entry could possibly be admitted as exception to the hearsay rule in that the two commanders of Madilonga can confirm his handwriting in the occurrence book. In fact, the two commanders can also confirm that Madilonga phoned them and informed them about the presence of Zimbabwean police at the border who stated that they wanted to enter the country to attend a meeting with Dramat. The call data provides further objective confirmation that a call from the border post had been made to Dramat's cell phone at the time.

164. There is thus a reasonable prospect of proving that Dramat was aware of the Zimbabwean police officials entering the country on the evening of 4

November 2010 and by implication that their coming to search for their suspects had been pre-arranged with him.

165. According to an information note dated 4 February 2011 and signed by Verster, found on the laptop of Maluleke, Zimbabwean Police visited the offices of DPCI on 5 November and held a meeting with Dramat about five of their nationals that were sought for killing a Zimbabwean police official and robbing him of his service firearm. The note also mentions that Maluleke was tasked to trace the suspects, who were arrested after three sleepless nights and that the suspects were later successfully taken to Zimbabwe.

166. Dramat's personal assistant, Ms Pumla Mphothulo received captain Maluleke and the Zimbabwean delegation the following day and took them to Dramat's office, who directed her to take them to his boardroom where he met them. She stated in her statement that on a date that she cannot recall (between 2010 and 2011), around midday, Maluleke arrived in the company of three or four Zimbabwean police officials. They did not have an appointment with Dramat but asked to greet him. They waited Dramat in the boardroom. He went into the boardroom to greet them where after they left. They were not there for longer than 5 minutes.

167. According to the consolidated success report dated 4 February 2011 and signed by Verster, also found on the laptop of Maluleke, Zimbabwean Police visited the offices of DPCI on 5 November 2010. On that day, Dramat and the Zimbabwean police held a meeting pertaining to the Zimbabwean nationals

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that were sought for killing a Zimbabwean police official and robbing him of his service firearm. The note also mentions that Maluleke was tasked to trace the suspects, who were arrested after three sleepless nights and that the suspects were later successfully taken to Zimbabwe.

168. Verster stated that around midnight on 5 November 2010 she returned from Hoedspruit on an operation with other members. Upon their return they saw several vehicles parked under the tree adjacent to her office. She met members of the Zimbabwean police there. The Zimbabwean police said they were working with Maluleke. She spoke to captain Maluleke who introduced her to the head of the Zimbabwean police delegation who was also a colonel and Maluleke informed her that they are in South Africa in connection with the investigation regarding a murder. She saw the same Zimbabwean colonel the following day in Maluleke's office drinking tea.

169. Several information notes and success reports relating to the arrest of the suspects wanted by the Zimbabwean police were drafted by Maluleke and signed by Verster and on occasion by Colonel Selundu ("Selundu"). These reports were directed to several high-ranking officers namely Major General Hlatswayo, Dramat and Lieutenant General Toka. The consolidated success report of 4 February 2011 addressed to the above three senior officials is of particular importance as it is mentioned in paragraph 4.1 thereof that "*Witness Ndeya was arrested and later successfully taken to Zimbabwe*".

170. Mphothulo stated that she brought these success reports to the attention of Dramat. Dramat received a large number of messages from Sibiya during the time of the first operation on 5 November 2010 and it is likely that these were updates related to the operation/arrest of Zimbabweans.

171. After the arrest of Nyoni on 26 January 2011 there was a braai held at Promat on the suggestion of Maluleke. There were Zimbabwean police officials present and the purpose of the braai was clearly to celebrate the arrest of the last of the "suspects" wanted by the Zimbabwean police in respect of the murder of Chatikobo. Of the four crime intelligence officials who effected the last two arrests, two stated that Dramat briefly made an appearance at the braai and congratulated them. The other two stated that they heard that he had been there but that they did not see him.

172. In a statement marked A68 in the docket, Student Constable Mkasibe ("*Mkasibe*") of crime intelligence stated that Dramat arrived in the company of McIntosh Polela ("*Polela*") where they were taking photographs with the Zimbabwean police. Dramat congratulated them and told them that they should not tell anyone about the operation.

173. Constable Mgwenya ("*Ngwenya*") of crime intelligence stated in his statement marked as A75 in the docket, that Dramat "*came and appreciated the team for a job well done*" and that he appreciated their work. Then Dramat said he had another obligation and he left."

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174. Rikhotso stated that he was told by someone that it was Dramat who came to congratulate them. He does not know Dramat and did not properly see the person who was walking away.

175. In a statement marked A69 in the docket, Constable Mokgobu ("*Mokgobu*") stated that after the photo shoot she went to the shop, but when she came back she was told that Dramat who was in the company of Polela had just addressed the people in her absence.

176. In a statement marked A61 in the docket, Moatshe transported Nyoni to Promat and was present when the photographs were taken with the Zimbabwean police. In his statement he makes no mention of Dramat having attended the gathering.

177. Constable Takalane ("*Takalane*") of TRT also attended at Promat after the arrest of Nyoni and was present when photographs were taken together with the Zimbabwean police officials. In a statement marked A62 in the docket, he makes no mention of Dramat arriving at the braai.

178. The TRT members also make no mention of the braai, so it may be that they may have left to detain Nyoni at Moot SAPS before Dramat arrived.

179. In her statement in the docket marked A73, Sombhane of Wierdabrug, stated that she attended the photoshoot and the braai and that there were people who said that the bosses were there to congratulate the people.

180. Mendez of INTERPOL South Africa stated that he briefed Dramat on a previous occasion on the extradition process.

181. Lieutenant General Mkwanazi ("*Mkwanazi*") stated that he called Dramat to his office after the rendition story broke out and that he came with Maluleke. When he asked him to give an explanation of the allegations pertaining to the rendition, Dramat just kept quiet and only Maluleke explained what happened.

182. In light of the evidence I have set out above, I am of the considered view that at the time I was requested by Mzinyathi to peruse the contents of the docket and give him my view there was clear evidence against Maluleke, Sibiya and Dramat. Based on such view, Mzinyathi wrote to the then NDPP Nxasana and recommended that Maluleke, Sibiya and Dramat be charged.

183. My legal representatives advised me that whilst perusing the documents in preparation for drafting my affidavit and those of my colleagues whom they represent, they noted that in paragraph 32 and 33 of the Werksmans report, it is stated that Mzinyathi had written the recommendation, dated 13 March 2015, to Nxasana that Maluleke, Sibiya and Dramat be charged. The Werksmans report further states that on 1 April 2015 Chauke the DPP: South Gauteng received the rendition docket from Nxasana instructing him to make a decision on the docket.

184. I cannot recall when the rendition docket made its way back to the office of the DPP: North Gauteng. However, from a document in the docket I have noted that on 3 March 2016 I arranged with the legal representatives of Maluleke,

Sibiya and Dramat, who were accused number one, two and three respectively. On 14 March 2016, I prepared a formal letter to the Senior Public Prosecutor ("SPP") Pretoria Magistrates Court which was their indictment. They were charged on 17 March 2016 after they attended the IPID's offices for taking of their fingerprints and photos. Their first appearance in court was on 18 March 2016.

Why, when and by whom was the rendition docket "resuscitated"

185. With regard to the question as to who "resuscitated" the rendition investigation after it went silent for a while and who was the investigating officer at the time, I am not in a position to answer same as I do not have personal knowledge of the activities during the period being referred to.

186. The rendition docket was handled by different prosecutors within the NPA and during different phases of its processing. I am but one of the various prosecutors and am therefore not best suited to offer the explanation sought.

187. I am advised by my legal representatives that, the best way to answer the question would be by way of submissions to the Commission after the affidavits of all the prosecutors implicated and represented by the same legal team have been filed with the Commission. At that stage and to the extent possible, a submission tracing the chronology of events attendant to the processing of the rendition docket shall be mapped out.

REPRESENTATIONS OF MALULEKE, SIBIYA AND DRAMAT

188. In 2018 I received the representations of Dramat on 24 April 2018 and those of Sibiya on 1 October 2018. Having considered their respective representation, I wrote a recommendation to the NDPP recommending the provisional withdrawal of the charges against them.

189. I received the representations made on behalf of Maluleke on 12 December 2019, from Acting Head: NPS, Mzinyathi. I note from the representations that they are dated 17 October 2019 and addressed to the NDPP, Adv Shamila Batohi ("*Batohi*"). I am still busy with the process of considering Maluleke's representations.

190. I am advised not to disclose the representations of Maluleke, Sibiya and Dramat until and unless I obtain the consent of their respective legal representatives to disclose same. A letter will be prepared forthwith requesting the consent as aforementioned.

191. In the event that consent is withheld, I am advised that a request will forthwith be made to the Commission to exercise its powers to obtain the representations as it is apposite for the Chairperson to have regard to same in order to have the context, background and facts upon which I decided to recommend the provisional withdrawal of the charges against Sibiya and Dramat.

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192. Should any of the mentioned avenues not meet positive response, I reserve my rights to rely on judicial authorities that lay down the principle for the disclosure of confidential documents that are not subject to legal privilege, as advised.

THE EFFECT OF THE FUL JUDGMENT

193. After judgment was delivered and on 11 June 2018, I wrote a memorandum to the then acting Head of NPS, Mzinyathi requesting that an independent panel be appointed to take a decision in the Jiba matter and to monitor any further investigation that might be necessary. A copy of this memorandum is attached as annexure **"GB21"**. However, the Acting Head of NPS responded by saying that my office must monitor the investigation itself. A copy of such letter is attached hereto, marked as annexure **"GB22"**.

194. Prior to that, the NDPP had constituted a panel, under the chairpersonship of advocate Rodney de Kock (*"De Kock"*), the current head of NPS and the panel gave an opinion wherein they held that the matter must be referred back to my office. A copy of their opinion is attached hereto, marked as annexure **"GB23"**.

195. The matter was allocated to Van Jaarsveld, a Deputy Director of Public Prosecutions, to take a decision. Van Jaarsveld compiled a memorandum dated 29 October 2019 in response to the panel's opinion. In that memorandum it is indicated, *inter alia*, that because of the withdrawal of the

MS GR

appeal, the charges and proceedings against Jiba are automatically reinstated. A copy of the memorandum is attached and marked **"GB24".**

196. The NDPP, in a letter dated the 24th of January 2020, attached hereto, marked as annexure **'GB25"**, directed to me, requested that I make a decision regarding the Jiba matter.

197. As more fully set out in a memorandum dated the 5th of May 2020, emanating from Van Jaarsveld, attached hereto, marked as annexure **"GB26"**, Van Jaarsveld is of the view that the charges against Jiba were, in fact, automatically reinstated by the High Court judgment.

198. Van Jaarsveld further indicated that she was of the opinion that the prosecution must continue, and arrangements must be made to get Jiba before Court, either by way of a request or summons, with the original prosecutors Advocates Ferreira and Van Eeden continuing to handle the prosecution.

199. The effect of the Court Order is that the charges against Jiba should proceed as the initial decision to prosecute remains extant, and therefore the prosecution against Jiba had to proceed.

200. It is trite law that a Court Order is binding, and effect should be given thereto until set aside by a competent Court.

CONCLUSION

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201. It behoves me to draw the Commission's attention to the totality of the evidence set forth in this affidavit, particularly about the impact of the allegations made against me by McBride, Khuba, Sesoko and, ostensibly, Maoka. While the persistent attacks may at first blush appear to be confined to my person, the impact these attacks have on the NPA as a constitutional institution cannot and should not be trivialised.

202. The Commission should not lose sight of the collective impact of the attacks on my colleagues and I. While I do not hold a brief on behalf of my colleagues there is no argument that in the eyes of the public, the NPA is host to captured prosecutors.

203. I have alluded to the fact that allegations are made that the core group of Advocates, of which I am alleged to be one, have for years been on a path of destabilising persons and institutions that are corruption busters whilst they protect and refuse to prosecute persons against whom there is evidence to sustain charges of corruption and malfeasance. The cumulative effect of these allegations is that the NPA is not to be trusted to effectively and properly to deliver on its constitutional and legislative mandate.

204. I have shown in this affidavit that all these allegations are made without any substantive evidence to support or sustain them. On close scrutiny, it is clear that the complainants as well as those they favour should be treated differently from the rest of the citizens. For instance, McBride, and Khuba accuse me of being malicious by preferring charges against Dramat and Sibiya in the

rendition matter. Apart from the fact that as a prosecutor I have sufficient ground to prefer such charges, an opinion that Khuba informed me that they obtained came to the same conclusion that not only Maluleke but also Sibiya and Dramat should to be charged. These witnesses have, notwithstanding that opinion, been making media statements that my decision to charge Sibiya and Dramat means that I am captured. Not only do they not disclose in their media statement the fact and content of the opinion they obtained, but as far as I am aware, they also did not disclose same to the Commission. I challenge McBride and Khuba to disclose to the Commission the aforesaid legal opinion. Should they fail to do so I implore the Commission to make use its powers to subpoena the disclosure of that opinion.

205. In the prevailing environment in the country where integrity and reputation is easily eroded through negative publicity in the media, those of us who have to take arguably difficult prosecutorial decisions may be hampered from exercising our prosecutorial decisions without fear, favour or prejudice.

206. It was not without reason that the drafters of the Constitution deemed it prudent to provide for prosecutorial independence in section 179 of the Constitution. Any threat to the independence of the prosecutors undermines the constitutional imperative for prosecutors to act without fear, favour or prejudice. Not only that, the persistent negative statements they publish seeking to impose upon the prosecutors decisions that are favourable to them and those that they favour is a direct violation of section 32(1)(b) of the NPA Act.

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207. In conclusion, I have instructed my legal representatives to apply for leave to make legal submissions as envisaged in Rule 3.9.

G BALOYI

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

COMMISSIONER OF OATHS

Commissioner of Oaths ex officio
Advocate Saluka Zana
Advocate of the High Court
of South Africa
1A Protea Place Sandown
Date 21 September 2020

I certify that this document is a true copy of the original

ANNEXURES TO AFFIDAVIT

GB1	Confirmatory affidavit – Kopman
GB2	Shaun Abrahams' letter to McBride dated 19 December 2017
GB3	Anthony Sehas letter to Sahaun Abrahams dated 26 July 2017
GB4	Adv Elbie Leonard SC's memorandum on Kgamanyane
GB5	McBride's letter to Shaun Abrahams dated 11 August 2017
GB6	Raphesu's letter to Shaun Abrahams 5 September 2017
GB7	*Nolle prosequi* letter re Sandton CAS688/02/2017 and Lyttelton CAS309/02/2017 dated 24 August 2017
GB8	Memorandum of Van der Merwe & Van Jaarsveld of 31 May 2017
GB9	Memorandum of Baloyi to Mzinyathi dated 6 September 2017
GB10	*PCLU* (Adv JP Pretorius') Memorandum to Brig Xaba
GB11	Baloyi's letter to IPID dated 24 October 2017 declining to prosecute of Xaba & team
GB12	Judgment by Fabricius J
GB13	*Nolle prosequi* certificate issued to Symington
GB14	Baloyi's letter to Werksman's Attorneys dated 19 January 2018
GB15	McBride's letter to Shaun Abrahams dated 23 February 2018
GB16	Memorandum re: *Nolle prosequi* in re: Gen Phahlane's case
GB17	E-mail stream between Khuba and Baloyi between 03/03/2017 & 10/03/2015
GB18	Baloyi's Memorandum to Mzinyathi dated 09/04/2015
GB19	Mzinyathi Memorandum to Nxasana re: Khuba & Maoka's complaint dated 13/4/2015
GB20	Protocol on Extradition
GB21	Memorandum from Baloyi to NDPP June 2018
GB22	Response to Memorandum
GB23	Opinion of De Kock panel
GB24	Memorandum Van Jaarsveld dated 29 October 2019

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GB25	Letter from NDPP dated 24 January 2020
GB26	Memorandum from Van Jaarsveld 5 May 2020

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

CONFIRMATORY AFFIDAVIT

I, the undersigned,

LUYANDA KOPMAN

do hereby declare under oath and state that: -

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

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

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

LUYANDA KOPMAN

LK M.M

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this 22 day of **SEPTEMBER 2020** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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

M.M

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ANNEXURE GB 2.



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

Reference Number: 10/2/12/3-229/2017

Mr R J McBride
Executive Director: IPID
Private Bag X 941
PRETORIA
0001

RECEIVED
2017 -02- 19

Dear Mr McBride

REPRESENTATIONS: IPID REQUEST FOR THE NDPP INTERVENTION.

Your correspondence dated 02 May 2017, 11 August 2017 as well as the subsequent letter with annexures dated 22 November 2017 refer.

The representations pertaining to the various matters will be addressed as per the headings in your first two letters.

1. Defeating the ends of justice investigation against General Phahlane.

1.1. This matter was registered under Kameeldrift CAS 123/11/2016, the complainant being Mr P O'Sullivan and the suspect Lt-General K Phahlane.

1.2. After perusal of the available information, I have decided to confirm the decision of the Acting Director of Public Prosecutions, Pretoria ("ADPP") not to prosecute in this matter.

1.3 The State will not be able to prove beyond reasonable doubt that the suspect in this matter had the required intention to defeat the ends of justice or obstruct the course of justice or commit any other crime in circumstances where IPID has abdicated its responsibility to investigate the matter to private individuals.

1.4 The original case docket is returned herewith.

2. Investigation against former Acting Executive Director General Kgamanyane

2.1. Pretoria Central CAS 868/11/2016 refers. The suspects in the matter are Major-General K I Kgamanyane and Mr M Matsomela.

2.2. After having considered the matter in its entirety, I am of the view that the decision of the ADPP not to institute a prosecution against the erstwhile Acting Executive Director of the Independent Police Investigative Directorate

(IPID), Major-General K I Kgamanyane and Mr M Matsomela is indeed the correct decision.

2.3. I am (not) convinced that the allegations contained in the docket constitutes sufficient evidence that would lead to a successful prosecution.

2.4 The case docket is returned herewith.

2. Torture investigation against the Mabula Team.

3.1. The DPP Pretoria informed that a decision was made to prosecute Ismael Dawood and Senemela Kutumela in the Regional Court on eleven (11) counts of Assault with Intent to do Grievous Bodily Harm.

3.2. These charges stem from a holistic decision pertaining to the following dockets:

Kanana CAS 188/01/2010
Kanana CAS 222/01/2010
Kanana CAS 86/06/2010
Klerksdorp CAS 94/04/2008
Mogwase CAS 91/04/2008
Potschefstroom CAS 175/04/2008
Jouberton CAS 07/04/2008
Orkney CAS 05/04/2008

3.3. The matter will be prosecuted by a state advocate stationed at the DPP office and no further review of these matters are required.

3.4 The other case dockets mentioned in your correspondence are as follows:

3.4.1 Klerksdorp CAS 113/02/2010 – According to your correspondence this matter was submitted to the ADPP for decision and is still pending.

3.4.2. Benoni CAS 860/05/2006 – According to the DPP this case docket relates to a housebreaking incident and appears to be unrelated to the torture cases. You are kindly requested to verify the CAS number.

3.4.3. Sinoville CAS 13/06/2006 – The DPP reported that the case docket is in possession of Mr A Sehas, an IPID member, and submission thereof is still awaited.

3.4.4. Akasia CAS 123/06/2006 – You indicated that you are still busy investigating the matter as the medical evidence is inconsistent with the version of the Task Team members and that the case docket will be submitted to the NPA shortly.

3.4.5. The DPP reported that the NPA was unable to trace Mamelodi CAS 280/06/2016.

4. Investigation against the Mabula Team on charges of Kidnapping, Defeating the ends of Justice and Contempt of Court.

4.1. The suspects and charges in two related case dockets pertaining to a incidents stemming from the above investigation are as follows:

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Lyttleton CAS 309/02/2017: Brigadier P D Ncube and Colonel I Dawood: Contempt of Court, Kidnapping, Fraud and Defeating the ends of justice;

Sandton CAS 688/02/2017: Brigadier C M Kgorane and Colonel I Dawood: Kidnapping, Theft of a cellphone and Intimidation.

4.2. Please be advised that having considered the representations in respect of the above matters and in consultation with the ADPP, I agree with the decision taken by the ADPP to decline to prosecute in the abovementioned matters.

4.3. I am of the view that the prosecution will have extreme difficulty in proving the prerequisite intention and knowledge of wrongfulness on the part of the suspects in these matters.

5. Investigation of Kidnapping and Assault against Brigadier Xaba and others: Symington matter.

5.1 Brooklyn CAS 790/10/2016 was opened by the complainant Mr V Symington, an employee of the South African Revenue Services against Brigadier N Xaba and Three Others. The alleged offences being Kidnapping, Intimidation, Assault and Robbery.

5.2. I support the decision not to prosecute members of the HAWKS and Mr Titi. Their actions during this incident should rather, be dealt with by means of disciplinary processes applicable to the SAPS and SARS respectively. The facts clearly do not warrant a full blown prosecution.

PERCEIVED DOUBLE STANDARDS BY SOME MEMBERS OF THE NPA IN DEALING WITH IPID CASES, COMPARED TO HOW THEY DEAL WITH SAPS CASES.

6. Decision to prosecute IPID investigators and issuing of J175

6.1. You complained that the DPP North Gauteng and in particular Adv Mashuga took a decision to prosecute two IPID investigators within 72 hours after they had submitted their warning statements and that they were promptly required to appear in court. You further stated that the swiftness with which this decision was made on charges that do not even make sense is suspicious when contrasted with and the delay in taking decisions on IPID cases.

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6.2. According to the information received from the ADPP the case docket under discussion is Kameeldrift 12/01/2017, the accused being Ms S Trent, Mr P O'Sullivan and the two IPID members, Mr Mahlangu and Mr Binang. The stand arraigned on the charges of Fraud, Intimidation, Extortion and a contravention of the IPID Act.

6.3. I am satisfied, following my consultation with the ADPP, that as this matter is handled by the Organised Crime Component with dedicated resources, the swiftness in the handling of the said matter is to be expected and nothing sinister can be found in this regard.

7 Failure by AFU to launch a preservation order.

7.1. Adv K Molelle, Acting Special Director AFU, submitted a report responding to your representations that you have not received any feedback from the NPA despite several enquiries and therefore came to the conclusion that there is a reluctance on the part of the NPA to launch this application. This also reinforced your perception that there are double standards in dealing with IPID matters.

7.2. I have been informed that it is not correct that the AFU preservation order application is completed. From the first draft submitted, several evidential gaps were identified, necessitating further investigations to be concluded. This matter was discussed with you and your team and you undertook to address the identified gaps and revert back to Adv Molelle. The feedback is still awaited.

7.3. As to the Phahlane application, the AFU application did not stall. The evidence that was presented in the first draft as a "completed application" did not properly reflect the case that AFU needed to make in court. Further and proper investigations needed to be made to address the evidential gaps. Detailed feedback was given to IPID members regarding further investigations that needed to be made and an undertaking was made by the said members to address the issues raised.

7.4. Adv Molelle has absolutely no relationship with Lt-General Phalane.

8. Refusal by NPA prosecutors to assist IPID in applying for Section 205 subpoena.

8.1 Your complaint about the conduct of a number of prosecutors in the Magistrate's Court, Pretoria as well as advocates in the DPP office pertaining to their alleged refusal to sign a Section 205 application related to Kameeldrift CAS 123/11/2016 was also investigated.

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including your suspicion concerning Adv G Baloyi's interest in "an on-going investigation of the second defeating the ends of justice investigation against General Phahlane and the Mabula Team"

8.2. Following a perusal of the explanations supplied by the relevant prosecutors I am satisfied that no sinister or inconsistent conduct can be attributed to them.

9. Protocol on decision making by NPA.

I am confident, as mentioned before and referred to in your latest correspondence that the envisaged MOU between our organisations will adequately facilitate a working relationship based on mutual understanding and respect.

Kind regards

Adv S K Abrahams
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Date: 19-12-2017

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ANNEXURE GB3

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001. City Forum Building, 114 Madiba Street, PRETORIA
Tel: (012) 399 0225, Fax (012) 326 0020, Email: ASehas@ipid.gov.za / complaints@ipid.gov.za

TO: MR SHAUN ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ANTHONY W SEHAS
ASSISTANT DIRECTOR: NSIT

DATE: 26 JULY 2017

RE: REQUEST FOR REVISION OF DECISION: PRETORIA CENTRAL CAS 868/11/2016

PURPOSE:

To provide the National Director of Public Prosecutions (NDPP) with information on abovementioned case and his possible revision of the decision made by the Acting DPP North Gauteng.

BACKROUND:

The above mentioned case relates to mismanagement of funds and an irregular appointment by the former acting Executive Director of the Independent Police Investigative Directorate (IPID), Mr KI Kgamanyane.

A criminal case was opened by the Executive Director, Mr RJ McBride, at the Pretoria Central police station under the reference CAS 868/11/2016 when the irregularity was discovered.

The case was fully investigated and the suspect, Mr KI Kgamanyane, who by then had been transferred to SAPS and held the rank of Major General in the D.P.C.I Hawks; was approached for a warning statement. He at first agreed to submit the statement and an appointment to obtain the statement was set.

On the date as agreed upon, Mr Kgamanyane started cancelling the appointments for various reasons. After requesting the statement, Mr Kgamanyane then changed his mind and said that he will not submit a warning statement anymore. He then submitted a letter stating that he cannot be investigated by IPID and that the investigation, if done by IPID, will be done with prejudice to himself.

We then contacted the person who was irregularly appointed by Mr Kgamanyane for his statement and he also refused stating that he will only make a statement if ordered by a court or magistrate to do so. It was clear that there were some contact between the parties and they decided not to submit their statements. We then proceeded to submit the docket to the DPP North Gauteng for a decision without their statements, and their unwillingness to cooperate was indicated in my investigating officer's statement.

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We discussed this case with one of the senior Advocates who said that there was a strong case and that Mr Kgamayane was now in the employ of SAPS falling within our mandate to investigate him, even though the crime was committed while in the employ of IPID.

The docket was booked in and a decision was made shortly thereafter by the Acting DPP North Gauteng, Mr George Baloyi, that read as follows:
"I decline to prosecute as there are no prospects of a successful prosecution."

A copy of the "Nolle Prosequite" certificate is attached for your reference.
This decision was made with only a letter and no statement from the suspect/s.

CONCLUSION:

After careful consideration and perusing of the case docket and liaising with our legal division, I have come to the conclusion that there are sufficient grounds for prosecution and that the decision not to prosecute, was made hastily and without careful consideration of the facts provided. It is also evident that the deciding Advocate did not take the content of my investigating officer statement into account when making this decision, especially the part that relates to their unwillingness to cooperate with the investigation.

Your assistance will herewith be requested to re-examine the case docket, and to make a careful and concise ruling and/or to overturn the decision.

Kind Regards.

.....
AW SEHAS
ASSISTANT DIRECTOR: NSIT
NATIONAL OFFICE PRETORIA
TEL: 012 399 0225
CELL: 084 750 7145

GB 4

REPORT: REFUSAL TO PROSECUTE: (IPID) GENL MAJ ISRAEL KGAMANYANE & MR MATSAMOLA

PRETORIA CENTRAL CAS 868/11/16

SUMMARISED ALLEGATIONS:

1. The suspect Kgamanyane (K) acted as Executive Director of IPID in stead of Mr John McBride who was suspended for a period of time. Upon his return to his post certain appointments by K was then investigated on instruction of McBride. It seems to be common knowledge that there is no love lost between the two. See the press reports attached. (K has since been appointed in a post with the HAWKS from 1 December 2015). M has apparently resigned his contract appointment from end of October 2015.

2. During the period, K acted as Executive Director he suspended the Chief Director of Corporate Services of IPID Ms Nomkhosi Netsianda (N) indefinitely - apparently on *suspicion that information was leaked by her to the press surrounding the irregular/controversial appointment of the daughter of the Deputy Minister of Police Minister Maggie Sotyo*). It is alleged that K should have reviewed this suspension of N within 2 months as per requirements. The impression is created that she may be a driving force regarding this matter. The affidavit signed by McBride initially made provision for her signature, which was scratched over and substituted by McBride. The latter in communication indicated that he received anonymous information about the appointment. N's suspension was apparently later overturned.

3. K then requested other Directors of IPID to act/perform the duties of N during her suspension apart from their own duties. (One Mr Sibanyoni and one Mr Nemusimbori). They did not cope. It is suggested that K also should have requested the remaining Director of HR to do the work of N which he did not do. This could have saved money and unnecessary costs

4. Apparently, K then complained that the above officials are not coping and certain targets are not made. He identified a need to appoint somebody on contract for the duration of the suspension of N. He complained about lack of leadership in driving key activities under program 1. A12 refers and A 10 refers.

5. A meeting was held on 4 May 16 where K aired his concerns and indicated his view that a contract appointment must be made for the period of suspension of N. Attended by **K Acting CFO** - now director finance, Setshedi (S - A10) and Director HRM & DS Phatatsi (P) and ASD Policy Planning, Alberts (A). During the meeting K requested advice on how to fund the contract appointment (S - A10). S then advised the contract post can only be filled from any Chief Director funded vacancy. It can be filled up until the outcome of the disciplinary hearing of N. K suggested the suitable candidate should be appointed for 6 months. P advised if a need arise to appoint a *contract worker the recruitment and selection processes have to be followed and the post can only be conditional to employment since the post is filled.* A12

6. K S then submitted and signed a memo on 5 May 16 to the Acting Executive Director Executive Support (L Nonjaduka) for the request of and advertisement for a contract position as Chief Director for a period of 6 months recommending funding from vacant posts. "J" refers.

SDMI

7. On 5 May 16 a submission was also submitted to the office of S – acting CEO by then - to advertise the post and he made comments that the recruitment process be followed the public service Act and regulations be taken into account and in terms of the delegation of the AED has authority to approve additional employment from level 13 to level 14.

THE ADVERTISEMENT OF THE CONTRACT POST

1. On 5 May K sent a memo to request advertisement of the post. The approvals were signed on 5 May.
2. On 5 May K also sent a memo to the Minister requesting approval to advertise the post. This memo was only signed by the Minister on 11 May. Annexure "K" refers.
3. The advertisement started on 8 May up to 13 May.
4. It is not clear who sent the advertisement to the press – it was probably the official responsible for the advertisements. There is no evidence that K was instrumental in causing the advertisement to run before official approval for it was given by the Minister. It also ran to 13 May meaning that from 11 May up to 13 May this was officially approved of.

THE FUNERAL AND ALLEGATIONS THAT K CONNIVED BEFORE THE APPOINTMENT WITH M TO HAVE HIM APPOINTED THIS SHOWING CORRUPTION:

1. During the funeral of a member of IPID's daughter and on 5 March 2016 one Sam, Ingrid, M and Simon Sono travelled together.
2. Rumours that M at that stage already knew he was going to be appointed as a Director in IPID and indicated as much are not confirmed by anyone in the car. See A7, A9, A11 and A12

INTERVIEWS:

1. On 6 May instructions were issued to invite panel members for the contract post (A6). NB A6 spesifically states *there is no policy dealing or regulating contract posts.* Due to the urgent need to fill the post the policy on Selection and Recruitment was not observed.
2. The post was advertised for a week (8 may to 13 may 16). A4 refers.
3. Suspect M applied for the post, went through screening, was put on the short list (shortlisting occurred on 20 May) and interviewed on 24 May by 4 panellists as were other candidates. He scored the highest marks and was appointed on contract.
4. His salary was funded from vacant Directors posts. (A5) Nobody refused to pay the salary and proceeded to do so.

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THE VETTING:

1. Apparently K requested State Security to do vetting on M already on 4 May 15 (the date he had the meeting about a contract appointment and funding thereof). Annexure "B1" refers.

2. He did not follow the route envisaged by the MOU between State Security and IPID. He only intimated that M was considered for appointment in a post at IPID not which post.

3. However, later, after the appointment of M was recommended by the panel the usual route was followed for vetting in any event and he was properly vetted.

THE FAILURE TO PROVIDE STATEMENTS:

1. Both K and M refused to provide statements to the IPID investigators. This seems to have upset the investigators and certain inferences are made from this failure. It must be borne in mind that both of them are suspects in this matter and they have a constitutional right to remain silent.

2. K argues also IPID cannot investigate a fellow member of IPID which he was at that stage. A 13 refers.

3. This is not something that needs to be commented or decided on in light of the decision not to prosecute.

4. M and K cannot be forced to make a statement and has a right to remain silent. In light of the decision not to prosecute there was no need to require warning statements from them and the decision was made without requiring statements from them. It was clear in any event that they will not cooperate.

IMPROPER/CORRUPT PRIOR CONTACT BETWEEN K AND M

1. There is no indication (either via cell phone records that were obtained or other evidence) of any links between K and M except the fact that M requested State Security on 4/5 to do a check on M by providing his ID document. Apparently, M is a former member of IPID and all his information should have been on record. K never said M was already identified/interviewed for the post in the request to state security.

2. It must be remembered that Headhunting is allowed in terms of the recruitment and selection policy of IPID and deviations from the policy may be approved by the Executive Director. In addition, K was of a view that the situation was to be addressed urgently as there was a fear that the targets would not be met.

MSG

3. M has worked for IPID previously and seems to have the appropriate skills needed at that stage on an urgent basis. This seems to have been common knowledge. This is clearly why he scored the highest marks of all candidates.

FRAUD/CORRUPTION

1. There is no evidence of any fraud K did not say to state security M was appointed in a post merely he was being considered for appointment. No post was mentioned and nothing was intimated that he already was interviewed etc. Not following the requirements of an MOU is also not indicative of fraud in light of the recruitment policy (silent on contract appointments) that K was allowed to headhunt in terms of the policy. He was also allowed to deviate from the policy in certain instance. The matter was clearly urgent and the advance request for vetting to State Security could expedite the process.

2. In addition it is clear that the appointment was eventually done pursuant to advertising, approval of the advertisement by the Minister albeit 3 days late, shortlisting, interviewing and being recommended by the appointed panel. There was no evidence of interference by K or M in the process of shortlisting, interviewing, eventual screening etc. There is no proof of corruption.

3. The failure to mention to the Minister that a 3rd person is available to act in the place of the suspended N does not constitute fraud. He did not state there is nobody else available other than the persons that acted and that have already indicated they could not cope. Annexure "K" refers. It may have been the better decision from a management point of view or with hindsight but that does not mean there was fraud. There is also no evidence of corruption at all. K was allowed to head hunt, the appointment was necessary on an urgent basis and pursuant to the normal requirements being met.

4. He considered the interests of IPID and the fact that targets were not met. M worked for the salary he earned and passed all screening/vetting requirements.

5. Moreover, he was the best candidate according to the panellists.

CONTRAVENTION OF THE PFMA.

1. The allegations in the above regard are very vague and inferences are made without bearing in mind all the prevailing circumstances as well as the clear objects of the PFMA.

2. It appears as if the suspension of N was the root of all evil and she feels aggrieved by it. Perusing the statement of Mr McBride it is clear that the intention was initially for N to sign it but her name was scratched out. Her suspension was considered to be unwarranted. Mr McBride apparently lifted the suspension after his suspension was lifted and upon his return to office as per the IO. It cannot be said that K did not take into consideration financial implications with the appointment of M. He requested advice during the meeting of 4 May about funding and was

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advised what to do inter alia by the acting CFO. It is also very noticeable that there were a lot of acting appointees who gave sometimes questionable advice. This is not a healthy state of affairs in any government department.

3. It cannot merely be stated the appointment of K was irregular. Apart from the advertisement that started running 3 days prior to the Ministerial approval (for which there is no evidence that K was directly responsible) the requirements were met. The request to state security on 4 May for security clearance of M can also not merely be considered to be irregular or corrupt. It was never stated for what post he was considered and it was not stated that M was already appointed or will be appointed. K was also allowed to headhunt.

4. If N was suspended wrongly by K that should have been addressed departmentally. To elevate the appointment of M under the prevailing circumstances to wilfully permitting or causing fruitless and/or wasteful expenditure is not correct. It can be argued that K facilitated the creation of a contract appointment because he wanted to ensure that the targets of IPID are met and he wanted to prevent fruitless and wasteful expenditure of tax payers' money.

5. K's memorandum to the Minister for the appointment of M is attacked and K is criticized for having suspended S. The latter appears to be the motivation behind this investigation.

REASONS FOR NOT PROSECUTING:

1. Before the initial decision not to prosecute all the evidence was considered as well as the surrounding circumstances. Any remarks to the contrary are ill informed and subjective.

2. The matter seems to emanate from in-fighting in the offices of IPID. (The tussle between IPID and K about the right to investigate a matter against one of its own is indicative of this as well as the suspension of N. There seems to be a prior history involving K and some decisions made in other matters not linked to the present one. There also seems to be bad blood between K and Mr McBride as set out in the attached press articles).

3. It started with the suspension of N (correctly or incorrectly – this is arguable to either side). She was clearly upset about this. Mr McBride got a tip off from somebody about K's appointment and was provided anonymously with information. It is of significance that the initial signatory of the affidavit of Mr McBride was to be N. Her name was scratched out and Mr McBride then signed it. It may also be argued that N is responsible for the tip-off of Mr McBride.

4. It is significant that internal investigations were done and recommendations made that misconduct be investigated. Annexure "F1" refers. This appears to have been the correct avenue that should have been followed. If K was considered to have suspended N irregularly/wrongly he should be charged departmentally. Enquiries indicated (as per the IO) that K was not departmentally charged because he was transferred to the Hawks. Both IPID and

MSGB

the HAWKS claiming that neither of them is responsible for such procedure. K has apparently now also left the HAWKS and transferred to another institution.

5. Overall there appears to be a subjective viewing of the evidential material available and a desire to have especially K prosecuted at all costs. **Taking everything into consideration there is no reasonably prospect for successfully prosecuting the suspects.**

6. What is most worrying it the fact that it appears as if there are attempts to use the NPA and the criminal justice system to solve internal problems within IPID. Wasting valuable resources that could be used for prosecuting more serious matters in the interests of the community.

7. This seems to be an internal matter best solved within the relevant departments. The NPA and the judicial process should not be used to settle conflicts of this nature.

E Leonard SC

Deputy DPP: Gauteng, Pretoria

NS SA

Aug 23, 2017

Mail and Guardian

NATIONAL

Bid to purge McBride associates

Qaanitah Hunter 04 Sep 2015 00:00

Robert McBride is fighting his suspension. (Madelene Cronjé, M&G)

COMMENTS

The acting head of the police's investigative directorate, Israel Kgamanyane, has been accused of pursuing a witch-hunt against senior managers in the Independent Police Investigative Directorate seen as linked to suspended IPID boss Robert McBride.

The IPID is tasked with independent oversight over the South African Police Service.

Kgamanyane was unsuccessful this week in pushing out three senior managers he accused of leaking information about the questionable appointment of Boniwe Sotyu as IPID deputy director of investigations in the Free State because she does not have

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"The people who are suspended are those who wrote affidavits for the McBride case," said a source close to the matter, who asked not to be named. "They are being dealt with."

The *M&G* understands that the IPID's acting chief director of corporate services, Nomkhosi Netsianda, who re-commended that Boniwe Sotyu not be appointed to the senior position, has also been suspended.

City Press reported in July that Sotyu was given the job ahead of 90 other candidates and did not have the qualifications or experience required for the position.

The newspaper reported that, of the seven shortlisted candidates, one had more than 22 years' experience as a police officer and joined the IPID as a principal investigator.

Netsianda wrote that Sotyu's "national diploma is not the equivalent of a recognised national diploma or degree, she does not have four years' experience at supervisory level managing investigations as advertised" and had less than two years' experience as a supervisor.

But Kgamanyane defended the appointment, saying everything was above board.

At the same time, it is alleged that the IPID Gauteng and Limpopo provincial heads have also been suspended because of their purported links with McBride.

The head of the IPID in Gauteng, Felicia Ntshangase, is currently suspended, pending an alleged nepotism probe.

The IPID head in Limpopo, Innocent Khuba, who headed the investigations into the rendition of Zimbabweans, and chief investigator Matthews Sesoko have also been suspended.

McBride was suspended in March this year by Police Minister Nathi Nhleko, who accused him of attempting to protect then Hawks head Anwa Dramat and Gauteng Hawks commander Shadrack Sibiya regarding the renditions matter.

MS GB

the required qualifications. Sotyu is the daughter of the deputy police minister, Maggie Sotyu.

After the Labour Court in Johannesburg ruled that Kgama-nyane could not take any action against the three managers accused of leaking information, he attempted to transfer them from their positions.

The three include IPID spokesperson Moses Dlamini, head of support Antoinette Mphago and head of legal services Pule Maoka.

Kgamanyane apparently believed the trio were assisting McBride in his fight to be reinstated in his position.

In a letter to Dlamini on Monday, seen by the *Mail & Guardian* and attached to the Labour Court bid, Kgamanyane said there were serious allegations against Dlamini, which he intended to investigate. This included leaking information to the media.

At the same time, he accused Dlamini of acting in an "improper, disgraceful and unacceptable manner" while on duty. But instead of putting Dlamini on precautionary suspension, Kgamanyane said in the letter that he would transfer him to the KwaZulu-Natal office as head of investigations.

Dlamini and the other two were expected to report to their new positions the next day and failure to do so would constitute misconduct on their part.

On Thursday, the court ruled that Kgamanyane should not take any action against the trio, pending a full hearing into the matter.

Insiders in the IPID believe that this is another attempt by Kgamanyane to purge anyone he believed was close to McBride.

Kgamanyane's phone went unanswered on Thursday.

Acting IPID spokesperson Grace Langa's phone was switched off when the *M&G* tried to contact her for comment.

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McBride is fighting his suspension and has further approached the Constitutional Court to rule whether Nhleko has the power to suspend him at all

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Controversy surrounds Hawks transfer of Kgamanyane to top job

30 January 2017 1:13 PM

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Former acting Independent Police Investigative Directorate (IPID) chief, Israel Kgamanyane, has been given the top job at the Hawks despite allegedly facing charges of fraud and corruption.

Speaking to Stephen Grootes on CapeTalk, Hawks spokesman, Brigadier Hangwani Mulaudzi was unable to confirm if Kgamanyane indeed faced any charges or not.

We don't know if he faces these charges or who has opened this case. We don't have a case number. We do know there was an internal disciplinary hearing in 2016, accusing him of committing fraud and on the same day, it was ruled that there were no grounds for these charges.

— *Hangwani Mulaudzi, Hawks spokesperson*

Robert McBride is reported to have objected to the transfer as Kgamanyane was allegedly responsible for a purge and restructuring of staff believed to have been close to McBride while McBride was suspended from IPID.

When questioned by Grootes if proper procedure had been followed before the new appointment was made, Mulaudzi confirmed that criminal and other checks would have been done.

It is proper procedure in government, not only in the Hawks, to do a proper check. That was done. ... I don't think there is anything sinister to ask for a transfer ... to go to another unit. I find this very normal

— *Hangwani Mulaudzi, Hawks spokesperson*

He says that process started in October and was finalised in December.

When asked if there was a war between Mc Bride and Kgamanyane, Mulaudzi said he was not sure if they were competing for the "soul of the two organisations", but that it was "disturbing".

He confirmed that Kgamanyane is working in Pretoria and said that any conflict between law enforcement agencies is very wrong and "not good for government."

Law enforcement agencies have to work together, without getting sidetracked on internal issues.

— *Hangwani Mulaudzi, Hawks spokesperson*

MS GR

MS-220

ANNEXURE GB5.

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001. City Forum Building, 114 Madiba Street, PRETORIA
Tel: (012) 399 0000, Fax: (012) 399 1440, Email: complaints@ipid.gov.za

The National Director of Public Prosecution
Adv. S Abrahams
VGM BUILDING
123 Weslake Avenue
Weavind Park
SILVERTON
0184

By Hand

11 August 2017

REQUEST FOR INTERVENTION

My numerous telephonic conversations, messages and my letters have reference.

As per your request, it is important that we discuss and conclude on the issues articulated below:-

1. **Matters Investigated by IPID**

1.1 **Defeating the ends of justice investigation against General Phahlane**

A letter dated 04 July 2017 was referred to your office to review the decision taken in the above matter.

It is important to note that the above matter was investigated under the guidance of Adv. Van Rensburg and at all material times while guiding the investigation she was of the view that this was a prosecutable case. However after the matter was referred to Adv. Mzinyathi and after some delay in making a decision, the decision was to decline to prosecute.

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1.2 Investigation against former Acting Executive Director General Kgamanyane

The Acting DPP North Gauteng Adv. Baloyi declined to prosecute this matter. In the letter dated 26 July 2017, the docket was referred back to your office to review the decision taken by the Acting DPP. The decision just does not make sense, having regard to the fact that the suspect did not even give his version, in the face of clear evidence of fraud and corruption as well as contravention of the PFMA.

1.3 Torture Investigation against the Mabula Team

This matter was decided in 2010 and suspects were arrested after J50 warrants were issued. The cases were later withdrawn with a view to centralize all matters. However, to date the cases have not been placed back on the Court Roll. The complainants and victims in this matter have now lost confidence in the Criminal Justice System. This issue was brought to your attention as well as Adv. Mzinyathi.

1.4 Investigation against the Mabula Team on charges of kidnapping, defeating the ends of Justice and Contempt of Court

The above investigations were guided by prosecutors Adv. van der Merwe and Adv. van Jaarveld. They both agreed that there is a *prima facie* case which is prosecutable. However, Adv. Baloyi queried the dockets. The dockets have since been referred back to him after all his queries were addressed. No decision has been made yet.

1.5 Investigation of Kidnapping and Assault against Brigadier Xaba and others: Symington matter

This matter was also guided by the prosecutor during investigation. At the time the prosecutor guiding the investigation was of the view that the case is prosecutable. The docket has been with Adv. Baloyi since 19 April 2017 to date no decision has been made, while we hear rumours that the decision was long made, however if that is true, it has not been communicated to IPID.

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MS-222

2. Perceived double standards by some members of the NPA in dealing with IPID cases, compared to how they deal with SAPS cases.

2.1 Decision to prosecute IPID investigators and issuing of J175.

The DPP North Gauteng and Adv. Mashuga in particular, took a decision to prosecute two IPID investigators within 72 hours after they had submitted their warning statements; they were promptly required to appear in Court. The swiftness with which this decision was made on charges that do not even make sense is suspicious when contrasted with how IPID cases are dealt with and the delay in taking decisions on IPID cases.

2.2 Failure by AFU to launch a preservation order.

IPID has been engaging with the AFU investigators on General Phahlane investigation with a view to obtain a preservation order. All the work was done and all parties were in agreement that there is enough evidence to launch an application. Papers were drawn-up, only the signature of Adv. Molefe was outstanding to take the matter forward. Even after the meeting with Adv. Mokgatla who promised to ensure that the application is launched, to date nothing has happened.

This matter was brought to your attention from 02 June 2017 through our numerous whatsApp communications. To date no progress has been reported to IPID, despite your undertaking to do so. The only conclusion IPID can come to in the absence of any explanation from NPA is that there is reluctance on the part of NPA to launch this application, which therefore reinforces our perception of double standards in dealing with IPID matters.

2.3 Refusal by the NPA prosecutors to assist IPID in applying for Section 205 Subpoena.

On 26 July 2017 Mr Nkabinde went to see Control Prosecutor Mathibe to sign 205 application. Prosecutor Mathibe said if it is regarding General Phahlane he cannot sign the 205 application. He referred him to Chief Prosecutor Mamane Nel. Upon

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engaging her, she asked him to review his statement and directed how it should be reviewed.

While back at the office and reviewing the statement, he received a call from Ms Nel saying she spoke to Adv. Baloyi who said she must not sign the 205 application but must bring to him (Adv. Baloyi) on the 27 July 2017 only he (Adv. Baloyi) can sign the 205 application on General Phahlane matter.

When Mr Nkabinde went to him (Adv. Baloyi), he said he was in the meeting and said he must come another time. Upon Mr Nkabinde refusing to leave, he directed that the two Seniors Adv. Fourie and Adv. Wilsenach to look at the application and to advise him, with a strict instruction that only he can sign the 205 application. After, the two Advocates wrote a memo to him advising him to sign, he read the docket and the memo, then refused to sign and directed that it must be referred back to the SPP to sign. The question is why he insisted in the first place that only he can sign the 205 application.

This raises suspicions about Adv. Baloyi's interest in an on-going investigation of the second defeating the ends of justice investigation against General Phahlane and the Mabula Team.

2.4 **Protocol on decision making by NPA**

We are informed by prosecutors in the DPP's office that they cannot take decisions on all the matters that we (IPID) are investigating. Only the DPP can take the decision. It would however appear that on matters investigated by SAPS and the Mabula Team in particular, the prosecutors concerned can take decisions. Hence their decisions are swift as compared to decisions that are to be taken on IPID matters.

This raises concerns about the consistency of NPA in dealing with IPID investigations and SAPS investigations, particularly those SAPS investigations

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conducted by Mabula Team which in our view are meant to counter IPID investigations.

I am looking forward to our meeting to resolve all the above issues.

Regards

MR RJ MCBRIDE
EXECUTIVE DIRECTOR
DATE: 14/03/2017

OMS

MS 9B

MS-230

ANNEXURE GB6

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE
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Tel: (012) 399 0000, Fax: (012) 326 0020. Email: complaints@ipid.gov.za

Ref: 2017050191

TO: MR SHAUN ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

OFFICE OF THE NATIONAL DIRECTOR
TIME: 10 H 45
06 SEP 2017
SIGN:
OF PUBLIC PROSECUTIONS

FROM: MANTSHA RAPHESU
SENIOR INVSTIGATOR

DATE: 05 SEPTEMBER 2017

RE: REQUEST FOR REVIEW OF THE DECISION OF THE DPP: SANDTON CAS 688/02/2017 AND LYTTELTON CAS 309/02/2017

1. PURPOSE

To provide the National Director of Public Prosecutions (NDPP) with information on abovementioned cases and his possible revision of the decision made by the Acting DPP North Gauteng.

2.D

2. BACKROUND

The above mentioned cases relate to the arrests of Mr Paul O'sullivan on 2017-02-13 at OF Malan Drive at Centurioun and Sarah Jane Trent on 2017-02-10 as per Sandton Cas 688/02/2017 and Lyttelton Cas 309/02/2017

2.1 Lyttelton Cas 309/02/2017

Complainant Mr P O'sullivan was arrested on 13/02/2017 at 18:30 in Johanneshurg by Brgadier Ncube from North West Province.
Brigadier Ncube approached the complainant, identified himself and informed the complainant that he was arresting him for various offences. At the time, the complainant had a High Court order that required SAPS to give 48 hours notice before any arrest could be effected.
The complainant informed Brigadier Ncube of the court order but Brigadier Ncube told the complainant that he did not care about the court order and subsequently seized his firearm and cellular phone.
The complainant's attorney was summonded to the scene by Sarah Trent. When the attorney arrived at the scene he reiterated what the complainant had already told Brigadier Ncube. Ms Trent managed to take the video of the part of the conversation between Mr Spies and Bregadier Ncube.

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He will indicate further that despide carefully pointed out to Ncube that his conduct is unlawful. Bregadier Ncube persisted to arrest the complainant and took him to Ka mmeidrift SAPS for detention.

At or about 23:45 the complainant was released and Bregadier Ncube told him that he was ordered by the court to release him.

2.2 Sandton Cas: 688/02/2017

On 2017-02-10 Sarah J Trent was kidnapped and kept in isolation at various places without her rights being properly explained. Her cellphone was also stolen from her and illegally tapped/downloaded. A warrant for her arrest was never shown to her and she was not given the oppotunity to contact her family or attorney immediately. The show of force with which she was arrested also paints a clear picture and was totally unnecessary if a valid warrant of arrest on a valid charge was available.

3. DISCUSSION

The Independent Police Investigative Directorate investigated the above mentioned cases and forwarded the dockets to the Acting Director of Public Prosecution for decision. On 2017/08/24 the Acting Director of Public Prosecuton declined to prosecute on both cases (Annexure 1). The decision not to prosecute was taken despite the memorandum by Advocate FW Van Der Merwe and Adv Van Jaarsveld confirming the existence of evidence to sustain a prima facie case against the suspects (Annexure 2). IPID is concerned that the decision not prosecute appears to be soley based on the version of the suspects.

The Acting Director of Public of Prosecution requested the investigating officer to bring back the dockets, citing new developments. The request is against the backdrop of the email which the complainant sent to the acting DPP after the decision not to prosecute was communicate to him in line with our Standard Operating Procedures. We have since resubmitted both dockets despite the fact that he would not be able to review his own decision.

4. CONCLUSION

After careful consideration of the available evidence and memorandum by two Advocates from your office, IPID is of the opinion that there are sufficient grounds for prosecution in both cases. The IPID request review of the decision of the Acting Director of Public prosecution in both matters.

Kind Regards

MR M SESOKO
CD: INVESTIGATION AND INFORMATION MANAGEMENTR
IPID
DATE: 05/09/2017

MS GB

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Kind Regards.

MR M SESOKO
CD: INVESTIGATION AND INFORMATION MANAGEMENTR
IPID
DATE: 05/09/2017

Omr-

MSSB

MS-233

ANNEXURE GB 7

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

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REF./VERW. NO. 10/2/4/13/3-P19/2017

BY HAND

Mr M Raphesu
Senior Investigator
IPID
PRETORIA

24 August 2017

IPID INVESTIGATION : LYTTELTON CAS 309/2/2017 AND SANDTON CAS 688/2/2017

1 The Director of Public Prosecutions remarks as follows :

"I decline to prosecute in both dockets. The suspects state in their warning statements that they acted pursuant to a warrant of arrest. The warrant of arrest was executed and the accused in that matter are appearing before court. The state will not be able to prove the elements of unlawfulness, knowledge of wrongfulness as well as intention."

2 The case dockets, Lyttleton CAS 309/2/2017 and Sandton CAS 688/2/2017, are enclosed.

ADV. G D BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA

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THE ACTING DIRECTOR OF PUBLIC PROSECUTION
ADV GEORGE BALOYI
CHURCH SQUARE 28
PRETORIA

ANNEXURE GB 8

MEMORANDUM DEALING WITH THE PROSPECTS OF A SUCCESFULL PROSECUTION OF CERTAIN MEMBERS OF SAPS

Both the case dockets Lyttleton 309/2/17 and Sandton 688/2/17 relate to the unlawful arrest of Mr O'Sullivan and his assistant (Trent).

1. LYTTLETON 309/02/17

O'Sullivan was at his office in Johannesburg when a traffic officer came to his office, and rang the doorbell and asked to be let in. She told O'Sullivan that his car was involved in an accident and she is there to investigate. O'Sullivan refused. She left the premises.

This is confirmed by Trent who was present.

The traffic officer (Mawikivana) states that she has received an instruction to go to Sandton where she will meet a certain Colonel. In Sandton she met the Colonel (Indian), who was later identified as Colonel Dawood, who told her to go to a certain address (house of O'Sullivan) because there is a warrant of arrest for this white man. The Colonel also told her what to do and say once she arrived at the house.

She did this but as the white man refused to come out she phoned the Colonel, told him what happened. He instructed her to leave which she did.

She parked down the street; the Colonel came to her and sat with them. A vehicle left the premises of the house and they tried to chase the vehicle to no avail. They went to a certain garage. The Colonel thanked them and she left.

Maluleke confirms above statement.

Van Wyk from the JMPD state that he received a request from Col Dawood to assist with an operation. He made the arrangements and Manikivana a[illegible] were instructed to assist.

According to O' Sullivan (complainant) he was ambushed by a number of vehicles when he left Afriforum's office. This "operation" was led by Brigadier Ncube who arrested him. The SAPS were told that there is a court order preventing the Saps to arrest him, but they refused to listen.

Willie Spies from Afriforum arrived, told them as well and showed Ncube the court order. Despite this O'Sullivan was arrested and taken to the Kameeldrift Police Station.

There is a transcript of the conversation between Spies and Ncube as well as printed photo's that corroborate the complainant's version.

Brigadier/

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Brigadier Ncube apparently applied for the warrant of arrest (A13). It is not clear based on what evidence this application was made. It is not clear at this stage whether the person who signed the warrant on behalf of the DPP had any information (evidence) available to him, and if so what. It is not clear who signed the warrant. According to the tape recording (A14) it is Adv. Mashuga. In the directions to the I/O the following was inter alia requested .

1.1 A statement from Willie Spies.

1.2 The docket (or the information) in respect of the charges against O' Sullivan supplied to Adv. Mashuga must be obtained.

1.3 A statement should be obtained from Adv. Mashuga.

Although it does not matter why the warrant was issued in the first place, (as the main charge should be contempt of court) it is advisable that this information be obtained.

2. *PRIMA FACIE* CASES

2.1 Contempt of court (in that O'Sullivan was arrested despite the court order being shown and explained to them) it will also be able that they were even before the issuing thereof aware of the court order as it was in the public domain and issued in one of the matters where the same investigating team is involved. In this regard the following is apposite :

> "Prosecutors and Police Officers are in the employ of the state, and have a *public law duty not to violate a person's right to freedom*. It is a fundamental right of an accused not to be detained arbitrarily and without just cause and interference with physical liberty, without justification, is *prima facie* unlawful."

2.2 Kidnapping

If no valid warrant of arrest existed (that appears to be the case) it will be easy to prove that the facts of this matter warrant a conviction on a charge of kidnapping The show of unnecessary force will also be a deciding factor in this regards and a charge of intimidation will most probably also succeed. The fact that the warrant of arrest was requested by an advocate purportedly from the DPP's Office will also be of no avail as there is no evidence to infer that the prosecutor and the arresting officer *acted within the authority conferred by the power in question which, in turn, requires him or her to have taken all reasonable precautions to avoid or minimise injury to others*. A failure to do so would render his or her conduct unlawful.

2.3 Fraud and defeating the ends of justice (in that the arrest was based on fraudulent allegations.) This all depends on the information or contents of the case docket, on strength of which the warrant was signed.

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The evidence shows that O'Sullivan had to be arrested at all costs. In this regard it should be noted that there are many cases against Mr O' Sullivan and he is also appearing on many cases in court. He is well known in South Africa and to SAPS. It is clear that even without the court order he should have never been arrested on the possible petty charges. It appears that the SAPS/ HAWKS behaviour was tantamount to police brutality. It is exactly for that reason why the court order was obtained by him to protect him against unlawful deprivation of his liberty. Total disregard for the rule of law cannot be ignored.

3. SUSPECTS

3.1 Brig Ncube and Col Dawood
SANDTON 688/02/17

This involves the arrest of Trent (complainant) at the office of O'Sullivan (after he left). This was on the same day that the traffic officer came to the office. Someone came to the office and arrested her where after she was taken to a Shell petrol station where she met Col Dawood who cuffed her with cable ties. According to her the arresting officer was Brig Kgorane.

Ms Trent was kidnapped and kept in isolation at various places without her rights being properly explained. Her cell phone was also stolen from her and illegally tapped. A warrant for her arrest was never shown to her and she was not afforded an opportunity to contact her relatives or lawyer immediately. The show of force with which she was arrested also paints a clear picture and was totally unnecessary if a valid warrant of arrest on a valid charge was available. It is however questionable why an arrest was necessitated on the alleged petty charges. A summons would have sufficed. The possibility that there was no warrant of arrest should be investigated. It appears that she was arrested on a whim after O' Sullivan could not be arrested

PRIMA FACIE CASES

3.1.1 Kidnapping

3.1.2 Theft of the cell phone

3.1.3 Intimidation.

3.2 SUSPECTS : Col. Dawood and Brig Kgorane

The OB books and registers from Kameeldrift SAPS station should be obtained in order to establish who booked her in

4 RECCOMMENDATION

Col Dawood appears to be a suspect in both dockets. Brig Kgorane and Ncube (appears) not to be involved in both dockets. It is possible to investigate further links to connect the various accused and maybe even others in one case.

However, the matters can also proceed separately and action can be immediately instituted despite the further outstanding investigation

The/

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The dockets already constitute *prima facie* cases. Adv Van Der Merwe and I am therefore of the view that prosecution must be instituted in the Regional Court. I am aware and have been informed that the decision cannot be made by me and will be taken at another level of authority.

I have to make it clear that in my view a failure to prosecute will be an injustice to the complainants and the public at large. If it is decided not to proceed with prosecution for whatever reason, care should be taken that the decision will withstand the requirements for a *Nolle Prosequi* certificate. The possible delictual liability of both the NPA and SAPS should also be taken into account.

SIGN at PRETORIA on this 31 day of MAY 2017

F W VAN DER MERWE
SENIOR ADVOCATE FOR THE STATE
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG, PRETORIA

H E VAN JAARSVELD
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG, PRETORIA

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ANNEXURE "GB9" GB 9

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY

REF NO. 10/2/4/3/3 – P19/2017

6 September 2017

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Advocate S. Mzinyathi
Acting Deputy NDPP
The Head: NPS
Private Bag X752
PRETORIA

Dear Sir

IPID/MR O'SULLIVAN REPRESENTATIONS: LYTTELTON CAS 309/2/2017 AND SANDTON CAS 688/2/2017
Your reference :10/2/12/3-229/2017.

The summary of the facts is attached hereto. I decided that a prosecution should not be instituted for the following reasons :

1.The suspects state in their warning statements that they acted pursuant to a warrant of arrest. This is confirmed by their commander, Major General N J. Mabula(who is also the Deputy Provincial Commissioner Crime Detection for North West Province). The warrant of arrest was executed and that matter is before court. His statement is attached hereto for ease of reference. I am of the view that the state will not be able to prove the elements of unlawfulness, knowledge of wrongfulness as well as intention.

2. The court order only relates to Mr Paul O'Sullivan and not to Ms Sarah-Jane Trent. The order states that :

"(i). In any matter....where the First Respondent(NDPP) has taken a decision to prosecute the Applicant(Mr Paul O'Sullivan) and where a warrant of arrest has been obtained for the arrest of the applicant... respondents **undertake** to afford applicant 48 hours' notice to present himself at a designated police station."(own emphasis),

(ii). In any matter where the First Respondent(NDPP) has made a decision to prosecute the Applicant(Mr O' Sullivan), Respondents **undertake** that the applicant will be brought to court by way of summons." (own emphasis), the order is attached for ease of reference.

3. My understanding of the court order is that the police gave an undertaking(they were not ordered) to afford Mr O'Sullivan to present himself(if there is a warrant of arrest, as in casu) or summons him if the

Prosecution decides to prosecute him. It is my view that the undertaking has strong contractual ring to it and I submit that if the police did not adhere to that undertaking, the correct route to follow is for Mr O'Sullivan to sue the police via the civil route for failure to adhere to the agreement .

4. When the police went to his offices on 10th February 2017 to execute the warrant, he evaded them by driving off at high speed. He never bothered to contact the police thereafter to find out what they wanted at his offices. Ms Sarah-Jane Trent was arrested on that day , it must have been clear to him that the police were looking for him, yet he failed to present himself to a designated police station as aforementioned in the order. He appears to also to have been aware of the urgent bail application brought in the High Court on behalf of Ms Trent on the night of 12 February 2017, yet he failed to present himself, instead his attitude was : "I knew that I could not be arrested, as a result of the High Court order I have obtained in November 2016, unless the police first of all gave me 48 hours' notice."

5. Brigadier Ncube states in his warning statement(attached hereto) that Mr O"Sullivan was aware from the 10th to the 13th February 2017 that the police were looking for him, that after he sped off when they tried to arrest him on the 10th February 2017 at his offices, another attempt was made to arrest him on 12th February 2017 at the International Continental hotel in Sandton, and that when he saw the police he jumped into his car and sped off. He thus frustrated the police efforts to get to him.

6. Brigadier Ncube states in paragraph 8 of his affidavit that "I was totally unaware of the order", until Mr Kriel of Afri-Forum brought it to his attention after he had effected the arrest. His interpretation was that he was arresting Mr O'Sullivan for a new matter, unrelated to the court order. In any case at that stage he had already effected the arrest and if the interpretation is that the order prohibits the arrest of Mr O'Sullivan (which I maintain this is, but a contractual undertaking by the police as explained above), he had technically breached the order and even if he would have released him, he would still be liable for contravening it. I am therefore of the considered view that he lacked the necessary intention and knowledge of wrongfulness.

7. The case dockets, Lyttelton Cas 309/2/2017 and Sandton Cas 688/2/2017, are enclosed herewith for your consideration.

Kind regards

ADVOCATE GD BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION,PRETORIA

Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear favour or prejudice and by working with our partners and the public to solve and prevent crime

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GB 10

Priority Crimes Litigation Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

Reference: 10/1/3/5/3SARS/PCLU1/2016(Rogue Unit)
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17 October 2016

The Section Head
Crimes Against the State and Tactical Operations Management
Directorate of Priority Crimes Investigations
Private Bag X1500
PRETORIA
0001

ATTENTION: BRIGADIER XABA

THE STATE VERSUS OUPA MAGASHULA AND TWO (2) OTHERS SARS ROGUE UNIT INVESTIGATION: BROOKLYN CAS 427/5/2015

We have received representations from the accused persons which makes it necessary that we approach Vlok Symington of the Legal and Policy Division of SARS for a statement under oath where he requires to clarify the following:-

- His qualifications and duration of employment at the Legal and Policy Division of SARS
- Under what circumstances he was asked by Mr Ivan Pillay to consider the elements of his (Pillay's) early retirement
- The basis of the technical position that he adopted particularly since no reference is made to any legal

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prescripts. In terms of what legislation can the early retirement penalty be "waived".

- How did it come about that he adds the Summary, in particular that the early retirement application should be considered together with the application for ministerial approval that SARS pay the GEPF penalty, and that SARS instead of the employee pay the GEPF penalty when the reasons for the employee's early retirement are purely personal, namely to take his children to school.

It will be appreciated if the obtaining of the statement can be prioritised so that a response can be considered to the representations received.

Dr J P Pretorius
Acting Special Director of Public Prosecutions
Date:

- State if it was the 180 time that someone in SARS asked for similar advice from us.

- Who [illegible] the memo directed to?

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ANNEXURE "GB11"

GB11

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY
South Africa

REF NO. 10/2/4/13/3-P24/2016

24 October 2017

The Chief Director: Investigations
IPID
Private Bag X94
PRETORIA
0001

(SARS incident)

ALLEGED OFFENCE: BRIGADIER N XABA AND 3 OTHERS
BROOKLYN CAS 790/10/2016
Your reference: 2016100744

1. The delay in reverting to you is regretted. This offices directed certain enquiries to the Commissioner of SARS and the Head of DPCI on 13th July 2017.There was a delay in getting a response to those queries and fortunately Mr Symington's attorneys furnished this office with a copy of the papers in his high court interdict application on 12th September 2017, which contained the information that was requested from the Commissioner of SARS. After receipt of the papers, judgment in the interdict application was awaited and the outstanding part of the judgment was received on 13th October 2017.
2. As Acting Director of Public Prosecutions I exercise powers vested in me by virtue of section 20(1) and (3) of the NPA Act 32 of 1998 by maintaining oversight on the decisions taken by staff members of this office, including high profile matters as I am ultimately responsible for the correctness of such decisions.
3. After careful reconsideration of all the evidence in this matter, I have decided not to institute a prosecution in this matter for the following reasons:

3.1 There are a number of material contradictions in the version of Mr Symington that renders the prospects of a successful prosecution very remote. Mr Symington made two statements on 24 October 2016 at 14h26 and 25 October 2016 at 15:12. There were also e-mail exchanges between him and the Commissioner of SARS, Mr Moyane, subsequent to the incident. The following contradictions appear :

3.1.1. In his two affidavits he states that "as I was seated in my office I unexpectedly saw a gentleman...standing at my office door.....this person just told me he wants a document...I was not sure which document he was referring to...I just assumed he was someone sent by the HAWKS to fetch the affidavit....*At that point I continued to assume that he was referring to the affidavit.* And I again explained that the affidavit is not ready yet.

PRETORIA

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GB MS

In Mr Symington's e-mail to the SARS Commissioner on 21 October 2016 he states: "I have reviewed the events of the week." And at paragraph 4 :Suddenly just before13h00, a person(who only after the events I learnt was Titi) shows up at my office unannounced and without introduction, where I was still working on the response and *demanded that I hand the document over* .5 Mr Titi continued with his demand when my meeting with the Hawks reconvened at 13h00, despite him knowing that *I still needed the document to complete the last question(including the ones added by the Hawks* afterwards *& which I wrote down at the bottom of the document.*6. *The Hawks then suddenly also started to demand that I hand this document over to them 7. So suddenly two different institutions(i.e SARS &SAPA) are claiming the same document.*" It is clear that by using the word document he is referring to the letter from NPA with the queries and not an affidavit as stated in his statements.

3.1.2. In his first affidavit dated 24 October 2016 he states in paragraph 8 that : "Kosie could not explain why the Hawks wanted the document and *I decided to leave the meeting without anyone blocking me.*" Yet in his affidavit of 25 October 2016 he states in paragraph 7 that :"After I announced closing the meeting I stood up and went towards the door with the intention of leaving the room A1 and return to my office. I had the NPA documents with me in my hand. *As I got closer to the door the man who initially stood at my office doorway blocked the way.*"

3.1.3. Mr Symington appears to be unsure as to who took the documents from him. In his e-mail to the SARS Commissioner on 18th October 2016(the day of the incident) he states in paragraph 9 : " From what I understand(and I'll be happy to be corrected) the document was taken from me by a person employed as the Commissioner's bodyguard. In the e-mail to the SARS Commissioner on 21 October 2016 referred to above, Mr Symington states in paragraph 10: "Lastly, if Mr Titi reported to you that he did not participate in the removal of the document, then it means the Hawks took possession of the document."

4. In his statement of 24 October 2016 he states in paragraph 9 that : "As I walked out the Hawks just grabbed me somehow and took the document from my hand by force. I was trying to hold onto the document but somehow they pulled it from my hand. I then told Kosie that the Hawks stole the document..." In his statement of 25 October 2016 he states in paragraph 9 : " As I was exiting the door I walked straight into all four members of Hawks, who immediately demanded the document to be handed over to them. When I continued to refuse, they physically grabbed me and at least one of them reached for the document in my hands. I continued to resist but I was overpowered by these members of Hawks. My hand was then twisted in a way that forcibly opened my hand in a way that enabled the members of the Hawks to take the document from my

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hand. The description of how the document was taken from him differs in the two statements. Furthermore Mr Mark Kingon states in paragraph 3 of his statement : "I then saw *the bodyguard hold Vlok by the arm*". Mr Symington does not mention this fact. He continues " Vlok then forced his way to pass the body guard and got to the door. As Vlok opened the door and stepped out, it seemed like a physical confrontation and *Vlok went down as if he was falling*", no such detail appears in Mr Symington's statement. Mr M.J Taljaard states in his statement that paragraph 5 : "As everyone were standing and speaking the tall black male who was standing with me just moved forward and grabbed the document from Mr Vlok's hand in a quick movement", there is no mention of forced twisting of the hand as My Symington states. The version of Mr Taljaard corroborates the version of col. Maluleka that LT Col Palaza snatched the document from Mr Symington's hands(see A14/3) paragraph 11.

4. All the accused state that when Mr Symington left the boadroom, he wanted to make copies of the documents, yet Mr Symington gives the impression that he was leaving the meeting as it was not making sense to him in order to return to his office(see paragraph 7 of his statement of 25 October 2016.
5. Mr Symington, on his own version, adopted an uncompromising stance regarding the release of the document, and would not even listen to his own supervisor Mr Louw or the Commissioner himself, through his body guard. Various alternatives were made to him such as retyping the question without the NPA logo but he refused to budge. Had he offered his co-operation, this incident would not have occurred.
6. The *nolle prosequi* certificate is attached hereto to be handed to the complainant.

ADVOCATE GD BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION,PRETORIA

GB MS TL GAB

GB 12

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 60723/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

22/9/17
DATE

SIGNATURE

In the matter between:

VLOK SYMMINGTON — APPLICANT

And

SOUTH AFRICAN REVENUE SERVICES — RESPONDENT

JUDGMENT

MS GB

Fabricius J,

1.

In this urgent application, the Applicant seeks the following relief:

ii) "Pending the outcome of the relief in Part B:

2.1 The Respondent is interdicted from taking any disciplinary action against the Applicant, that in any way relates to protected disclosures listed in Part B;

2.2 The Respondent is interdicted from suspending the Applicant from his employment, for reasons that in anyway relate to protected disclosures listed in Part B;

2.3 The Respondent is interdicted from engaging in any conduct towards the Applicant which would amount to an "occupational detriment" as defined in the ***Protected Disclosures Act 26 of 2000*** ('The ***PDA***").

iii) The Respondent is ordered to pay the costs of the application".

In Part B, the following relief was sought:

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5. "It is declared that the following disclosures by the Applicant constitute "protective disclosures" as defined in s. 1 and 6 of ***Protected Disclosures Act 26 of 2000*** ("The ***PDA***");

5.1 The lodging of a grievance with the Respondent on or about 27 October 2016;

5.2 The participation in the subsequent investigation into the grievance, and the evidence provided to the external Attorneys tasked with investigating the grievance;

6. It is declared that the following disclosures by the Applicant constitute "protected disclosures" as defined in s. 1, 8 and 9 of the ***PDA***:

6.1 The disclosures made by the Applicant to the Independent Police Investigation Directorate ("IPID") during the period October to December 2016;

6.2 The disclosures made by the Applicant to the National Prosecuting Authority ("The NPA") during the period October to December 2016.

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7. The Respondent is interdicted and restrained from subjecting the employee to any form of "occupational detriment" as defined in s. 1 (vi) of the *PDA*, which is in anyway connected to any of the above disclosures.

8. The Applicant is declared to be excluded from all civil and criminal liability as a result of making the above disclosures, in terms of s. 9 (1) of the *PDA*."

A cost order was also sought.

2.

The hearing served before me on 15 September 2017 and the disciplinary enquiry was to be held on 18 and 19 September. During the hearing, the Respondent however indicated that it would not proceed with any hearing before my judgment had been delivered.

3.

In the Founding Affidavit, Applicant alleged that he made several disclosures which qualify as "protected disclosures" as defined in s. 1, 5 and 9 of the *Protected*

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Disclosures Act. As a result of having made those disclosures, he said, he now faced a disciplinary hearing and probable dismissal from his employment with SARS. He added that the disclosures related to events that took place on 18 October 2016. In order to motivate this allegation, he deemed it necessary to provide an account "of the larger events" leading up to the incident on 18 October 2016. Most of those events did not involve him personally, but he alleged that the events of 18 October 2016 must be understood in the broader context of the issues of State Capture, and the attempts to oust Mr Pravin Gordhan, a former Minister of Finance from his position. He then continued to describe the events that apparently took place relating to the removal of Minister Nene and Minister Gordhan from their posts. In that particular context his involvement was that he had drafted a memorandum in March 2009, in which he expressed an opinion that the proposed retirement of Mr Ivan Pillay, a former Deputy Commissioner of SARS, was lawful, and in compliance with applicable laws and regulations.

Respondent sought an order striking out these allegations as being irrelevant amongst others, but at the hearing of this application I was not invited to do so

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inasmuch as the argument pertaining thereto would be presented to the Court in later proceedings dealing with Part B of the Notice of Motion.

Respondent's view in the Answering Affidavit was that the particular paragraphs were in the form of a political treatise based on unconfirmed hearsay and media reports. They could well be interesting to read as part of a wider dissemination of information about political events which are playing themselves out in this country at the moment, but it was said that they were irrelevant and speculative in the context of the present application. They had no bearing as to how the Applicant conducted himself at a particular meeting on 18 October 2016. It was also said that by referring to these speculative and irrelevant events and Applicant's conduct in general after the incident on 18 October, demonstrated his tendency for melodrama and the exaggeration of his self-importance.

4.

The broad purpose of the ***Protected Disclosures Act*** is to encourage whistle blowers in the interests of accountable and transparent governance in both the

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public and private sector. That engages an important constitutional value and such values must therefore be given full weight in interpreting the particular legislation. A general protected disclosure must be made under the circumstances it described in s. 9 of the *Act*. A "disclosure" is also defined in s. 1, and so is the "occupational detriment" which is prohibited by the provisions s. 3 which reads as follows:

"**Employee or worker making protected disclosure not to be subjected to occupational detriment.** – No employee or worker may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure". Any employee who has been subjected, is subjected or may be subjected to an occupational detriment in breach of s. 3 has certain remedies set out in s. 4 of the *Act*, which would include an approach to this Court and the Labour Court for appropriate relief.

5.

Before dealing any further with questions arising from this *Act* in the present context, it is necessary to revert to the facts.

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On 18 October 2016, Applicant met with certain officers of the HAWKS in a boardroom. He was asked to provide further details regarding his 2009 memorandum. He returned to his office to work on the required affidavit and was later confronted by a Mr Thabo Titi, who demanded that he hand over a certain document to him. He objected to that and Mr Titi allegedly then locked the door to the boardroom, refused to allow him to leave or phone for assistance. He called his secretary and SARS security for such assistance however, but they were refused access to the boardroom. He then called 10111 to report that he was being held against his will. At some point he then began a video and audio recording of the events using his cell phone. At some stage, also his superior Mr Louw joined the meeting and other SARS colleagues, and he described how an altercation occurred, which included him being grabbed, his arm being twisted and certain documents being wrestled from his hand. He alleged that he was extremely upset and traumatized by what had transpired and thereafter made disclosures which are now alleged to be protected disclosures in terms of the *Act*.

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In the Founding Affidavit he says that the first protected disclosure was an email that he sent to Mr Robert McBride, Head of IPID on 21 October 2016, setting out a summary of the events on 18 October and enquiring as to whether IPID could assist him. IPID was presented with a full statement together with access to the audio and video recordings on his cell phone.

The second protected disclosure was a Supplementary Affidavit made 14 December 2016, which he submitted to IPID.

The third protected disclosure was a formal complaint raised against Mr Titi on 27 October 2016.

After some time he was informed that an independent firm of Attorneys would investigate his grievance and it is clear that the firm Mothle Jooma Sabdia then provided two memoranda recommending ultimately that he be charged with misconduct. It is for present purposes not necessary to deal with the contents these

reports and on which basis they were produced. Applicant has certain complaints in respect thereof which were fully dealt with in his Founding Affidavit.

7.

On 25 July 2017, the senior manager of workplace relations at SARS, sent the following email to him and Mr Titi: "I had indicated in my emails to you that the Thipe Mothle of Mothle Jooma Sabdia was requested to provide a conclusive report on all findings related to the incident that gave rise to the grievance.

He has now concluded that exercise and has provided his addendum report with recommendations to the organization. A copy of this addendum report is attached.

The report has been considered by the organization which has elected to accept the findings and recommendations made.

Key amongst the recommendations made was that charges be brought against both of you for possible misconducts highlighted in the report. Due to the dynamics involved in this matter it has been decided that a disciplinary process be run by external parties. An external chairperson as well as external initiator be appointed to

conduct the process. Details of the proceedings will be shared with you by your HRBP once the parties are appointed".

8.

On 29 August 2017, a notice of a disciplinary hearing was presented to the Applicant and it is necessary that I quote it:

"You are hereby given notice to attend a disciplinary hearing in terms of Clause 10 of the Disciplinary Code and Procedure.

The alleged misconducts are (a detailed description of the misconducts is attached):

INTRODUCTION

You are employed by SARS as senior legal advisor, with an obligation to, inter alia,

- Obey all lawful and reasonable instructions issued to you;
- Act in the best interests of SARS at all times;
- Respect your fellow employees;
- Treat all your fellow employees with dignity; and
- Not bring the image and name of SARS into disrepute.

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It is alleged that you have committed gross misconduct by breaching all of the above duties as set out hereunder:

CHARGE 1:

- GROSS INSUBORDINATION, ALTERNATIVELY,
- INSUBORDINATION, FURTHER ALTERNATIVELY,
- REFUSAL TO OBEY LAWFUL AND REASONABLE INSTRUCTIONS

1. It is alleged that you are guilty of misconduct as set out above in that on 18 October 2016 and at Lehae la SARS, Brooklyn, Pretoria, you repeatedly, unreasonably and obstinately refused to comply with repeated lawful and reasonable instructions given to you separately by Mr Thabo Titi, acting on behalf of the Commissioner of SARS, Mr Kosie Louw, your line manager, and Brigadier Xaba, acting on behalf of the HAWKS, to surrender and hand over to them, separately and/or jointly, documents which were in your possession and under your control at the time consisting of a letter from the National Prosecuting Authority ("NPA") and email attachments, the latter having been erroneously been attached to the letter from the NPA.

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CHARGE 2: CONDUCT UNBECOMING OF AN EMPLOYEE OF SARS

2. It is alleged that on 18 October 2016 and inside Boardroom 1A, at Lehae la SARS, Brooklyn, Pretoria, you conducted yourself in an unbecoming, belligerent and disgraceful manner by becoming visibly agitated, argumentative, obstinate and disrespectful while interacting with members of the Hawks, including Brigadier Xaba and Colonel Maluleke, and SARS employees, including Messrs. Louw, Titi, Clifford Smith and Mark Kingon.

CHARGE 3: USE OF ABUSIVE AND INSULTING LANGUAGE AND AGGRESSIVE CONDUCT

3. It is alleged that on 18 October 2016 and inside Boardroom 1A at Lehae la SARS, Brooklyn, Pretoria, you verbally insulted, abused and undermined the dignity of Mr Thabo Titi by uttering and directing the following words towards him *"...your own bloody phone you f...ng phone yourself* or words to that effect, and by aggressively pointing and shoving a cell phone towards his face.

CHARGE 4: BRINGING THE NAME AND IMAGE OF SARS INTO DISREPUTE

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4. It is alleged that on 18 October 2016 and inside Boardroom 1A, at Lehae la SARS, Brooklyn, Pretoria, you recorded interactions between yourself, members of the HAWKS and employees of SARS on your cell phone. You thereafter, shared the recorded footage with unknown third parties, which resulted in the footage being broadcast on public media, which had the result of bringing the name and image of SARS into disrepute.

The hearing will take place on:

DATE:	TIME:	VENUE:
18 & 19 September 2017	09:00	LEHAE LA SARS BOARDROOM 4

If you do not attend and cannot give reasonable grounds for failing to attend, the hearing will be held in your absence.

You have the following rights:

- To be represented by a fellow employee or a union representative of a recognized trade union;

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- To have reasonable access to documents and/or information to prepare for the hearing;
- To be allowed reasonable time to full pay and benefits away from the workplace to prepare for the hearing;
- To have an interpreter if so desired;
- To present evidence on your behalf in the form of documents or through witnesses;
- To cross-examine witnesses of the employer;
- If found guilty, present any relevant circumstances in mitigation in determining the disciplinary sanction, and
- To apply for an Appeal against the outcome of the disciplinary hearing".

9.

It is clear from the charges that they all relate to the events that occurred on 18 October 2016.

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10.

In this context the following was said in the Respondent's Answering Affidavit having regard to the relief sought and the relevant allegations made by the Applicant in Founding Affidavit:

1. The relief sought was incompetent in that Applicant was not under any eminent threat of suspension. Also, nowhere in his Founding Affidavit did he claim that he had been threatened with suspension pending the outcome of the disciplinary hearing. The notice of the disciplinary hearing also makes no reference to any pending or contemplated suspension. Applicant himself also does not allege that any such intention was ever communicated with him by Respondent. Accordingly, any claim for an interdict relating to such suspension of the Applicant was baseless and without any factual support;

2. A proper consideration of the notice of disciplinary hearing made it patently clear that the charges which form the subject matter of the proposed hearing related to events of 18 October 2016. The charges of misconduct relate to the manner in which the Applicant conducted himself during the events which

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led to the investigation that was conducted by Mothle and reported on it in the report submitted by him and the addendum thereto;

3. The alleged "protected disclosures" referred to in Part B of the Notice of Motion and elucidated upon in the Founding Affidavit make it clear that they relate to reports made by the Applicant after 18 October 2016. Properly construed, the alleged protected disclosures bear no relation to the charges as formulated in the notice of disciplinary hearing. It is beyond dispute that the investigative report prepared by Mothle was as a result of a grievance lodged by the Applicant himself;

4. In the report it was said that having regard to the various versions presented as to what occurred on 18 October 2016, these conflicting versions ought to be tested in the hearing;

5. Respondent was entitled to exercise its powers and responsibilities as set out in s. 9 (2) (c) of the ***South African Revenue Act 34 of 1997*** as amended, which provided that the Commissioner of the Respondent had the

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responsibility in particular for the maintenance of discipline of the employees of Respondent;

6. There was also no allegation by the Applicant that the respondent was not entitled to discipline its employees in respect of allegations of misconduct. At the hearing Mr Unterhalter SC, on behalf of Applicant, also submitted that he did not seek to attack the fairness or otherwise of the envisaged disciplinary hearing;

7. Applicant had also not suggested or offered any basis in terms of which it could be concluded that an independent chairperson who would preside over the disciplinary hearing would not conduct such in a fair manner as contemplated in labour legislation and Respondent's disciplinary code and procedure. An independent Advocate was appointed to preside over the hearing as well as an independent initiator.

8. Accordingly, there was no reasonable prospect of the Applicant succeeding in the relief sought in Part B of the Notice of Motion which would warrant the granting of the interim relief sought in Part A.

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The crux was that the Applicant was not charged in respect of any of the disclosures that he made subsequent to 18 October 2016.

11.

In any event, Applicant had all the statutory remedies at his disposal were he to be found guilty and if he was dismissed because of any protected disclosures contemplated by the ***Act***, he would be entitled to full retrospective reinstatement by the Labour Court in terms of s. 187 (h), read with s. 193 (1) (a) of the ***Labour Relations Act of 1995*** as amended. It was also submitted in the Answering Affidavit and argued by Ms K. Pillay SC, on behalf of the Respondent, that Applicant had not shown a prima facie right open to some doubt, would not suffer any irreparable harm, and was not entitled to an interim interdict on the basis of the balance of convenience being in his favour either, inasmuch as the Respondent is entitled to exercise its prerogative to discipline its employees who have engaged in conduct that is prohibited by Respondent's disciplinary code.

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12.

It is clear that s. 3 of the ***Protected Disclosures*** Act makes it clear that an employee may not be subjected to any occupational detriment "on account, or partly on account" of having made a protected disclosure. There must therefore be a discernible link between a disclosure made and "any occupational detriment". In the present instance, such would include being subjected to any disciplinary action, having regard to the definition of "occupational detriment" in s. 1 of the ***Act***. Mr Unterhalter submitted in this context that this link meant something lesser than legal causation, having regard to the fact that interpretation issues pertaining to this Act should be done in a manner that would result in the broadest possible protection given to a whistle blower. In this context reference was made to ***City of Tshwane Municipality v Engineering Council of South Africa 2010 (2) SA 333 SCA at par. 42***. I have no difficulty with this interpretation which seems to be enforced by specific reference to "partly on account". In both instances however an analysis of the factual situation remains important.

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13.

The charges must therefore be analysed *vis-à-vis* the relief sought in respect thereof.

Applicant, in the Founding Affidavit referred to the disclosures made by him and I have mentioned them. Ms Pillay argued that none of the disclosures relied upon by Applicant were disclosures as defined by the Act. Also, she argued that Applicant's Founding Affidavit failed to set out the factual basis on which it was contended that the three disclosures relied upon by him constituted protected disclosures. I prefer to leave these topics for the Court hearing Part B of the application. At present I am concerned about the three disclosures that Applicant has pleaded in the Founding Affidavit, which forms the basis of this application. The question now is whether the charges were brought "on account or partly on account of, of having made a protected disclosure?"

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14.

In the Replying Affidavit, Applicant purports to make out a new and/or additional case concerning "constitutional issues raised in this application". I do not know exactly which issues he has in mind, but he puts this new case as follows:

13.1 "This application raises serious constitutional matters of significant public importance, relating to the Rule of Law and principle of legality generally, and in particular the spectre of a State Capture and the obstruction of justice and the use of selective prosecutions by public institutions tasked with law enforcement.

13.2 Furthermore, the application raises novel and constitutionally important questions regarding the application of the ***PDA***, and the admission of hearsay evidence on grounds of public interest, in matters of this nature".

None of these issues has been pleaded as they ought to have been, and Applicant's urgent application is certainly not based thereon, as it appears from the Founding Affidavit. It is impermissible to plead a particular case and then to seek to establish

MS GB

a different case, either in reply or at a hearing. It is equally impermissible for a Court to have recourse to issues falling outside the pleadings.

See: ***Molusi and Others v Voges N.O. 2016 (3) SA 370 (CC) at paras. 27 to 28.***

He continued to say that for the purposes of adjudicating Part A of this application, the Court should take cognisance of the broader background information, and should accept, at least on the prima facie level, that it constitutes a fair summary of events that are largely within public knowledge, and which are of critical importance to the country.

15.

I have briefly referred to the "broader background", but in my view it must be emphasized that this broader background, which may indeed one day become of critical importance to the country, has at present nothing to do with the question whether or not I should grant Part A of the application on an urgent basis, and the question whether or not the disclosures that he made after the altercations in the

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office on 18 October 2016, are now the subject matter of the charges as they have been framed.

16.

In the Replying Affidavit, Applicant furthermore attacks the integrity and the credibility of Mr T. Moyane, the Commissioner of SARS in the context of whether or not he had been the complainant in the criminal case against Mr Gordhan, the previous Minister of Finance. I must emphasize that this question is not the subject matter to be decided herein, and it is unfair to the Respondent as well that that debate was raised in some detail in a Replying Affidavit to which the Respondent could not ordinarily answer to. That particular debate is for present purposes irrelevant. Other issues, also irrelevant, are raised in Replying Affidavit in the context of the fairness or otherwise of Respondent's instructions to the firm of Attorneys which produced the two reports. That is also not the subject matter of the present proceedings. Other irrelevant issues are whether or not SARS has on previous occasions ignored the findings of independent chairpersons and dismissed

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employees regardless of the fact that the chairperson imposed a lesser sanction, whether or not SARS fails to comply with the provisions of its own disciplinary code and whether or not members of the National Prosecuting Authority and the HAWKS acted *mala fide* in certain instances. Those issues may or may not become relevant during disciplinary proceedings against the Applicant, but for present purposes they are not.

17.

Applicant also, together with the Replying Affidavit, filed a notice in terms of ***Rule 16A*** which purported to raise certain constitutional issues which, as I have said, are not the subject matter of the present proceedings and have not been pleaded. In any event, the notice is so broad and vague that it for practical purposes becomes meaningless, certainly in these proceedings, if not in general.

18.

In the Replying Affidavit, Applicant also says the following:

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34.3 "In broad strokes, my defence is that I acted in the manner that I did, because I was subjected to unlawful kidnaping, intimidation and assault by the HAWKS, assisted by Titi, and that in the circumstances, my conduct was reasonable, and I am not guilty of misconduct".

That defence is one that ought to be put before the envisaged disciplinary enquiry. Applicant's own version of the events in the office on 18 October 2016, and the findings of Attorney Mothle, certainly show conflicting facts as to who did what and when and why during the particular altercation, or scuffle. In my view, those events ought to have been settled with a handshake and a discussion over a beer. Mr Titi was prepared to accept an apology, whilst Applicant demanded his dismissal. Respondent's comment that Applicant is inclined to melodrama is borne out by his assertion that he was "subjected to unlawful kidnapping". The persons on that day in the boardroom conducted themselves in a less than dignified manner and that is about it. The disciplinary enquiry will have to determine whether or not the charges raised against the Applicant have any merit and whether they are serious. In my view the charges are not brought "on account, or partly on account, of ... ", having

MSGB

made a protected disclosure. The disclosures made by the Applicant, on his own version, occurred after the particular altercation/scuffle in the office.

19.

Applicant does not need urgent relief now. He is entitled to proceed with the relief brought on the Part B and does not at present need an urgent interdict to protect that right.

See: ***IPID v Minister of Police [2015] ZAGPHC 138 (13 March 2015) at par. 9 and 12.***

I must consider that the Respondent also has rights, certainly the rights of an employer *vis-à-vis* instances of misconduct, and of course also the right to have its particular version considered properly. Section 3 of the ***Act*** cannot be interpreted on the basis that even remote background facts (if they are such) can provide a causal link between disclosures and proceedings that would result in an occupational detriment to an employee. The link between a protected disclosure and "occupational detriment" must be realistic and fairly close.

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20.

As a result of all of the above considerations I am of the view that the Applicant has not made out a case for an interim interdict, and accordingly the application is dismissed with costs, including costs of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

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Annexure "GB13"

GB13

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY

10/2/4/13/3-P24/2016

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NOLLE PROSEQUI CERTIFICATE IN TERMS OF SECTION 7(2)(a) OF ACT 51 OF 1977

I, **GEORGE DICK BALOYI** , Acting Director of Public Prosecutions Gauteng Division, Pretoria, in terms of section 7(2)(a) of Act 51 of 1977, hereby certify that I have considered all the statements and affidavits on which a charge of Kidnapping/Assault/Intimidation is based, as contained in the case docket, Brooklyn Cas 790/10/2016 and that I decline to prosecute Brigdier N Xaba,Colonel H.W. Maluleka, Lt Col S Palaza and Catain MF Sewele at the instance of the State.

This certificate is issued to Mr Johan Daniel Vlok Symington for the crimes of Kidnapping/Assault/Intimidation.

SIGNED at PRETORIA on this 24th day of OCTOBER 2017.

ADVOCATE GD BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION:
PRETORIA

GB MJ TL GAB

ANNEXURE GB13 GB14

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY
South Africa

REF NO. 10/2/4/13/3-P24/2016

19 January 2018

Werksmans Attorneys
Private bag 10015
SANDTON
2146
IPID

Per e-mail:terasmus@werksmans.com

Dear Sir/Madam

BROOKLYN CAS 790/10/2016: MR VLOK SYMINGTON/BRIG XABA AND OTHERS
Your B Hotz/te/SYMI34640.1/#5303481v1 dated 18 January 2018 refers.

1. I acknowledge receipt of your above mentioned letter.

2. The *nolle prosequi* certificate includes all the suspects (also Mr Thabo Titi) on the charges mentioned therein or any other charges, after careful consideration of all the evidence.

Yours faithfully

ADVOCATE GD BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION,PRETORIA

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MS-245

Annexure GB 15

CONFIDENTIAL

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001, City Forum Building, 114 Madiba Street, PRETORIA
Tel: (012) 399 0000, Fax: (012) 326 0109, Email: mtsepho@ipid.gov.za

By Hand

23 February 2018

The National Director of Public Prosecution
Adv. S Abrahams
NATIONAL PROSECUTING AUTHORITY
VGM BUILDING
123 Weslake Avenue
Weavind Park
SILVERTON
0184

RE: REQUEST FOR INTERVENTION

Your letter dated 19/12/2017 refers, copy attached for easy reference.

IPID would like to respond as follows:

1. Defeating the Ends of Justice against General Phahlane (Kameeldrift, CAS 123/11/2016)

1.1 We still do not agree with your decision not to prosecute and we question the rationality of this decision. IPID strenuously object to your assertion that we abdicated our responsibility to investigate this matter to a private individual.

1.2 This assertion is exactly what is alleged by General Phahlane and the Mabula Team. The NDPP by perpetuating same already indicated bias, without taking into consideration IPID's position into these allegations. IPID take umbrage with the NDPP's position in this regard and request that the NDPP issue a *nolle prosequi* certificate.

2. Investigation against former Acting Executive Director, General Kgamanyane (Pretoria Central CAS 868/11/2016)

We also do not agree that there is no case to answer and we question the rationality thereof. We have however taken note of your decision and request that you issue a *nolle prosequi* certificate.

OMS.

MLSB

3. **Torture investigation against the Mabula Team:**
(Kanana CAS 188/01/2010)
(Kanana CAS 222/01/2010)
(Kanana CAS 86/06/2010)
(Klerksdorp CAS 94/04/2008)
(Mogwase CAS 91/04/2008)
(Potchefstroom CAS 175/04/2008)
(Jouberton CAS 07/04/2008)
(Orkney CAS 05/04/2008)

3.1 While we appreciate that Ismael Dawood and Sememela Kulumela have been charged, we still do not understand why other accused members were not charged.

3.2 The office of the DPP, under the direction of Adv. Mzinyathi to Adv. Mrwebi, decided to prosecute 7 members of the Mabula Team and even issued J50 warrants of arrest in respect of all the accused. Find attached the DPP minute dated 07/10/2010 as well as the warrants of arrest marked Annexure "A" and "B1-7".

3.3 The case was only withdrawn because the prosecutor at the time indicated that they were awaiting the NDPP decision for centralization.

3.4 After consultation with witnesses in April 2017, Adv Van der Westhuizen instructed IPID investigators to obtain further statements from witnesses as she was of the view that General Mabula must be added as an accused. (See attached statements marked "C1 and C2")

3.5 The question that remains unanswered is what happened to influence the decision not to prosecute the other five suspects, as the evidence remained the same if anything there were additional statements obtained as per Advocate Van Der Westhuizen instruction to enable NPA to add General Mabula as an accused.

3.6 The question is, was Adv. Mzinyathi and Adv. Mrwebi's decision reviewed by the Acting DPP, Adv. Baloyi or was it reviewed by you as the NDPP. Did the NDPP receive representations in this regard and if so why was IPID not informed of such.

3.7 From our stand point the decision not to prosecute the other accused and not to add General Mabula as an accused is irrational. However, if your position remains the same, we request a

nolle prosequi certificate in respect of the other 4 accused not charged, as Captain Maano is now deceased.

4. **Investigation against the Mabula Team on charges of Kidnapping, Defeating the Ends of Justice and Contempt of Court (Lyttleton CAS 309/02/2017 and Sandton CAS 698/02/2017)**

Your decision is noted. We disagree with it. The complainant in this matter indicated that they intend pursuing private prosecution.

5. **Investigation of Kidnapping and Assault against Brigadier Xaba and Others: Symington Matter (Brooklyn CAS 790/10/2016)**

Your decision is noted. We disagree with it. The complainant in this matter indicated that they intend pursuing private prosecution.

PERCEIVED DOUBLE STANDARDS BY SOME MEMBERS OF THE NPA IN DEALING WITH IPID CASES COMPARED TO HOW THEY DEAL WITH SAPS CASES.

6. **Decision to prosecute IPID Investigators and Issuing J175 (Kameeldrift CAS 12/01/2017)**

6.1 As you may be aware that Kameeldrift 12/01/2017was removed from the court roll in terms of section 342A(3)(c) of the Criminal Procedure Act as amended.

6.2 We still hold the view that the investigation against the IPID is for an ulterior motive, which is to interfere with IPID investigations. Our view is that continuing with this prosecution will be irrational.

6.3 There is litigation pending before the North Gauteng High Court on this matter, we reiterate our position that before any decision is taken on this matter we should be informed as we would like to make representations in this regard.

OMS

NS GB

7. Failure by AFU to launch preservation order

7.1 Your response is noted. It is true that IPID officials engaged with Adv. Molelle. However, before that engagement IPID officials dealt with AFU investigators and an Advocate who advised that the preservation order will be done in respect of the vehicle investigation only. After engagement with Adv. Molelle, he was of the view that the preservation order must be done in respect of both the vehicles and the house.

7.2 We have however moved forward on this issue in consultation with the SCCU prosecutors assigned to the case and there is an agreement on how to move forward with this matter.

8. Refusal by NPA prosecutors to assist IPID in applying for section 205 subpoenas (Kameeldrift CAS 123/11/2016)

Your response is noted. However, we are not able to engage further on this issue as we are not privy to the explanation given to you.

9. Protocol on decision making by NPA

We agree with you in this regard and hope the MoU can be concluded soon.

Mr RJ McBride
Executive Director
Date: 26/02/2018

ANNEXURE GB 16

MEMORANDUM

TO : ADV. KH VAN RENSBURG

RE : KAMEELDRIFT CAS 123/11/2016

A. INTRODUCTION

I have been requested by Adv. Van Rensburg to peruse the case docket and to make a recommendation herein, where after the DPP will be briefed. The case docket has been received without a covering letter or recommendation. The suspect in this matter is the Acting National Commissioner of SAPS and the matter is investigated by IPID. It is alleged that the suspect interfered with witnesses whilst IPID investigators were investigating a case of corruption against him.

B. SUMMARY OF CASE DOCKET

IPID has not provided either a summary or any recommendation regarding this matter. I will briefly summarize the available evidence.

A1. MANDLAKAYISE MAHLANGU

- He is a senior investigator stationed at IPID and is currently investigating IPID caseno. CNN 2016030085 relating to allegations of corruption against the Acting National Commissioner of SAPS, Lt. General Phahlane.
- One of the allegations relates to the financing of the residence of Phahlane namely Erf 53, Sable Hills Waterfront Estate, near Kameelfontein.
- On 9 November 2016 Mahlangu, Temane Bibanang (also an IPID member) met up with Paul O'Sullivan (the complainant) and Sarah-Jane Trent (an attorney working for the complainant). The complainant had indicated that he might be able to "get hold of crucial evidence" and was invited by Mahlangu to assist in the investigation.
- The group departed to Sable Hills and was initially refused entry by security. Eventually they were let in and escorted to the Home Owners Association Offices.

MS GB

- At the HOA offices, they met Chris Jooste, the estate manager.
- O'Sullivan "knew exactly what evidence might be available" and "was able to convince Jooste to show us the relevant evidence, being the HOA concerning the House."
- The file was then perused, seemingly by O'Sullivan and Mahlangu.
- Jooste was not able to inform them who the contractor was.
- O'Sullivan then established the identity of the contractor as being Frikkie Terblance. His cellphone number was obtained and it was decided that O'Sullivan would phone him to set up a meeting. The meeting was duly set up and the group departed. Jooste was informed to keep the information private and confidential.
- The group met up with Terblance at "Klein Winnertjies" nursery school in Sinoville, Pretoria. The discussion with Terblance was recorded by Trent and he was warned that it was a serious offence if he was to alert the subject of the investigation thereof.
- On 17 November 2016 there was a meeting at the IPID offices and O'Sullivan alleged that both Phahlane and Terblanche may have committed defeating the ends of justice.
- Trent called Jooste and informed her that he was phoned by Phahlane informing him not to co-operate with IPID.
- Mahlangu then phoned Terblanche on his cellno. 082 781 6899.
- Terblanche intimated that he regularly phoned Phahlane on cellno. 082 778 9666 and stated that he was not coming for any further interviews at IPID.

A2. CHRIS JOOSTE

- He is the estate manager and confirms the meeting as described by Mahlangu.
- He furnished the group with the file pertaining to the house of Phahlane and made copies of certain documents.
- On 16 November 2016 (12:49) he received a phone call from Phahlane on cellno. 082 339 7910. The call came from no. 082 778 9666.
- The alleged conversation is contained on para. 4.1 – 4.4 of his affidavit. In summary it is alleged that Phahlane told him not to co-operate with IPID and instructed security not to allow anyone access to his house.
- As a result of this call, the witness did not make further copies for IPID of the HOA file and was subsequently served with a formal notice to comply.

A3. SARAH-JANE TRENT

MS GB

- She confirms that she was present and the meeting with Terblanche and that she recorded the interview, seemingly without Terblache knowing thereof.
- The conversation was transcribed and is Annexure "A" to her affidavit.
- From the transcription it is clear that O'Sullivan mainly interviewed Terblanche and not IPID. The conversation relates to the work and payment done for Phahlane by Terblanche.

A4. PAUL O'SULLIVAN

- He states that he is the complainant in the corruption matter alluded to in A1.
- The affidavit contains various averments and annexures not relevant to this charge.
- In as far as it is relevant, it corroborates the version of A1, A2 and A3.
- It is also stated that he previously (par. 5) attended the house of Phahlane and took photographs thereof.

A5. ABRAM TEMANE BINANG

- He is also a member of IPID and a colleague of A1.
- His affidavit corroborates that of A1 in all material respects.

A6. SARAH-JANE TRENT

- This is an additional affidavit of A3.
- The affidavit corroborates A1 in as far that the witness called Jooste after the allegation defeating the ends of justice surfaced.
- Phahlane allegedly said to Jooste : "... instructed Jooste not to give any information to the IPID whatsoever as this was Phahlane's "personal information."

A7. FREDERIK GERHARDUS TERBLANCHE

- He confirms the interview between himself and the group as stated in A1.

MS GB

- On 14 November 2016 he decided to call Phahlane to inform him about the said interview, Phahlane replied by stating that he was "not guilty."
- On 16 November 2016 he again phoned Phahlane and informed him that "those people wants my bank statements", Phahlane replied by stating that he was in Mpumalanga and he will later arrange a meeting with Terblanche.
- No further communication occurred between Phahlane and Terblanche after the said phone call.

A8. FREDERIK JOHANNES JACOBUS VAN DER WALT

- He is the security manager at Sable Hills Waterfront Estate.
- On 16 November 2016 he was informed by a security guard, Elvis Mukhasi, that Phahlane instructed him (Elvis) that no person is allowed to go to his residence.
- Van der Walt then informed Jooste, the Estate Manager thereof.

A9. ELVIS MUKHASI

- He confirms the affidavit of A8 pertaining to the instruction received from Phahlane.

A10. DOES NOT APPEAR IN CASE DOCKET

A11. CELLPHONE RECORDS

- This is a voluminous record of cellphone records without any accompanying affidavit.
- It appears to relate to the cellphone contact between Phahlane and Jooste and Phahlane and Terblanche.

A12. SUPT. LEENDERT JACOB MEIJER

WC GB

- He is a member of SAPS and was previously RICA agent for SAPS.
- He confirms that the cellphone number 082 778 9666 is currently issued to Phahlane.

A13. CEDRICK MTHOKOZISI NKABINDE

- He is a member of IPID and the investigator in this matter.
- The affidavit explains the relevance of the cellphone communication.
- It also states that Phahlane was unwilling to furnish a warning statement.
- The investigator is of the view that there is a strong prima facie case against Phahlane and requests that a summons be issued against him

C. POSSIBLE OFFENCES COMMITTED IN TERMS OF AVAILABLE EVIDENCE

The following offences may have been committed:

i. Contravention of Section 33 of the IPID Act 1 of 2011 which states that:

"33 Offences and penalties
(1) Any person or private entity, who interferes, hinders or obstructs the Executive Director or a member of the Directorate in the exercise or performance of his or her powers or functions, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.
(2) Any member of the Directorate who wilfully discloses information in circumstances in which he or she knows, or could reasonably be expected to know, that such a disclosure will or may prejudicially affect the exercise or the performance by the Directorate of the powers and functions, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
(3) Any police officer who fails to comply with section 29 is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
(4) Any member who fails to make disclosure in accordance with section 25 (2) *(a)*, or fails to withdraw in terms of section 25 (2) *(b)*, as the case may be, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
(5) Any person who pretends to be an investigator in terms of this Act, is guilty of an offence and liable on conviction to a fine or to imprisonment for period not exceeding two years."

MS GB

It is evident that neither Phahlane nor Terblanche contravened Section 33(2) of the Act, as they are not members of IPID. Sections 33(3) – (5) are also not relevant in this matter.

Section 33(1) of the Act may have been contravened, if the evidence establishes that Phahlane or Terblanche "interfered, hindered or obstructed" a member of IPID in the performance of his or her duties.

In terms of Section 24 of the Act, an investigator of IPID has wide powers and may exercise the same powers as provided for a police officer in terms of the Criminal Procedure Act.

Ii. Defeating Or Obstructing The Course Of Justice

The learned author Snyman Criminal Law 6th Ed. defines the offence as:

"The crime of defeating or obstructing the course of justice consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice."

It is also important to draw a distinction between "defeating and obstructing":

"There is a difference between "defeating" and "obstructing" the course of justice. The latter connotes something less than the former. A person can be found guilty on a charge of defeating the ends of justice only if it is proved that justice has in fact been defeated. This will be the case where it is proved that an innocent person has been convicted or a guilty one discharged or, in a civil case, an order has been made which would not have been made if the wrongful conduct had not taken place.
Because it is usually difficult to prove that the course of justice has in fact been defeated, it is customary to charge conduct falling within the ambit of this crime as defeating or obstructing the course of justice (or attempting to do so). In charges of "defeating or obstructing the course of justice" or of "attempting to defeat or obstruct the course of justice" it is not necessary that the ultimate verdict should be one of defeating only or of obstructing only (or attempting to do either of these). In other words, a charge of "defeating or obstructing the course of justice" (or attempting to do so) is one of a single offence, not one involving two distinct alternative offences.
The course of justice can be obstructed in many ways, for example, where a trial has to be delayed or postponed, or where the police or prosecution authorities are made to waste time and energy investigating the wrong charge or the wrong person."

It is evident that the course of justice has not been defeated *in casu*, but that the alleged actions of Phahlane or Terblanche **may** amount to obstructing the course of justice.

The following remark is appropriate in this context:

"If a person, knowing that police investigations are based on a suspicion that a crime may have been committed, does acts which obstruct the police in their investigations with the intention of doing so, it should, in the light of modern developments in the

MS GB

administration of justice, be no defence for the accused to plead that he never foresaw the possibility of a prosecution and that his motive for the intended obstruction was purely to harass the police and not to prejudice the end result of the investigation."

Vide: S v Greenstein and another 1977 (3) Sa 220 (Ra)

D. EVALUATION OF AVAILABLE EVIDENCE

1. No warning statement has been obtained from Phahlane, as according to A13, he refused to do so. It is noted that Phahlane convened a press-conference yesterday wherein he denied the allegations. Copies of media reports have been placed in the office file.

2. It is evident at this stage that Terblanche has been treated as a witness by IPID and not as a suspect due to the fact that a witness affidavit has been obtained from him. Although he was warned during the meeting of 9 November 2016 not to do so, his calls to Phahlane in my view is not an offence. The leaking of information in terms of Section 33 of the IPID Act is only an offence when done by a member of IPID. Similarly I am of the view that his actions do not amount to a contravention of Section 33(1) of the Act or defeating or obstructing the course of justice. In any event the only version as to what transpired in the phone calls between Terblanche and Phahlane came from Terblanche and he incriminated himself in his statement. No warning was ever given to him in this regard (As required by Section 24(4)(b) of the IPID Act), such evidence would therefore in any event be inadmissible against him in terms of Section 24(5) of the IPID Act. According to Terblanche's affidavit (A7), he is the person that twice contacted Phahlane. Nowhere in the said affidavit is it alleged that Phahlane requested him to interfere with the investigation in any manner.

3. The main issue to be determined therefore is whether the following alleged actions by Phahlane amount to an offence:

3.1 The telephone call to Jooste on 16 November 2016 whereby he allegedly instructed Jooste not to give any documents pertaining to him or his house to any investigators (see A2). Jooste informed Trent that Phahlane told him not to give any information to IPID as this is Phahlane's "private information (See A6). There is therefore a minor discrepancy as to what Phahlane exactly told Jooste. As a result of Phahlane's alleged actions, Jooste did not furnish further drawings and documentation to IPID as previously agreed. Jooste has subsequently been issued with a "formal notice" to furnish the further documents.

3.2 The instruction given to A9 relating to the refusal of access to any person to his (Phahlane's) house.

4. In my view the following factors need to be considered carefully in deciding this matter:

MP GB

4.1 On O'Sullivan's own version it is evident that he has come to the conclusion that Phahlane is corrupt and ought to be prosecuted (See A4 and the various annexures).

4.2 It is further stated by O'Sullivan that he had previously entered Sable Hills to take photographs of Phahlane's house. On what legal basis a private person, who has no investigative powers in terms of the Criminal Procedure Act, SAPS Act or IPID Act, was allowed entry is unclear to the writer.

4.3 It appears that the investigation in this matter was mainly conducted by O'Sullivan and not by IPID, a few examples are the following:

4.3.1 According to A1, "O'Sullivan thought he might be able to get hold of crucial evidence...". Furthermore it is stated in A1 that "O'Sullivan knew exactly what evidence might be available and was able to convince Jooste to show us the relevant evidence." It is respectfully submitted that it therefore appears that O'Sullivan effectively took over the investigation in this matter and had insight into the HOA file. Yet again it is unclear on what legal basis access to these documents was provided to a private person.

4.3.2 The same modus operandi was followed (A1 para. 5) in establishing the identity of the contractor.

4.3.3 The interview conducted with Terblanche (Transcription to A3), was largely conducted by O'Sullivan and not by the IPID investigators. This is again in my view wholly irregular for the members of IPID to have allowed this to happen. O'Sullivan even informs Terblanche that it would be easier if he provides his bank statements to avoid the usage of Section 205 subpoenas. (page 7 of transcription).

4.3.4 It also appears that the interview with Terblanche was recorded without his consent. Although this is not a decisive issue, it yet again in the writer's opinion is indicative of a certain modus operandi that has been followed to obtain evidence against Phahlane at all costs. (See the RICA 70 of 2000, Section 4(2) for instances where a law enforcement official may record a communication without a warrant). This information was also brought to Terblanche's attention at a later stage when he did not want to attend a further meeting (See A1, para. 10).

4.4 At no stage did IPID obtain a search warrant or a Section 205 subpoena in terms of the Criminal Procedure Act. It appears that the persuasive skills of O'Sullivan were used to obtain access to these documentation.

5. The access to the documentation that was granted to O'Sullivan, is in the writer's opinion wholly irregular and taints the investigation that was conducted on 16 November 2016. The manner which the investigation was handled is a clear violation of Phahlane's right to privacy in terms of Section 14 of the Constitution of the Republic of South Africa.

MS GB

6. Taking into account the abovementioned factors, together with the available evidence, the writer therefore comes to the following conclusions:

6.1 It appears common cause that Terblanche informed Phahlane pertaining to the meeting that he had with A1 and the other role players. It would be evident that Terblanche would also inform him of the participation of O'Sullivan, a private person in the investigation. It is further common cause that at that stage Phahlane would have been aware of the various allegations that had been levelled against him by Phahlane.

6.2 It is submitted that Phahlane's subsequent conduct in instructing Jooste not to co-operate with IPID, was not unlawful, especially taking into account the fact that IPID allowed a private person access to confidential information relating to the house of Phahlane. Even if it can be argued that his conduct was unlawful in this regard, there is insufficient evidence to warrant the interference that he acted with the necessary *dolus* in acting in the manner that he did.

6.3 Phahlane did not threaten Jooste or instruct him to hide or destroy any evidence. All the information that IPID required could easily have been obtained by applying for a search warrant and/or a Section 205 subpoena.

6.4 The allegation that the instruction that Phahlane gave to security at the Estate not to allow any access to his house amounts to an offence, can be dismissed out of hand. The residence of a person is sacrosanct and any intrusion can only be done in terms of legal procedures, which in the writer's opinion was not done *in casu*. The fact that O'Sullivan previously photographed the house of the Commissioner of SAPS and e-mailed it to him was in the writer's opinion further illegal conduct.

E. CONCLUSION

7. The writer is therefore of the opinion that taking into account the factors supra 4 – 6 that there is not a reasonable prospect of a successful prosecution in this matter.

8. Consequently it is submitted that the docket be closed as "*nolle prosequi*".

PW COETZER
STATE ADVOCATE
2 DECEMBER 2016

MS GB

ANNEXURE GB 17

GB17

GD. Baloyi

From: GD. Baloyi <gdbaloyi@npa.gov.za>
Sent: 07 April 2015 01:01 PM
To: GD. Baloyi
Subject: Fw: Re: Reguest for new investigative guidelines as per our discusion

---

On 2015/03/10, at 18:15 GD. Baloyi <gdbaloyi@npa.gov.za> wrote:

Dear Mr Khuba
It appears that you misunderstood me.There is not yet a final decision, I was debating various senarios with you as the i/o and getting to understand the case.Once a decision is reached at the appropriate level, it will be communicated to you through correct channels.I will send you the instruction regarding Vodacom when I am back at the office on Friday, regards, george

---

On 2015/03/10, at 11:53 AM, IKhuba@ipid.gov.za <IKhuba@ipid.gov.za> wrote:

Good day Adv. Baloyi,

On the 23 February 2015, you called me and advised me that you have been seized with the responsibility to decide and/or prosecute the investigations by the IPID against Lt. General Dramat and Others. In our discussions you indicated that, based on the case docket we have presented to the DDP, there is no way that you will charge and prosecute Generals Dramat and Sibiya.

However, on the 3 March 2015, I consulted with you with our Litigation and Advisory Services Mr. Maoka, you stated that you changed your decision and have now decided to prosecute General Dramat, which we accept is your prerogative as a Prosecutor. Further, in the same meeting you indicated that there are further investigations that must be conducted and you will issue a minute with instructions about which investigations you wanted us to conduct.

We just wish to remind you that we are awaiting the said minute in order to enable us to continue and finalize the investigations. Kindly advice when same should be expected.

Mr, Khuba H.I.
Provincial Head
IPID: Limpopo
Tel: 015 291 9800
Cell no: 084 7022 741
Email: ikhuba@ipid.gov.za
Fax no: 015 295 3409

GB. MS GB

ANNEXURE GB18 GB 18

National Prosecutions Service
Director of Public Prosecutions
North Gauteng - Pretoria

The National Prosecuting Authority of South Africa
Igunya Fikelelo Lobetshutshisi boMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

TO : ADVOCATE S. MZINYATHI
DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION,PRETORIA

FROM : ADVOCATE G D BALOYI
DEPUTY DPP,GAUTENG DIVISION,PRETROIA

RE : COMPLAINT BY MESSRS MAOKA AND KHUBA REGARDING A MEMO FOR FURTHER INVESTIGATION IN DIEPSLOOT CAS 390/7/2012

DATE : 9 APRIL 2015

PRETORIA

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Dear advocate Mzinyathi

1. The NDPP memo with reference 10/2/4/13/3-P1/2015 dated 31 March 2015 refers.

2. I assisted in reading the above mentioned docket. I am duly aware of the Code of Conduct for members of the NPA as well as United Nations Guidelines on the role of prosecutors. One of the fundamental requirements of the Code is for a prosecutor to institute a prosecution only when a case is well founded, based upon reliable, credible and admissible evidence. It was with this goal in mind that I telephoned the investigating officer in this case, Mr Khuba, on 23 February 2015 to get to grips with his impression on the reliability and credibility of the evidence *in casu*.

3. I had broken the back of the evidence in the docket at that stage and wanted to gauge whether my understanding of the case is at par with his, as he had lived with the case since its inception. In particular I wanted to gain an understanding of his assessment of the credibility and reliability of the eye/main witnesses and the documentary evidence. During the telephone conversation, he mentioned that they had obtained the opinion of advocate Barry Roux SC and I might have probed him on what the view of counsel was on some of the issues that bothered me at that stage. We scheduled to meet on 3 March 2015 at our offices at 9h00. > para 5.1

4. Mr Khuba then arrived with Mr Maoka on the appointed day. I could not immediately comprehend the need for Mr Maoka's presence, but after exchanging pleasantries he mentioned that he now works for IPID. Since he is an old colleague, I though his input might be valuable. However, it immediately became clear to me that he was raising irrelevant points and causing us to digress. I had to get the

MS GB TC GM

consultation with Mr Khuba back on track several times. In hindsight, it appears that he came to eavesdrop, constantly maintaining that there was no case against Lt- General Dramat.

5. I get the distinct impression that both Messrs Khuba and Maoka misunderstood the consultation process and perhaps were also in a different frame of reference. I put various scenarios to Mr Khuba, to assess how strong and reliable the evidence was should that scenario be followed through in the decision making process on prosecution. This is a normal process that is followed with seasoned detectives, they give you more insight into the case. When various scenarios and the evidence around them are canvassed, it does not mean that any decision has been reached thereon, it is merely playing devil's advocate and it refines the decision making process.

6 The consultation stretched into the lunch hour and I then went to the bathroom and bumped into the DPP along the way. I mentioned to him that I am consulting with the IPID officials. I conveyed to the IPID officials that I met the DPP in the corridor and told him of their presence. When I was seeing them off, I told them the final decision rests with the DPP. Reference to biting the bullet would have been made in the context that in assessing the evidence, we do so objectively and dispassionately, based solely on the admissible evidence.

7. I did tell them that I will, at a later stage, compile a list of all the outstanding evidence that need to be finalized, should there be a prosecution. I made it to clear that some of the outstanding investigation is not necessary for a decision to be taken whether or not to prosecute. I told them that the issues that form the subject matter of outstanding investigation are the loose ends that will need to be tied before the trial commences, should a prosecution be instituted.

8. Some of the outstanding issues pertain to the cell-phone evidence, and were already identified by my colleague, advocate Mosing to the investigating team in February 2014. I attach his memo dated 14 February 2014, wherein he states at paragraph 6.3 that: "The cellphone evidence does not corroborate his(General Sibiya's presence) during the operations. This can be looked at again more closely after an expert witness has been procured to analyse the cellphone data. **This could not be done by the time of writing this report despite it being pointed out to the investigating team.**"(own emphasis). So the investigating officer knew for more than a year about the cell-phone evidence, but he took no steps to procure it. I am startled that he is now making it to look urgent. Such evidence is obtained on the basis of a section 205 of the CPA(I explained the procedure to Mr Khuba) and can take up to several weeks to procure and analyse. The prosecutorial decision could not wait until then as the matter had become urgent. In fact already during our telephone conversation I asked him to obtain some outstanding statements in preparation for our meeting on 3 March 2015, but he came without those statements.

MS GB CABI

9. I went on a three day conference at Emperor's Palace from 10-12 March 2015 and was swamped with work when I came back and had to prioritize urgent matters. I was still intent on compiling a comprehensive list of the outstanding investigation as per my notes and dispatch them to the investigating officer at the appropriate time.

10. Whilst at the conference, I received an e-mail from Mr Khuba on 10th March, to which I responded. I attach the e-mail correspondence. The matter was referred to the NDPP on 13 March 2015 and I felt it would be appropriate to await his decision first. I am aware of the duty that the Code of Conduct and UN Guidelines imposes on prosecutors to deport themselves with dignity and integrity at all times and furthermore to co-operate with the police. I have not in the least deviated from my professional ethics and will not.

ADVOCATE GD BALOYI
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION, PRETORIA

GB MS 5AB

ANNEXURE GB19

GB19

National Prosecutions Service
Director of Public Prosecutions
North Gauteng - Pretoria

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South Africa

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INTERNAL MEMORANDUM

TO : **MR M. NXASANA**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
NATIONAL PROSECUTING AUTHORITY

FROM: **ADV S. MZINYATHI**
DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION,PRETORIA

DATE : **13 APRIL 2015**

RE : **COMPLAINT BY IPID OFFICIAL REGARDING OUTSTANDING INVESTIGATION IN DIEPSLOOT CAS 390/07/2012**

Dear NDPP

1. Your evenly numbered communication dated 31 March 2015 refers.

2. I enclose herewith, a report by advocate Baloyi of my office in response to the complaint.

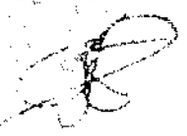
3. After reading the docket I handed it over to advocate Baloyi for his attention. Advocate Baloyi gave me regular feedback as he was working through the docket. I was not involved in the consultations with the investigating officer.

4 Advocate Baloyi is an experienced senior Deputy Director of Public Prosecutions, and I find the insinuation by the IPID gentlemen that I might have influenced him when he was working on the docket as insulting, because that did not happen.

5. I trust that you find this in order

GB MF SAB

Kind regards



ADVOCATE S. MZINYATHI
DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION, PRETORIA

GB MC 612

SEQ 33/2020-240

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PROTOCOL

ON

EXTRADITION

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TABLE OF CONTENTS

PREAMBLE 1

ARTICLE 1 DEFINITIONS 2

ARTICLE 2 OBLIGATION TO EXTRADITE 3

ARTICLE 3 EXTRADITABLE OFFENCES 3

ARTICLE 4 MANDATORY GROUNDS FOR REFUSAL TO EXTRADITE 4

ARTICLE 5 OPTIONAL GROUNDS FOR REFUSAL 5

ARTICLE 6 CHANNELS OF COMMUNICATION AND REQUIRED DOCUMENTS 6

ARTICLE 7 AUTHENTICATION OF DOCUMENTS 7

ARTICLE 8 ADDITIONAL INFORMATION 7

ARTICLE 9 SIMPLIFIED EXTRADITION PROCEDURE 8

ARTICLE 10 PROVISIONAL ARREST 8

ARTICLE 11 CONCURRENT REQUESTS 9

ARTICLE 12 DECISION ON A REQUEST 10

ARTICLE 13 SURRENDER OF A PERSON 10

ARTICLE 14 POSTPONED OR CONDITIONAL SURRENDER 10

ARTICLE 15 SURRENDER OF PROPERTY 11

ARTICLE 16 RULE OF SPECIALTY 11

ARTICLE 17 TRANSIT 12

ARTICLE 18 EXPENSES 13

SBMS

ARTICLE 19 RELATIONSHIP WITH OTHER TREATIES..... 13
ARTICLE 20 SETTLEMENT OF DISPUTES 13
ARTICLE 21 WITHDRAWAL 14
ARTICLE 22 AMENDMENT 14
ARTICLE 23 SIGNATURE... 14
ARTICLE 24 RATIFICATION 14
ARTICLE 25 ENTRY INTO FORCE 15
ARTICLE 26 ACCESSION 15
ARTICLE 27 DEPOSITARY 15

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PREAMBLE

We, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of the Congo
The Kingdom of Lesotho
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

NOTING with concern the escalation of crime at both national and transnational levels, and that the increased easy access to free cross border movement enables offenders to escape arrest, prosecution, conviction and punishment;

CONVINCED that the speedy integration amongst State Parties in every area of activity can best be achieved by seeking to create and sustain within the Southern African Development Community, such conditions as shall eliminate any threat to the security of our people;

DESIRING to make our co-operation in the prevention and suppression of crime more effective by concluding an agreement on extradition;

BEARING in mind that the establishment of a multilateral agreement on extradition will greatly enhance the control of crime in the Community;

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HEREBY AGREE AS FOLLOWS:

ARTICLE 1

DEFINITIONS

1. In this Protocol, terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.

2. In this Protocol, unless the context otherwise requires:

"confiscation"	means, a permanent deprivation of property by order of a court or other competent authority and includes forfeiture where applicable;
"offence"	means a fact or facts which constitute a crime under the laws of State Parties;
"property"	means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;
"Requested State"	means a State being requested to extradite or to provide assistance in terms of this Protocol;
"Requesting State"	means a State making a request for extradition or assistance in terms of this Protocol;
"sentence"	means any penalty or measure imposed or pronounced by a court of competent jurisdiction as a result of a criminal conviction;
"State Party"	means a Member State which has ratified or acceded to this Protocol;
"Third State"	means any State other than the Requested State or Requesting State.

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ARTICLE 2

OBLIGATION TO EXTRADITE

Each State Party agrees to extradite to the other, in accordance with the provisions of this Protocol and their respective domestic law, any person within its jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence.

ARTICLE 3

EXTRADITABLE OFFENCES

1. For the purpose of this Protocol, extraditable offence are offences that are punishable under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty. Where the request for extradition relates to a person wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition may be refused if a period of less than six months of such sentence remains to be served.

2. For the purposes of this Article, in determining what constitutes an offence against the laws of the Requested State it shall not matter whether:

   (a) the laws of the State Parties place the conduct constituting the offence within the same category of offence or describe the offence by the same terminology; and

   (b) the totality of the conduct alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the State Party, the constituent elements of the offence differ.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the Requesting State.

4. An offence is extraditable whether or not the conduct on which the Requesting State bases its request occurred in the territory over which it has jurisdiction. However, where the law of the Requested State does not provide for jurisdiction over an offence in similar circumstances, the Requested State may, in its discretion, refuse extradition on this basis.

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5. Extradition may be granted pursuant to the provisions of this Protocol in respect of any offence provided that:

   (a) it was an offence in the Requesting State at the time of the conduct constituting the offence; and

   (b) the conduct alleged would, if it had taken place in the Requested State at the time of making the request for extradition, have constituted an offence against the law of the Requested State.

6. If the request for extradition relates to several separate offences, each of which is punishable under the laws of both State Parties, but some of which do not meet the other requirements of paragraph 1, the Requested State may grant extradition for such offences provided that the person is to be extradited for at least one extraditable offence.

ARTICLE 4

MANDATORY GROUNDS FOR REFUSAL TO EXTRADITE

Extradition shall be refused in any of the following circumstances:

(a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;

(b) if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;

(c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;

(d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;

(e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason , including lapse of time or amnesty;

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(f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and

(g) if the judgment of the Requesting State has been rendered *in absentia* and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence.

ARTICLE 5

OPTIONAL GROUNDS FOR REFUSAL

Extradition may be refused in any of the following circumstances:

(a) if the person whose extradition is requested is a national of the Requested State. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;

(b) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested State against the person whose extradition is requested;

(c) if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;

(d) if the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the Requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

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(e) if the offence for which extradition is requested is regarded under the laws of the Requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the Requested State shall, if the other State Party so requests submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested; and

(f) if the Requested State, while also taking into account the nature of the offence and the interest of the Requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

ARTICLE 6

CHANNELS OF COMMUNICATION AND REQUIRED DOCUMENTS

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties.

2. A request for extradition shall be accompanied by the following:

(a) in all cases,

(i) as accurate as possible, a description of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

(ii) the text of the relevant provision of the law creating the offence and, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

(b) if the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission;

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(c) if the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

(d) if the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of this Article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

(e) if the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence; and

(f) the documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the Requested State or in another language acceptable to that State.

ARTICLE 7

AUTHENTICATION OF DOCUMENTS

1. Where the laws of the Requested State require authentication, documents shall be authenticated in accordance with the domestic laws of the Requesting State.

2. Authentication procedures of State Parties shall be communicated to the Secretariat.

ARTICLE 8

ADDITIONAL INFORMATION

If the Requested State considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Protocol to enable extradition to be granted, that State may request that additional information be furnished within such time as it specifies.

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ARTICLE 9

SIMPLIFIED EXTRADITION PROCEDURE

The Requested State, if not precluded by its laws, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents, before a competent authority, to be extradited.

ARTICLE 10

PROVISIONAL ARREST

1. In all cases, the competent authority of the Requesting State may apply by any means which allows for a written record for the provisional arrest of the person sought.

2. A request for provisional arrest shall be sent to the competent authority of the Requested State either through the diplomatic channel or directly by post or telegraph or through the International Criminal Police Organisation (INTERPOL) or by any other means affording evidence in writing or accepted by the Requested State.

3. An application for provisional arrest shall include the following:

   (a) such information, as may be available, about the description, identity, location and nationality of the person sought;

   (b) a statement that a request for extradition will follow;

   (c) a description of the nature of the offence and applicable penalty, with a brief summary of the facts of the case, including the date and place the offence was committed;

   (d) a statement attesting to the existence of a warrant of arrest or a statement of the punishment that can be or has been imposed for the offence to which this Protocol applies; and

   (e) any other information which would justify provisional arrest in the Requested State.

4. The Requested State shall decide on the application in accordance with its laws and communicate its decision to the Requesting State without delay.

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5. (a) Provisional arrest shall be terminated if the Requested State has not received the request for extradition and supporting documents through the channel provided for in Article 6 within thirty (30) days after the arrest. The competent authorities of the Requested State, insofar as it is permitted by the law of that State, may extend that delay with regard to the receipt of the documents. However, the person sought may be granted bail at any time subject to the conditions considered necessary to ensure that the person does not leave the country; and

(b) The provisions of paragraph (a) shall be without prejudice to the right of the person so arrested to be released in accordance with the domestic law of the Requested State.

6. The release of the person pursuant to paragraph 5 of this Article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

ARTICLE 11

CONCURRENT REQUESTS

1. Where requests are received from two or more States for the extradition of the same person either for the same offence or for different offences, the Requested State shall determine to which of those States the person is to be extradited and shall notify those States of its decision.

2. In determining to which State a person is to be extradited, the Requested State shall have regard to all the relevant circumstances, and, in particular, to:

(a) if the requests relate to different offences, the relative seriousness of those offences;

(b) the time and place of commission of each offence;

(c) the respective dates of the requests;

(d) the nationality of the person to be extradited;

(e) the ordinary place of residence of the person to be extradited;

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(f) whether the requests were made pursuant to this Protocol;

(g) the interests of the respective States; and

(h) the nationality of the victim.

ARTICLE 12

DECISION ON A REQUEST

The Requested State shall deal with the request for extradition pursuant to procedures provided by its own laws, and shall promptly communicate its decision to the Requesting State.

ARTICLE 13

SURRENDER OF A PERSON

1. Upon being informed that extradition has been granted, the State Parties shall, without undue delay, arrange for the surrender of the person sought and the Requested State shall inform the Requesting State of the length of time for which the person sought was detained with a view to surrender.

2. The person shall be removed from the territory of the Requested State within such reasonable period as the Requested State specifies and, if the person is not removed within that period, the Requested State may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent either State Party from surrendering or removing the person to be extradited, it shall notify the other State Party. The two State Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of this Article shall apply.

ARTICLE 14

POSTPONED OR CONDITIONAL SURRENDER

1. The Requested State may, after making a decision on the request for extradition, postpone the surrender of a person sought, in order to proceed against that person, or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought. In such a case, the Requested State shall advise the Requesting State accordingly.

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2. The Requested State may, instead of postponing surrender, temporarily surrender the person sought to the Requesting State in accordance with conditions to be determined between the State Parties.

ARTICLE 15

SURRENDER OF PROPERTY

1. To the extent permitted under the laws of the Requested State and subject to the rights of third parties, which shall be duly respected, all property found in the Requested State that has been acquired as a result of the offence and that may be required as evidence shall, if the Requesting State so requests, be surrendered if extradition is granted.

2. The said property may, if the Requesting State so requests, be surrendered to the Requesting State even if the extradition agreed to cannot be carried out.

3. When the said property is liable to seizure or confiscation in the Requested State, it may retain it or temporarily hand it over.

4. Where the laws of the Requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the Requested State after the completion of the proceedings, if that State so requests.

ARTICLE 16

RULE OF SPECIALTY

1. A person extradited under this Protocol shall not be proceeded against, sentenced, detained, re-extradited to a Third State, or subjected to any other restriction of personal liberty in the territory of the Requesting State for any offence committed before surrender other than:

   (a) an offence for which extradition was granted;

   (b) any other offence in respect of which the Requested State and the person extradited consents to. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Protocol.

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2. A request for the consent of the Requested State under this Article shall be accompanied by the documents mentioned in Article 6 of this Protocol and a legal record of any statement made by the extradited person with respect to the offence.

3. Paragraph 1 of this Article shall not apply if the person has had an opportunity to leave the Requesting State and has not done so within thirty (30) days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the Requesting State after leaving it.

ARTICLE 17

TRANSIT

1. Where a person is to be extradited to a State Party from a Third State through the territory of the other State Party, the State Party to which the person is to be extradited shall request the other State Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other State Party is scheduled.

2. Upon receipt of such a request, which shall contain relevant information, the Requested State shall deal with this request pursuant to procedures provided by its own laws. The Requested State shall grant the request expeditiously unless its essential interest would be prejudiced thereby.

3. The State of transit shall ensure that legal provisions exist that would enable the detention of the person in custody during transit.

4. In the event of an unscheduled landing, the State Party to be requested to permit transit may, at the request of the escorting officer, hold the person for such reasonable period as may be permitted by its laws, pending receipt of the transit request to be made in accordance with paragraph 1 of this Article.

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ARTICLE 18

EXPENSES

1. The Requested State shall make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition.

2. The Requested State shall bear the expenses incurred in its territory or jurisdiction in the arrest and detention of the person whose extradition is sought, and the maintenance in custody of the person until that person is surrendered to the Requesting State.

3. If during the execution of a request, it becomes apparent that fulfillment of the request will entail expenses of an extraordinary nature, the Requested State and Requesting State shall consult to determine the terms and conditions under which execution may continue.

4. The Requesting State shall bear the expenses incurred in translation of extradition documents and conveying the person extradited from the territory of the Requested State.

5. Consultations may be held between the Requesting State and the Requested State for the payment by the Requesting State of extraordinary expenses.

ARTICLE 19

RELATIONSHIP WITH OTHER TREATIES

The provisions of any treaty or bilateral agreement governing extradition between any two State Parties shall be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. In the event of any inconsistency, the provisions of this Protocol shall prevail.

ARTICLE 20

SETTLEMENT OF DISPUTES

Any dispute arising from the interpretation or application of this Protocol which cannot be settled amicably shall be referred to the Tribunal for determination.

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ARTICLE 21

WITHDRAWAL

1. Any State Party may withdraw from this Protocol upon the expiry of twelve (12) months from the date of giving the Executive Secretary a written notice to that effect.

2. Any State Party that has withdrawn pursuant to paragraph 1 of this Article shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective but shall remain bound by the obligations under this Protocol for a period of twelve (12) months, from the date of giving notice to the date the withdrawal becomes effective.

ARTICLE 22

AMENDMENT

1. Any State Party may propose amendments to this Protocol.

2. Proposals for amendments to this Protocol may be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendments by State Parties. Such period of notice may be waived by the Member States.

3. Amendments to this Protocol shall be adopted by a decision of three quarters of all the State Parties, and shall become effective thirty (30) days after such adoption.

ARTICLE 23

SIGNATURE

This Protocol shall be signed by the duly authorised representatives of the Member States.

ARTICLE 24

RATIFICATION

This Protocol shall be subject to ratification by the signatory States in accordance with their respective constitutional procedures.

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ARTICLE 25

ENTRY INTO FORCE

This Protocol shall enter into force thirty (30) days after the deposit of instruments of ratification by two-thirds of the Member States.

ARTICLE 26

ACCESSION

This Protocol shall remain open for accession by any Member State.

ARTICLE 27

DEPOSITARY

1. The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States.

2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union (AU).

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IN WITNESS WHEREOF, WE, the Heads of State or Government or our duly authorised Representatives, have signed this Protocol.

DONE at **Luanda** this **3rd** day of **October, 2002** in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.

.....
REPUBLIC OF ANGOLA

.....
REPUBLIC OF BOTSWANA

.....
DEMOCRATIC REPUBLIC OF CONGO

.....
KINGDOM OF LESOTHO

.....
REPUBLIC OF MALAWI

.....
REPUBLIC OF MAURITIUS

.....
REPUBLIC OF MOZAMBIQUE

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REPUBLIC OF NAMIBIA

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REPUBLIC OF SEYCHELLES

.....
REPUBLIC OF SOUTH AFRICA

.....
KINGDOM OF SWAZILAND

.....
UNITED REPUBLIC OF TANZANIA

.....
REPUBLIC OF ZAMBIA

.....
REPUBLIC OF ZIMBABWE

GB21

National Prosecutions Service

Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY
South Africa

REF:10/2/4/3-1-01/2018

11 June 2018

Advocate S Mzinyathi
Acting Deputy NDPP
The Head: NPS
Private Bag X752
PRETORIA
0001

Dear Advocate Mzinyathi

RE: REQUEST FOR AN INDEPEDENT PANEL TO LOOK IN THE COMPLAINTS REGARDING THE NDPP'S DISCONTINUATION OF CHARGES AGAINST ADVOCATE N.JIBA
SILVERTON CAS 332/2/2018

The purpose of this communication is to request that an independent panel be established to look into the abovementioned complaint and to guide any investigation that might be necessary. For obvious reasons no member of staff at this office nor myself feel comfortable to work on this matter.
Your guidance will be appreciated.

Kind regards

ADVOCATE G D BALOYI
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION
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GB22

National Prosecution Service

NATIONAL PROSECUTING AUTHORITY
South Africa

Reference number: 10/2/12/3-524/2017
Enquiries: Ms R Bester

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Adv Leonard
Adv Lawy
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Adv G Baloyi
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Dear Adv Baloyi

RE: REQUEST FOR AN INDEPENDENT PANEL TO LOOK INTO THE COMPLAINTS BY MR JOHAN BOOYSEN REGARDING THE DISCONTINUATION OF CHARGES AGAINST ADVOCATE N. JIBA: SILVERTON CAS 332/02/2018.
Your 10/2/4/3-01/2018 dated 11 June 2018 refers.

I have considered your request and wish to inform you that the proposal for an independent panel to be established to guide the investigations in **Silverton CAS 332/02/2018** is not supported and can unfortunately not be acceded to. I am of the opinion that the investigations should be guided from your office and that an experienced team of a Deputy Director and Senior advocate will ably execute this task.

Once the investigations are finalised you are welcome to approach this office again as to the way forward regarding the decision making in the matter with the aim to invoke Section 22(3) of the National Prosecuting Act read with Section 111 of the Criminal Procedure Act.

Regarding **Silverton CAS 688/10/2014** which is subject to the request of Mr J Booysen for a Nolle Prosequi certificate your attention is drawn to the fact that Section 7 of the Criminal Procedure Act mandates the Director of Public Prosecutions who declines to prosecute to grant such a certificate. I am thus also in this regard of the view that you should first consider the matter and make a decision where after the way forward can be chartered.

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- The **Silverton CAS 332/02/2018** is returned herewith.

Kind Regards

ADV S MZINYATHI
ACTING HEAD NPS
DATE: 20 JUNE 2018

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GB 23

Director of Public Prosecutions
Western Cape

NATIONAL PROSECUTING AUTHORITY
South Africa

INTERNAL MEMORANDUM

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TO: **ADV. S BATOHI**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: **ADV. R J DE KOCK**
ADV. I THENGA
ADV. S RILEY
ADV. E. R MAMABOLO

SUBJECT: **RECONSIDERATION OF AUTHORISATIONS IN TERMS OF SECTION 2(1) (e) and (f) OF THE PREVENTION OF ORGANISED ACT, 121 OF 1998**

DATE: **27 JUNE 2019**

BOOYSEN AND 4 OTHERS CHARGED WITH CONTRAVENING SECTION 2(1)(f) OF THE PREVENTION OF ORGANISED CRIME ACT
BOOYSEN AND 16 OTHERS CHARGED WITH CONTRAVENING SECTION 2(1) (e) OF THE PREVENTION OF ORGANISED CRIME ACT

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PURPOSE

The purpose of this report is to provide the NDPP with an opinion as to the validity and the appropriateness of the decisions by the former National Director of Public Prosecutions, Advocate S. Abrahams, and the Acting National Director of Public Prosecutions, Advocate N. Jiba to authorize a prosecution in terms of Section 2(4) of POCA read with Section 2(1)(e) and 2(1)(f) in respect of the State versus Booysen and others.

A. BACKGROUND AND HISTORY OF THE INVESTIGATION AND PROSECUTION

1. This matter has a long history. The relevant period of the indictment involves incidents from 3 September 2008 to 4 September 2011. The case involves twenty-three (23) dockets. The State alleges in the indictment that the accused unlawfully killed 28 persons and that they were involved in a criminal enterprise that killed for reward and financial gain.

2. During September 2011, the Sunday Times published a front-page story about the Cato Manor 'hit squad'. The publication of this article resulted in an investigation by the Independent Complaints Directorate (ICD) (now IPID) and the Directorate for Priority crimes Investigations (DPCI).

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3. By January 2012, General Anwar Dramat, the Head of the DPCI, appointed Major General Mabula from North West Province and two other generals to investigate the allegations made in the newspaper. [1]

8 March 2012: First NPA meeting with IPID and HAWKS

4. On 8 March 2012, a meeting took place between the NPA, IPID and HAWKS regarding the Cato Manor investigations. Advocate A Mosing in his affidavit dated 5 May 2015 ("*Mosing Affidavit*") states that the Hawks and IPID decided to meet with the Acting NDPP to 'rope in prosecutors' to handle the matter urgently and that the prosecutors seemingly promised by the Acting DPP of KZN, Advocate Mlotshwa, '*was not materialising*'. [2] This Affidavit dated 5 May 2015 is attached hereto as Annexure "A"

5. In this meeting, they reported that there was a meeting with the Minister of Police and the National Commissioner, N Vilakazi, and the decision was to merge the two teams. According to Mosing, the IPID members and the Hawks had a joint meeting with the Minister a week before the meeting of 8 March 2012, when the Minister expressed his dissatisfaction with the slow progress made by the two investigating units, since December 2011.

6. According to the police, of the twelve cases, six were ready and they wanted Mosing to decide the six cases by the next day.

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[1] State Capture Report- testimony of Johan Wessel Booysen.
[2] DPP SG JHB office file and Mosing Affidavit dated 5.5.15.

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7. Mosing briefed the Acting NDPP, Advocate N Jiba and she mentioned to him that there would be a meeting the next day with General Mabula from the Hawks on the same matter.

9 March 2012: Second NPA meeting with ICD and HAWKS

8. This meeting was attended by Major General Mabula of the DPCI, investigators of the Independent Police Investigative Directorate, the acting NDPP Advocate Jiba, the DPP of South Gauteng, Advocate Chauke, advocates A Mosing, advocate S Maema, advocate Mathenjwa, advocate JJ Mlotshwa and advocate M Ntlakaza. A decision was made that the DPCI would assist the ICD with the investigation. A decision was also made that the prosecutors who attended the meeting would be part of the prosecution team in the matter.

9. Advocate Jiba requested the prosecutors to go to KZN on 13 March 2011 for one week, to assist the investigators with the matter. Major General Mabula was requested to arrange accommodation for the Prosecutors at a safe house in KZN.

10. The following dockets were handed over to the prosecutors at the meeting:

TONGAAT 190/03/2009,
DURBAN NORTH 67/07/2011,
DURBAN NORTH 71/07/2011,
DURBAN NORTH 69/07/2011,
KWAMASHU 698/11/2009,
HOWICK 106/09/2008,

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PINETOWN 668/05/2009, AND
KWAMASHU 629/04/2009.

The prosecution team and its management

11. At the 9 March 2012 meeting attended by the Hawks and IPID with Advocates Jiba, Mosing, Chauke, Maema, Mathenjwa, JJ Mlotswa and Ntlakaza, Mosing said that he was informed that the members present were appointed as the prosecuting team and that Maema was the "lead prosecutor" due to his experience in prosecuting in organised crime cases, particularly racketeering.

12. Subsequently, delegations and authorisations were issued to the prosecution team that was constituted as follows:

Advocate Sello Maema

Advocate Raymond Mathenjwa

Advocate Mahlubi Ntlakaza

Advocate Patience Moleko

Advocate Jabulani Mlotshwa

Advocate Pumeza Futshane

13. Mosing states that his understanding of Advocate Chauke's role was that he was "*merely to manage the team as they were mainly from his office but would not be vested with any decision making powers regarding prosecutorial decisions*

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as he indeed did not have same, as the case fell outside of his area of jurisdiction."

14. The Acting DPP: Kwa Zulu Natal, Advocate C Mlotshwa, in an affidavit dated 12 May 2015, states that he received a call from the Acting NDPP, Advocate Jiba during period January-March 2012 requesting that a matter urgently be enrolled "*due to pressure*". He indicated that he did not have prosecutors to study the dockets. A few days later he was advised telephonically by Chauke informing him that he is instructed by Advocate Jiba to send a team of prosecutors to prosecute the accused in the Cato Manor case.

15. Advocate Mlotshwa states in his affidavit that while he attended a meeting of Directors of Public Prosecutions in Pretoria on the 29 May 2012, he was requested by Advocate Chauke to attend a meeting with Advocate Jiba. At this meeting, he was told by Advocate Jiba that she received an opinion from Advocate Gerhard Nel that he (Mlotshwa) can sign delegations for the prosecutors to prosecute in his jurisdiction and that he should, in terms of this legal opinion, sign the indictment.

16. Advocate Chauke said that he could not discuss '*everything relating to the matter since he had serious security concerns and there was a possibility of the investigation necessitating even the arrest of advocates in the office of the DPP, KZN.*'

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17. Advocate Mlotshwa responded by indicating that he would only sign an indictment if it was accompanied by a prosecutor's memorandum or report detailing the evidence implicating each accused as individuals and the evidence implicating all the accused as a collective.

18. By 12 June 2012, he received an email from the P.A. of Advocate Chauke attaching a copy of an indictment only. A number of emails were exchanged regarding this between him and Advocate Chauke. From this exchange of emails, it is noted that Advocates Mlotshwa and Chauke were in confrontation with each other about the signing of the indictment and the insistence by Advocate Mlotshwa for a prosecutor's report and the refusal of Advocate Chauke to agree to provide it.

19. The Acting NDPP, Advocate Jiba and the Acting head of the NPS, Advocate Thoko Majokweni were copied on these emails but there is no indication in any of the office files that they intervened to resolve the dispute. Advocate Mlotshwa states further that his acting appointment ended on 9 July 2012, and he never had anything to do with the matter thereafter. Advocate Noko was then appointed Acting DPP: KwaZulu-Natal.

20. It is remarkable to note that this arrangement, to constitute a national team of prosecutors to assist with an investigation and conduct a prosecution in KwaZulu-Natal Province, was never formalised in writing with a National

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Directive or Memorandum by the NDPP. We did not find any written instruction in this regard, by Advocate Jiba in any of the office files provided to us.

The first racketeering application

21. On 29 August 2012, a report written by the 'Cato Manor Prosecution Team', which was signed by Advocate Maema, was sent to Advocate Chauke. It reported as follows in respect of the request for authorisation to institute a racketeering prosecution:

"*The final draft indictment was handed to Advocate Mosing at his house in Pretoria on night of Thursday 16th August 2012. We were working on correcting the description of the enterprise to include concerns that Advocate Mosing raised, relating to the SAPS as a legal entity that formed the enterprise. It is because of this close cooperation with Advocate Mosing, who kept the Acting NDPP informed of the progress at all times that we were able to get our racketeering authority on Friday, 17 August 2012.*"

22. A copy of this memorandum to Advocate Chauke is attached hereto as Annexure 'B'. It will be discussed during the evaluation of the evidence later in this memorandum. It is instructive to note, at this stage, that the memorandum was submitted to Advocate Jiba some five (5) months after the initial meeting that was held with the NPA officials and officials of the ICD and the DPCI.

MS GB

23. It is also striking that the prosecution team did not do a presentation to the Acting NDPP in support of the application for the authorisation of the racketeering prosecution, as is customary in the NPA in applications of this nature.

24. Furthermore, the Acting NDPP signed the authorisation to institute the prosecution in terms of sections 2(1) (e) and (f) of the Prevention of Organised Crime Act, on the same day that the memorandum was presented to her by Advocate Mosing. Mosing in his affidavit, described his role as follows:

24.1 He was to interact with the prosecuting team and guide them as far as racketeering issues were concerned.

24.2 He acted as the liaison between the Acting NDPP and the team.

24.3 He had to advise the Acting NDPP on developments conveyed by the team or as gleamed from his interaction with the team.

24.4 He would attend meetings with the team when compiling the application for racketeering and he contributed with advice, as he would ordinarily do in matters of this nature.

24.5 He stressed the fact that he was NOT an integral part of the prosecuting team and he DID NOT read and decide the dockets.

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24.6 He stated that he has not decided to involve any of the members of his unit because they had 'similarly close working relationships with the suspects, especially Booysen in the course of their duties regarding organised crime related matters…' (Our emphasis)

24.7 He also wanted the matter to be handled '*with due regard to the sensitive nature thereof.*'

24.8 He said that he would simply deliberate with the team on the merits of the evidence, '*mostly from a critic point of view*' (Our emphasis).

24.9 He attended the first hearing of the accused in the Durban Court merely as an observer in order to brief the Acting NDPP.

25. To the extent that Advocate Mosing says he only played an advisory and guiding role to the prosecutors and that he did not read the evidence, the absence of a proper presentation to the Acting NDPP by the prosecutors is a matter of concern. The Acting NDPP was not in a position to critically question and analyse the evidence as presented in the memorandum, since she did not engage directly with the prosecutors thereon. Mosing was not in a position to do so, since by his own admission; he had no direct knowledge of the evidence against the accused.

Setting aside of the POCA authorisations

26. On 7 May 2013, accused No 1, Johan Booysen launched an application in the High Court to review and set aside the decision by the Acting NDPP to issue the

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authorisations for racketeering as well as the decision to prosecute him on the counts confronting him in the indictment.

27. He alleged in the application that the decision to prosecute him was irrational since there was no evidence in the dockets linking him to the offences in question.

28. On 7 February 2014, the matter was argued in the KwaZulu-Natal Local Division, Durban.

29. On 26 February 2014, the High Court handed down Judgment in the matter.[3] A copy of the judgment is attached hereto marked Annexure "C"

30. "*In paragraphs 29 to 32 of the said Judgment, the Court states as follows:*

"[29] As regards the contents of the dockets, the respondents conceded in argument that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.

[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath. She says in addition, that they implicate Mr Booysen in one or more of the offences in question.

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[3] Booysen v Acting National Director of Public Prosecutions and Others 2014 2 All SA 391 (KZN)

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[31] The submission of Mr Booysen in his replying affidavit can be summarised as follows. Two of the annexures are sworn statements made under the name of one Colonel Aiyer.

These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern 'office politics' and submits that they in no way implicate him in any of the offences with which he has been charged. The second of these, in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the impugned decision was taken. The document referred to as a statement by Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen. As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[33] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate" (our emphasis).

31. The Court found *"most significantly, the inference must be drawn that none of the information upon which she says she relied linked Mr Booysen to the offences in question. This means that the documents upon which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s2(1)(e) and (f) respectively."*

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32. The Court consequently found that it is just and equitable to review and set aside the decision to issue the racketeering authorisations and the decision to prosecute Booysen. The Court in conclusion declared the impugned decisions invalid.

Events following the high court judgment

33. On 5 March 2014, an unsigned memorandum was addressed to Advocate Chauke by the 'Cato manor Prosecution team' entitled "Judgement (sic)- Booysen versus The National Director of Public Prosecutions" (This memorandum is not signed by Advocate Maema as is customary in all prior memoranda).

34. It is noted in the memorandum that outside Counsel were briefed by the State Attorney, namely Hodes SC and Manaka to represent the then Acting NDPP in the matter.

35. It is stated that '*the prosecution team, however is of the view that there were crucial concessions which were incorrectly made by our counsel during his argument: see [29] of the judgment.*'

36. In this regard, the memorandum explains as follows: '*the concession in paragraph [29] was that there are no statements in the dockets which implicated*

MS GB

the applicant in any of the offences with which he had been charged. This was an incorrect concession, as there are statements that implicate the applicant in the dockets, for instance in Howick CAS 106/09/2008, the applicant arrived at the scene in a helicopter and congratulated the members who fired shots for the job very well done. In this matter it appears that the applicant was informing the tracing unit of the whereabouts of the deceased which resulted in the deceased being located on the N3, this is made clear by the motivation for the monetary awards which was submitted by the applicant.' (Our emphasis).

37. This is the only example given by the prosecution team of evidence implicating the applicant in the offences in *Howick CAS 106/09/2008*. As will be seen later in this memorandum these statements, although they are contained in the docket, do not implicate Mr Booysen in any offence and the prosecutors statement above is misleading.

38. The High Court, in any event, made reference to the statements in the dockets where Mr Booysen is mentioned. In paragraph [25] of the judgment, the Court finds that "*of the 23 dockets, he is mentioned only in two. Of the 290 statements in all the dockets, only 3 statements even mention him.*"

39. The prosecution team in conclusion states that it does not intend to appeal the judgment since it intends to apply to the NDPP for the reissuing of the certificates.

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Noting an appeal against the high court judgment

40. Despite the view expressed by the prosecution team that it did not intend to appeal the judgment, an appeal was noted in the matter.

41. It is not clear on whose instructions this was done since there are no copies of this document or any other correspondence about the appeal in the office files that indicate this.

The appointment of Mr. Nxasana and the decision to withdraw the appeal

42. Mr Nxasana was appointed NDPP during August 2013, effective from 1 October 2013. It appears that from the outset of his tenure it was a troubling one that was fraught with difficulties[4]. A copy of the State Capture transcript of Nxasana's evidence is attached hereto as Annexure "D".

43. Mr Nxasana indicated in his evidence at the State Capture Commission that he was not given the file in the Booysen matter despite his request to Advocate Jiba to provide him with a 'hand over' report in respect of her activities as Acting NDPP.

44. He testified that after he read about the Gorvan Judgment in the Business day newspaper he requested that Advocate Jiba and the prosecution team discuss the Booysen matter with him.

[4] See evidence State Capture Commission 12 June 2019.

MS 96

45. Prior to this, he was not aware of the matter and, despite a request to do so, there was no official handover from Jiba when he was appointed NDPP.

46. At this meeting, Nxasana asked them to indicate to him the relevant evidence that points to racketeering and the relevant evidence that implicates Booysen.

47. He was surprised that they produced a mere unsigned statement of a person named DANIKAS who was in Greece and two 'twice removed' hearsay statements.

48. He convinced them that they would not succeed in appealing the Gorvan Judgment.

49. It is not clear when this meeting took place, but it was some time after his appointment as NDPP. In his affidavit, Advocate Mosing says that he was aware that a meeting took place between the prosecution team and the NDPP. He understood that the team was preparing a detailed briefing for the NDPP.

50. Mr. Nxasana also testified that he discussed the merits of the matter with Advocate Jiba and the prosecutors and made it clear that there was no evidence to justify racketeering.

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51. According to Mr. Nxasana Advocate Jiba said that she relied on the racketeering experts who she referred to as the prosecutors in the room.

52. Mr. Nxasana testified that he understood from Jiba "*that she had not had direct access or required direct access to evidence but rather relied on the opinion of others.*"

53. In conclusion, after discussion of the matter, he instructed the prosecution team to withdraw the notice of appeal, which they subsequently did.

54. It is important to note that we were not placed in possession of an office file in respect of the discussions that Mr. Nxasana had with Advocate Jiba and the prosecution team and the decision to abandon the appeal in respect of the matter.

55. We have relied on the evidence, which Mr Nxasana gave at the State Capture Commission to determine what happened in respect of the Notice of Appeal. As indicated earlier, we could also not find any documentation in the office files handed to us regarding the appeal and its withdrawal.

The appointment of Advocate S. Abrahams as NDPP

56. Mr. Nxasana vacated the Office of the NDPP on 14 May 2015. Advocate Shaun Abrahams was appointed as NDPP on 18 June 2015. During the period of Mr. Nxasana's tenure as NDPP, he gave no new authorisation for the prosecution of

Mr Booysen on racketeering charges. It is clear from his evidence at the State Capture Commission that he did not believe that there was sufficient evidence in the dockets to justify the issuing of a racketeering authorisation in the matter. During the intervening period the prosecution team did not institute a prosecution against Mr Booysen on any other charges. In the meantime, Naidoo launched an application in respect of himself and the rest of the accused charged with racketeering by Advocate Jiba to review and set aside these authorisations as well. This application was pending when Advocate Abrahams issues new authorisations against Mr Booysen and those accused who were already before the High Court for racketeering.

The second racketeering authorisation

57. On 19 August 2015, Advocate Noko, the DPP of KZN submitted a Memorandum to the NDPP, Advocate Abrahams for a 'fresh' authorisation in terms of section 2(4) of POCA against the Accused. This request attaches a Prosecution Memorandum signed by Advocate Maema on 17 August 2015, as well as other supporting documentation.

58. Advocate Abrahams indicated that he was not satisfied that there was sufficient evidence to institute a prosecution in respect of section 2(4) of POCA and requested that certain further investigation must be completed. A copy of the affidavit of advocate S Abrahams is attached as Annexure "E".

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59. A period of almost four (4) years had now elapsed since the prosecution team first became involved in the matter during March 2011.

60. On 16 October 2015, an amended Prosecution Memorandum was submitted to the NDPP for the authorisations in terms of section 2(1) (e) and (f) of POCA.

61. Advocate Abrahams was still not satisfied with this memorandum and instructed Advocate Maema and Mr Dawood Adam to travel to Greece to interview Mr Danikus, the person who was referred to in the High Court application brought by Mr Booysen against the Acting NDPP, Advocate Jiba.

62. After their return from Greece and consultation with Advocate Abrahams he issued new authorisations against the accused in terms of section 2(1)(e) and (f), on 16 February 2016.

B. LEGAL POSITION IN RESPECT OF RACKETEERING PROSECUTION

The nature of the crime of racketeering

63. Classical criminal law targets the perpetrator. The crime of racketeering as defined in POCA focuses on the *enterprise* and *objects* rather than on the perpetrator. Racketeering is a complex crime, which bears some resemblance to the common-law crime of conspiracy. It usually involves group activity.[5]

[5] Organised Crime and the Proceeds of Crime Law in South Africa – Albert Kruger (Paragraph 63 – 67 is a summary of Kruger

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64. In South Africa, for a person to be liable under section 2(1) (e) of POCA he or she must participate or be involved in at least two underlying offences listed in Schedule 1 of the Act.

65. The offence consists not in the commission of an act (such as stealing) but in the membership of an organisation (enterprise) which has been shown to have committed at least two particular offences. The focus is on the relationship between the accused, the enterprise and the pattern of racketeering activity.

Participating in the affairs of an enterprise (section 2(1) (e))

66. Participation in the affairs of the enterprise is the offence. The accused must conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. The conduct leading to conviction must be causally connected to the enterprise who participates directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity is guilty of racketeering. The accused is guilty by virtue of

(a) being involved in an enterprise (being part of the group of racketeers), and

(b) being involved in the commission of two or more offences

67. In order to determine whether the pattern of racketeering existed there are a number of factors the Court could take into consideration for example:

- The number and variety of the predicate offences.
- The length of time over which the acts were committed.

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- The number of victims the accused injured by similar acts.
- The similarity of the offences.
- The character of the unlawful activity.

68. The above factors were formulated by the American courts in cases such as ***Morgan v Bank of Waukegan 804 F 2d 970 (1986) at 975 and Jones v Lampe 845 F 2d 755 (1988) at 756-59*** to prevent the punishment of sporadic activity in terms of the RICO legislation. This is not a closed list of factors.

69. A 'pattern of racketeering activity' requires at least two acts of racketeering activity. It was held in several US cases that the mere existence of multiple acts of racketeering (*our emphasis*) may not be enough. The criteria are that the acts must "amount to or pose a threat of continued criminal activity."(See the American case of ***H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238-39 [1989]***).

70. Elements of a contravention of section 2(1)(e)'

- An enterprise existed.
- The accused managed, was employed by or associated with the enterprise.
- The pattern of racketeering activity existed.

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- The accused directly or indirectly conducted or participated in the affairs of the enterprise through a pattern of racketeering activity.'[6]

71. Managing the enterprise (section 2(1)(f))

Managing the operation or activities of the enterprise is the offence. Here the target is the manager. It must be shown that the accused occupies some kind of management position in the enterprise.

72. Elements of a contravention of section 2(1)(f)

- An enterprise existed.
- The accused managed the operation or activities of the enterprise.
- The pattern of racketeering activity existed.
- The accused knew or ought reasonably to have known that a person (the accused or another)

(a) employed by or associated with that enterprise

(b) conducted or participated in the conduct (directly or indirectly) of the affairs of the enterprise

(c) through a pattern of racketeering activity

73. When looking at the elements of the enterprise, certain characteristics become noticeable, for example, differentiation of roles or tasks; a system of command; common or shared goals or purpose; intention to profit ; continuity of personnel

[6] IBID Kruger paragraphs 70 - 72

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(failing which misjoinder will arise). It is a separate entity and apart from the pattern of racketeering activity in which it engages and, as stated above, it is the organising principle behind the events (*our emphasis*).

74. In the ***United States v Turkette 452 U.S 576 (1981),*** the Court held that the enterprise and the existence of the pattern of racketeering are distinct elements of the charge. An enterprise should therefore be established by evidence separate from that establishing the existence of a pattern of racketeering activity.

75. In ***United States v. Bledsoe***, 674 F.2d 647, 664 (8th Cir) the Court stressed that an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. This does not mean that simply the members must exist, but rather the enterprise itself exists and maintains structure.

Open-ended continuity, however, does not require that the acts span for a certain period. Rather, the racketeering acts must *"include a specific threat of repetition extending indefinitely into the future [or] . . . are part of an ongoing entity's regular way of doing business.*

76. If these factors can be proven to exist then it satisfies the requirement that there must be a relationship between the predicate offences and the enterprise. These factors mentioned would prove the requirements of 'continuity' and 'relationship' between the predicate offences and the enterprise.

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C. THE EVALUATION OF EVIDENCE CONTAINED IN THE DOCKETS

77. The evaluation of the evidence in the docket will be done in accordance with the principles of the law discussed above.

78. In evaluating the evidence on which the NDPPs, Advocates Jiba (*Jiba*) and Abrahams (*Abrahams*) relied on in finding that there are *prima facie* proof that the accused were involved in racketeering activities, reference will be made during the analysis to the racketeering authorisations in Tables 1 and 2.

79. There are some differences in the two authorisations granted by Jiba on 17 August 2012 and Abrahams on 13 February 2016.

80. In respect of Felokwakhe Dlamuka, Advocate Jiba granted authorisation in respect of him for participation in racketeering activities. On 13 February 2016, Abrahams decided not to grant any authorisation against him in respect of both sections 2(1) (e) and (f). He is therefore still an applicant in the Naidoo application in which the accused is challenging her racketeering authorisations. In his Answering Affidavit, Advocate Abrahams said this was an error and the authorisation will have to be rectified. It is not clear if this was ever done.

81. In respect of Neville Eva who is deceased, whilst Jiba granted authorisation in respect of both sections 2(1) (e) and (f), Abrahams only did so in terms of sections 2(1) (f).

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TABLE 1: *Section 2 (1) (f) racketeering authorisation*

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998	
SECTION 2(1) (f) – Managing an Enterprise	
17 August 2012	13 February 2016
BOOYSEN (ADV. JIBA) EVA OLIVIER LOCKEM VAN TONDER	BOOYSEN (ADV. ABRAHAMS) LOCKEM VAN TONDER EVA OLIVIER

TABLE 2: *Section 2 (1) (e) racketeering authorisation*

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998	
SECTION 2(1) (e) – Participation in the conduct of an Enterprise	
17 August 2012 ADVOCATE JIBA	13 February 2016 ADVOCATE ABRAHAMS
BOOYSEN (ADV. JIBA) PADAYACHEE STOLTZ MOSTERT NEL EVA (deceased) GHANESS MAKHANYA OLIVIER MKHWANAZI MDLALOSE NAIDOO LEE LOCKEM VAN TONDER SMITH CJ MCINNES MARTEM J FELOKWAKHE DLAMUKA	BOOYSEN (ADV. ABRAHAMS) PADAYACHEE STOLTZ MOSTERT NEL GHANESS MAKHANYA OLIVIER MKHWANAZI MDLALOSE NAIDOO LEE LOCKEM VAN TONDER SMITH CJ MCINNES MARTEM J

82. We also read and analysed the evidence in the twenty-three (23) dockets that the prosecution team, in their PowerPoint Presentation to Abrahams said implicated the accused in the racketeering activities. It appears based on an

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analysis of the two indictments that formed part of the documentation Jiba and Abrahams considered, that no further dockets were added or removed. Table 3 refers to those dockets. (Our emphasis)

83. We will discuss the content of the dockets and in particular some of the challenges in the investigations. In the discussion on the Racketeering Investigation, reference will be also be made to the incidents that traversed a period of four (4) years from 2008-2011. It should be noted that the bulk of the racketeering events occurred between 2008-2009 whilst in 2010 there were only three events and in 2011 two events. Durban North CAS 67/07/2011, CAS 69/07/2011 and CAS 71/07/2011 refer to one moving crime scene.

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TABLE 3: *Case dockets*

DOCKETS			
2008	2009	2010	2011
1. Berea CAS 288/05/08 2. KwaMashu CAS 116/08/08 3. Escourt CAS 34/08/08 4. KwaDukuza CAS 39/9/08 5. Howick CAS 106/9/08 6. Mandeni CAS 76/9/08 7. Umkomaas CAS 235/10/08 8. Melmoth CAS 142/11/08 9. KwaMashu CAS 314/11/08	10.Durban Central CAS 185/02/09 11.Tongaat CAS 356/03/09 12.KwaMashu CAS 629/04/09 13.Pinetown CAS 1000/05/09 14.Phoenix CAS 377/08/09 15.Rustenburg CAS 1098/9/09 16.KwaMashu CAS 698/11/09	17. KwaDukuza CAS 115/3/10 18. Esikhawini CAS 3/4/2010 19. Bhekithemba CAS 44/5/10	20.Durban North CAS 67/7/11 21.Durban North CAS 69/7/11 22.Durban North CAS 71/7/11 23.Esikhawini CAS 50/09/11

RACKETEERING CHARGES

Gorven Judgment

84. In accordance with our mandate regarding the validity of the Abrahams authorisations we considered, after the *Gorven judgment* that said that the documents Jiba relied on did not provide a rational basis for the decisions to issue the authorisations to charge Major General Booysen (*Booysen*) for contraventions of s 2(1)(e) and (f) respectively, whether the Abrahams authorisations were based on the same documents, statements or were in any way supplemented with new evidence.

85. We have already made the point that the dockets considered remained unchanged.

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86. We therefore considered whether in addition to the statements of Colonel Rajendran Sanjeevi Aiyer (*Aiyer*), Aris Danikas (*Danikas),* and Bhekinkosi Mthiyane ("Dlondlo") that were submitted in the Booysen Application as *prima facie* proof that the Applicant was involved in racketeering activities, any further statements or evidence were placed before Abrahams.

87. In the *Gorven Judgement*, the document referred to as a statement by Danikas was found to be an undated and unsworn statement and the contents thereof did not cover the period dealt with in the indictment except for one event that does not relate to Booysen. The Court also found that Aiyer's statements did not implicate Booysen in any of the offences with which he has been charged. It is therefore important to consider whether subsequently the statement of Danikas was signed and commissioned and/or supplemented and if any reliance can be placed on the statements of Aiyer.

88. In line with our mandate to determine if, any further statements and other evidence was placed before Abrahams that did not serve before Jiba, we thought it prudent to study the affidavit of Abrahams since the dockets as well as the files of the NDPP, that of the DPP SG JHB and of Advocate Mosing was unable to shed light on whether there were any formal written requests for further investigation and obtaining of other witness statements and or documents. We managed to find two letters drafted by Advocate Mathenjwa requesting that the

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investigating officer complete further investigation but it is dated 29 August 2012, and 3 September 2012, respectively.[7]

Advocate Abrahams answering affidavit

89. In respect of the above enquiry, Abrahams alleged that he had indeed called for additional information and investigations. [8]

90. He said on 27.08.2015 when the prosecution team made a presentation to him, he was not prepared to sign the POCA certificates and informed the prosecuting team that he wanted additional information and investigations. Later that day Maema and Mlotswa compiled a list of items he had requested.

91. It is important to determine what the additional information and investigation Abrahams requested and if indeed, there was compliance with his requests. Maema says in his affidavit that some of the documents on the list were later obtained and served before the NDPP.[9] A copy of the affidavit of advocate S. Maema is attached as Annexure "F"

92. Abrahams said that after he "*obtained these items, Maema amended his prosecution memorandum.*"[10] Both Abrahams and Maema in their affidavits in

[7] We found an internal Memorandum from Maema to Abrahams dated 27.8.2015 as annexure 'SM5' to Maema's affidavit that lists the additional information and investigation he required and which he was going to advance to the National Commissioner of the police (See Annexure F).
[8] See page 72, paragraph 222 of his affidavit.
[9] See paragraph 14.3. of his affidavit.
[10] See paragraph 116-117 of his affidavit.

MS GB

reference to the additional information and investigation refers to the October 2015 Memorandum.

93. It was important to study the two Prosecution Memoranda. The differences are minute and contain no new evidence.

94. Abrahams himself says in his affidavit that the "October Memo[11], *as included in the FSR, does not differ radically from the August Memo*".

95. He lists five differences between the two memoranda:

95.1 The memorandum now reflected that Cochrane was not the pilot but a crew member;

95.2 A schematic representation of the Durban Organised Crime Unit was included;

95.3 A more detailed description as to how the unit functioned was included;

95.4 The roles of the managers in the enterprise were highlighted; and

95.5 An analysis or summary of the modus operandi was included.

[11] The October Prosecution Memorandum is attached as annexure SM3 to the affidavit of Maema (Annexure F).

MS GB

96. We are of the view that these changes to the October Memorandum were merely cosmetic changes made to the memorandum based on information and evidence already in possession of the prosecution. Witness statements were supplemented to explain further aspects and this did not amount to new evidence.

97. Abrahams was still not satisfied after the October 2015 Memorandum was presented to him and instructed Maema and Advocate Dawood Adam to travel to Greece to consult with Danikas. When Maema returned, he was verbally briefed and Abrahams said that he was "*now satisfied that the Danikas statement, as now elaborated, provided material that would assist in establishing the nature, scope and modus operandi of the alleged enterprise.*"[12] (Our emphasis).

98. He further states that his "*final remaining concern-the evidence of Danikas- had been resolved. I had no reason to revisit the material that was previously placed before me.*" [13]

99. We have already concluded that the dockets remained the same and that the additional information and investigation as reflected in the October 2015 memorandum were merely cosmetic changes. It appears from the affidavit that

[12] See paragraph 132 of his Affidavit
[13] See paragraph 136 of his Affidavit

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Abrahams placed a lot of reliance on Danikas statement. It is important then to determine whether Danikas's statement contained new and additional evidence.

100. In respect of whether he had new evidence that was not before Jiba, Abrahams says the following at various stages of his affidavit:

100.1 *"I did rely upon new evidence."* [14]

100.2 While it is true that the new authorisations he issued is very similar to the Jiba authorisations, his authorisations "*were based on a significant amount of material that did not serve before Jiba.*" [15]

100.3 "*In fact there was considerable material before me when I issued my authorisations that did not serve before Jiba.*" [16] (Our emphasis)

100.4 "*What I can confirm with absolute confidence is that there served before me evidence that had not served before Jiba.*" [17] (Our emphasis)

100.5 "*By this time there was new material that had not served before Jiba that strengthened the case against the Applicants.*" (Our emphasis)

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[14] See paragraph 96, paragraph 338
[15] See pages 66-67, paragraph 190
[16] See page 91, paragraph 313
[17] See page 91, paragraph 315

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101. It is therefore important to look exactly at what Abrahams described in his affidavit as new evidence and this is found at page 52 of Advocate Abrahams affidavit where he describes the basis for his decision to issue the authorisations as follows:

101.1 The input of Maema in his October Memo;

101.2 The SAPS correspondence which corroborated from the inside the basic narrative in the October Memo;

101.3 The intrinsic unlikelihood of 28 people being killed by a single relatively small unit, none being captured alive;

101.4 That in 26 out of 28 cases there were no arrest or search warrants;

101.5 The ballistic reports which cast doubt on the claim that the deceased were resisting arrest;

101.6 No officers were harmed or police vehicles damaged;

101.7 The similar fact evidence in the statement of Danikas;

101.8 Aiyer's affidavits;

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101.9 Ex-Provincial Deputy commissioner, Brown's affidavit;

101.10 The statements of Bhekinkosi Dlondlo Mthiyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') Bongani Mandla Mkhize ('Bongani').

102. The factors Abrahams considered in 101.1-6 are not new evidence and are merely his assumptions, inferences and conclusions based on existing evidence in the dockets.

103. It is therefore important to discuss the statements in 100.7-10 that he considered as part of the spectrum of statements and factors he considered as the basis for his decision to authorise the racketeering prosecutions against the accused.

Aiyer's further statements

104. Colonel Aiyer made three statements on 3 August 2012, 31 August 2012, and 13 March 2013.

105. On 29 August 2012 and 3 September 2012, Adv. Mathenjwa drafted letters with instructions to the investigating officer requesting a supplementary statement from Col Aiyer.

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106. The gist of the request for a supplementary statement focused on the operations of the Cato Manor Section and Booysen's involvement in it.

107. None of the statements implicates Booysen in any of the predicate offences except to overstate his perceived interference in his work and budget. His affidavits also contains uncorroborated hearsay. He speaks of reliable sources informing him of the fact that Booysen was on the payroll of Stanger Taxi association, but this was never investigated or the correctness of thereof ascertained. Aiyer subsequent statement smacks of fabrication of a recent nature.

108. His three affidavits failed to show at all material times that Booysen was in direct control of the Cato Manor Unit or that his managerial approach he adopted as a result of the volatile working relationship between Aiyer and his subordinates means that he was also involved in illegal activities.

109. Aiyer's credibility was questioned and he was discredited by Advocate Cassim S.C in the Booysen internal disciplinary hearing. Advocate Nazeer Cassim SC, the chairperson of the disciplinary hearing against Booysen described Col Aiyer who testified before him as a "*dismal witness in material respects…is obsessed by the notion of his own importance and his entire testimony was permeated by his political acceptability and self-importance.*"

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110. In our view, a witness should be both credible and reliable. In our view no reliance should be placed on the statements of Colonel Aiyer.

Statement of Ex-Provincial Deputy commissioner, Brown

111. Brown's statement deals with the following:

111.1 He gives an organogram of the structure of the KZN Hawks and the changes within the police structures before and after 2007.

111.2 Brown elaborates on the challenges in the relationship between Booysen and Aiyer and said that because of the volatile relationship between Aiyer and the members of the SVC Durban Organised Crime Unit, Booysen was forced to step in as Aiyer's superior.

111.3 It shows that between 2008 – 2010, the period of the indictment, that Booysen reported to Major General Brown, Major General Masemola and Lt General Ngidi, as the Provincial Commissioner of the SAPS in KZN. It further shows that the commander of the SVC Durban Organised Crime (Cato Manor Unit) was Colonel Olivier who reported in turn to Col Aiyer.

111.4 Brown's statement in fact, shows that it is incorrect to single Booysen out as being responsible for the Cato Manor Unit when there were two Deputy Provincial Commissioners, namely, Masemola and Brown who were also in positions of authority.

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111.4.1Brown is unable to assist the prosecution in proving that Booysen managed a criminal enterprise and or participated in the affairs of the criminal enterprise.

Danikas Statement

112. In an internal memorandum addressed to the DPP SG JHB, advocate Chauke, the prosecution team alleged that this statement does not relate to a specific incident covered in the indictment but is intended to corroborate the evidence in possession of the state that the applicant was involved in the activities and "*that the applicant encouraged and with like minded in the Cato Manor component in killing of suspects.*"

113. This statement was already found in the *Gorven judgment* to be unsigned document lacking applicability and relevance.

114. On 25 January 2015, Maema says in an email to the attorney of Danikas that there was indeed consideration to use Danikas as a witness in the ensuing trial and that they have even "*drafted the MLA documents asking authorities in Greece to assist to have the documents signed in accordance with the prescripts.*"

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115. He however indicated that there are some challenges in using him as a witness and listed them as follows:

115.1 *"The incidents that Mr Danikas refer to in his draft statements started in 2001 to 2007, a period which is not covered in the indictment.*

115.2 *Most of those incidents are not referred to in the indictment and do not have dockets which relate to them.*

115.3 *The concerns and fears that the witness has which prevents him from coming to the country even though they may be real, will make it very difficult for the state to secure his evidence, considering that evidence on commission is used rarely.*

115.4 *The real possibility of other offences unrelated to Cato Manor that the witness may be involved in, makes it a very risky consideration to expect him to come to the RSA for the purpose of testifying.*

115.5 *The tendency of material that should be used in court just being flashed in the media is a great concern. It draws unnecessary attention of the media to the case.*

115.6 *Section 204 requires a witness who expects indemnity from prosecution to testify openly and answer questions frankly and honestly, even those questions that may expose him or incriminate him. We are not sure that*

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the witness is telling us everything; the chances of surprises in court are very real."

116. Maema also indicated that he did not include Danikas in the list of witnesses.

117. He ended the email and said they have not been to date "*able to convince our prosecution authorities that Danikas' evidence will assist the state case in any way*." (Our emphasis)

118. Danikas's statement in Greek was only signed on 26 October 2016; months after the NDPP signed the authorisations on 13 February 2016. The English translation was made available to the prosecution on 12 October 2018.

119. According to Maema, he is still in possession of the original statements and none were filed in the docket. None of the statements was made available to the defence. He also stated in an email dated 24 April 2019, that the signature of Danikas on the Greek version of his statement was just superimposed on the English version. Danikas has never signed the English translation as he pointed out a number of mistakes.

120. The decision of the prosecution to call Danikas simply to testify about a similar modus operandi based on similar fact evidence is at most puzzling. Abrahams in his Answering Affidavit at paragraph 267.2 says that the practices described by

MS GB

this "*eyewitness, who was an accepted part of Cato Manor SVC prior to the indictment period, bears a distinct similarity to what is described in the indictment.*" and that similar fact evidence is admissible under POCA.

120.1 This witness relates an incident in 2001 when the police killed a suspect and that he personally believed the person was not armed. Booysen came afterwards and also congratulated the members.

120.1.1 It would not have been necessary to make use of similar fact evidence because if there was an incident of this nature, the easiest would have been to expand the life and continuity of the criminal enterprise and charge Booysen and the police officers as it appears to be the same persons who are now being charged for participation in a racketeering enterprise.

120.1.2 Similarly, Danikas alleged that Booysen tampered with crime scenes. Danikas would have been able to testify not only about a murder but also about incidents when Booysen tampered with crime scenes that would have provided corroboration and additional charges.

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121. It appears that the prosecution never intended to bring Danikas to South Africa to testify since Maema in his email already provides reasons why he cannot call him to testify.

122. It begs the question, did the investigators manage to trace these dockets mentioned in paragraphs 120.1.1 and 120.1.2. Does it exist or are the allegations false? Danikas said that he submitted details of all his records of case files from 2000-2008 to General Mabula. The following questions arise:

122.1 Where are the records and if the records pertain to the issues Danikas will testify about, why did it not form part of the docket as corroboration?

122.2 Why was the defence not placed in possession of the records if it forms part of the evidence?

122.3 Did Danikas make any other statements before he left South Africa?

122.4 Why is the signed English translation still outstanding after almost three (3) years? Who made the decision to superimpose the signature of Danikas on the English translation that Danikas says has mistakes?

122.5 Why did the prosecution not hand over the signed Greek statement and English translation to the defence yet?

MS GB

123. In an Internal Memorandum from the prosecution team to the DPP SG JHB, advocate Chauke, dated 1 April 2014, it is noted that the team said they had a meeting with the DPP, advocate Noko and that they wanted to finalise the MLA application to seek the signing of the draft statement of Danikas and to secure the pictures he refers to in his draft statement. The DPP indicated that she required a full briefing in the matter to apply her mind properly, particularly in the light of the court challenges. Since a full briefing was planned for the NDPP on 7 April 2014, it was recommended that it would be prudent that the DPP also attend the briefing if she was available.

123.1 If the first meeting with the prosecution was on 8 March 2012 why did it take so long to deal with this application especially since Major General Mabula who was appointed by General Dramat in January 2012 to investigate this case had in his possession records obtained from Danikas.

123.2 In a letter it appears signed by Maema on behalf of advocate Chauke dated 8 May 2013, he states that a *"statement of Aris Danikas has been obtained but must still be routed through the chanelles ('sic') provided for in the International Co-operation in Criminal Matters Act, 75 of 1996."* A copy of the letter is attached as Annexure "G".

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123.3 It is unclear where the MLA file is.

124. There are various challenges with the Danikas testimony.

124.1 The credibility challenges as pointed out by Adv. Maema in the email to the Lawyer of Danikas:

124.2 He is a witness that will be called in terms of section 204 of the Criminal Procedure Act. If he is called, the defence will be allowed to cross – examine him about the incidents and corroboration for it. It does not appear that it was investigated otherwise it would have formed part of the docket and indictment.

124.3 It also appears that certain information has been withheld from the defence.

124.4 The NDPP was not in possession of a statement from Danikas when he made his decision to grant the authorisations, but he was briefed by Maema and Advocate Dawood Adam. The Greek Statement was signed on 24 October 2016.

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125. We therefore conclude that the situation at the time of the second authorisation remained the same as when Jiba granted the first authorisation.

125.1 Danikas's statement was not a sworn statement.

125.2 It was not part of the docket.

125.3 The contents of the statement do not cover the period dealt with in the indictment except for one incident in which he arrived on the scene after the event (Berea CAS 288/5/08) in which Booysen is in any event not implicated (Berea CAS 288/5/08).

125.4 Danikas does not implicate Booysen and the other accused as far as the racketeering offences specifically are concerned and will not assist the prosecution to prove the racketeering charges.

125.5 Abrahams places a lot of reliance on Danikas statement and said that once he received the verbal briefing from Maema that he was now satisfied that the Danikas statement, as now elaborated, provided material that would assist in establishing the nature, scope and modus operandi of the alleged enterprise and he had no reason to revisit the material that was previously placed before him.

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125.6 It is our view that his reliance on this unsigned statement was misplaced.

Statements of Bhekinkosi Dlondlo Mthiyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') Bongani Mandla Mkhize ('Bongani').

126. The prosecution declared that Col Aiyer's statements "*were not intended to implicate Booysen in any particular predicate offence.*" His evidence was intended to demonstrate Booysen's direct involvement by managing Cato Manor SVC, both at local and provincial levels. Aiyer was alleged that Booysen 'managed' the SVC section by engaging and instructing members directly, compromising the chain of command.

127. The prosecution will therefore rely primarily on three (3) witness statements to prove that the SVC section of the Durban Organised Crime "*was operating as a hit squad for eliminating the rivals of the Stanger Taxi Association while operating under the veil of South African Services.*"

128. We are of the opinion that the prosecution will not be successful in having the two (2) statements admitted in terms of the exception to the Hearsay Amendment Act and that the statement of the one (1) witness, Bongani Mandla Mkhize is insufficient to prove that Booysen and Mostert were involved in a hire to kill scheme. Mkhize can only identify Mostert who apparently received

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money from Bongiswe. He alleged that he could see the money since it was in a clear plastic and he assumes it was handed to Mostert as he remained in the vehicle whilst Bongiswe went to Mostert's vehicle. There was never an ID Parade held to identify Mostert and the other white male that was with him.

129. Two of the witnesses, Bhekinkosi Dlondlo Mthlyane ('Dlondlo') and Simphiwe Cyprian Mathonsi ('Mathonisi') are deceased. The testimony of the two deceased witnesses amounts to double hearsay (our emphasis). It is trite law that first-hand hearsay is preferable to multiple hearsay, because of the risk of manufacture and the errors that may be introduced by repetition. Hearsay often carries the risk of errors appearing as the statement is repeated by different people. The person who reports the words of another may have misheard them or misinterpreted them. The more remote the source, the greater the likelihood of errors in transmission.

130. Furthermore, with the presumption of innocence principle strictly applied in criminal law cases, courts have been hesitant in relying on hearsay evidence to convict an accused, more so in multiple hearsay.

131. Bongani and Mathonsi were bodyguards who accompanied Sanele Zondi and Bongiswe Zondi ('Mhlongo') when they had meetings with Booysen and Mostert to discuss the murder of Superintendent Chonco and the killings of the hitmen who murdered Chonco. Sanele Zondi and Bongiswe Zondi were

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responsible for making the payments from the Stanger Taxi Association to Booysen and Mostert. Sandile and Bongiswe acted on behalf of the management of the taxi association. Both Sanele Zondi and Bongiswe Zondi ('Mhlongo') through their lawyers disputed the averments of the witnesses. They were not charged and it is unclear if they were ever approached to testify against Booysen.

132. On the other hand, Dlondlo, who was part of the executive of the Stanger Taxi Association, had meetings about the killings, arrange payment and received report backs from Sandile and Bongiswe.

133. Besides the fact that his evidence is double hearsay he is also a witness in terms of Section 204 of the Criminal Procedure Act 51 of 1977. It is not evident from the statement if he was ever warned in terms of the provisions of the Act. It is trite law that the evidence of an accomplice has to be treated with caution (see Hlapezula and others 1965 (4) SA 439 (A)).

134. We are of the opinion that it will amount to an unfair trial since this witness's double hearsay evidence is also that of an accomplice witness that is highly prejudicial to the accused who would not be able to test his credibility through cross-examination.

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135. The court in Hewan v Kourie NO and another also examined the provisions of section 3(1)(c)(i) and nature of criminal and civil proceedings, and Du Plessis J stated that: 'in order to prove a central issue in a criminal case, *the Court would in turn probably require a high degree of reliability or a substantial probative value before exercising its discretion in favour of admitting evidence.*

136. The probative value of the evidence is highly relevant in this matter. There were no attempts made to obtain corroboration for the witnesses and the prosecution therefore seek to adduce evidence of a very low probative value. We are of the opinion that it would result in undue waste of time in the attempt to have it admitted because of the low probative value of the evidence.

137. In this matter, reliability of the evidence is also a major issue. It is important to determine when the witnesses made their statements to the police. Bongani Mkhize made his statement on 1 July 2012, Dlondlo on 31 July 2012 and Mathonsi on 15 March 2013. All of the witnesses made statements about incidents that occurred in 2007-2008. These statements were made years after the incidents in question and not when the events were fresh in their memories. There is value in the argument that many facts could be lost in the reporting of these statements years after the incidents.

138. Based on the aforesaid, we concluded that an application to have this hearsay evidence admitted will be unsuccessful.

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139. An analysis of the statements that Abrahams relied on shows that it is totally misplaced and that no new evidence was placed before Abrahams.

Who were charged?

140. On their own narrative, the prosecution team should have charged certain persons and not have charged others. The prosecution also charged persons that were not involved in the individual incidents or at most had minimal involvement in the commission of the offences. The discussion below will look at who were charged for the racketeering offences, who were not charged with racketeering offences and the rationale behind it, whether persons were incorrectly charged and what were the charges preferred against persons or left out based on the statements in the dockets.

Charges against Booysen and the managers of the enterprise

141. Booysen was charged only in respect of Counts 8-12 in both the August 2012 and October 2015 indictments, i.e. for the murders of Magojela Timson Ndlmande and Sibusiso Thokozani Tembe, for the possession of a firearm to wit an AK47 assault rifle with serial number 1975-849754, for possession of ammunition and defeating the ends of justice in that in Counts 8-9 he created an impression that the deceased were armed and/or would have used the firearm to shoot at them and/or endanger their lives (Howick CAS 106/09/2008).

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142. In Watts vs State, 558 So. 2d 142, 144 (Fla. Dist. Ct. App. 1990) the defendant was involved in racketeering, kidnapping, and a burglary scheme. When reviewing the RICO conviction the court reversed it because all the predicate acts arose out of same incident or event. The proper target of RICO prosecution is of a career criminal. A series of acts, from several transactions will and should satisfy the requirements.

143. Booysen admits in his applications that he was on another crime scene, which is further corroborated by an entry in the Occurrence Register (No 185/2011, dated 4 July 2011 by Captain Msomi). In fact, both Captain Olivier and General Booysen who it is alleged managed the activities of the SVC section of the Durban Organised Crime were present afterwards at the crime scenes in Durban North CAS 67/07/2011, CAS 69/7/2011 and CAS 71/07/2011.

144. Interestingly enough, in respect of Counts 80-93, that deal with the incidents in the abovementioned dockets; both Olivier and Booysen were however not charged. (Our emphasis)

145. Counts 8-12 are but one event or incident and there is no meaningful lapse of time between the offences. The State has to prove two underlying predicate offences for a successful racketeering prosecution.

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146. If both Olivier and Booysen were charged in respect of Counts 80-93 the State would have overcome one of the issues raised by Booysen namely that he is only charged with one predicate offence.

147. In both matters, there is however insufficient evidence to sustain a conviction on these potential two predicate offences. In both instances, the high-water mark is the arrival of Booysen on the crime scene after the incidents. Booysen was therefore incorrectly charged in both sections 2(1) (f) and (e) of POCA.

148. In respect of the requirement of continuity and relatedness to show the pattern of racketeering activity, the prosecution alleged that all of the accused conducted unlawful activities on a continuous basis through the enterprise.

149. A general statement is made that Booysen, Olivier, Eva, Lockem and van Tonder, managed the activities of the SVC section of the Durban Organised Crime without giving specific detail as to how and when and proof thereof. There is also no distinct role attributed to each accused and to their responsibilities as to how they managed the affairs of the enterprise.

150. In this matter, it is alleged that the managers were both involved in the commission of offences and that they also participated or involved themselves in the enterprise as they had knowledge of the pattern of racketeering activity.

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151. Therefore if the managers managed the operations or activities of the enterprise and knew or ought reasonably have known of the activities conducted through the enterprise as well as participating therein themselves, the prosecution should have charged the managers in respect of all the killings on the basis of conspiracy and/ or accessory after the fact. When the enterprise engages in a conspiracy, the predicate offences committed by one member of the enterprise in furtherance of the conspiracy may be attributed to another member of the enterprise.

152. An enterprise is characterised by its members having a common or shared purpose, where there is some sort of hierarchical, decision-making structure and where the enterprise is ongoing, with some continuity of personnel. The Prevention of Organised Crime Act 121 of 1998 does not define who is a manager.

152.1 In respect of who the managers of the enterprise were the prosecution charged the accused according to the Organisational Structure of the South African Police and positions they held within their own units and/or sections. Booysen was charged as a manager since he was the Provincial Commander: Organised Crime, KZN, and later on the Provincial Head: DPCI, KZN, from 2010 onwards. Olivier was the section commander of the section whilst Lockem and Van Tonder were group commanders

MS SB

within this section. Whilst all the others under their command were charged in terms of section 2(1) (e).

152.2 The rationale for the above is not clear, since the requirement for a hierarchical management structure within an enterprise was intended to be more functional than formal.

152.3 An individual need not be part of an enterprise's upper management or hold a formal position within the organization in order to be guilty. The test only required that the individual, whatever his title or status, exert some degree of control over the operation of the enterprise.

152.4 In two of the three witness statements the prosecution relies on to show the complicity of Booysen in the taxi killings, the witnesses described how accused 4, Paul Jonathan Mostert, whom they referred to as a Senior Officer met the Stanger Taxi Association members with Booysen to discuss matters relating to the murders and handing over of money.

152.5 In the Internal Memorandum to the NDPP, Advocate Shaun Abrahams, dated 18 August 2015 it was stated that the docket contained a statement of Simphiwe Cyrian Mathonsi '*wherein he explains the collusion of Stanger Taxi Association with Messrs Booysen and Mostert to protect their association...and payment made to these two police officials.*'

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152.6 Based on this evidence, Mostert should have been charged as a manager in terms of section 2 (1) (f). Mostert was incorrectly charged.

152.7 Accept for their positions they held as commanders within the police, there is no evidence to prove that Lockem, Olivier and Van Tonder managed the affairs of the criminal enterprise and they were therefore incorrectly charged.

153. In the both August 2012 and October 2015 Prosecution memoranda[18], at paragraphs 25.5 and 32 respectively, it is stated that Accused 12,17,18,19,20,21,22,23,24,28,29 and 30 in the proposed indictment are not charged with racketeering activities. It is pertinently stated that they did not commit more than one offence in the predicate offences. Accused no 19 in both indictments is Felokwakhe Thomas Dlamuka.

153.1 Dlamuka is charged with in respect of two events; to wit in counts 20-24 and 39-52, he was charged with racketeering in both indictments, and on 17.08.2012, racketeering authorization was granted against him for participation in the criminal enterprise.

[18] See annexure SM3 of Maema's affidavit.

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153.2 In the October 2015 Prosecution Memorandum, Dlamuka is incorrectly referred to as accused 17. At all times in both indictments, accused 17 is Musawenkosi Ernest Nkabane. In the October 2015 Prosecution Memorandum, the prosecution also identified Dlamuka, as part of the criminal enterprise and charged him in the indictment drafted by Advocate Noko in terms of section 2(1) (e) of POCA.

153.3 Although the NDPP, Advocate Shaun Abrahams, did not grant the racketeering authorisation in terms of section 2(1) (e) in respect of Dlamuka on 16.2.2016, advocate Jiba granted it on 17.08.2012. Dlamuka is therefore Applicant 17 in the application against Jiba and the NPA.

153.4 The October 2015 indictment has not been amended to reflect the decision of advocate Abrahams not to grant the racketeering authorisation in respect of Dlamuka.

153.5 There is no evidence in the docket that proves that Dlamuka who was part of the National Intervention Unit (NIU) participated in the affairs of the SVC Durban Organised Crime criminal enterprise.

153.6 We therefore conclude that all the accused in Table 1 was incorrectly charged.

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Not charging persons mentioned in dockets and charging of persons not involved in incidents or minimal involvement in incidents

154. It became evident during the study of the twenty-three dockets that some persons charged were not mentioned in statements in the dockets setting out the involvement of the accused; others would be mentioned at least once as being involved and now are part of a racketeering indictment of 116 counts; yet others were on the crime scene but were not charged and in many instances those persons had fulfilled a specific role such as securing the crime scene but had not been involved in the actual shooting incidents.An example is Neville Eva who has been charged with both sections 2(1)(f) and (e) of POCA. The analysis below set out some of these examples.

154.1 In Kwadukuza CAS 39/9/2008, the duty officer on the scene, A5, said that Eugene van Tonder was also on the crime scene whilst Eva (deceased) attended to the crime scene after the shooting. Van Tonder was not charged whilst Eva was charged on all the counts which included murder, the assault on the deceased's girlfriend inside the house, and the possession of a firearm and ammunition. (Our emphasis)

154.2 Similarly, in Pinetown CAS 1000/05/2009 (counts 25-29), according to the statements of Adriaan Stoltz (A6) and Eugene van Tonder (A7), Eva took

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over the crime scene after the shooting. Yet Eva was not charged. (Our emphasis)

154.3 In Rustenburg CAS 1098/09/2009 only Padayachee, Mostert and Eva were charged. Mkhanya (accused 8); Mkwanazi (accused 10) and Ghaness (accused 7) were allegedly also involved but were not charged. Eva attended to the crime scene after the shooting. (Our emphasis)

154.4 In Melmoth CAS 142/11/2008, four (4) police officers made statements in which they admitted to shooting the deceased. They were Nel; McInnis of Durban Organised Crime; and Ngodwana, and Nzama of the National Intervention Unit (NIU). They also made admissions to the first officer on the scene.

154.4.1 The latter two members of NIU who admitted they shot at the deceased were not charged whilst their commander, Inspector Dlamuka, who is not linked to the offences by any witness was charged solely on the basis of his duty officer reports, A44 and A46.

154.4.2 In an internal Memorandum from the prosecution team to the DPP, advocate Chauke, dated 29 August 2012, it is stated that *"(w)e must still decide on the addition of both Ngodwana*

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and Mthethwa to the indictment. The report so far is that they both made statements to their lawyer and they are unwilling to consider becoming state witnesses. The team's prevalent view is that the members must be added to the charge sheet."

[19]Despite this knowledge of their unwillingness to cooperate both Ngodwana and Nzama who admitted that they fired were never charged.

154.4.3 There were eleven members of NIU involved in this operation and in totality plus minus thirty members formed part of this operation.

154.4.4 Olivier identified Eva, A Pillay and Mkhwanazi on the photographs but they were not charged.

154.4.5 Of the two officers who were in charge of the operation, Olivier and Captain Smith, only Smith was charged.

154.4.6 It is not clear from the docket how Padayachee, Lee and Panday are linked to the offences.

155. Bongani Zondi was charged on counts 13-19 in Mandeni CAS 76/09/2008. He was only charged in respect of one incident and not charged in terms of section

[19] See the DPP SG JHB office file

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2(1) (e) and (f). There are no independent witnesses and or other evidence such as video surveillance that place him at the crime scene.

156. The prosecution relies on the statements of the accused to place him at the crime scene.According to their statements, Capt Eva, Lockem, Mdlalose, Makhanya, Zondi and Mkhwanazi took guard outside while Mostert, Stolz and Naidoo entered the house. He had no role in what transpired inside the house.

157. In counts 58-61 that relates to the killing of the deceased, Lindokuhle Philip Nzuza, Mostert, Lockem and Naidoo are charged but not for the consequential charges such as the possession of the firearm, ammunition and defeating the ends of justice. The exception is Mostert. Different accused are charged such as Nel, Padayachee and Eva who are not linked in the docket to any of the offences.

158. Asogram Pillay cited in both indictments as accused no 29 is not charged with any offence.

Lack of charges

159. In the August 2015 Prosecution Memorandum, it was also alleged that Mostert and Booysen "*were planning to kill Superintendent Zethembe Chonco.*" The prosecution places heavy reliance on the statement of Mathonsi, who is deceased and who made a statement based primarily on hearsay as evidence that will prove the complicity of Booysen in the murders. Yet they have not properly charged in terms of that statement.

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159.1 The prosecution chose not to charge Mostert and Booysen with conspiracy to commit murder in respect of Superintendent Chonco.

159.2 They were also not charged with corruption in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

159.3 The prosecution did not charge the Stanger association as being part of the enterprise in that the association and its members colluded with the members of the Durban Organised Crime in particular Booysen and Mostert to protect their association.

159.4 Neither have Sandile Zondi and Bongiswe Zondi, who negotiated on behalf of the association with Mostert and Booysen and made payments on behalf of the association been charged.

160. In three matters, the police alleged they also found explosives in addition to the unlicensed firearms the deceased used to shoot at them to wit Khamashu CAS 629/04/2009, Khamashu CAS 116/07/2008 and Khamashu CAS 314/11/2008.

160.1 None of the charges against the accused for illegal possession of unlicensed firearm and defeating the ends of justice for planting the firearms next to the deceased's bodies mentions the explosives.

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160.2 There are also no separate charges against the police in terms of the Explosives Act 15 of 2003.

160.3 It appears that the Asset Forfeiture Unit in KZN has done an asset analysis to determine if there were any proceeds of crime that the accused laundered and for the prosecution to consider whether they could add a money laundering charge in the indictment. It is not clear from the office files and dockets if this analysis was concluded and the outcome thereof. No money laundering charges were added.

Charging persons on a single event in a racketeering case

161. Since this case was a racketeering investigation with a focus on the management and participation of the members of the SVC Durban Organised Crime in the criminal enterprise, we looked at the role of the persons charged on the basis of a single event and whether it could be argued that their inclusion in the case amounts to misjoinder. Table 4 lists the persons charged, the charges and the events/incidents.

TABLE 4: *Accused not charged with racketeering*

ACCUSED NOT CHARGED IN TERMS OF SECTION 2(1)(e) and (f) of POCA				
ACCUSED	DETAILS	COUNTS	DOCKET	INCIDENTS
12	BONGANI ZONDI	13-19	MANDINI CAS 76/09/2008	1
17	MUSAWENKOSI NKABANE	19	UMKHOMAAS 235/10/2008	1

18	NICO CROUSE	19	UMKHOMAAS 235/10/2008	1
19	FELOKWAKHE DLAMUKA	20-24, 39-52	DURBAN CENTRAL CAS 185/2/2009; MELMOTH CAS 142/11/2008	2
20	SANDILE STANLEY MFENE	20-24	DURBAN CENTRAL CAS 185/2/2009	1
21	SIBONGILE SIKHUMULUME	20-24	DURBAN CENTRAL CAS 185/2/2009	1
22	VINCENT AUERBACH (deceased)	3-7	KWADUKUZA 39/9/2008	1
23	PETER WILLIAM GEORGE	66-69	ESIKHAWINI CAS 3/4/2010	1
24	WILBARD M THABETHE	66-69	ESIKHAWINI CAS 3/4/2010	1
29	ASOGRAM PILLAY	0	0	0
30	MUKESH PANDAY	39-52, 102-103	DURBAN CENTRAL CAS 185/2/2009; ESCOURT CAS 34/08/2008	2

162. Of the eleven accused who were not charged in terms of sections 2(1) (e) and (f) of POCA, eight are charged with only one event/incident and Asogram Pillay was not charge with any offence in the two indictments. After a diligent search of the evidence, we did not find any evidence linking Asogram Pillay to any incident let alone any offence. It is a mystery to us why he is an accused before court.

163. Accused 19, Felokwakhe Thomas Dlamuka and Accused 30, Mukesh Panday, were charged in respect of two incidents/events.

164. Accused 17, Musawenkosi Ernest Nkabane and Accused 18, Nico Crouse, were charged with only one count of murder.

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165. In POCA indictments, the Accused cannot successfully, claim that there is a misjoinder of offences or defendants if they are alleged to have participated in the same underlying pattern of racketeering. In those instances, the accused would fail to demonstrate any prejudice that would outweigh the benefit afforded to efficient judicial administration by a single trial.

166. In the USA, courts have held that the fact that all the defendants are not charged with the RICO count is immaterial. In order to do so the Government would have to prove that each either committed two predicate offenses (§ 1962(c)) or conspired to do so (S1962(d)). As long as the indictment alleges that all the defendants were in some way involved in a common scheme or plan with respect to the enterprise, joinder is proper.

167. The prosecution does not at any stage explain how the accused that were not charged with racketeering knowingly performed activities helpful to the operation of the criminal enterprise. There is in any event no evidence in the dockets to substantiate an averment that the accused performed activities helpful to the operation of the enterprise as it can be argued that they acted within the course and scope of their work. Furthermore , there is no evidence that they acted with a common purpose in furtherance of the objectives of the enterprise.

167.1 Dlamuka, Mfene and Sikhumulume are members of the National Intervention Unit (NIU) which is mandated to assist the police with operations. There is no evidence that show that they in any manner

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conspired with the members of the Durban Organised Crime to commit offences.

167.2 Similarly, both Crouse and Nkabane who are charged with a single count of murder are from the Port Shepstone Organised Crime and there is no evidence that show that they in any manner conspired with the members of the Durban Organised Crime to commit offences. In fact, none of the members of the Durban Organised Crime was part of this operation.

168. Another aspect to take into consideration is the potential prejudice to the accused who are charged as above. The remainder of the accused have been charged with multiple counts of murder and other charges. In United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), the First Circuit reversed the convictions of two defendants on a RICO conspiracy count and then found that it must also reverse the defendants' convictions on two independent substantive counts. The court reasoned that it was too prejudicial to the defendants, whose involvement in the enterprise was limited, to be tried on the two substantive counts when there was extensive, unrelated evidence introduced at the trial involving a massive race-fixing RICO conspiracy.

169. We therefore conclude that it would not be in the interest of justice to retain the remainder of the accused charged with single events in a big racketeering prosecution of this nature.

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Charging of deceased persons

170. Abrahams charged Neville Eva with management of the enterprise in terms of section 2(1) (f) of POCA (see Table 1). Vincent Auerbach was charged with a single event (see Table 4). Both are deceased. We are of the opinion that exist no good reason for charging the deceased persons.

171. Warrant Officer RC Maharaj was killed in September 2011, Captain Neville Eva in November 2012 and Captain Vincent Auerbach in January 2013.

172. Maharaj was never charged and is not mentioned in any of the documents.

173. Although Eva died months after the first racketeering authorisation, he remained charged with forty-four counts that includes the racketeering charge in terms of section 2(1) (f) of POCA. Therefore, it is not only that Eva's name appears on the racketeering authorisation but he is also charged.

174. Auerbach who died in 2013 also remained charged in terms of one incident (counts 3-7).

175. Though it is possible that there could exist a compelling reason for naming an unindicted person in an indictment, it should be used sparingly since it can cause reputational injury. More importantly in terms of the accused's due process rights at trial this process will not provide that person with a forum in which to vindicate

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his rights. If there exist compelling reasons for doing so, evidence can be led at trial of a person's participation by designating him anonymously as an "other person" or as "Person A" or with numbers.

176. Similarly, although it can be argued that deceased persons do not have constitutional rights, they leave behind families; possess a legacy and a memory that might deserve protection from being linked to criminal activity.

177. A decision at the trial that the accused were not guilty of the crimes will not vindicate the deceased since the court will not make a finding in respect of them.

178. If the prosecution made the choice not to charge or mention Maharaj who participated in operations in Kwadukuza CAS 115/3/10, Durban Central 185/2/09, Berea CAS 288/5/08 and Melmoth CAS 142/11/08, there exist no rationale from the responses to the applications or the dockets, for charging Eva and Auerbach who are deceased.

The purpose of the criminal enterprise

179. The prosecution in their memoranda, indictments and summary of substantial facts alleged that the criminal enterprise operated primarily for monetary gain and participated in pattern of racketeering activities of corruption, violence and murder.

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180. As proof thereof, the prosecution team obtained a comprehensive list of the rewards awarded to police members including the accused which ranged from a mere R10 000.00 to R95 000.00. A copy of this list is attached as Annexure "H"

181. Booysen who is charged with seven counts, namely; contravention of section 2(1)(f); contravention of section 2(1)(e) of Act No. 121 of 1998, counts 8 – 12 (predicate offences) relating to two counts of murder, unlawful possession of firearm and ammunition and defeating the ends of justice, only received a once off sum of R10 000.00.

182. It is thus absurd to suggest that a manager of a criminal enterprise would involve himself in killings so that he can be rewarded for a mere sum of R10 000.

183. Since a National Committee decides the awarding of the rewards and or certificates over which nominated persons and their nominees have no control over their decision, makes it sound even more ludicrous.

184. Mostert who is not charged as a manager of the criminal enterprise but simply for participation in the affairs of the criminal enterprise received a substantial amount more than Booysen.

185. Padayachee who was charged with several predicate offences received none.

186. Some of the rewards were also received for cases investigated before 2008.

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187. Many members from the SVC section of the Durban Organised Crime Unit also received awards and certificates but were not charged.

188. The lack of money laundering charges and the failure to conduct a proper financial investigation is apparent from the indictment and evidence. If there was an investigation of this nature the failure to reveal it, is prejudicial to the defense of the accused.

189. In our view, the prosecution will fail to prove that the purpose for the establishment of alleged criminal enterprise was for financial gain and the awarding of certificates.

Concluding remarks on the racketeering offences

190. It is clear from our discussion that the prosecution will not succeed in proving the racketeering offences for the following reasons:

190.1 There is no evidence to establish the existence of an unlawful enterprise separately from the existence of a pattern of racketeering activity.

190.2 The prosecution simply had several cases that they alleged established the pattern of racketeering activity and then attempted to show through the statements of Aiyer, Danikas, Mathonsi, Mkhize and Ndlondlo that an enterprise existed. The case law is clear that an enterprise cannot simply be the undertaking of the acts of the racketeering. A racketeering

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indictment should focus on the entire enterprise, rather than individual participants in specific criminal acts.

190.3 The statements do no prove that an organised criminal group existed that acted in common purpose and conspired together on a continuous basis to commit murder.

190.4 The statements do not prove that each of the managers in the criminal enterprise played a defined role in its operations and pursued their common goal to commit murders for profit on an on-going basis as a cohesive unit.

190.5 By simply choosing the managers of the enterprise according to the Organisational Structure of the South African Police and positions they held within their own units and/or sections, the fallacy of this approach was exposed. Despite Mostert's alleged 'managerial role', the prosecution could not charge him since he was not a manager in the police.

190.6 If one has reference to the evidence as contained in the dockets, the alleged enterprise was on the verge of extinction. In 2011, the accused are only charged with two racketeering acts as compared with nine racketeering acts in 2008. To show a continuity the racketeering acts must include a specific threat of repetition extending indefinitely into the future.

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D. INCONSISTENCIES AND MATERIAL CONTRADICTIONS IN INDICTMENT, PROSECUTION MEMORANDA AND SUMMARY OF SUBSTANTIAL FACTS VIS-À-VIS THE EVIDENCE IN THE DOCKETS

Lack of evidence against the deceased

191. The prosecution team alleged in the October 2015 Prosecution Memorandum in their analysis of the modus operandi of the accused that the tracking or tracing of the suspects for questioning happened without shreds of evidence linking them to any offence. They also alleged that the accused also killed civilians and /or suspects without any tangible evidence against them and in the absence of warrants of arrests for the suspects.

192. This is misleading and contrary to the evidence in the dockets. The evidence in the dockets clearly shows that the deceased were sought on various serious violent crime cases.

192.1 In respect of the dockets, KwaDuzuka CAS 39/09/2008, Mandeni CAS 76/09/2008, Howick CAS 106/09/2008 and Umkhomaas 235/10/2008 (Counts 3-19), it is incorrect to aver that there was no evidence to link the deceased to any offence.

192.1.1 In the docket, Maphumulo CAS 99/9/2008 (the murder docket of Superintendent Chonco), there is a statement under oath of a witness. He that alleged that he was with two other persons at the taxi rank in

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Stanger when Nathi Mthembu, the deceased in Mandeni CAS 76/09/2008 and from the Maphumulo Taxi Association came up with an idea to kill the police officer who was investigating taxi violence cases. One of the persons with him was Kopolota Ntuli, the deceased in Mandeni CAS 76/09/2008. Mthembu said that he was going to organise the hitmen to kill Chonco.

192.1.2 The cellular phone records provides corroboration for this witness and identify the following persons whose cellular phones picked up towers/base stations that provided reception to the crime scene, Nathi Mthembu, Kophalathu Ntuli and Lindelani Buthelezi who is now the deceased in KwaDukuza CAS 39/09/2008.

192.1.3 In addition to this evidence, there is the statement of the police officer who was with Chonco and who survived the attack on them. He identified three (3) of the four men who fired at them with AK47'S as Kopolathu Ntuli, Lindelani Buthelezi and Mdu Mkhize.

192.1.4 Seated in a taxi,was a member of the public who also saw Mdu Mkhize, now the deceased in Umkhomaas CAS 235/10/2008, with a firearm close to the crime scene.

192.1.5 The witness in 186.1.1 also identified the deceased who was killed on the scene by the police officer who accompanied Chonco. This deceased was found with an AK 47 between his legs.

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192.1.6 In addition to the evidence under oath, the police also had a warrant of arrest for the deceased Kopolato Nthuli in another murder case, Maphumulo CAS 2/02/2005.(Our emphasis)

192.2 In respect of the dockets, Durban Central CAS 185/02/2009, Pinetown CAS 1000/5/2009 and Rustenburg CAS 1098/09/2009 (Counts 20-34), It is also not correct to aver that there was no evidence linking the deceased to any offence.

192.2.1 These dockets relate to the murder of the ex-police officer Mbongeleni Wellington Zondi who was assassinated at Road 2403, Z Section in Umlazi. He was shot with an AK 47 as well as a 9mm calibre firearm, whilst driving in his Toyota RunX vehicle. His murder was investigated in the docket, Bhekithemba CAS 113/1/2009.

192.2.2 On the day of the assassination, information was received by an officer from Organised Crime as to the identity of the assassins as well as who the orchestrators of the assassination were. Information to hand indicated that Bongani Mkhize he was one of the orchestrators of the assassination.

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192.2.3This information was later confirmed by Mswayo Mkize as well as Spe Mhlongo after their respective arrests. Mswayo Mkize made a warning statement confession and pointing out (A8-A10 of the docket). The statements of Mkize implicated the deceased, Bongani Mkhizi (Durban Central CAS 185/02/2009; counts 20-24) in the conspiracy to kill Zondi. They also identified Sibongile Badumile (Pinetown CAS 1000/05/2009, counts 25-30) and Sfiso Ndimande (Rustenburg CAS 1098/09/2009, counts 31-34) who were present when they planned to kill Zondi. The motive for the murder was that they believed that Zondi gave the police (Booysen) information on the whereabouts of Magojela Ndimande who was killed in Howick CAS 106/09/2008.

192.2.4In the murder docket of Zondi, Bhekithemba CAS 113/1/2009, there is a statement of a witness who saw persons in a Maroon Polo shooting at the vehicle of Zondi. Later information received confirmed that the suspects were indeed driving a Maroon Polo Playa motor vehicle with registration ND 601 862. A few minutes later, the said Polo was recovered outside a house (number U 424) and it was identified as a hijacked vehicle. LCRC Durban lifted fingerprints and later positively identified the prints in the vehicle as those of Sfiso Ndimande, the deceased in Rustenburg CAS 1098/09/2009.

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192.3 In both the 'Chonco' and 'Zondi' murders there were *prima facie* cases against the suspects and the averment by the prosecution in their memorandums and summary of substantial facts that there was no tangible evidence or not even a shred of against the deceased, is misleading.

192.4 In respect of Berea CAS 288/05/2008 (counts 35-38), the deceased Thabo Sunshine Msimango was arrested on Brighton Beach CAS 343/1/08 on a charge of armed robbery. He later escaped from members of the unit and a docket, Durban Central CAS 1641/01/2008, was registered.

192.5 In Melmoth CAS 142/11/2008 (counts 39-52), the deceased Bongani Velaphi Biyela was wanted on Maphumulo CAS 30/11/2008 on charges of murder, attempted murder and armed robbery. In respect of Brighton Beach CAS 243/01/2008 he was wanted on a charge of armed robbery. Khanyisani Biyela was also killed. According to the police, this person shot at them from one of the rondavels through the window. They then moved to the rondavel and fired one round in the direction of the suspect as more shooting erupted.

192.6 In Phoenix CAS 377/08/2009 (counts 58-61), the deceased Phillip Nzuza was wanted in cases forming part of the project, Operation Bulldozer, Durban North CAS 440/03/2009 (Armed Robbery), Phoenix CAS 872/06/2009 (Armed Robbery), Umbilo CAS 393/06/2009 (Armed Robbery),Umbilo CAS 394/06/2009(Armed Robbery and Attempted Murder),Umbilo CAS

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494/06/2009(Armed Robbery), Sydenham CAS 75/07/2009(Armed Robbery) and Greenwood Park CAS 117/07/2009 (Armed Robbery).

192.7 In KwaMashu CAS 698/11/2009 (counts 62-65); the deceased Sakhile Prince Thabede was investigated in the docket Umhlali CAS 150/08/2008 (Armed Robbery). The deceased Sakhile Thabethe, alias "Mtako" was linked to the abovementioned matter through information from reliable sources and he was also implicated by Accused 1, Nqaba Mdluli in a statement dated 26.11.2009.

192.8 In Esikwanini CAS 3/04/2010 (counts 66-69), the deceased was Kwazi Wiseboy Ndlovu. The police were investigating the matter relating to Westville CAS 263/2/2010 in which nine prisoners escaped from Westville Prison, Medium A, 7™ Floor on 21.02.2010. They were following up on information of the suspect Tilili Mzimela who escaped from Westville. On their arrival at house No J63, they introduced themselves as the police and they entered the house. The deceased was killed. Mzimela later on made a statement in which he states that his family rented out this property to the Ndlovu family.

192.9 In Esikwanini CAS 50/09/2011 (counts 94-97), the deceased Qinisani Philangenkosi Gwala ('Gwala') was sought for the murder of a police officer in Inyoni CAS 158/08/2010. In the latter docket, a witness identifies the persons who came to his place with the items stolen from the police officer. The informant went with the police to the house of the deceased where he was pointed out.

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192.10 The deceased also had a pending case for the illegal possession of firearm in Esikhawini CAS 263/8/2011. The offence was committed days before the police came to his house.

192.11 After the members of Cato Manor left the crime scene, the local police found a pump action firearm lying between the mattress and the base in addition to the firearm the police alleged he used to shoot at them. This firearm was booked into SAP 13 as per SAP 13/667/201.

192.12 On the police CRIM System, there are several matters against his name, in Esikhawini CAS 423/10/2002 on a charge attempted murder, Esikhawini CAS 196/12/2002 on a charge attempted murder, Esikhawini CAS 484/12/2002 on a charge of attempted murder, Esikhawini CAS 291/10/2002 on a charge of attempted murder. Esikhawini CAS 162/12/2002 on a charge of attempted murder and Esikhawini CAS 139/6/20012 on a charge of attempted murder.

192.13 In Escourt CAS 34/08/2008 (counts 102-103), the deceased Muzi Sanele Majola was wanted on a number of ATM bombings, Nyoni CAS 41/4/2008, Nyoni CAS 41/4/2008 and MAPHUMULO CAS 2/7/2008.

193 This analysis clearly shows that all of the deceased either had cases pending or were being sought in connection with cases in order to be questioned and or

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charged and that the averment that the police traced or tracked the deceased without there being a shred of evidence against them is misleading.

Killing of innocent civilians which the police alleged were suspects

194 In the Prosecution Memoranda, the prosecution also alleged that the police killed innocent civilians and would then allege that they were suspects.

195 The deceased, Khanyisani Biyela and Kwazi Wiseboy Ndlovu were not suspects sought by the police. According to the accused, Biyela fired at the police through a window of a rondavel when they went to arrest a family member at the reserve. The police entered the rondavel and he was fatally wounded. The cartridges found in the rondavel was positively linked to the firearm the accused alleged he fired at them. The firearm had a serial number but no investigation was done to determine ownership.

196 In respect of Ndlovu, the accused were following up on information of the suspect Tilili Mzimela who escaped from Westville under the docket, Westville CAS 263/02/2010. On their arrival at house No J63 they introduced themselves as the police and they entered the house. They alleged that when they went inside a boy fired a shot at them and Warrant officer G. Padayachee returned fire and shot the boy. He shot him four times with an R5 rifle. Padayachee left the crime scene.

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197 In respect of the latter matter we are of the opinion that the investigation should be concluded and a decision be made whether Padayachee shoud be charged.

Lack of search and arrest warrants for the deceased

198 The prosecution also alleged in the Prosecution Memoranda that the Accused did not have any arrest and/ or search warrants for any of the suspects. This is also misleading as there was information in some of the dockets that details applications for warrants of arrests. The following dockets contain information about these warrants of arrest:

198.1 The police had a warrant of arrest for the deceased Kopolato Nthuli in another murder case, Maphumulo CAS 2/02/2005 (See 28.1.3 above).

198.2 It is logical that in Westville CAS 263/2/2010 in which nine (9) prisoners escaped from Westville Prison, Medium A, 7™ Floor on 21.02.2010, that there would have been warrants of arrests for the escapees.

198.3 In the partly heard High Court matter, the State versus Nhlanhla Lucky Mhlongo, Case number CC174/2009, a J50 warrant of arrest was applied for and issued.

198.4 After LCRC Durban lifted fingerprints and later positively identified the fingerprints in the vehicle as those of Sfiso Ndimande, the Umlazi magistrate issued a warrant for his arrest (See 28.3.4 above).

198.5 A warrant of arrest was obtained for Mdu Mkhize from the Stanger Court (count 19).

The accused would kill and shoot the victims and thereafter place a firearm next to the deceased

199 The prosecution team alleges that all of the firearms found were planted by the accused. In all but two of the dockets, firearms were found next to the deceased.

200 In all of the matters, there is no evidence to substantiate the averment that the police placed the firearm next to the deceased, except in the docket of Kwamashu CAS 698/11/2009 in which the girlfriend of the deceased, Denyse Hurley, alleged that she saw the police placed a firearm next to the deceased. There are however contradictions between her first and second statement she deposed to and between her statements and that of the two accused who were arrested before the deceased, A21 (Nqaba Mdluli) and A22 (Nkanyiso Ntenza).

201 They alleged that it was Mostert who came to look for the firearm in the Quantum vehicle in which they were seated. A21 saw Mostert take out a .38 from under the seat. A22 overheard Mostert asking the other police officers for his 'spook'. It appears highly unlikely that Mostert would do this in front of the co-accused of the deceased.

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202 It also appears that Hurley changed her version of the events to fit in with theirs. Initially she said that the white male instructed the Indian male to shoot. She never said she saw him leaving and then returning. She also pertinently said Mostert came in afterwards and asked what happened. She never said he came in with the firearm and placed it in the room. In her 2012 statement, she refers to more than one white male who went into the bedroom and placed the firearm there.

203 In the majority of the matters, where there are witnesses who are family members and who did not witness the shooting, they would allege that the deceased did not have any firearm or explosives.

204 There is no other independent objective evidence that firearms were placed next to the deceased.

205 These allegations should be evaluated against the totality of the evidence in the docket. There is evidence in many dockets of primer residue found on the hands of the deceased.

206 There is also evidence of spent cartridges found in the vicinity of the deceased that were linked to the firearm the accused allegedly used to fire at the police at the time of the incident.

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207 The prosecution team alleged that primer residue may be deposited within a two metre radius when a firearm is discharged. It is argued that primer residue may be deposited on the deceased's bodies. There are no reports in the dockets that show how this could have happened in each docket. The prosecutor is not an expert and cannot be a witness in his own matter.

208 In an attempt to counter the defence that the deceased fired at them and were in possession of firearms, statements were obtained from experts such as Steyl, Captain Mangena and Dr Reggie Perumal. Steyl was initially appointed as the defence's expert in some of the dockets.

209 In 2012, he was appointed by IPID to do reconstructions of some of the crime scenes and is now to be called as the prosecution's witness.

210 All of these experts relied on crime scene photographs, post mortem photographs and other statements in the docket. Their evidence should be evaluated against the evidence of the pathologists and ballistic experts that examined the bodies of the deceased and exhibits.

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211 In Mandini CAS 76/09/2008 the high water mark of Steyl's statement is that he alleged that the police fired at the suspects when they were already in a lying position. He says that the deceased, Mzamani Johannes Ntuli, death register 347/2008 sustained multiple gunshot wounds. The police officer concerned is not denying that he shot at the accused while they were lying. According to Naidoo as they entered the room, "a black male alighted from the cupboard armed with a pistol." Stoltz fired a shot. Naidoo fired several shots towards the suspect. The suspect fell to the floor. The suspect still had the pistol in his hand and Naidoo continued to fire at the male.

E. LACK OF PROPER INVESTIGATIONS

Racketeering offences

212 It was evident after the analysis of the dockets that there were serious concerns regarding the quality of the investigation into the Racketeering offences and the underlying Predicate offences. Investigations of this nature ordinarily take more than five (5) months to be finalised. In cases of this nature, a racketeering docket will be registered that will document the investigation. This did not happen in this case. There is consequently no investigation done that shows how this case was investigated. There is thus no objective record of the investigation.

213 In the Danikas statement the allegation is that, the criminal enterprise has been in operation for a longer period than what is alleged in the indictment. If the

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purpose of a racketeering investigation is to look at the life and continuity of the criminal enterprise and how it evolved over a period, the allegations in the Danikas statement and corroboration thereof should have been fully investigated which has not been done at all. This once again show that there was a haste to obtain the racketeering authorisations since an investigation focused on the life and continuity of the criminal enterprise should have been done over a long period.

214 Racketeering investigations focuses on the entire enterprise, rather than individual participants in specific criminal acts, which appears, was the focus in this matter. Consequently, there were no investigations to determine the nature, structure and scope of the enterprise as well as the relationship of the members to the enterprise. This explains the lack of cellular phone evidence and an analysis thereof to show a pattern of communication between the members. This could have shown not only how they communicated at strategic times, before, during and after the incidents, but also their communication with Booysen.

215 A racketeering investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its associates, its past acts, intended criminal goals, and its capacity for harm. There was no investigation into the size and composition of the group that constituted the criminal enterprise but simply a focus on individual participants engaging in specific criminal acts.

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As a result, the investigation is unable to provide a proper analysis of exactly how many cases this group investigated over a period of four (4) years, its outcomes and why there was a focus on twenty-three (23) dockets; nine (9) in 2008, seven (7) in 2009, three (3) in 2010 and two (2) incidents in which four (4) dockets were registered in 2011. If the reason for the existence of the criminal enterprise was to obtain monetary gain or profits through racketeering activities, the decline in the racketeering activities is peculiar. A criminal enterprise does not necessarily end when one or more of the participants are prosecuted, since they are motivated by the monetary gain or profits. The failure to properly investigate the size and composition of the group involved and its associates explains the lack of charges against the Stanger Taxi Association that allegedly entered into a corrupt relationship with the members of the SVC Durban Organised Crime.

216 Investigations of this nature ordinarily employ informants and confidential sources, financial investigations, monitoring of electronic communications and section 252 A operations especially if the allegation is that the criminal enterprise can be hired to kill for monetary benefits. It appears that none of these investigative techniques was employed and would explain why there are no money laundering charges.

217 It appears that during the arrests of the accused searches and seizures of their homes were conducted. There is no indication that there were any searches and

MS GB

seizures at the offices of the accused in particular to search for documents, operational plans, meeting minutes and any other relevant information on their computers. It appears that the police seized several items when they arrested the accused at their homes such as computer disks, printers, cellular phones etc. It is not clear what if the items were investigated and if indeed so what are the outcomes.

Predicate offences

218 There is a lack of objective eyewitness accounts of incidents. The prosecution team places reliance on statements made by the persons charged. It appears that the police and or IPID/ICD made very little attempt to find witnesses that saw the incidents happen.

219 In all of these dockets, no identification parades were held. In counts 3-7, the girlfriend of the deceased alleged that she was assaulted by a white male. The absurdity now is that all of the accused Mostert, Naidoo, Makhanya, Auerbach and Eva are charged with the assault on her whilst Eva was not even in the house. In Melmoth CAS 142/11/2008, two witnesses alleged they were assaulted by the police. They were only taken to a doctor for a medical report in 2012, which means that the report would be of no value in a trial. No identification parades were held and all the accused were also charged for the assault on the

witnesses despite the fact there is evidence that more than thirty(30) officers were on the scene.

Ballistic evidence

220 In many dockets, the custodial chain statements are still outstanding. In Kwadukuza CAS 39/09/2008, counts 3-7, it is not clear what had happened to the exhibits that were collected by LCRC. Only one (1) spent cartridge found later by a duty officer was analysed. IPID/ICD also raised this issue in a letter and wrote a letter to the ballistic unit to enquire as to what happened to the exhibits: "...above report in our case docket only refers to a spent cartridge case that was examined. A letter with reference Durban LCRC 167/09/2008 refers to five cartridge casings, two bullet Heads and one firearm delivered to your office for analysis. "They enquired whether the ballistic unit received these exhibits. It is not clear from a reading of the docket if this issue of the lost exhibits were ever resolved.

221 In Howick CAS 106/09/2008, residue tests were done on the hands of the deceased and police officials (See A18; LAB 134428/08(1), HOWICK 106/9/2008). Primer residue was found on the test sample marked inter alia "B638RIGHT".There is a statement from ZONDI (A14), that simply stated he collected 11 spent cartridges, 86 live rounds, five rifles, three pistols and five magazines and he conducted primer residue tests on two deceased and on the

policeman involved. It is not clear on whose hands the primer residue was found and why if several police officers admitted they shot he took primer residue on the hands of one (1) police officer.

222 In Mandeni CAS 76/09/2008, it is not clear from the evidence in the docket on whose hands the primer residue were found. The test samples marked inter alia "D173RIGHT" and "C902RIGHT" tested positive for primer residue. There is no report from LCRC.

223 In many dockets, the firearms of the individual members were not tested to link it to the bullets that killed the deceased. In Kwadukuza CAS 39/09/2008, Mostert admitted that he fired yet it appears that his firearm was never tested. IPID/ICD also enquired "whether the following fire arm, ***a 9mm with serial number Q119840,*** was received by your office and if it was compared to the exhibits forwarded to your office for analysis."

224 In Mandeni CAS 76/09/2008, the ballistic investigation is also incomplete. Several of the cartridges, bullet heads and fragments found on the crime scene are not linked to any firearms. It appears that the firearms of the police were not seized at that time and sent for ballistic testing and comparison. The ballistic expert, Steyl, appointed by IPID, also confirms this. He says that the ballistic statement in this case is not complete '*as none of the shottists' firearms were connected with the cartridge cases and exhibits at the scene.*'

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225 In some of the dockets, there are mistakes in some of the ballistic reports and some reports are not filed in the docket. In Mandini CAS 76/09/2008, it is stated in the report that the cartridge cases mentioned in 3.1 were fired in one firearm. This is a typographical mistake in the ballistic report and should be corrected, 3.1 refers to a firearm, one (1) 9mm parabellum calibre lew model z88 semi-automatic pistol with serial number obliterated and not cartridge. In Durban Central CAS 185/02/2009, the ballistic report with reference number LAB 18592/09 (5) was not found. In the same docket there appears to be mistakes in the reports. In the same docket a second set of bullets from the mortuary are missing.

226 In some of the dockets, either the firearms found in possession of the deceased had a serial number or in the case of obliterated serial numbers, some of the numbers were retrieved through the etching process. No investigation was done to determine ownership or how the firearm possibly came in possession of the deceased. Where an investigation of this nature was done in one incident, it proved that there was no evidence to connect the accused to the firearm the prosecution team alleged they planted. In Mandeni CAS 76/09/2008, the second firearm found, a CZ 75 9mm parabellum with serial number G2921 was stolen at a police station from the SAP 13 safe and appears to be one of several that went missing from that police station (ULUNDI CAS 185/7/2010). No suspects were

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identified. It therefore begs the question how the State is going to prove that the accused planted this firearm.

227 The whole SVC Durban Organised Crime Unit's firearms were however seized on 25/1/2012. It is unclear whether it were compared with the spent cartridges on all the other crime scenes and if indeed so, where is that report?

Inquests

228 In the October 2015 Prosecution Memorandum it is alleged that *'(s)ome of these cases ended up as informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, placing firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting and that the killings were justifiable." The acts of tampering ....were cover ups of their unlawful activities."*

229 Despite the averment, several inquests were finalised to wit;

229.1 KWADUKUZA CAS 39/09/2008, Inquest No 320/09, held on 16.4.2010, deceased Lindelani Buthelezi. Magistrate S Maharaj has made a 'no' finding; Counts 3-7 refer.

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229.2 BEREA CAS 288/05/2008, Inquest No 556/10, held on 17.8.2010, deceased Thabo Sunshine Masimango. Magistrate has made a 'no' finding; Counts 35-38 refer.

229.3 ESIKHAWINI CAS 3/4/2010, deceased is Kwazi Ndlovu: According to the investigation diary, C1 25.3.2012, the history of the case was obtained from the ICD offices, Durban, and it was established that the case docket could not be traced. The parent, Ndlovu, was interviewed and the mentioned that the case was finalised as an inquest after a ruling was made by the court that no one could be responsible for the death of the victim; Counts 66-69 refer.

229.4 KWAMASHU CAS 116/7/2008, Inquest No 95/2008, held on 9.07.2010, deceased is Mfanafuthi Armstrong Zwane. Magistrate has made a 'no' finding; Counts 98-101 refer.

229.5 ESTCOURT CAS 34/08/2008, Inquest No 26/2010, held on 22.3.2010, deceased is Muzi Sanele Majola. The magistrate, Michelle Geldenhuys, Magistrate has made a 'yes' finding; on the part of Inspector Nel who shot the deceased (See A31 of the docket); Counts 102-103 refer.

229.6 KWADUKUZA 115/3/2010, the deceased is Ntlanhla Lucky Mhlongo. It is not clear if an inquest was finalised:

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There is a letter from branch commander to the SPP requesting that an inquest be held. In the investigation diary on 1.4.2010 at C5, the investigation officer said he referred the inquest documents to court and he filed return of service at A12. At C5 dated 3.5.2012 it appears that when a person SMITH went to uplift the inquest documents he found that the docket /inquest was returned with queries and never returned. Captain Eckard who is now on pension signed it. Last entry in docket is dated 2.8.2012; Counts 113-116 refer.

229.7 MELMOTH CAS 142/11/2008, Inquest No 67/2009, of the deceased, Bongani Biyela and Khanyisani Biyela. Magistrate F B Memela made the finding that the "Police returned fire in self-defence"; Counts 39-53 refer.

230 In addition, these dockets were also investigated by IPID/ICD who are responsible for investigating wrongdoing on the part of the police. If they suspected any wrongdoing on the part of the police there would have been a recommendation to the immediate commander for an enquiry to be held. It is important to pose the question if the ICD/IPID made any such recommendations and in particular, what did they do in respect of the matters referred for inquests.

231 Additionally, the NPA will prosecute police officers who conduct themselves unlawfully. It is important to pose the question if the ICD/IPID referred any of

MS GB

these matters for a decision with their recommendations and what the outcomes were.

232 If the prosecution had any further evidence, in particular that the firearms were planted by the accused, requests should have been made to have the inquests reopened in terms of Section 17(2) of the Inquests Act 58 of 1959. It is unclear if there were any applications of this nature and if inquests were reopened.

F. CONCLUSION

233 After a careful evaluation of the evidence and the other relevant material placed at our disposal, it is clear that there are currently two sets of authorisations in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998, relevant to this matter.

234 The first, are the authorisation issued by Advocate Jiba, the acting NDPP on 17 August 2012.

235 These authorisations are applicable to all the accused persons originally charged with racketeering except accused number 1, Johan Booysen. It was only in respect of these authorisations to prosecute Mr Booysen that the High Court revlewed and set aside the authorisations of Advocate Jiba.

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236 The second are the authorisations issued by Advocate Abrahams on 13 February 2016.

237 Table 1 of this memorandum, indicates all the accused in respect of the authorisations issued by Advocate Jiba on 17 August 2012 as well as all the accused in respect of the authorisations issued by Advocate Abrahams on 13 February 2016. Both sets of authorisations are currently the subject of litigation in the High Court in KwaZulu-Natal.

238 This memorandum is accordingly directed at the validity of the authorisations issued by the acting NDPP, Advocate Jiba and the NDPP, Advocate Abrahams.

239 After a careful evaluation of the evidence contained in the dockets, the pleadings in the various applications brought in this matter, we conclude that there was insufficient evidence placed before the Acting NDPP, Advocate N Jiba and NDPP, Advocate S Abrahams to justify the authorisations to institute a prosecution in terms of sections 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act 121 of 1998.

240 Despite the prosecution memoranda and the statements that were placed before the Acting NDPP, Advocate N Jiba and the NDPP, Advocate S Abrahams these were not sufficient to implicate the accused in the alleged racketeering offences.

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The obvious credibility challenges that the prosecution would face in respect of the evidence of Col Aiyer in our view would be insurmountable during a criminal trial.

241 In respect of the potential witness Danikas at the time the NDPP, Advocate S Abrahams issued the authorisations the statements were still unsigned and no certified translation of the Greek statement has to date been filed in the docket. The prosecution, would furthermore, have challenges in presenting this evidence as similar fact evidence for the reasons as discussed in this memorandum. The hearsay statements of Ndlondlo, Mkhize and Mathontsi have its own challenges in respect of the low probative value and reliability of the statements. The prosecution would have difficulty in having these hearsay statements admitted as evidence. The application to have the hearsay evidence admitted will be unsuccessful.

242. There appeared to be undue haste on the part of the prosecutors to obtain the racketeering authorisations.

243. The investigation, both in respect of the racketeering and predicate offences, are incomplete.

244. Proper processes and procedures were not followed when the application for racketeering authorisations were made.

245. A proper presentation was not made by the prosecutors to the NDPP in respect of both sets of authorisations.

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246. In respect of both sets of authorisations a proper case for racketeering was not made out on the papers presented.

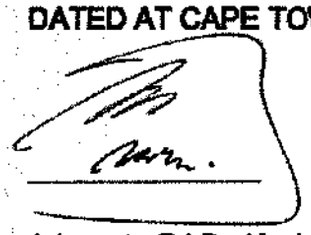
F. RECOMMENDATIONS

The following recommendations are made:

1. The racketeering authorisations issued in terms of sections 2(4) of the Prevention of Organised Crime Act 121 of 1998, by the acting NDPP, advocate Jiba on the 17 August 2012, is invalid.
2. The racketeering authorisations issued in terms of sections 2(4) of the Prevention of Organised Crime Act 121 of 1998, by the NDPP, advocate S Abrahams on the 16 February 2016, is invalid.
3. The prosecution instituted against all the Accused on the racketeering charges based on the authorisations issued by the acting NDPP N Jiba and the NDPP S Abrahams as set out above, should be withdrawn.
4. The Director of Public Prosecutions, KwaZulu- Natal should, in compliance with the Prosecution Policy of the National Prosecuting Authority, review the evidence in respect of the remaining charges preferred against the Accused and decide whether or not to proceed with the prosecution against the individual Accused named in those charges.
5. A copy of this memorandum and its annexures should be provided to the DPP, KZN.

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DATED AT CAPE TOWN ON THIS 28TH DAY OF JUNE 2019

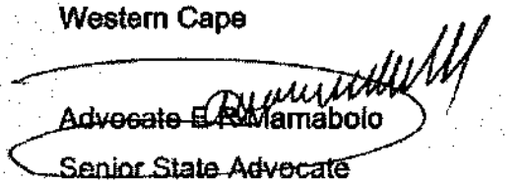


Advocate RJ De Kock
Director of Public Prosecutions
Western Cape

On behalf of

Advocate I Thenga
Director of Public Prosecutions
Limpopo

Advocate S Riley
Deputy Director of Public Prosecutions
Western Cape



Advocate E R Mamabolo
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MEMORANDUM

TO : **ADV. S MZINYATHI**
DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA

AND TO : **ADV G BALOYI**
DDPP
GAUTENG DIVISION, PRETORIA

FROM : **ADV. H E VAN JAARSVELD**

DATE : **29 OCTOBER 2018**

SUBJECT : **SILVERTON CAS 688/10/2014 (PROSECUTION JIBA) and SILVERTON CAS 332/02/2018 (PROSECUTION ABRAHAMS AND MOKGATHLE)**

A. SILVERTON CAS 688/10/2014

I have studied the judgement of **CASE NUMBER 89849/2015** and the request for a *Nolle* certificate received from Hurter and Spies attorneys. The following aspects are relevant :

1. The docket was either never received at this office or it was not brought to my attention. I state categorically that I have not dealt with a docket or dockets against JIBA.

2. I have however, studied the judgement in **CASE NUMBER 89849/2015** and the application request for a *NOLLE PROSEQUI* certificate from HURTER AND SPIES attorneys.

3. The court found that the decision to withdraw the charges against Jiba was irrational and it was set aside.

4. The charges and the proceedings are thus automatically re-instated.

5./...

5. Since the NPA abandoned the appeal against the decision the *status quo* must be revived and the position should be exactly as before the NPA withdrew the matter. That is the legal position.

6. I am thus of the opinion that the prosecution must continue and arrangements must be made to get JIBA before court, either by way of a request or a summons. I am further of the view that a *Nolle* certificate should be declined at this stage.

7. I cannot comment on any statement made in the press and in the public domain. If it is indeed true that the docket was referred to the DPP, NORTH WEST and that he has declined to prosecute it is a matter for the two DPP's to discuss. Whatever the position is, Hurter and Spies attorneys must be advised of the correct position in order for them to take their request to the responsible DPP.

8. I cannot comment on the allegation that any official in this office may have discussed the matter with JIBA. I never had any discussion with her in respect of this or any other matter.

B. SILVERTON CAS 332/02/2018

In this matter Johan Booysen opened a case of *inter alia* PERJURY against ABRAHAMS AND MOKGATHLE relying on the same judgement referred to above. I have read his affidavit and the judgement and agree that sufficient ground exists to investigate the alleged crimes. The following findings from the judgement is apposite :

1. JIBA could not rely on Section 78(POCA) and ABRAHAMS and MOKGATHLE committed an error of law by also relying on it;

2. There is no merit in the allegation that there was a vendetta against JIBA;

3. ABRAHAMS AND MOKGATHLE had no defence;

4./...

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SEQ 33/2020-360

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NATIONAL PROSECUTING AUTHORITY
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10/2/12/3 – NPA 59/2019

Dear Adv. Baloyi

RE: APPLICATION FOR NOLLE PROSEQUI CERTIFICATE SILVERTON CAS
~~**688/10/2014**~~ 628/10/2014.

Please find attached an opinion dated 04 October 2019 from the panel coordinated by Adv. de Kock that considered this matter. I agree with the recommendations of the panel.

I also forward:

a. Letter from Hurter Spies Attorneys dated 05 December 2019
b. My response letter dated 06 January 2020

Please take a decision in this matter and communicate to Ms van Schalkwyk of Hurter Spies Attorneys. Send a copy to this office.

This matter has a long and unfortunate history. In the circumstances, we need to expedite.

Yours sincerely,

ADV S BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 24/01/2020

Copy: Adv. Mzinyathi

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National Prosecutions Service

Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY
South Africa

REF. NO.

MEMORANDUM

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TO : **ADV. GEORGE BALOYI**
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA

FROM : **ADV. H E VAN JAARSVELD**
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA

DATE : **5 MAY 2020**

SILVERTON CAS 688/10/2014 (PROSECUTION OF JIBA)
SILVERTON CAS 332/02/2018 (PROSECUTION ABRAHAMS AND MOKGATHLE)

This matter has a very long history and further lengthy litigation may be expected.

On 12 February 2020, I have compiled a memorandum and concluded that:

"IN RELATION TO SILVERTON CAS 688/10/2014

After perusal of the opinion of the panel appointed by the NDPP and having regard to the judgement of **CASE NUMBER 89849/2015** and the request for a *Nolle Prosequi* certificate received from Hurter and Spies attorneys, I have decided that the original charges of Fraud and Perjury must be re-instated against N JIBA. These charges were in fact automatically re-instated by the High Court in the above- mentioned case. No new evidence or representations were received since then."

You agreed with the decision and on 23 March 2020, the instruction went out to the SCCU and the Head NPS was copied. The Attorneys for Jiba was also advised of the decision. No response was received from either the HEAD:NPS or from JIBA's attorneys.

The matter has not been re-enrolled because of the lockdown. Adv. Ferreira, the prosecutor in this matter, queried whether the prosecution should be instituted without Adv SMITH's decision being reviewed.

The panel established by the NDPP concluded that the transferral of the matter to the jurisdiction of the DPP North West was invalid and therefore his decision to decline to prosecute was legally invalid. The panel differed with the conclusions previously reached by Adv. Nordier. The panel's submission was supported by the then acting head of the NPS, Adv Mzinyathi.

The NPA derives its power from section 179 of the Constitution and the provisions of the NPA Act. Section 179(5)(d) of the Constitution clearly provides for a review by an NDPP of decisions made by Directors of Public Prosecutions, in terms of section 24 of the NPA Act read with section 179(2) of the Constitution. Once a decision to prosecute or not to prosecute is made, the NPA may review that decision in a manner prescribed by section 179(5)(d) of the Constitution. The decision of the DPP, NORTH WEST, was reviewed and overturned which paved the way for the DPP, Gauteng, Pretoria, to decide the matter afresh.

Furthermore, the NDPP, in her affidavit for leave on petition to the SCA in the OSD litigation, stated that the NPA is entitled to ignore unlawful actions of officials. This is a civil matter where administrative law is relevant. The statement referred to the NPA's failure to have a decision of the previous NDPP set aside on review. Given this view of the organisation, the instruction to proceed with the prosecution by the DPP, Gauteng, Pretoria, appears to be in order and the prosecution should continue.

The memorandums of the panel and of Adv Nordier are of a highly sensitive nature and should not be disseminated without their permission.

I am of the view that the matter may proceed without reverting to a formal court review process.

HE van Jaarsveld
DDPP: GAUTENG NORTH