IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: *17782/15*

Set down for 2 - 4 February 2016

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
NOMGCOBO JIBA	Fourth Respondent
GENERAL COUNCIL OF THE BAR	Fifth Respondent

ANSWERING AFFIDAVIT ON BEHALF OF FIRST, SECOND AND THIRD RESPONDENTS

I, the undersigned,

SHAUN KEVIN ABRAHAMS

do hereby declare under oath and state that: -

1. I am the National Director of Public Prosecutions of the Republic of South Africa ("**NDPP**"), duly appointed by the First Respondent on 18 June 2015 in terms of section 179 (1) of the Constitution of the

Republic of South Africa ("**the Constitution**"), read with sections 10 and 12 of the National Prosecuting Authority Act 32 of 1998 ("**the NPA Act**").

2. I am the Head of the National Prosecuting Authority ("**NPA**") and the Third Respondent in these proceedings.

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

4. Where I make submissions of law, I do so on the strength of legal advice obtained by me from my legal representatives in this matter, which advice I verily believe to be correct.

5. Where I rely on information conveyed by others, I state the source, which information I verily believe to be true and correct.

INTRODUCTION

6. This affidavit answers that of James Selfe, deposed to on 14 September 2015, in support of the application of the Democratic Alliance ("**DA**"), the official opposition in Parliament, to review and set aside the decision of the First Respondent (the "**President**"), taken under s. 12(6)(a) of the NPA Act, not to suspend Adv Nomgcobo Jiba ("**Adv Jiba**"), and institute an enquiry into her alleged misconduct and fitness to hold office. This affidavit, read with the accompanying affidavits of the First and Second Respondents ("**the Respondents**"

(including myself)), serves also to answer the supplementary affidavit of Mr Selfe, dated 12 October 2015.

7. Because this application has to do solely with the decision of the President concerning Adv Jiba, I herein set out the gravamen of my briefing to the Minister concerning her, whom I understand briefed the President accordingly. Affidavits will be submitted confirming my affidavit insofar as it concerns the Minister and the President. I understand that these affidavits will delineate what information served before the President. (I should add that, although, as noted, I cover only the case of Adv Jiba, my discussions with the Minister over time also canvassed the cases of Advocates Mrwebi and Mzinyathi, who are referred to in Annexure JS10, which document is referred to below in this affidavit.)

8. As to timelines, I mention that this matter was initially set down for 18 November 2015. Following negotiations between the parties, the Honourable Judge President Hlophe entered an order providing for the following timelines:

   8.1. the hearing would be on 2, 3 and 4 February 2016;

   8.2. answering papers would be due on 1 December 2015;

   8.3. replying papers would be due on 15 December 2015.

<u>THE SCHEME OF THIS AFFIDAVIT</u>

9. This affidavit is structured as follows:

9.1. An overview of the nature of this application, the nature of the relevant executive discretion, and the issues at stake.

9.2. An *in limine* point, that this application should be dismissed, because the Constitutional Court enjoys exclusive jurisdiction over the subject matter.

9.3. Considerations that support the staying of this matter pending the disposal of General Council of the Bar of South Africa v Jiba (Case No. 23576/15) (G) (the "GCB application").

9.4. Submissions, advanced by way of reference to the answering affidavit of Adv Jiba in the GCB application, that the adverse judicial comments regarding her do not justify a finding that the President's decision not to suspend Adv Jiba was irrational; it is my understanding that my sentiments were conveyed to the President by the Minister.

9.5. Further submissions that, in the event that this Court finds the President's decision to have been reviewable, it should exercise its discretion not to set that decision aside, in light, inter alia, of acute separation of powers concerns, and that, to the extent the decision is set aside the matter should be remitted for determination in light of the Court's finding.

9.6. *Ad seriatim* responses to the allegations appearing in the two affidavits of Mr Selfe.

GENERAL LEGAL SUBMISSIONS

10. I have been advised to advance the following submissions of law which I verily believe to be correct.

11. The relief sought by the DA envisages perhaps the most far-reaching intrusions imaginable by the judiciary into the powers of the executive. Under the doctrine of separation of powers that underpins our Constitution, a court will be hesitant to venture into that territory. It will defer to an executive decision-maker *not* to act, save in the most exceptional circumstances.

12. The Respondents do not, for present purposes, contest the *locus standi* of the DA as a political party that sits as the official opposition in Parliament. But, I have been advised that, given that this court enjoys a residual discretion as to remedy, it is apposite to mention that some courts have deplored the fact that party political battles are increasingly fought out in our courts. This runs the risk of politicising the judiciary and rendering political battles into constitutional litigation. This tendency diverts resources and attention from the political fora in which issues such as those raised in this application should properly be fought, and at the same time risks delegitimising the judiciary by dragging it into issues beyond the proper scope of the judicial role.

13. This matter offers a good example of the phenomenon. Section 12(7) of the NPA Act provides for Parliament to take steps initiating the removal of senior NPA officials. The DA, eschewing that route, has resorted to litigation, without attempting to trigger the proper parliamentary machinery.

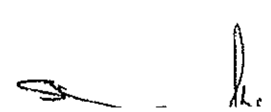
14. I turn to the text of the provisions at the heart of this litigation. The NPA Act grants power to appoint up to four Deputy National Directors of Public Prosecutions ("**DNDPPs**") to the President, "*after consultation with the Minister and the National Director*" (s 11(1)). A DNDPP serves until the age of 65 (s 12(2)).

15. Section 12(5) provides that a DNDPP "*shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)*"

16. Section 12(6)(a) provides as follows:

> *The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit, and, subject to the provisions of this subsection, may thereupon remove him or her from office–*
>
> *(i) for misconduct;*
>
> *(ii) on account of continued ill-health;*
>
> *(iii) on account of incapacity to carry out his or her duties of office efficiently; or*
>
> *(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."* (Emphasis added).

17. It is significant that the word "*may*" is employed in the foregoing. Argument will be advanced at the hearing that the permissive form denotes that the President exercises a broad discretion - as one would expect given the far-reaching implications of the suspension of the incumbent of high office. By contrast, s. 12(6)(b) employs the



peremptory *"shall"* form. The difference between the immediately succeeding provisions, it will be argued, should be given due interpretative weight.

18. Because a decision of the President under s. 12(6)(a) of the NPA Act is quintessentially *executive* action, it may be set aside by a court of law only in the event that it is found to be irrational. Hence, even if a court is convinced that the President should have decided otherwise than he or she did, it will not intervene – save where the Applicant can show that the power was exercised in a manner manifestly at odds with the purpose for which the power is conferred.

19. This is a particularly heavy burden for the Applicant. The question is not whether the decision not to take steps against Adv Jiba was correct, desirable, or even reasonable. It is whether the Applicant can show that the decision was irrational, in the sense that there exists *no* conceivably rational basis therefor.

20. Further, I am advised and verily believe that, even should this Court find that the President's decision not to take steps under s. 12(6)(a) was irrational, relative to the information before the President at the time he took the decision, the Court enjoys a residual discretion as to remedy. Here it should exercise that discretion not to set aside the decision.

21. I point out that no declaratory relief is sought by the Applicant.

22. Judges have indeed commented adversely on Adv Jiba – on occasion employing harsh language. However, contrary to Applicant's insistence, she has never been found, to use the Applicant's words, "*guilty of dishonesty*". (It is unfortunate that, in an application itself accusing senior office bearers of misleading courts, the Applicant should mischaracterise judicial pronouncements.)

23. In large part, the judicial criticism takes Adv Jiba and the NPA to task for delay in filing of records, affidavits and heads of argument. This is of course to be deprecated.

24. But it is neither realistic nor fair to hold an official, who sits at the apex of a large organisation running thousands of matters across the country at any one time, personally responsible for the filing of documents outside of stipulated deadlines.

25. It must be acknowledged that two courts found that Adv Jiba had failed to make full and proper disclosure, and found also that her conduct had lowered the NPA in the esteem of the public. Doubtless, when Adv Jiba was acting in her capacity as Acting National Director of Public Prosecutions, she was institutionally responsible for what happened on her watch. However, having carefully considered the text of the adverse judgments, Adv Jiba's responses thereto, and a variety of other factors canvassed below, I satisfied myself that there were insufficient grounds for the President to invoke s 12(6)(a).

26. My sentiments in this regard were conveyed to the Minister over the course of several meetings; and I am given to understand that these

sentiments were placed before, and carefully considered by, the President.

27. Even to the extent that the Court should find that suspension and investigation of Adv Jiba would indeed be justified, desirable, or appropriate, this does not entail that the President's decision not to invoke s. 12(6)(a) was itself irrational. With respect, it is not for any Court to substitute its judgment in this regard for that of the President.

IN LIMINE

A. The Constitutional Court Enjoys Exclusive Jurisdiction

28. The Notice of Motion seeks the "review and setting aside the First Respondent's decision ... in terms of s 12(6)(a) of the National Prosecuting Authority Act of 1998 (the "*NPA Act*"), not to suspend the Fourth Respondent and institute an enquiry into her alleged misconduct and her fitness to hold office". That being so, the application should be dismissed on the basis that the High Court lacks jurisdiction.

29. Section 167(4)(e) of the Constitution, provides that "only the Constitutional Court may ... decide that Parliament or the President has failed to fulfil a constitutional obligation". Section 12(6)(a) of the NPA Act, on the Applicant's own version, imposes an obligation, in specific terms, exclusively upon the President. The President may invoke s. 12(6)(a) only on the grounds stipulated therein. I am informed and verily believe that courts have held that it is most

especially in such instances that the Constitutional Court enjoys exclusive jurisdiction.

30. The Applicant relies on s. 7(2) of the Constitution, requiring all organs of state, including the President, to "respect, protect, promote and fulfil the rights in the Bill of Rights". The Applicant relies further upon section 165(4) and 179 of the Constitution.

31. Also invoked is item 1 of Schedule 2 of the Constitution, setting forth the oath of office of the President, in terms of which he must pledge to "obey, observe, uphold and maintain the Constitution and all other law of the Republic". These are all constitutional obligations, falling within the exclusive remit of the Constitutional Court.

32. Above and beyond the foregoing, the President like all other organs of state, is subject to the principle of legality and the daily linked fundamental value of the rule of law; the Applicant emphasizes that in paragraph 130 of the founding affidavit. This itself establishes, as indeed as strongly suggested by the Applicant itself, a self-standing obligation rooted firmly within the Constitution. An allegation that the President has conducted himself contrary to these fundamental principles fall quintessentially within the jurisdiction of the Constitutional Court.

33. Moreover, I am informed and verily believe that matters that have important political consequences, and that call for a measure of comity between the judicial and executive branches of the State, have been held to fall within the exclusive jurisdiction of the Constitutional

Court. It is *a fortiori* where there is a potential of the judicial branch treading upon territory that might be considered to be within the purview of other branches of government, and most especially the powers of the President, that out of respect for other branches, only the apex court should exercise jurisdiction. Argument in this regard will be addressed at the hearing of this matter.

B. Applications covering the same issues are pending in Court

34. Pending before the High Court in Pretoria are two applications covering much the same territory as this one. In the first, General Council of the Bar v Nomgcobo Jiba and Two Others, case no. 23576/2015, the General Council of the Bar is seeking to have Adv Jiba struck from the roll of Advocates. The allegations against Adv. Jiba are exhaustively canvassed. It is my understanding that the parties to this application have agreed to meet with the Deputy Judge President in order to obtain a special allocation and an expedited date for hearing.

35. In a second application, Freedom Under Law v The National Director of Public Prosecutions and 5 Others, case no 89849/2015, Freedom Under Law ("**FUL**"), is seeking the review and setting aside of the President's decision under s. 12(6) of the NPA Act – as well as other relief relating to the withdrawal of criminal charges lodged against Adv Jiba. Significantly, in the judgment of 19 November 2015 (a copy of which is attached hereto as annexure **SA1**), striking the urgent

application brought by FUL from the roll for want of urgency, Prinsloo J, at para [27] observed that –

> *"The GCB ... will ... rely on the same grounds that feature in this and other applications ... in its quest to remove [Jiba] and [Mrwebi] from the roll of advocates. Success for the GCB will, in any event, overtake the present proceedings because such a result will mean that [aforementioned advocates] are in any event, unfit to continue in their positions."*

36. Admittedly, Applicants in the other two pending cases are not the same as in this one. But, so I am advised, the underlying principle of *lis alibi pendens* is to avoid the highly undesirable situation in which different courts pronounce differently upon some issues of law or fact. The Supreme Court of Appeal has held that it may be open to a court to stay a subsequent matter - *even if the parties are not identical* - because it would be an abuse of process to permit a party to re-litigate substantially the same issues in another proceeding.

37. One might add that it would be especially undesirable to have courts hand down inconsistent decisions with regard to subject matter as politically sensitive as the exercise of Presidential powers.

<u>Adv Jiba's Appointment and Subsequent Events</u>

38. The NDPP is appointed by the President and invested by section 179(2) of the Constitution and Chapter 4 of the NPA Act with the

powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary functions and duties incidental thereto.

39. The NPA has four DNDPPs; several Directors of Public Prosecutions ("**DPPs**") at the seat of each Provincial Division of the High Court and four Special Directors of Public Prosecutions ("**SDPPs**") who are all accountable to the NDPP.

40. The four DNDPPs are assigned responsibilities by the NDPP.

41. The DPPs, who are responsible for prosecutions in their respective provincial jurisdictions, resort under the National Prosecuting Services ("**NPS**"), headed by a DNDPP. In essence, NPS is responsible for prosecutions in both the high and lower courts of South Africa.

42. On 28 December 2011, after the office of the NDPP had become vacant pursuant to a Court order in terms of which the decision of the President appointing Adv Menzi Simelane as NDPP was reviewed and set aside, the President appointed Adv Jiba as Acting NDPP. Adv Jiba was the head of NPS prior to her being appointed Acting NDPP. She held the latter position until Mr Nxasana was appointed the NDPP with effect from 1 October 2013. Adv Jiba at this point resumed her position as DNDPP and as head of NPS.

43. I have noted the Applicant's allegation that, in the course of a reorganisation which I implemented during August and September

2015, Adv Jiba was given "ultimate power over virtually all prosecutions" (Founding affidavit: para 85). Because this claim is potentially misleading it warrants clarification.

44. Prior to early March 2014, the NPS was headed by Adv Jiba, a DNDPP; the National Specialist Prosecution Services ("**NSPS**") by Dr Silas Ramaite SC ("**Dr Ramaite SC**"), a DNDPP; the Asset Forfeiture Unit ("**AFU**") by Mr Willie Hofmeyr ("**Mr Hofmeyr**"), a DNDPP; the Legal Affairs Division ("**LAD**") by Adv Nomvula Mokhatla ("**Adv Mokhatla**"), and Corporate Services by then-Chief Executive Officer (CEO), Adv Karen Van Rensburg ("**Ms Van Rensburg**" or the "**former CEO**").

45. On or about 3 March 2014, the former NDPP, Mr Nxasana reassigned the responsibilities of three out of the four DNDPPs. In this regard, Mr Nxasana assigned the responsibilities of Adv Jiba to head the LAD, Adv Mokhatla the NSPS and Dr Ramaite SC the NPS. Mr Hofmeyr remained head of AFU.

46. It is an open secret that I inherited an institution which found itself having the lowest morale since the coming into operation of the NPA Act on 16 October 1998. It could not be business as usual and something had to be done to turn this dreadful situation around. Shortly after my appointment I embarked on a wide-scale consultative exercise individually and independently with each DNDPP, DPP, SDPP, the former CEO, former Deputy CEO and with other senior members of the NPA. One of the questions I asked each and every

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person I consulted with was: Should there be any changes? If in the affirmative what changes are recommended? If no changes are recommended, why not? In this regard, each person shared their views with me.

47. As a result of these deliberations and recommendations I, inter alia, reassigned the responsibilities of the DNDPPs on 17 August 2015 as follows:

47.1. Dr Ramaite SC, as head of Administration (formerly Corporate Services);

47.2. Mr Hofmeyr, as head of LAD;

47.3. Adv Mokhatla, as head of AFU, and

47.4. Adv Jiba, as head of NPS.

47.5. In this regard I, inter alia, incorporated three of the NSPS Business Units, namely, the Priority Crimes Litigation Unit ("**PCLU**"), the Special Commercial Crime Unit ("**SCCU**") and the Sexual Offences and Community Affairs Unit ("**SOCA**"), into the NPS and thereby dispensed with the NSPS. This notion was first mooted five years ago but for some unknown reason had never been implemented.

48. The NPA Act does not make provision for a CEO but does provide for administrative support in the office of the NDPP and at each DPP

office. As such, in giving effect to the letter of the law, the positions of CEO and Deputy CEO were dispensed with.

49. The aforementioned changes and reassignment of responsibilities were supported and welcomed by the overwhelming majority of the DPPs, SDPPs and some of the DNDPPs.

50. The object of the re-assignment of responsibilities was to make the institution more efficient by eliminating duplication of functions and promoting inter-departmental collaboration. The former CEO was reassigned to the office of the DPP and the Deputy CEO, who had been acting in the position, returned to her original position as head of Communications in the NPA.

51. The responsibilities of several officials, including that of the four DNDPPs were re-assigned, taking optimal advantage of the DNDPPs respective capacities and experience and in transforming the institution. Adv Jiba was one of only two DNDPPs with any significant prosecutorial experience. (The other being Dr Ramaite SC). Mr Hofmeyr and Adv Mokhatla have both never prosecuted a case in their entire careers.

52. I deemed it the best use of Adv Jiba's capacities to vest in her the overall managerial and administrative responsibility for the newly-consolidated prosecution services. This did not accord Adv Jiba day-to-day decision making powers as to individual prosecutions. Moreover, she remains, as prior to the re-assignment of

responsibilities, accountable to me for all major decisions. In this regard I have not assigned any powers to Adv Jiba to institute and conduct prosecutions as envisaged in s. 22(9) of the NPA Act.

53. I deem it prudent to note, incidentally that neither Adv Jiba nor the other DNPP's who were assigned new responsibilities in the reorganisation received a salary increase or decrease as a result of their lateral re-assignment.

Background to the Criminal Charges and GCB application

54. The central issue in this matter is the rationality of the decision of the President not to act in terms of s. 12(6)(a). The precursor to the decision was the letter addressed by the Applicant's attorneys dated 26 August 2015 to the President (annexure **JS16**, p 739).

55. The premise for the request that the President take a decision whether or not to suspend Adv Jiba is to be found in paragraph 3 of JS16. For ease of reference, this paragraph is repeated hereunder:

> *"... Three separate courts, including the Supreme Court of Appeal and a committee headed by a retired judge, have found that Adv Jiba has acted dishonestly in her conduct before the courts. Criminal charges have been brought against her for fraud and perjury and the General Council of the Bar has sought to have her struck from the roll of advocates."*

56. In carrying out my mandate from the Minister to ascertain all the relevant facts, I established that there are some serious criticisms of Adv Jiba in the judgments, but much of the material upon which the

Applicant relies (as per paragraph 3 of JS16), was manipulated, and actuated by ulterior motives with a view to getting rid of Adv Jiba.

57. At first blush the litany of charges, complaints and demands concerning Adv Jiba indeed do appear compelling

58. I hope to show in what follows that closer examination of the facts places a somewhat different complexion on things. The criminal proceedings and the GCB application were not initiated by disinterested persons who wished to protect the integrity of the institution. In fact, they can be traced to officials within the NPA, central around Mr Nxasana, who have long been at loggerheads with Adv Jiba. I deem it rather unfortunate to traverse what follows, but nevertheless deem it prudent, and I do so with the greatest of respect and without any malice.

59. The starting point is a memorandum prepared by Mr Willie Hofmeyr. At the time he was the head of the AFU. It must be mentioned at the outset that the allegations concerning Adv Jiba had nothing to do with AFU and, in the ordinary course, would not be investigated by Mr Hofmeyr or AFU.

60. The NDPP at the time, Mr Nxasana, had taken two days leave on 17 and 18 July 2014. He had appointed Mr Hofmeyr as the Acting NDPP, purportedly in terms of s.11(3) of the NPA Act. A copy of Mr Hofmeyr's memorandum, dated 18 July 2014, is attached hereto marked **"SA2"**. Considering the length of the memorandum it is

unlikely that it was prepared in the two days of Nxasana's absence. (I interpose here to mention that more than a year later it was confirmed that Mr Hofmeyr had all along been doing Mr Nxasana's bidding in pursuing Adv Jiba. This came to light when, on 17 August 2015, I hosted an inaugural collective leadership meeting in my boardroom, with DNDPPs, DPPs and SDPPs. It was during this meeting that I, inter alia, announced the reassignment of the responsibilities of the four DNDPPs to the DPPs and SDPPs. In answer to my question about the genesis of the investigation of Adv Jiba, Mr Hofmeyr stated that he had investigated Adv Jiba on the direct instruction of Mr Nxasana.)

61. The Minister wrote to Mr Nxasana, as dealt with hereunder, articulating the Ministers understanding that Mr Nxasana was aware of the contents of the memorandum. That was never disputed by him.

62. The following next transpired:

62.1. The Minister wrote to Mr Nxasana on 8 August 2014 (a copy of which letter is annexure "**SA3**" hereto). The Minister, referring to Mr Hofmeyr's memorandum dated 18 July, noted that he had not been advised that Mr Hofmeyr had been acting as NDPP. He observed that it was in the period of 17-18 July, during which Mr Hofmeyr had acted, that Mr Hofmeyr had signed his document.

62.2. Mr Nxasana responded to the Minister in a letter dated 11 August 2014, a copy of which is attached hereto as "**SA4**". He expressed his desire to meet with the Minister to "discuss all NPA issues that required discussion", including those raised in the Minister's letter of 8 August 2014.

62.3. The next day, 12 August 2014, the Minister responded that he in principle accepted the need for a meeting, but insisted that the issues raised in his letter of 8 August 2014 should still be responded to by Mr Nxasana. (A copy of this letter is annexure "**SA5**" hereto.)

62.4. During the week of 23 November 2015 I learned for the first time that Mr Nxasana, in a memorandum to the Minister dated 17 September (attached hereto as Annexure "**SA6**"), responded to the Minister, in a document that sheds some light upon the murky genesis of the investigation of Adv Jiba, Adv Mrwebi and others.

62.5. Mr Nxasana having complained of Adv Jiba's "insubordination", manifests what may fairly be described as a paranoid sensibility, writes that he has "heard from others" that:

> *"[Jiba] has been confident for some time that I will be removed from my position soon and that she will be appointed as National Director or acting National Director. Thus, it appears that she is simply defying my instructions*

in the belief that I will not be there to hold her to account." (para 17)

62.6. Because, as noted, I only learned of the memorandum recently, it of course did not feature in my discussions with the Minister.

63. It seems clear that Mr Nxasana's mounting anxiety about what he saw as machinations against him is not unconnected with the emergence of allegations that he had failed to disclose his personal history of violence.

64. On 19 June 2014, the President wrote to Mr Nxasana requesting information concerning criminal charges previously faced by Mr Nxasana. He was also asked for his comments on sentiments attributed to Mr Nxasana in the media. (A copy of the President's letter is attached as annexure "**SA7**").

65. On 21 June 2014, Mr Nxasana submitted a lengthy response to the President, which I attach hereto as Annexure "**SA8**". Relevant here is the following portion of Mr Nxasana's response which, with respect, suggests that Mr Nxasana may have been animated by ulterior motives:

> *"As early as October 2013, it was brought to my attention that one of my deputies together with some NPA and SAPS officials were involved in a plot to have me removed from office. I was provided with tangible evidence that implicated these officials. ... The campaign to have me removed was continuing such that members of SAPS seconded to the Missing Persons Task Team in Durban were used to find*

something on me that could be used to argue that I was not the right candidate for the position of the NDPP."

66. The fact that Mr Nxasana had Adv Jiba in his sights did not go unnoticed in the press. A headline in *News24/City Press* of 13 July 2014, reads "*GLOVES OFF IN NPA AS NXASANA GUNS FOR JIBA*" (A copy of the article is attached hereto as annexure **"SA9"**. According to the article, the NPA was "being torn apart by internal strife" and that morale was at "an all-time low". The article continues that Adv Jiba had fallen "foul of Nxasana just two months of his appointment last August", and that there were those in the NPA who were "involved in attempts to dig up dirt on him".

67. According to Mr Hofmeyr (in his 18 July 2014 memorandum, para 12), on 26 June the NPA briefed Ellis SC to furnish a legal opinion regarding the disciplinary procedures applicable to senior personnel at the NPA, and on whether disciplinary steps ought to be taken against advocates Jiba, Mrwebi (SDPP and head of the SCCU), Mzinyathi (DPP, Pretoria) and Moipone (in reference to Adv Noko, DPP : KZN), arising out of findings in various judgments, and in particular the judgment of Gorven J in the Booysen matter. Mr Hofmeyr notes that Ellis SC provided such opinion on 7 July 2014.

68. It is alarming to note that in the course of the preparation of the said opinion, Ellis SC consulted with General Booysen himself on 16 February 2015. (I refer in this regard to an invoice presented to the

State Attorney by Ellis SC dated 1 June 2015, attached hereto as annexure "**SA10**")

69. I refer also in this regard to a letter from Bernhard van der Hoven Attorneys, dated 20 November 2015 (attached hereto as annexure "**SA11**"), reiterating that the GCB had suggested to the NPA that the latter be responsible for the funding of 75% of the "entire attorney/client costs relating to the application" (para 2.2).

70. In the middle of 2014, it emerged that Mr Nxasana had failed to disclose prior criminal convictions for violent conduct - as well as the fact that he had at one point been charged (albeit subsequently acquitted), of murder.

71. In June 2014, former Minister of Justice, Jeffery Radebe MP, called upon Mr Nxasana to resign in light of the fact that he had not received the necessary security clearance. I refer in that regard to the draft minutes of a special Exco meeting of 22 May 2014 (attached hereto as "**SA12**"), chaired by Mr Nxasana in which the following appears at items 3.2 to 3.5.

> "The Minister informed the NDPP that the State Security Agency declined his top secret clearance.
>
> The Minister further informed the NDPP that they [sic] referred to a court matter which transpired [*sic*] in 1985 and that the Public Service commission also refers to a complaint from Mr P Mokotedi to the Ministry, but it was not yet attended to.
>
> The Minister suggested that in light of this the NDPP should resign.

> The NDPP informed the Minister that he will not resign and the matter which the State Security Agency refers to in 1985 [*sic*] he was acquitted which means he was not found guilty.
>
> The NDPP indicated to Exco that it was important that he inform Exco about the meeting and that he will continue with his duties as NDPP and will protect his integrity."

72. The latter appears from a report, attached hereto as annexure "**SA13**"), in the *Natal Witness* dated 9 June 2014, in which the following also appears:

> "Despite Nxasana's involvement in [a stabbing incident in the 1980's] and new claims that he had been involved in another murder incident in Nongoma in 1986 ... he was idolised in the community. ...
>
> Nxasana was told he had been denied top security clearance for failing to declare the murder acquittal, a R2 000 Law Society fine and a 2012 traffic offence, and for allegedly wanting to disband [the NPA integrity management unit]"

73. Further light is shed upon the reasons for denial of Mr Nxasana's security clearance by a report in *The Citizen* dated 15 June 2014 (a copy of which is attached hereto as annexure "**SA14**"), in which the following appears:

> "Joyce Khumalo, the former girlfriend of NPA head, Mxolisi Nxasana laid an assault charge against him in 186 he allegedly beat her up. When Joyce tried to dump him, Nxasana allegedly beat her so badly that she was admitted to hospital. ...Nxasana also allegedly attempted to strangle her during the breakup.
>
> Khumalo then laid an assault charge against him in Nongoma, KwaZulu-Natal, and it was believed that this was the case for which he paid a R50 admission of guilt fine.
>
> Last month, former Justice Minister, Jeff Radebe, reportedly instructed Nxasana to resign after not being given a security

clearance because of past brushes with the law. He has refused to resign.

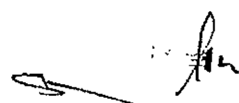
74. Another report of the same day (*News 24*, 15 June 2014, attached hereto as annexure "**SA15**"), quoted the *Sunday Times* as reporting as follows:

> "The Head of the Integrity Management Unit Prince Mokotedi said he had been stopped [by the Agency] from investigating allegations that one of the assault charges against Nxasana in the 1980's had in fact been a killing. ... Last week the DA said it was seeking an urgent probe into the October appointment of Nxasana. ... Democratic Alliance MP Glynnis Breytenbach, said in a statement on Wednesday that Parliament's Justice Portfolio Committee should meet to *investigate the process followed in appoint Nxasana.*"

75. Concerns about instability within the NPA during this period were being publicly articulated. The Minister implored senior NPA officials to desist from their public bickering. (I refer in that regard to a report in the *Mail & Guardian* dated 2 July 2014, a copy of which attached hereto as annexure "**SA16**").

76. And on 18 June 2014 Justice Edwin Cameron, in a public address in Durban, is reported to have said that the NPA appears to be "chaotic and dysfunctional," and that there was a lack of confidence in the institution. (A copy of a report on *News24* dated 18 June 2014 is attached hereto as annexure "**SA17**").

77. The report about Mr Nxasana's prior convictions and the ensuing furore, reflected in the aforementioned statements and reports gave rise to a chain of correspondence between the President and Mr Nxasana, the convening of an enquiry in terms of s. 12(6)(a) of the



NPA Act, and the resignation of Mr Nxasana. The details are not relevant to a determination of this matter.

The charges against Adv Jiba

78. The judgment of Gorven J in the matter of Booysen v the Acting NDPP [2014] 2 All SA 391 (KZD) was delivered on 26 February 2014. This judgment was highly critical of Adv Jiba. But what is pertinent is the following:

78.1. An application for leave to appeal was filed on the advice of senior counsel, Lawrence Hodes SC;

78.2. Mr Nxasana, however, ordered the withdrawal of the application for leave to appeal. I refer to the answering affidavit of Adv Jiba in the GCB application (which is attached to the founding affidavit as annexure **JS20,** p 835), particularly paragraph 221 in which she states the following:

> *"On or about 24 March 2014 Adv Mosing was called to a meeting with Mr Nxasana, who asked him to bring all the files pertaining to the "Booysen" matter. Mr Nxasana enquired about the notice of appeal and wanted to know why he had not been briefed about it. He also questioned the merits of an appeal and suggested that Adv Hodes SC may have advised this in order to save his own reputation. He further suggested that the prosecution team wanted to take the matter on appeal in order to save my reputation. Mr Nxasana indicated that he wanted the appeal to be withdrawn."*

79. In the judgment of Gorven J, the learned Judge had found that crucial concessions had been made by Hodes SC, counsel for Adv Jiba.

However, in Adv Jiba's answering affidavit in the GCB application (para 219), she states:

> *"On 13 March 2013 the entire prosecuting team, including Adv Chauke and Adv Mosing consulted with Adv Hodes SC to discuss the judgment. Counsel indicated that there were a number of issues in respect which he felt the learned Judge had erred. He also indicated that he did not believe that he had made the concession regarding the lack of evidence implicating Booysen, as stated by Gorven J at paragraph 29 of his judgment. The result of the meeting with counsel was that it was decided to apply for leave to appeal against the decision of Gorven J. Adv Hodes SC was therefore instructed to prepare an application for leave to appeal, which he duly did. ..."*

80. In March 2015, Adv Jiba was charged with perjury and fraud arising out of the events in the Gorven J judgment. I have been advised by Adv Marshall Mokgatlhe ("**Adv Mokgatlhe**"), a Deputy Director of Public Prosecutions ("**DDPP**") and the Regional Head of the SCCU in Pretoria, that he was informed by one of the members of the prosecutorial team, Adv Gerhard van Eeden, that the team to prosecute Adv Jiba had been personally appointed by Mr Nxasana and they had met with him.

81. On 13 August 2015 I requested Adv Mokgatlhe to provide me with his decision as the Regional Head of that office concerning the prosecution of Adv Jiba. Adv Mokgatlhe had formed the view that there were no prospects of a successful prosecution and declined to prosecute. I did not myself take the decision to decline to prosecute, but I agreed with his view.

82. In regard to the application by the GCB to strike Adv Jiba off the roll, I have established the following:

82.1. A supplementary answering affidavit was filed by Adv Jiba in that application (case no. 23576/2015, GDP).

82.2. The supplementary affidavit refers to correspondence concerning an alleged agreement by the NPA to pay, through the office of the State Attorney, 75% of the GCB's attorney and client costs of instituting and prosecuting the application for the striking off of Adv Jiba and two other advocates, namely Lawrence Mrwebi and Sibongile Mzinyathi.

82.3. In a supplementary replying affidavit filed by Muller SC, on behalf of the GCB, certain revealing correspondence and e-mails are attached. Pertinent are the following:

82.3.1. On 18 November 2014 the GCB wrote to Mr Gerhard Nel at the NPA. A copy of this letter is annexure "**SA18**" hereto. The letter records that:

> *"... the request of the National Director of Public Prosecutions ("NDPP") that the General Council of the Bar ("GCB") consider making application in terms of section 7 of the Admission of Advocates Act, No. 64 of 1974 ... in respect of three of the NDPPs senior members, was considered by the GCB Exco at its scheduled meeting held on 15 November 2014. The GCB resolved in principle to bring such applications in the exercise of its obligation to do so in terms of section 7(2) of the Admission of Advocates Act.*

The applications are likely to be strenuously opposed. None of the persons concerned are members of a Bar. While members of a constituent Bar of the GCB usually render their service in striking-off applications involving our own members free of charge, the present applications are in that respect unusual. The GCB Exco accordingly resolved that I request that the NPA fund the applications on a basis to be agreed. Kindly indicate whether this is in order."

82.4. In a letter dated 8 December 2014, a copy of which is attached hereto as "**SA19**", Muller SC, chair of the GCB, wrote to Advocate Nel. He stated that he was prepared to recommend to the GCB Executive Committee that the GCB bear some proportion of the costs, "but in view of the fact that these applications are to be brought by the GCB at the request of the NPA in respect of three of its officials, it would, I think, be more than fair if the NPA accept responsibility for 75% of the attorney/client costs."

82.5. Having established that payments had already been made, I gave an instruction in August 2015 that no further payment be made.

82.6. As noted above, as recently as 20 November 2015 I have received a demand for payment from attorney Bernhard van der Hoven, representing the GCB. A copy of this demand is attached above marked **SA11**.

83. The State Attorney responded to this letter on my behalf on 26 November 2015 (*per* annexure **"SA20"** hereto). The contents of this letter are of sufficient significance to warrant quotation at length.

> *"3. The NDPP is perturbed by a number of issues concerning the arrangement relied upon by the GCB in claiming the fees of counsel as well as your own fees. His concerns include the following:*
>
> *3.1 Firstly, the authority of Gerhard Nel, Hanika van Zyl, Karen van Rensburg and any other persons who purported to represent the NPA, to enter into the arrangement. The NDPP is of the view that they did not have authority to do so and he is investigating this issue further. As part of this investigation, it will be necessary to determine whether the NPA's funds can legitimately be used for this purpose.*
>
> *3.2 Secondly, the vagueness of the agreement. In this regard, it is not clear whether it is the GCB's position that the NPA agreed to fund the application without having any say as to who is briefed; whether both senior and junior counsel would be briefed; if counsel were to be briefed outside the jurisdiction of the court where the application was to be brought, would the NPA be responsible for its pro rata portion of their travelling and sustenance charges; the rate of counsels' and attorneys' fees; whether the NPA was committed to fund the application until final determination, including any appeal; whether the NPA would be reimbursed if the applications were to be successful and, if so, the basis of such reimbursement; and whether it would it be left to the GCB to make all decisions in regard to the application without referral to the NPA?*
>
> *4. The NDPP also expresses his disquiet concerning the propriety of the arrangement. In the first instance, it is Adv Abrahams' understanding that the GCB, and its constituent members, have always prided themselves, on their independence. Prior to Adv Abrahams having been appointed as the NDPP, there were media reports concerning acrimony and disputes within the NPA which was disruptive of the proper functioning of the NPA. These reports must have come to the attention of the*

GCB. It is disconcerting that the GCB, in these circumstances, allowed itself to be seen to become embroiled in internal conflict within the NPA by asking for and agreeing to accept payment towards its fees to strike off senior officials within the NPA. It is unfortunate that the GCB's independence has been compromised, or at the very least is seen to have been compromised.

5. *Adv Abrahams has no knowledge as to what arrangements are usually made regarding fees charged by advocates when applications are made to strike off members of the respective constituent Bars of the GCB. Similarly, he is unaware as to whether fees are normally charged when applications are made to strike off advocates who are not members of these Bars. We would ask the GCB to confirm that in the former instance, counsel do not charge, whereas in the latter instance, they always charge. If counsel do not charge in the latter instance, Adv Abrahams requests to be informed of the criteria applied for the respective decision.*

6. *Adv Abrahams further requests that he be provided with copies of the minutes of the meeting by the Pretoria Bar Council during August 2014 where the latter resolved to refer this matter to the GCB and the minutes of the meeting of the GCB Exco of 15 November 2014 at which the resolution was taken to "in principle...bring such applications in the exercise of its obligations to do so in terms of section 7(2) of the Admissions of Advocates Act."*

7. *A further matter which is of serious concern to Adv Abrahams is the letter from the GCB of 8 December 2014 wherein the Chairman, Adv Muller SC, states that the GCB will do what it can to ensure that the costs are limited as far as possible. He further stated that to this end he would ask those who will be involved in the applications to consider rendering their services for a reduced fee. In the letter of 20 November 2015 addressed to the NDPP, various accounts have been attached. It is startling, taking into account the letter from Adv Muller of 8 December, that Adv Burger SC has charged a fee of R50 000.00 per day plus VAT of R7 000.00. Even in the most complex of commercial matters and involving large amounts of money, this fee would be on the very high end. Adv Abrahams requests the GCB to advise whether it endorses for senior counsel the daily rate charged by Adv Burger SC. It is not insignificant that the fees charged*

by Adv Ellis SC are at less than half the rate charged by Adv Burger SC.

8. *Whilst disputing that the NPA is liable for any fees in terms of the arrangement relied upon, we place on record that the reasonableness of all of the fees claimed is disputed.*

9. *In this regard the NDPP received a letter from Adv Cassim SC dated 28 October 2015 in which he states, inter alia:*

> *"The General Council of the Bar is an independent organisation and the guardian of the advocate's profession in South Africa. It is unbecoming of it to have entered into an 'arrangement' with the NDPP to bring an application to strike off Adv Jiba from the roll of advocates".*
>
> *and*
>
> *"The NDPP, if it has cause of complaint, should act on its own steam to bring disciplinary charges against Jiba".*
>
> *and*
>
> *"What is of more disconcerting (sic) to me is the alleged agreement by the NDPP to pay the fees of counsel retained by GCB. The fees of Advocate Burger SC amount to R307,800.00l. This is apparently for settling papers. I find it offensive as a South African and as a taxpayer that the NDPP would countenance such a high fee. If you are minded to pay, please request the counsel concerned to tax his bill because the fee is enormous and out of range".*

The letter was also addressed to the Honourable Minister of Justice and to Mr V Ngalwana SC who is the chairman of AFT.

10. Adv Abrahams is still investigating this matter, but has in the interim consulted with senior counsel who has expressed the opinion that the agreement contended for by the GCB is invalid and unenforceable. The payments claimed will not be made and any steps taken to enforce payment will be defended. Without prejudice to the aforementioned, and in the event that it may ever be

> found that the agreement is enforceable, the NPA hereby terminates the agreement."

84. Particularly disconcerting is the fact that Muller SC, in his letter of 8 December 2014 (annexure "SA19" above), in which he requests the NPA to fund 75% of the costs of the GCB application, states bluntly that it is to *"be brought by the GCB at the request of the NPA."* Effectively, the GCB, an independent association of advocates, is to act as the cat's paw of the NPA.

85. Applicant in this matter makes much of the pending application to strike Adv Jiba off the roll. But in truth, it is the NPA's application - using the GCB as a front.

86. Whilst I am aware that Ellis SC furnished an opinion as to the conduct of Adv Jiba, it does not seem that he was apprised of the factional acrimony and motives behind the request made by the NPA, headed by Mr Nxasana at the time, to bring the striking off applications. The fact that the NPA was prepared to use its funds to pay 75% of the fees, whatever they may be, speaks volumes.

87. In the circumstances described above, the reality in my assessment is that the criminal proceedings were initiated, not in order to see that justice is done, but as part of a vendetta and a stratagem to get rid of Adv Jiba. Similarly, so with the NPA's initiation, under the direction of Mr Nxasana, to have an application brought to have Adv Jiba and other NPA officials struck off the roll of advocates.

C. The Yacoob Report

88. On 31 July 2014, Adv Van Rensburg informed the Minister that the NPA had appointed a committee made up of retired Constitutional Court Justice Yacoob and Adv Manyaje (**"the Yacoob Committee"**), to investigate the conduct of Adv Jiba and other senior NPA staff. I have read the report, which was completed in October 2014, and handed to the Minister in February 2015.

89. I noted that:

    89.1. the report stated that it was based upon limited information and was not conclusive.

    89.2. the report did not find that Adv Jiba had been guilty of improper conduct, but did recommend that existing prosecutions (without apparently referring to Adv Jiba), be continued, subject to being withdrawn on good grounds;

    89.3. the Committee did not recommend that Adv Jiba or any other persons be suspended; it recommended instead that the National Director recommend to the President that a judicial commission be appointed.

    89.4. the report recommended directives be issued to resolve confusions and misunderstanding about, *inter alia*, the limitations of the power of a Special Director in the Office of National Prosecution.

90. I mention in passing that *Prosecution Policy Directives* were issued on 1 June 2015; an extract from part 45, entitled "Investigating and Special Directorates" is attached hereto as annexure "**SA21**". It will be noted that protocols are set up providing that case dockets pertaining to a list of priority crimes must be forwarded to the PCLU at the office of the National Director. In addition, reference is made to the SCCU dedicated to the prosecution of commercial crime as well as serious organised and complex financial crime cases. It is stipulated that the prosecutors in the Unit fall under the auspices of a Special Director of Public Prosecutions appointed by the President in terms of section 13(1)(c) of the NPA Act. The Special Director is required to consult with the relevant DPP in respect of representations, as well as requests for a regulation 342A(3)(c) written instructions to resume or reinstate a prosecution.

91. Having examined the relevant NPA files in the course of preparing this affidavit, I have uncovered documentation that has fortified my conviction that the Yacoob Commission was initiated by Mr Nxasana and Ms Van Rensburg (absent any statutory or regulatory authorisation), with a mind in particular to discredit Adv Jiba. (Importantly, I pause to mention that Mr Hofmeyr confirmed to me that he had recommended the notion of the Yacoob Commission to Mr Nxasana). Most indicative perhaps is a list of documents (attached hereto as annexure "**SA22**"), compiled, apparently at the instance of Mr Nxasana and Ms Van Rensburg, the then CEO, to be placed before Justice Yacoob prior to the commencement of interviews. It

will be noted that the suggested documentation related predominantly to allegations against Adv Jiba including, for example, the Ellis SC opinion and attachments thereto and the Mdluli and Booysen judgments.

92. The irregular fashion in which the Yacoob Commission was convened by Ms van Rensburg did not go unnoticed at the time. In a letter from the Director-General: Justice and Constitutional Development ("**the DG**"), of 6 August 2014, a copy of which is attached hereto as "**SA23**", the DG took issue with the fact that:

    92.1. the Committee had been established without the concurrence of the Director-General and purporting to inform the Minister only *post facto* (para 2);

    92.2. no legislation or prescript had been named as the basis for the establishment of the Committee (para 2.2).

93. The Director-General also raised, inter alia, the following questions with Ms Van Rensburg:

    93.1. On what basis was it concluded that senior employees had been engaged in unethical and unprofessional conduct?

    93.2. What would be the implications of the findings of the Committee upon senior employees?

    93.3. What were the projected costs of the Committee?

    93.4. Why the appointment of the Committee had been revealed to

the media prior to input from the Director-General and the Minister?

94. There are additional reasons why the establishment of the Yacoob Committee and its processes are problematic. I mention in this regard that the terms of reference of the Yacoob Committee were, without any evident authorisation, expanded well beyond those initially envisaged. I wish to draw to the attention of this Honourable Court draft minutes of a special Exco meeting of 31 July 2014, chaired by Mr Nxasana, a copy whereof is attached hereto as "**SA24**". Item 3.1 reflects that Mr Nxasana announced that the purpose of the meeting was to advise Exco about the decision taken to "establish a committee [to] investigate the leaks to ... media". It is difficult to understand how it came to pass that the Yacoob Report ultimately ballooned into a sweeping set of criticisms of Adv Jiba and several other senior NPA officials.

95. The narrow mandate of the Committee is evident also from an undated NPA bulletin, a copy of which is attached hereto as '**SA25**", the first page of which makes clear that the Committee was established in light of and following "various media articles which demonstrate the involvement of certain employees, including senior members of the NPA in leaking information to the media and other interested parties".

96. In similar vein is an internal memorandum from Ms Van Rensburg to the NPA's state accountant dated 25 August 2014, a copy of which is attached hereto as "**SA26**", in which one finds the following language:

> "*A fact finding Committee was appointed to investigate allegations of senior employees of [sic] National Prosecuting Authority in leaking of information to media and other interested parties and certain unethical and unprofessional conduct.*" (para 2)

I conveyed my views about the Yacoob Report to the Minister, whom I understand in turn conveyed same to the President.

97. My strong impression that the investigation of Adv Jiba lacked objectively was vindicated when I came into possession of a document (attached above as **SA22),** which, so I was informed by my office manager, Mr Danie Schmidt, had been prepared by Mr Theodore Leeuwschut, the former office manager of the CEO at the time, Ms van Rensburg. The purpose of the manuscript was to identify documents to be placed before the Yacoob Committee. I observe as follows:

 97.1. What is significant is that the documents to be furnished includes a category styled "SARS, PAPARAS COMPLAINTS", which I note were not themselves placed before the Yacoob Committee.

 97.2. I should mention that this category has to do with alleged impropriety by member of the prosecuting and investigating teams in the Selebi/Paparas prosecutions (former members of the now defunct Directorate of Special Operations ("**DSO**")). Some of these very officials had been tasked by Mr

Nxasana and Ms Van Rensburg with assisting the Yacoob Committee. It is relevant to note that these persons were part of the AFU, headed by Mr Hofmeyr (at the time) - a unit that ordinarily would not have any involvement in the investigation regarding Jiba. They reported to Mr Hofmeyr in this investigation.

97.3. Not surprisingly, they had failed to place before the Committee information and documents regarding the investigation to which they were themselves subject.

97.4. When a decision was made by the GCB, complying a request from the NPA, to apply to strike off from the roll Advocates Jiba, Mrwebi and Mzinyathi, consultations were held by the GCB's counsel, Ellis SC, with one of the abovementioned NPA officials, Mr Andrew Leask, an AFU financial investigator, who at the time, worked under Hofmeyr. (Mr Leask was previously the Chief Investigating Officer of the DSO and the lead investigator in the Selebi and Paparas matters.) It is significant that Ellis SC had consulted with Mr Leask, General Booysen, Mr Hofmeyr and Ms Van Rensburg. The aforementioned appears from annexure **SA10** hereto.

97.5. I mention the above to demonstrate the lack of objectivity in the investigation targeted at Advocates Jiba, Mrwebi and Mzinyathi, conducted by Mr Hofmeyr and Ms Van Rensburg at the instance of Mr Nxasana.

D. The GCB application

98. Soon after taking up my position as NDPP, as part of my overall survey of important pending matters having to do with the NPA, I familiarized myself with the pending GCB application (already discussed above) to strike senior NPA officials from the roll of advocates.

99. I requested then CEO, Ms Karen van Rensburg, in her capacity as custodian of documents, to provide me with the documentation, as well as general background material, including how the matter had been initiated. I received from her the documentation in three lever arch files sealed in tamper proof evidence security bags.

100. It was in my review of these documents, and in particular in the course of my examination of the opposing affidavit of Adv Jiba, that I became familiar with her comments of the conclusions and inferences that the GCB had drawn from various adverse judicial remarks about her.

101. For the most part, and having carefully read the judgments themselves, I was persuaded that Adv Jiba's responses were well-founded. Her conduct may not always have been exemplary. There was certainly a case to be made that she could have more carefully managed aspects of the underlying litigation. But the suggestion that she had conducted herself dishonestly was, in my view, negated by the surrounding circumstances, especially when read together with qualifying comments by the respective judges.

102. My conclusions as to the qualifications and explanations for the adverse comments about Adv Jiba in the respective cases are set forth herein.

103. As explained in more detail below, it was these conclusions that I conveyed to the Minister in a series of meetings, which I understand, were subsequently placed before the President.

104. I discussed with the Minister in general terms of the nature of applications to strike advocates from the Bar. I specifically recommended that any steps in terms of s. 12(6)(a) of the NPA Act be deferred until such time as a decision was handed down in the GCB matter. I advised further that an application under s. 7 of the Admission of Advocates Act, No 74 of 1964, is *sui generis*, and is of an interrogatory nature. I expressed confidence that the outcome of the application would be thorough, well-reasoned and legitimate in the eyes of the profession and public in general.

E. <u>The Adverse Judicial Comments about Adv Jiba</u>

105. I wish to comment upon the four judgments invoked by the Applicant in support of their contention that it was irrational not to suspend Adv Jiba. I am advised that it is prudent not to burden this affidavit with an extensive discussion of the cases. My own brief observations are hence referenced to Adv Jiba's answering papers in the GCB matter, which, as we have seen, overlaps in large measure with the present litigation.

Freedom Under Law v National Director of Public Prosecutions 2014 (1) SA 254 (GNP) (Murphy J)

106. Regarding this matter, I carefully read the judgment in its overall context, and conveyed to the Minister my observations to the following effect:

106.1. Punitive costs were not awarded against any of the Respondents by Murphy J.

106.2. Components of Murphy J's order were overturned on appeal, with the SCA observing that the appellants had achieved "substantial success", and granting costs in favour of the NPA.

106.3. The fact that the SCA overturned Murphy J's substitution of the decision, and instead remitted the matter back to the NPA. (Evidently the SCA did not share Murphy J's lack of confidence in the NPA's ability properly to make a determination in light of the judicial finding.)

106.4. The SCA decision contains no direct criticism of Adv Jiba. On the other hand, Brand JA did take Murphy J to task for his positive remarks about two of Freedom Under Law's deponents; Brand JA noted the need for the courts to display even-handedness towards litigants before them.

106.5. Adv Jiba had nothing to do with the day-to-day conduct of the litigation on behalf of the NPA. This is the province of the LAD, acting on the advice of the State Attorney and counsel.

107. In my view, there is no basis for contending that, where a person or an institution adopts a legal position, which is subsequently held to be incorrect by a court, it follows that the position was in bad faith. Courts routinely find that decision-makers have erred in their administrative and executive decision making. Finding that these decisions were made in bad faith are rare indeed.

108. Adv Jiba, so I understand, stands by her position that FUL's review application was premature. She stands also by her position that Adv Breytenbach's dissent from the decision to discontinue the prosecution was not brought in terms of the relevant regulatory framework. There was hence no obligation upon her to treat Adv Breytenbach's view as a formal application for a review.

109. It bears mention that, in instances where judicial officers may be thought to conduct themselves in such a way that there is a reasonable apprehension of bias, there has never to my knowledge been any question of Judges being subject to removal or

impeachment proceedings.

110. Incidentally, my understanding is that, in the wake of the decision of Murphy J, charges of kidnapping have since been reinstated against Mdluli, and remain part-heard. The corruption charges were also reinstated, but have been since struck from the roll with the court making an order in terms of s. 342A of Act 51 of 1977. I have been briefed by the prosecuting team and intend announcing the decision to prosecute or not once the outstanding issues have been resolved and processes followed.

111. In the course of preparing this affidavit, I considered those parts of Adv Jiba's answering affidavit in the GCB application (paras 77-199), dealing with the Mdluli matter. I noted that Adv Jiba's comments overlap to a large extent with my own views as set forth above.

Booysen v Acting National Director of Public Prosecutions (Gorven J)

112. I carefully read this judgment in its overall context, and conveyed to the Minister my observations to the following effect:

112.1. This case concerned a challenge by a senior officer in the South African Police Services to the institution of charges of racketeering in KwaZulu Natal. Booysen successfully argued that the decision to prosecute should be reviewed and set aside. One of the bases for the review was that the NPA had relied upon statements that provided no support for the

authorisation of the charges.

112.2. Booysen's counsel pointed out that Adv Jiba had claimed to base her authorisation in part upon an unsigned witness statement, as well as another statement that was not signed until two weeks after Adv Jiba's answering affidavit. Gorven J found it was inexplicable that Adv Jiba had not sought to interpose a further affidavit to answer Booysen's allegation that her earlier affidavit was deceitful.

112.3. I had been aware of the Cato Manor matter, involving charges against Booysen, since before taking office as NDPP. Having read the Gorven J judgment, I called for a briefing on 9 July 2015 by the prosecution team, who made clear that they were unhappy with the fact that, shortly after assuming office, and without having been briefed, Mr Nxasana had unexpectedly instructed that the appeal be withdrawn.

112.4. The prosecution team was strongly of the view that Adv Jiba had properly authorised the prosecution of Booysen. They expressed concern at her being criminally charged for what they viewed as the conscientious, *bona fide* execution of her duties. They were especially aggrieved that they had not been consulted prior to criminal charges being laid against Adv Jiba.

112.5. I was inclined, having read the papers, and having spoken to Adv Jiba herself, to agree with the prosecution team. It was