not fair to describe Adv Jiba as "mendacious" in her conduct in this matter. I concluded, after careful review of the documentation, including all of the documents filed as of record before Gorven J, that Adv Jiba had acted *bona fide* throughout.

112.6. I noted, in any event, that Gorven J did not adopt the view of Mr Booysen as stated in his replying affidavit. He focused upon Adv Jiba's not having applied to interpose a further affidavit to deal with the allegation of Mr Booysen. I am aware, based from my years of courtroom experience, that it is only in exceptional circumstances that the court will admit a further affidavit by a Respondent. I have gleaned from the record that Adv Jiba's instructions were in fact that a further affidavit be interposed to deal with the allegations in Booysen's answering affidavit. I do not know why such an affidavit was never filed.

112.7. I briefed the Minister extensively regarding the Booysen matter during July and August 2015 as per the briefing received by me from the prosecution team.

113. I might add here that concerns about Booysen have been reflected in recent media reports. To take one example, in a group of articles published by the *Sunday Times* on 22 November 2015, a copy of which is attached hereto as annexure "**SA27**".

114. In the course of preparing this affidavit, I considered those parts of Adv

Jiba's answering affidavit in the GCB application (paras 200-240), dealing with the Booysen matter. I note that her comments comport largely with my views as set forth above.

Zuma v Democratic Alliance (No. 836/2013 SCA) (28 August 2014)

115. I carefully read the judgment in its overall context, and conveyed to the Minister my observations as set forth below.

116. As already noted, this litigation arose in part out of an application by the DA to review the decision of Mpshe SC to discontinue a prosecution in connection with the so-called arms deal. Preliminary to the review, the DA demanded the Rule 53 record that served before the decision-maker. There arose a dispute as to the scope of a directive regarding the Rule 53 record. The Applicant had approached the High Court for an order compelling the NPA to release to the Applicant copies of transcripts and audio recording which, it was alleged, related to the decision to drop charges against the President. Adv Jiba took the position that she was not in a position to release the tapes and transcripts until such time as she had consulted with the President's legal representatives.

117. I am advised that Adv Jiba, while of course respecting the judgment of the Court, stands by her election to consult with the President's legal team before releasing the transcripts. Given the potentially irrevocable consequences of the release of the transcripts, it is my view that it was appropriate for Adv Jiba to allow the legal representatives opportunity to comment. This she did on the advice

of senior counsel representing the NPA.

118. In the course of preparing this affidavit, I considered those parts of Adv Jiba's answering affidavit in the GCB application (paras 241-161), dealing with the so-called "spy tapes" matter, and I concur broadly with same.

APPLICANT'S DEMANDS AND RESPONSES THERETO

119. On 26 August 2015, the DA formally demanded that the President invoke s. 12(6) of the NPA Act with respect to Adv Jiba.

120. That was responded to in a letter of 1 September 2015, which response appears to accurately capture the gist of my advice to the Minister. I had by this time already expressed my confidence to the Minister that the GCB application was likely to trigger a full, fair and independent assessment of the facts underlying the adverse judicial comments about Adv Jiba. It would be appropriate to give weight to the outcome of the GCB's application in determining Adv Jiba's future within the NPA.

121. I take the opportunity to summarise my input into the decision of the President that is the subject of the present application, as conveyed through the Minister. As foreshadowed above, in a series of meetings with the Minister since my appointment, I conveyed to him my views, together with my reasons therefor. I believe the Minister conveyed this to the President. The upshot of my input was that it was neither necessary nor appropriate to suspend Adv Jiba and initiate an

investigation in terms of section 12(6)(a) of the NPA Act. I believe the Minister conveyed my view to the President.

122. In sum, the bases of my views to the Minister, the gist of which I understand was conveyed to the President, included the following considerations:

122.1. The allegations regarding Adv Jiba were to be fully canvassed in the aforementioned GCB application.

122.2. My close examination of the four judgments in which adverse comments were made about Adv Jiba, revealed that she had not been found guilty of dishonesty; further, the admittedly serious allegations against her were in my respectful view, not completely justified.

122.3. The Yacoob Report, based almost entirely on the adverse judicial remarks was not, in any event, duly authorised and is, in its own terms, not conclusive.

122.4. Adv Jiba had been performing her tasks well, and my view was that she was operationally vital to the NPA.

122.5. The charges against her appeared to be animated by a vendetta conducted by a faction of NPA officials and, in particular, my predecessor Mr Nxasana.

AD THE AFFIDAVIT OF JAMES SELFE

123. I do not deal with each and every one of the allegations made by the deponent. Those that pertain most specifically to Adv Jiba's conduct, I leave for her to address. I should not be taken to have admitted allegations to which I have offered no answer.

_Ad_ paras 1, 2 and 3

124. The contents of these paragraphs are noted.

_Ad_ para 2

125. The contents of this paragraph are noted.

_Ad_ para 3

126. The contents of this paragraph are noted.

_Ad_ para 4

127. The contents of this paragraph are admitted.

_Ad_ para 5

128. The first sentence of this paragraph is denied. It is misleading to say that the High Court and the Supreme Court of Appeal ("***SCA***"), have *"repeatedly found Adv Jiba guilty of dishonesty and unbecoming conduct"*.

129. This is not to deny that several courts have been critical of the conduct of Adv Jiba, along with other litigants before them.

130. We have seen that Mr Nxasana has had an unfortunately vexed

relationship with Adv Jiba. Ultimately Mr Nxasana resigned and was replaced with me. There is a good working relationship between Adv Jiba and I. So too is there a good working relationship between Adv Jiba and the DPPs, SDPP's and almost all DNDPPs. The impediments that may have existed to the smooth functioning of the NPA have largely been resolved since my appointment.

131. The Yacoob Committee did not recommend that Adv Jiba or any other persons be suspended. Rather, it said that criminal charges instituted against certain senior members of the NPA be continued, subject to being withdrawn if and when convincing written representations were received. A major recommendation is that the NDPP should recommend to the President that a judicial commission be appointed.

***Ad* para 6**

132. I deny that there have been any "judicial findings" against Adv Jiba. It is, however, true that various courts have expressed disquiet about aspects of her conduct.

133. I deny the second sentence of this paragraph. In the letter to the Applicant, it was made clear that the reason for exercising the discretion against suspending Adv Jiba was that there was no legal basis for so doing.

***Ad* para 7**

134. The contents of this paragraph are denied. No doubt, there are circumstances in which a GCB application to have Adv Jiba struck

from the roll may constitute a basis for her immediate suspension. That, however, would depend upon the particular nature of the allegations, as well as an evaluation of the seriousness of the charges, and the prospects of success of such an application.

135. In this case, however, the advice I understand the President received was that the nature and seriousness of the charges, and the prospect that Adv Jiba would ultimately be struck from the roll, were such that it would be improper for the President to invoke s. 12(6)(a).

***Ad* para 8**

136. I deny that the matter is urgent. An unparticularised allegation of urgency, depending solely upon the fact that Adv Jiba occupies an important position in the NPA is not sufficient to establish urgency. As found by Prinsloo J in his aforementioned judgment, a generalised apprehension of harm is not a proper basis for urgency. There is no allegation, for example, that Adv Jiba's remaining in place will cause harm with respect to any particular prosecution.

137. Regarding the second sentence of this paragraph, I assume that the word *prompted* should read *promoted*.

138. It is denied that the designation of Adv Jiba to the Head of the National Prosecuting Service constituted a "promotion.' In fact, as explained above, the NPA senior structures were re-organised to rationalise certain tasks under the new authority. Adv Jiba did not receive a salary increase as a result of her move into the newly created

position. It is fair to say that the responsibilities imposed upon Adv Jiba arose out of a lateral move within the institution. In addition, as of this date, I have not assigned any powers to Adv Jiba as envisaged in s. 22(9) of the NPA Act.

***Ad* para 9**

139. The contents of this paragraph are denied.

140. The Applicant makes a fundamental conceptual error in suggesting that the fact that the President has the power to suspend Adv Jiba entails that he is compelled to do so. The exercise of his discretion to suspend a senior official within the NPA is a matter in which a court will be loath to interfere.

141. The Applicant quite properly alludes to the constitutionally entrenched independence of the NPA. In fact, one of the considerations that weigh against precipitous suspension of Adv Jiba is precisely the importance of the independence of the NPA from political interference.

142. I note the allegation that the President's conduct is "motivated by an ulterior purpose". This allegation is entirely speculative and I do not accept it. I am advised and verily believe that, especially where the test is one of rationality, the Applicant's burden of demonstrating ulterior purpose is especially onerous.

143. The suggestion in the final sentence that the President has "abandoned" to the GCB and to the courts his power to act is equally

baseless. There could be no legitimate objection to the President taking into account the court's ultimate determination on the GCB's application to strike Adv Jiba from the roll.

***Ad* para 10**

144. For the reasons set forth above, the contents of this paragraph are denied.

***Ad* para 11**

145. The contents of this paragraph are noted. There is no basis for any of the relief sought by the Applicant.

***Ad* para 12**

146. The contents of this paragraph are noted.

***Ad* para 13**

147. The contents of this paragraph are noted. I would add that the level of political representation of the Applicant is of no relevance one way or another to the merits of the present application.

***Ad* para 14**

148. It is not disputed that the Applicant has standing to bring the application.

***Ad* paras 15 - 18**

149. The contents of these paragraphs are noted.

***Ad* para 19**

150. It is unfortunate that the Applicant attempts to portray that the pending GCB application is the "sole reason" that the President has not suspended her. The Applicant must be well aware that the very first reason given for the decision reflected in the letter of the Director-General and Secretary of the Cabinet dated 1 September 2015, was that the President believed that grounds did not exist to warrant the suspension of Adv Jiba.

***Ad* para 20**

151. I deny that any court has found that Adv Jiba acted dishonestly.

152. That being said, it is admitted that judges have expressed their disapproval of Adv Jiba's conduct in strong language. In the exercise of his discretion, the President has not deemed this to warrant her suspension at this stage. That the President is empowered to suspend Adv Jiba, and that this might even be deemed rational, does not logically entail that not doing so is irrational.

***Ad* para 21**

153. It is disputed that Murphy J was critical of Adv Jiba's tenure as Acting NDPP in general. He was, however, disapproving of certain aspects of the manner in which the NPA, generally, and Adv Jiba, in particular, dealt with the matter.

***Ad* para 22**

154. The contents of this paragraph are admitted.

_Ad_ para 23

155. I refer to Adv Jiba's answering affidavit herein.

_Ad_ para 24

156. I admit that Murphy J said that Adv Jiba had been partly responsible for the protracted nature of the litigation. I deny, however, that he found that Adv Jiba had been dishonest or acted in bad faith. This is dealt with in her answering affidavit in the GCB matter.

157. Given her senior position within the departmental hierarchy, Adv Jiba has nothing to do with the day-to-day conduct of the litigation on behalf of the NPA. This is the province of the Legal Affairs Division ("*LAD*"), acting on the advice of the State Attorney and counsel. While she was aware in general terms that the litigation was protracted, it is not practicable for her to monitor each and every one of the many matters in which the NPA is involved.

_Ad_ paras 25 - 28

158. I have taken note of and refer to Adv Jiba's response in this regard at paras 86 – 104 of her answering affidavit in the GCB matter.

159. Regarding the allegation that an incomplete record was filed, this was not inconsistent with a *bona fide* interpretation of the scope of the directions of the Supreme Court of Appeal.

***Ad* para 29**

160. This is not the place to debate why Adv Halgryn SC returned his brief.

***Ad* paras 30, 31, 32, 33, 34, 35, 36 and 37**

161. I expect that this will be dealt with in the affidavit of Adv Jiba to be filed in this matter.

162. I reiterate that there is no finding of bad faith or dishonesty on the part of Adv Jiba in the Murphy judgment. I reiterate, as noted above, that the Supreme Court of Appeal ultimately differed in fundamental respects with the determinations of Murphy J. Whilst this does not absolve Adv Jiba, it does mitigate the criticism of Murphy J directed at Adv Jiba.

163. I am informed and verily believe 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 is seldom any question of them being subject to removal or impeachment proceedings. It is difficult to imagine a decision *not* to institute impeachment proceedings against a judge in these circumstances being deemed to be irrational.

164. In particular, I take issue with the words *misled* and *deceit*. As set forth above, for the most part, Murphy J's decisions implied that the officers in the NPA, including Adv Jiba, had acted contrary to a correct interpretation of the law in the manner that they handled the withdrawal of the Mdluli prosecutions.

165. I submit that it was within the scope of the President's discretion to give Adv Jiba the benefit of the doubt.

***Ad* paras 38, 39, 40 and 41**

166. I expect, as stated above, that the contents of these paragraphs will be dealt with by Adv Jiba in her affidavit.

***Ad* para 42**

167. The suggestion put up in the paragraph under reply is highly speculative. It borders upon being mischievous.

***Ad* paras 43, 44, 45, 46.1, 46.2 and 46.3**

168. The contents of these paragraphs are noted.

***Ad* para 47,**

169. I refer to Adv Jiba's answering affidavit which I expect to be filed herein.

170. I note that Gorven J did not adopt Booysen's description of Adv Jiba as "mendacious". The learned Judge's analysis was focussed upon an adverse inference arising from the failure of Adv Jiba having applied to interpose a further affidavit to deal with the allegations of Mr Booysen in his replying affidavit. From my extensive courtroom experience, I know that it is only in exceptional circumstances that a court will allow the filing of a fourth set of affidavits. I am advised and verily believe that Adv Jiba was relying upon the advice of counsel in

not seeking to interpose a further affidavit.

***Ad* paras 48 and 49**

171. I refer to Adv Jiba's answering affidavit which I expect to be filed herein.

172. I repeat that I dispute that Gorven J found Adv Jiba to have lied under oath.

173. It is true that Adv Jiba was subsequently criminally charged with perjury. That charge was subsequently withdrawn. I briefed the Minister in this regard. I submit that the President was entitled to attach weight to the fact of the withdrawal of the charges.

***Ad* para 50**

174. The contents of this paragraph are noted. The deponent has cherry-picked what he deems to be "*relevant aspects*" of the decision of the SCA. The deponent's rendition is opportunistic.

***Ad* para 51**

175. The contents of this paragraph are noted.

***Ad* para 52**

176. To the extent the paragraph under reply correctly quote the relevant passage from the SCA decision, it is admitted.

***Ad* paras 53,**

177. I refer to Adv Jiba's answering affidavit herein.

***Ad* para 54**

178. I refer to Adv Jiba's answering affidavit herein. which I expect to be filed herein.

179. The finding that Adv Jiba adopted a "supine" posture should be understood in its broader context as set out in her opposing affidavit in the GCB matter.

***Ad* para 55**

180. I refer to Adv Jiba's answering affidavit herein, which I expect to be filed herein.

181. The deponent fails to acknowledge that the Court did not grant the DA's prayer that Adv Jiba be found in contempt.

182. Regarding the quoted language of Navsa JA, I am advised that difficult and novel issues of law were implicated, and that the SCA's directive as to the scope of the material to be discovered was not unambiguous.

***Ad* para 56**

183. I did not agree with the Applicant's characterisation of the SCA's comment about Adv Jiba as "damning".

184. It is not denied that Navsa JA found that Adv Jiba's affidavit left much to be desired. But he made no finding that Adv Jiba had acted

deceitfully or in bad faith.

185. Regarding the last two sentences of the quoted portion of the judgment, I take issue therewith. Whilst her conduct may have fallen short of the standard expected, it did not in itself disqualify her from continuing to hold her position.

***Ad* para 57**

186. I am of the considered view that the President acted within his discretion in giving Adv Jiba the benefit of the doubt in this regard. It is not questioned that Adv Jiba was required to obey the SCA's order.

***Ad* para 58**

187. I refer to Adv Jiba's answering affidavit herein.

***Ad* para 59**

188. I refer to Adv Jiba's answering affidavit herein.

189. It is not denied that Adv Jiba was subject to serious criticism. However, she cannot be held personally responsible for every delay, late filing or deferral by officials within the organisation.

190. No doubt certain conduct in the litigation, on the advice of counsel may, with retrospect, have been imprudent. This cannot, however, render her suspension obligatory. If that were to be the standard, it would place in jeopardy the jobs of thousands of the decision-makers in organs of state who are embroiled in litigation or one kind or

another who have been found by courts to have acted imprudently or irrationally.

191. I acknowledge that a court did find that Adv Jiba shielded "irrational and illegal actions from judicial scrutiny". This is without doubt a serious charge. However, I understand that, having carefully considered the matter, the President concluded that all things considered, suspension of Adv Jiba was not appropriate at that point.

***Ad* para 60**

192. The first two sentences of the paragraph under reply are admitted. For the reasons set forth above, the final sentence is denied.

***Ad* para 61**

193. The contents of this paragraph are noted, save to deny as I have already done, that Adv Jiba has been "promoted".

***Ad* para 62**

194. The contents of this paragraph are admitted.

***Ad* para 63**

195. My understanding is that the President has taken note of the NPA's, reaction to the judgments in its 2014/15 Annual Report, having been briefed by the Minister in that regard.

196. As to the senior counsel opinion referred to, recommending that disciplinary steps be taken against Adv Jiba and other officials, this

has not served before the President; I do not comment on it. My understanding is that the President is aware that charges of perjury were laid against Adv Jiba, and that these were subsequently withdrawn.

197. I wish to comment briefly on the Annual Report:

197.1. Under s 35(2)(a) of the NPA Act, read with s. 22(4)(g), the NDPP is obliged to prepare a report regarding the operation of the entity. What we are hence dealing with here is Mr Nxasana's Report, signed off by him on Friday 29 May, his very last working day.

197.2. It bears noting that during the course of May 2015 Mr Nxasana was himself the subject of a s. 12(6)(a) inquiry into his fitness to hold office, which was scheduled to commence on 11 May 2015.

197.3. It is rather unfortunate that Mr Nxasana took the opportunity to use the Annual Report to vent his personal feelings, using immoderate language essentially about the Minister and Adv Jiba. (Page 33.) (A copy of pertinent extracts from the report is attached hereof as Annexure **"SA28"**.) In my view, this conduct called the integrity of the NPA into disrepute along with that of the office of the NDPP.

198. My respectful view is that it is not irrational of the President to be guided by the reports and recommendations of the Minister, and by

the fact of the withdrawal of the charges against Adv Jiba.

***Ad* paras 64**

199. I deny that the memorandum mentioned was from the NPA. This was an intervention by Mr Hofmeyr, who acted as NDPP for two days in July 2014. Further, I am advised and verily believe that the memorandum was not forwarded to the President.

Ad para 65 and 66

200. The contents of these paragraphs are noted.

***Ad* para 67**

201. My understanding is that the President has noted the contents of the Yacoob Commission's report, having been briefed in that regard by the Minister.

202. In the quoted passage in paragraph 67, the Yacoob Committee does no more than summarise some of the judicial comments discussed above and indicates agreement therewith.

203. The deponents errs in his speculation that the Report stated that there was a *prima facie* case for the pending criminal prosecutions, presumably including Adv Jiba, She was in fact only charged in March 2015, some five months after the Report was issued.

***Ad* para 68**

204. The quoted portions of the Yacoob Committee report are noted. It

goes without saying that the NPA must operate without fear, favour or prejudice, and that DPPs must be persons of integrity.

205. Persons in government frequently come in for severe criticism from the public, the press, and even the judiciary. The President is of course bound to take such criticism into account.

206. I point out that, in terms of s. 12(7) of the NPA Act, the President is obliged to remove the National Director or a Deputy National Director if requested to by each of the Houses of Parliament in the same session. It cannot therefore be said that the President's decision not to invoke his suspension power entails that such an official can never be removed.

***Ad* para 69**

207. The contents of this paragraph are admitted.

***Ad* para 70**

208. Regarding a letter of **12 September 2014,** the President, so I understand, disputes that any such letter was handed to him by Nxasana; the letter has not been located.

209. What has to be borne in mind, however, is that Nxasana was, as we have seen, embroiled in a bitter dispute with several other members of the NPA, including Adv Jiba. It would be improvident for the President to respond to thrust and counter-thrust with precipitous action. My view is that it was well within the President's discretion in this case to defer

his decision until such time as a Court had the opportunity to consider the GCB application.

***Ad* para 71**

210. As stated above, I became aware of the memorandum to the Minister of **17 September 2014** only recently. I understand that the foregoing memorandum came to the attention of the Minister, who briefed the President on the subject. The President was satisfied that no action was at that stage called for.

***Ad* para 72**

211. The contents of this paragraph are noted.

***Ad* para 73**

212. I noted the Annual Report of the NPA in general, and the quoted text in particular. I disagree with the conclusion of this part of the Annual Report in particular.

213. The Annual Report and the various communications from Mr Nxasana must be understood in the context of tension plaguing the organisation at the time.

***Ad* para 74**

214. I am unaware whether there were further representations from Mr Nxasana.

***Ad* para 75.1**

215. Insofar as this paragraph accurately summarises the parliamentary questions and responses thereto, it is admitted. My understanding is that the President was apprised by the Minister of the subject matter of Adv Breytenbach's questions from the floor of the National Assembly.

***Ad* para 75.2**

216. Insofar as this paragraph accurately summarises the question and answers, I admit its contents. I understand that the NDPP was called upon to provide facts and circumstances requisite for consideration of the request that Adv Jiba be provisionally suspended.

217. I deny that the President had been supplied with more than sufficient reasons for suspending Adv Jiba eight months earlier. Taking all of the circumstances into account, he determined that it would not be appropriate to suspend Adv Jiba at that point.

***Ad* para 76**

218. I am aware of the contents of this letter which provide no further support for the Applicant's case

***Ad* para 77**

219. The contents of this paragraph are noted.

220. I am advised and verily believe that the GCB and any Court that hears the application make determinations of this kind independently from considerations that the President is required to take into account

when exercising his discretion.

221. On the other hand, many of the same factual issues will indeed arise in the GCB matter.

222. The President will, so I understand, consider whatever judicial determination emerges from the GCB's application.

***Ad* para 78**

223. The contents of this paragraph are noted. I do not understand the meaning of the final sentence.

***Ad* paras 79, 80 and 81**

224. The contents of these paragraphs are admitted.

***Ad* para 82**

225. This issue is the subject of pending litigation. It is of no relevance *in casu*.

***Ad* para 83**

226. The contents of this paragraph are admitted.

***Ad* para 84.1**

227. It is true that on 18 August 2015 the fraud and perjury charges against Adv Jiba were withdrawn.

228. I do not understand the second sentence, stating that I pleaded "innocence". It was quite appropriate that the decision to withdraw the

charges against Adv Jiba were taken by Adv Mokgatlhe. I have set out in some detail above the process leading up to the latter's decision.

229. Mr Nxasana and Mr Hofmeyr had placed the matter in the office of the SCCU, Pretoria. Notwithstanding that the matter was not properly within the remit of the SCCU, I resolved on reflection not to move it elsewhere.

230. I note that there has been no attempt to review the decision to discontinue the proceedings against Adv Jiba, despite the fact that the Applicant was invited by the NPA to do so through one of its representatives, Adv Breytenbach in an e-mail dated 24 August 2015.

***Ad* para 84.2**

231. It is true that the NPA has been reorganised.

232. It is not accurate to say, however, that Adv Jiba was promoted. I refer to what I have said above in this regard.

***Ad* para 85**

233. As noted, there was indeed no promotion of Adv Jiba.

***Ad* para 86**

234. I welcome the GCB's endeavour to have a court of law resolve the questions that surround Adv Jiba. My office will carefully consider the outcome.

235. As for the NPA, the Applicant has not challenged the decision to withdraw the charges against Adv. Jiba taken by Adv Mokgatlhe.

236. I reiterate that it appears that the charges against Adv Jiba were animated by professional and personal rivalries within the hierarchy of the NPA. With the resignation of Mr Nxasana, who was himself under a cloud, it is my hope that the NPA can henceforth focus on its constitutionally-ordained duties.

237. The President has indeed determined not to provisionally suspend Adv Jiba at this point.

***Ad* para 87**

238. I reiterate that Adv Jiba was not promoted. To the extent this paragraph under reply accurately summarise the letter of 26 August 2015, it is admitted.

***Ad* paras 88, 89, 90, 91 and 93**

239. The contents of these paragraphs are noted.

***Ad* para 92**

240. For the reasons set forth below, I disagree with the contents of this paragraph.

***Ad* paras 93.4, 93.5 and 93.6**

241. The contents of these paragraphs are denied.

***Ad* para 94**

242. To the extent that this paragraph accurately quotes, summarises or paraphrases the Constitution, it is admitted.

***Ad* para 95.1**

243. The contents of this paragraph are admitted.

***Ad* para 95.2**

244. The contents of this paragraph are admitted.

***Ad* para 95.3**

245. To the extent that this paragraph accurately quotes, summarises or paraphrases the relevant constitutional provisions, it is admitted. As to the final sentence, it is too vague and open-ended to admit of response. It goes without saying that those constitutionally and legislatively entrusted with powers over the NPA should take all appropriate steps under s. 165(4) of the Constitution.

***Ad* para 95.4**

246. To the extent the paragraph under reply accurately quotes, summarises or paraphrases the constitutional text, the contents thereof are admitted.

***Ad* para 95.5**

247. The contents of this paragraph are admitted to the extent it accurately quotes, summarises or paraphrases the relevant constitutional text. Regarding the comments in the last two sentences, the general

sentiment can only be agreed with. I would disagree, however, with the implication that the President's oath of office is inconsistent with his exercise of a broad discretion under s. 12(6)(a) of the NPA Act.

***Ad* para 96**

248. The contents of this paragraph are admitted insofar as it accurately reflects the relevant legislation.

***Ad* para 97**

249. The contents of this paragraph are admitted.

***Ad* paras 98 - 103**

250. The contents of these paragraphs are admitted, insofar as they accurately quote the relevant text.

***Ad* para 104**

251. It is difficult to respond to this paragraph, given the open-ended nature of the language. The phrase *concerns about the fitness for office*, for example, is too vague to admit of response.

252. The power to suspend any senior official is not to be exercised on every occasion when anyone raises questions about fitness for office of high officials, in an over-heated political environment. Charges and counter-charges are routinely exchanged, some serious and some trivial. Too often, baseless allegations are advanced to serve personal or political causes.

253. The President is given the responsibility, having weighed all the information available, to determine whether suspension is warranted in a particular instance. The truth is that virtually every high official faces politically and personally motivated claims and attacks at any given time.

254. A person who has been suspended may challenge the decision. "Swift and decisive" decisions may readily be set aside if the decision has been taken precipitously.

_Ad_ para 105

255. It is denied that a decision under s. 12(6)(a) of the NPA Act constitutes administrative action. Such decisions are quintessentially of an executive nature, *per* s. 84(1) of the Constitution.

_Ad_ para 106

256. Decisions not to suspend in terms of s. 12(6)(a) are not administrative action. But they will be reviewed if irrational, and therefore inconsistent with the principle of legality.

_Ad_ para 106.1

257. I agree that the decision to appoint, remove and suspend are different in quality. Nonetheless, I am advised and verily believe that all are executive in character, and are therefore not to be treated as administrative action.

_Ad_ para 106.1.1

258. The fact that, in suspending an official under s. 12(6)(a), the President need not choose among a range of Applicants does not entail that he exercises administrative action in making his decision under that prevision. Likewise, the fact that the ultimate decision rests with Parliament does not entail that the power to suspend is not executive. The purpose of the Parliamentary "veto" is to buttress the independence of the NPA.

***Ad* para 106.1.2**

259. It is so that the exercise of the President's power under s. 12(6)(a) is not the final word whether or not a person should serve as NDPP or DNDPP. But that does not settle the question one way or another as to whether the exercise of the power to suspend is of the nature of administrative action.

***Ad* para 106.2**

260. The s.12(6)(a) decision is indeed not "polycentric". However, the decision remains highly political in its nature. It must also be borne in mind that a suspension, albeit provisional, has significant consequences. It constitutes a direct intervention by the President in an organ of state that is constitutionally required to be independent and autonomous. That is another reason that the decision to suspend must not be taken lightly.

261. The fact that the President has invoked s. 12(6)(a) in other instances, including in respect of Mr Nxasana, is of no relevance to the legality or

otherwise of the decision not to invoke that power with regard to Adv Jiba. Each decision must be evaluated on its own merits, always subject to the need for the Courts to abstain from trading upon territory that is constitutionally assigned to other branches of government.

***Ad* para 107**

262. The contents of this paragraph are noted.

***Ad* para 108**

263. The first sentence of this paragraph is denied. To the extent the second two sentences accurately summarise or paraphrase the relevant provisions, their content are admitted.

***Ad* para 109,**

264. I refer to the affidavit of Adv Jiba's to be filed in this matter.

***Ad* para 109.4**

265. I deny that the Yacoob Committee concluded that there was a "*prima facie* criminal case" to be made against Adv Jiba. In fact, the Committee determined that criminal charges that had already been lodged should be proceeded with, subject to being withdrawn in the event of a compelling representations. The Committee recommended a judicial Commission of Inquiry, and further that the confusion and misunderstandings that had led to the criticised decisions be clarified.

266. I have noted above that the Yacoob Report was not properly authorised. Moreover, it covered areas well beyond the limited terms of reference, which contemplated consideration only of the recurrent issue of media "leaks".

***Ad* para 109.5**

267. I reiterate what is stated above regarding Mr Nxasana's oft-stated grievances against Adv Jiba.

***Ad* para 110.1**

268. The contents of the paragraph under reply are admitted.

***Ad* para 110.2**

269. It is true that Adv Jiba was charged in connection with the Booysen matter, and that the charges were subsequently withdrawn. The basis for the withdrawal of the charges is discussed above.

270. The Applicant and the Court may be convinced that the President should have decided otherwise and should the Court be so convinced it will not justify the setting aside of the decision, unless he is deemed to have acted irrationally. I am informed and verily believe that, especially given the separation of powers concerns discussed above, this is a particularly high burden for the Applicant to meet in a case such as this.

271. The deponent misstates the judicial sentiments. There are no findings of "dishonesty". Courts have found that Adv Jiba and the NPA have not

always conducted themselves in an exemplary fashion and have lowered the institution in the esteem of the public. But harshly-worded adverse commentary about senior officials of organs of state is commonplace. Such remarks must always be taken seriously. But they however do not invariably lead to suspension or removal.

272. As for the suggestion that Adv Jiba must be suspended immediately "in order to prevent the risk of further dishonesty and misconduct", the deponent offers only broad, far-reaching statements, without naming specific prosecutions that may be in jeopardy.

273. It needs to be pointed out that Adv Jiba is accountable to me in terms of the NPA Act.

***Ad* para 111**

274. The contents of this paragraph area denied.

***Ad* para 112**

275. Whilst it is true that a suspension of Adv Jiba could be lifted after the conclusion of an investigation, that does not justify suspension at this point. As I have already observed, the frequency with which serious allegations are made against public officials in a politically volatile atmosphere would denude the ranks of senior officials of organs of state if the mere existence of such allegations *ipso facto* demanded provisional suspension.

276. It is the difficult responsibility of the empowered decision-maker to determine whether provisional suspension is warranted on the facts of each case, taking into account, amongst other things, the credibility of the allegations, whether they may be personally or politically motivated, the gravity of the alleged infraction, the legal rights of the incumbent, the need for on-going investigation, and whether allowing the incumbent to remain *in situ* pending the completion of the investigation would seriously harm the institution.

***Ad* para 113**

277. The contents of this paragraph are disputed.

278. I stand by my considered view that the suspension of Adv Jiba is at this stage not warranted.

279. The suggestion that suspension is necessitated if a "reasonable suspicion" exists as to fitness to hold office, sets the bar too low. Criminal law standards cannot be transposed into the institutionally distinct issue of the President's powers under the NPA Act.

280. Argument in this respect will be advanced at the hearing.

***Ad* para 114**

281. I deny that there has been an unlawful "passing of the buck" to the GCB and the courts. It has not been suggested that the President's decision will be contingent upon the outcome of the GCB application.

282. Especially in the difficult situation created by a perceived conflict of interest, it is appropriate that, in the absence of any urgency in the suspension decision, the President awaits the outcome of a decision of a Court that will be considering issues very similar to those which the President would be required to weigh in determining whether to suspend Adv Jiba.

***Ad* para 115**

283. I do not deny that the fact that the GCB has applied to strike Adv Jiba off the roll may be of relevance. However, to claim that the fact that the GCB has taken the view that Adv Jiba is not fit to practice should prompt the President immediately to suspend her would indeed constitute the proverbial passing of the buck.

284. In the absence of any urgent pressing and immediate need to suspend Adv Jiba, it is not irrational for the President to determine that he should defer his decision pending the Court's adjudication of the GCB matter.

***Ad* para 116**

285. I remain of the view that, all things considered, it is best that the outcome of the GCB application be awaited.

***Ad* para 117**

286. The contents of this paragraph are noted. It is true that the two processes are in a formal sense dissimilar. It does not follow that the

President acted irrationally in taking into account the pendency of the GCB application.

***Ad* para 118**

287. The contents of this paragraph are noted. It is not for the President to anticipate how the High Court will adjudicate Adv Jiba's argument that a s. 12(6)(a) enquiry must be conducted before the GCB application is heard.

***Ad* para 119**

288. I do not deny that a distinct legal question is posed in the GCB application. However, comparison of the founding papers herein and in the GCB application make clear that the factual basis for each application are similar. The centrepiece of both applications is a series of judicial remarks adverse to Adv Jiba. One of the few significant differences between the two founding affidavits is that the one signed by Jeremy Muller SC in support of the GCB application relies extensively upon the reasons given by the NPA's counsel for returning their briefs.

289. The Applicant correctly points out that there is a fundamental difference between the two applications in the sense that a suspension under s. 12(6) of the NPA is provisional, not final. But suspension under the NPA Act is in a sense a more drastic outcome than removal or striking from the roll, given that suspension under the Act comes *prior* to investigation.

290. Accordingly, the courts consider factors over and above the ordinary requisites for removal when considering suspension. In the case of precautionary suspension, this will usually entail a showing that, unless the target is immediately precluded from attending work, significant prejudice will ensue. Typically, in the labour context, that will include disruption of the workplace, or interference with witnesses. The Applicant's papers are silent as to any particular allegations along those lines. All one sees is a generalised claim that the "esteem" of the institution will suffer so long as Adv Jiba remains in place. What the Applicant does not acknowledge is the damage to the esteem of the institution will suffer law enforcement in general if the President is seen to be too ready to intervene.

291. The wording of s.12(6)(a) establishes that there may be a suspension before an enquiry. The invoking of the provision is hence inherently far-reaching.

***Ad* para 120**

292. It is true that the President may properly decide to suspend Adv Jiba even if the GCB's application is unsuccessful. Suspension, even in the face of a successful GCB application may not be warranted. However one looks at it, the outcome of the GCB application one way or another will be germane to the exercise of his 12(6)(a) discretion. Short of there being a reason not to pre-empt the GCB application, it is within the discretion of the decision-maker to defer his decision. It may be so that continued occupation of the office could undermine the independence

and impartiality of the NPA. On the other hand, a precipitous suspension, which may later be withdrawn, could no less undermine the independence and impartiality of the NPA.

293. The considered weighing of factors and considerations by the President must, so I am advised and verily believe, be deferred to by the Courts, save where irrationality is demonstrated. In this case, it is not.

***Ad* para 121.1**

294. The situation of Mr Simelane is distinguishable from that involving Adv Jiba. A definitive finding by the SCA, determining the very same question that would need to be asked in considering suspension, is of course a stronger basis for suspension. None of the negative inferences that have been drawn by the courts regarding Adv Jiba, as relied upon by the Applicant, are truly comparable to the SCA's resounding findings regarding Mr Simelane.

***Ad* para 121.2**

295. The case of Mr Nxasana is also not comparable. For one thing, there was no corresponding application by the Law Society to have him declared not fit and proper to be an attorney.

***Ad* para 122**

296. To my knowledge it has not been suggested that the GCB's pending application was the sole reason that the President decided not to

suspend Adv Jiba. The fact that the GCB instituted an application is merely an additional factor that might legitimately weigh in determining whether or not to suspend Adv Jiba at the time.

***Ad* para 123**

297. The observation here is beside the point. It is obvious that, even should the High Court rule in favour of the GCB's application, this may not be the end of the matter. That being said, a finding by the High Court on some of the very same questions as are germane to the 12(6)(a) decision, will obviously weigh very heavily.

298. It is true that the point of the 12(6)(a) power is to allow for swift action. However, there must be a demonstrated basis for immediate action. If the President acts precipitously, and contrary to the advice of the Minister, that may indeed be deemed to be irrational.

***Ad* para 124**

299. I reiterate what is stated above. Obviously, an initial determination by a High Court of the GCB's application will weigh heavily upon the President's 12(6)(a) decision.

***Ad* para 125**

300. Nothing foreclosed the GCB from praying for Adv Jiba's suspension pending a final order.

***Ad* para 125.2**

301. The GCB elected not to proceed on an urgent basis.

***Ad* para 125.3**

302. I concur that it is fruitless to speculate why the GCB has not sought interim relief. Suffice to say that the fact that it has not sought to proceed on an urgent basis undermines but admittedly does not negate the Applicant's suggestion that suspension is warranted.

***Ad* para 126**

303. The contents of this paragraph are denied. I reiterate what is stated above in this regard. I submit that it is not irrational to await the outcome of a pending application that promises to dispose of many if not all of the factual questions at issue herein, especially so having regard to the proceedings instituted by a professional controlling body.

***Ad* para 127**

304. The contents of this paragraph are denied. The Applicant's arguments cut both ways. For the President to acquiesce in the demand that Adv Jiba be suspended, where that demand emanates from an opposition political party and, in the face of a concerted campaign by disgruntled senior officials within the NPA, may itself have a deleterious impact upon the perception of the independence of the NPA.

***Ad* para 128**

305. The claims in this paragraph beg the very question to be decided: whether the conduct of Adv Jiba is such that she cannot be trusted to act ethically and honestly. As set forth above, there has been no finding by any court that Adv Jiba has acted dishonestly. Furthermore, my experience in working with her is that she performs her duties in an exemplary fashion. In this regard, the DPP's and SDPP's comment favourably on her ability and suitability to head the NPS.

***Ad* para 129**

306. The content of this paragraph is disputed. The President's decision is deemed to be an executive action. The President's decision is, however, subject to review in terms of the principle of legality.

***Ad* para 130**

307. The contents of this paragraph are denied for the reasons set forth above. I deny that the President's decision had an ulterior purpose. The contrary is purely speculative.

***Ad* para 131**

308. The contents of this paragraph are utterly speculative.

309. I refer to Adv Jiba's answering affidavit herein.

***Ad* para 132**

310. The contents of this paragraph are denied.

***Ad* para 133**

311. The contents of this paragraph are admitted.

***Ad* para 134**

312. The contents of this paragraph are denied. The s.12(6) decision is not contingent upon the decision of the GCB or the Court. The fact that the GCB matter is pending, so I understand, is but one factor that weighed with the President not taking a decision to suspend Adv Jiba at this point.

***Ad* para 135**

313. The President's decision is not contingent upon the decisions of anyone else. It seems entirely appropriate that the President have the benefit of the decision of the High Court in the GCB matter before he exercises his discretion under s. 12(6)(a) of the Act.

***Ad* para 136**

314. The deponent sets up a false dichotomy. The President does not intend to be bound either way by the outcome of the GCB application.

***Ad* para 137**

315. I deny that the decision of the President was unlawful and must be set aside. The application should be dismissed with costs of three counsel.

Ad para 138

316. The content of this paragraph is denied.

317. I am advised and verily believe that the Court always retains a broad discretion as to remedy in a review application. Argument in this regard will be presented at the hearing.

318. As already noted, Applicant has not sought declaratory relief.

Ad para 139

319. While the Applicant is wrong as to s. 172(1)(a), it is correct that, under s. 172(1)(b), and under s. 8 of PAJA (which fact is of no application here), a court may indeed grant any order that is "just and equitable". The Applicant is correct also in pointing out the Court's order may "substitute" the President's decision.

320. *In casu*, given the nature of this review, a substitution order would be singularly inappropriate. By imposing such an order, the Court would arrogate to itself a decision that the NPA Act affords exclusively to the President. That would represent an extraordinarily far-reaching compromise of the doctrine of separation of powers. That being so, to the extent it is warranted that the decision be reviewed and set aside, the appropriate remedy would be to remit the matter back to the President for reconsideration in light of the court order.

321. I note that such a referral would ordinarily be accompanied by a declarator to guide the decision-maker in her or his reconsideration. However, the Applicant has not sought that in its Notice of Motion.

Ad para 140.1

322. While a s. 12(6)(a) determination may not be *polycentric*, in the sense that term is used in administrative law literature, there are undoubtedly far-reaching implications attached. Whether or not to suspend and institute an investigation into a high officer of state is a weighty question indeed, involving a broad discretion, animating important policy considerations, and demanding the weighing of a wide large number of factors.

323. The Applicant misconstrues what is at stake here. The issue is not just whether suspension is "justified". The s. 12(6)(a) decision will entail a determination as to whether, even assuming suspension would be justified "objectively", it is appropriate in the circumstances. The President, given his position at the apex of the executive, his discretion, and his duty to weigh all factors, including political considerations, is uniquely positioned to make this determination.

324. It is not denied that one of many factors that may be taken into account in the exercise of the discretion under s. 12(6)(a) of the NPA Act is what is required of an officer of the court. It is precisely for that reason that it is within the President's discretion to await disposition by the Pretoria High Court of the GCB application, in which precisely these issues will be determined by a tribunal of impeccable independence.

Ad para 140.2

325. It is submitted that the Applicant misstates the factors taken into account by a court in determining whether to issue a substitution order. A court must evaluate whether the result of remittal would be a

"foregone conclusion". The Court does not consider under this heading whether only "one outcome" of the exercise of discretion is objectively justified. The issue is instead whether or not, in light of the history of the dispute, the decision-maker is likely to arrive at the same (incorrect) decision if the matter is remitted, or whether, on the other hand, the decision-maker will approach the issue with an open mind.

Ad para 140.3

326. The contents of this paragraph are denied. It is sheer speculation to assert that the reason for the President not exercising his discretion in favour of suspension at this point arises from a desire to protect himself and allies from prosecution. First, as noted above, the burden of approving ulterior motive or purpose is an especially heavy one. Second, a decision as crucial as that whether or not to prosecute a senior official of the executive would be taken by the NDPP, not a DNPP. In any event, I have not assigned powers to Adv Jiba as envisaged in s. 22(9) of the NPA Act.

327. The suspension and investigation of Adv Jiba would make no difference one way or another to the decision whether to prosecute the President, or anyone else for that matter, except in the attenuated sense that she, like the three other DNPPs, may offer advice to the NDPP.

328. The allegation that the President acted in terms of s. 12(6)(b) against Mr Nxasana "for [*sic*] far less serious allegations" is unsupported by any allegations as to the nature of the charges against Mr Nxasana. In

any event, I deny that the allegations against Mr Nxasana were in fact less serious than those against Adv Jiba. The account of the allegations against him are in itself indicative of the seriousness thereof.

Ad para 140.4

329. The contents of this paragraph are denied. They have already been dealt with above under the heading of "urgency". The fact is that Adv Jiba was ensconced for more than 18 months in the position of Acting NDPP. The Applicant did not approach the President or a court demanding her suspension in that period. Moreover, it does not now assist the Applicant to refer in open-ended terms to the risk of "biased and dishonest decisions" by Adv Jiba. The Applicant must at the very least specify particular prosecutorial decisions that it fears will be derailed, delayed, misdirected or suborned going forward. The Applicant and other interested parties have their remedies with respect to any such "bad" decisions going forward.

Ad para 141

330. Save for the final sentence of this paragraph, the contents are admitted. Regarding the latter: the Applicant does not take account of damage to Adv Jiba's reputation that will be occasioned if she is suspended. Nor does the Applicant acknowledge the institutional costs of further disruption within the NPA, which has already been subject to significant stress over the past years.

331. My view is that the majority of staff have confidence in the leadership of the NPA and in the NPA as an institution. The NPA has only recently stabilised and have commenced regaining traction in renewing public confidence in it and in its leadership.

Ad para 142

332. The content of this paragraph is noted. I note in particular the use of the qualifier *relative* before the word urgency in the first sentence. It is precisely to accommodate cases that are less than urgent that the semi-urgent roll is established in the rules of the Western Cape Division of the High Court of South Africa.

333. I reiterate that the matter is not urgent. The Applicant has not complied with the provisions of the Uniform Rules to the effect that the grounds for urgency must be stipulated. And the Notice of Motion seeks no prayer dispensing with the ordinary course timelines.

334. Moreover, whatever urgency does exist, is self-created. The application was lodged some two years after the adverse comments of Murphy J upon which Applicant heavily relies.

Ad para 143

335. The content of the second sentence of this paragraph is denied. The Applicant did not provide the Respondents with reasonable and fair timelines. As pointed out in the State Attorney's letter of 21 October 2015, this is, as acknowledged by the Applicant, a matter of supreme importance. It demands that affidavits be obtained from executive

officials of the highest level. The Respondents have very busy schedules, rendering it difficult to arrange consultations.

Ad para 144

336. The first sentence of this paragraph is denied. The dates mentioned in the balance of the paragraph are admitted. The Murphy J judgment, purportedly calling Adv Jiba's fitness to hold office into question, was handed down on 23 September 2013. Whatever urgency existed was self-created.

Ad para 145

337. The implication that the Applicant seeks to draw from the President's reply to Mr Selfe's parliamentary question is denied. The expedition with which the President and other executive officers of state demanded an answer to a particular question, is a different matter entirely from the showing of urgency demanded by the Uniform Rules of Court.

Ad para 146

338. The contents of this paragraph are denied. In any event, these paragraphs are grouped under the heading *URGENCY* in the founding papers. Any delay on Respondents' part hardly justifies the Applicant in waiting for some 24 months after the judgment of Murphy J to institute action. In fact, if the matter is as urgent as the Applicant insists it is, the question arises why the Applicant waited from late May until September this year to bring this application.

Ad para 147

339. The contents of this paragraph are denied. I have set forth above why the open-ended allegations that for Adv Jiba to remain in office would cause irreparable harm are not justified.

Ad para 148

340. The contents of this paragraph are denied.

Ad para 149

341. The contents of this paragraph are denied. I respectfully submit that the application should be dismissed, and the Applicant ordered to pay the costs.

SHAUN KEVIN ABRAHAMS

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this 29TH day of **NOVEMBER 2015** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
PRIVATE BAG X1500
2015 -11- 29
SILVERTON
CRIMES AGAINST THE STATE

COMMISSIONER OF OATHS
NO. 218 GENERAL PIET JOUBERT BUILDING
VISAGIE STREET
PRETORIA 0001
S.A.P.S.
CAPTAIN: SANJAY NUNDLAL

"SA1"

IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED √

DATE 19/11/2015 SIGNATURE

CASE NO: 89849/2015

DATE: 19/11/2015

IN THE MATTER BETWEEN FREEDOM UNDER LAW (RF) NPC	APPLICANT
AND	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	2ND RESPONDENT
NOMGCOBO JIBA	3RD RESPONDENT
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	4TH RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	5TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] Before me was what can essentially be described as an urgent application for interim relief (the so-called Part A portion of the notice of motion) to interdict two very senior members of the National Prosecuting Authority from discharging any function or duty in their mentioned official capacities pending the final determination of the Part B section of the application, which is for final relief, in this case aimed at reviewing and setting aside a certain decision taken by the first respondent, and also the reviewing and setting aside of the failure by the fifth respondent (the State President) to take certain decisions. There is ancillary relief sought in the form of a *mandamus* to compel the fifth respondent to institute enquiries, in terms of the National Prosecuting Authority Act, no 32 of 1998 ("the NPA Act"), into the fitness of these two senior officials, the third and the sixth respondents, to hold office.

The parties

[2] The applicant is Freedom Under Law (RF) NPC (also described as "FUL"), a non-profit organisation incorporated and registered in the Republic of South Africa in accordance with the provisions of section 21 of the Companies Act, 1973, now section 10 of the Companies Act, 2008. The applicant was created for the purposes of "promoting democracy under law and to advance the understanding of and respect for the rule of law and the principle of legality".

[3] The applicant approaches the court, firstly, in its own interest as an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law.

[4] Secondly, the applicant approaches the court in the public interest. The applicant alleges, correctly, that all South Africans have an interest in upholding the rule of law, the requirement for a properly functioning constitutional democracy and, in particular, urgent steps necessary to root out impropriety and corruption within constitutionally imperative institutions which were created, *inter alia*, to protect this young and developing democracy.

[5] The first respondent is the National Director of Public Prosecutions ("NDPP"). The incumbent of that office is Mr Shaun Abrahams. The first respondent is joined in these proceedings by virtue of the fact that he is the head of the NPA and that he, alternatively, he and the second respondent, took a decision on 18 August 2015 ("the 18 August 2015 decision") in terms of which he declined to continue with a prosecution against the third respondent on charges of fraud and perjury, and decided to withdraw those charges.

[6] The second respondent is the Regional Head: Specialised Commercial Crime Unit of the NPA. The incumbent of that office is Mr Marshall Mokgatle. The second respondent is joined in these proceedings by the applicant by virtue of the fact that he, together with the first respondent, took the 18 August 2015 decision.

[7] The third respondent is Ms Nomgcobo Jiba ("Jiba") cited in her personal capacity and official capacity as the Deputy National Director of Public Prosecutions ("DNDPP"). The 18 August 2015 decision relates directly to the third respondent and her conduct

which gave rise to findings of serious impropriety in, *inter alia*, certain judicial findings expressed in reported judgments, to which I will refer hereunder.

[8] The fourth respondent is the Minister of Justice and Correctional Services and is cited in his capacity as the Member of Cabinet responsible for the NPA. He is joined in these proceedings by virtue of the fact that section 179(6) of the Constitution provides that "the cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority".

[9] The fifth respondent is the President of the Republic of South Africa (also at times referred to as "the President"). He is joined in these proceedings by virtue of the fact that the applicant challenges failures by him to exercise his powers under section 12 of the NPA Act and the fact that aspects of the relief sought in the notice of motion, if granted, will require the President to give effect to such relief.

[10] The sixth respondent is Lawrence Mrwebi cited in his personal capacity and in his capacity as Head: Specialised Commercial Crime Unit and Special Director of Public Prosecutions within the NPA, appointed as such on 25 November 2011. The 18 August 2015 decision and the President's alleged failures relate directly to the sixth respondent and his conduct which gave rise to findings of serious impropriety as described in some of the reported judgments which will be mentioned later.

[11] Before me for decision in the urgent court two days ago was only the Part A section dealing with the interim interdicts against the third respondent ("no 3") and the sixth

respondent ("no 6"). The matter has a long and tortuous history. If one has to sum up the situation in a sentence or two, it could be this: a number of our courts, in reported judgments, have expressed reservations, to put it lightly, about the conduct of no 3 and no 6 while executing their official duties, and expressed reservations, at least by implication, about their fitness for office. This, and other developments and observations from various sources, inspired the applicant, true to its noble objectives, to launch these proceedings. It is not logistically possible, nor necessary for that matter, in the busy urgent court, to give a detailed overview of the history of the case which, no doubt, is one of national importance which has made headlines in the media now for a number of years.

[12] A few brief remarks will suffice: the cases in which the conduct of no 3 and no 6 came under scrutiny and evoked severe criticism include the following: *Freedom Under Law v National Director of Public Prosecutions and others* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions and others v Freedom Under Law* 2014 4 SA 298 (SCA) (these two judgments deal with decisions by certain members (including no 3 and no 6) of the NPA to withdraw criminal charges against Lieutenant-General Richard Mdluli, Head of Crime Intelligence in the South African Police Service, and the subsequent finding of both these courts that the charges had to be reinstated. I was told from the Bar by Mr Epstein SC, who appeared with Mr Osborne and Mr Mabuda for the first, second, fourth and fifth respondents, that the charges were in fact reinstated, and that the matter is pending. Where necessary, I will refer to these two cases as "the Mdluli judgments"); *Booysen v Acting National Director of Public Prosecutions and others* [2014] 2 All SA 391 (KZD) ("the Booysen application").

This matter deals with what was found to be groundless charges laid by no 3, in her official capacity, against Major General Booysen of the SAPS. Booysen successfully applied to have the decision by no 3 to charge him reviewed and set aside. It was in the course of this judgment, that the learned Judge, Gorven J, severely criticised no 3. This judgment forms the basis upon which fraud and perjury charges were instituted against no 3 by the erstwhile NDPP, Mr Mxolisi Nxasana. The latter was relieved from his position by the President, who then appointed Mr Abrahams (first respondent) who, as I indicated, took the 18 August 2015 decision (perhaps in consultation with the second respondent) to decline to prosecute no 3 (this was on the eve of the criminal trial against her) and to withdraw the charges.

The fourth and last judgment which I need refer to, for present purposes, is that of *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA) involving the so-called "spy tapes" which featured in the decision to withdraw criminal charges against Mr Zuma, opening the door for him to later become the State President.

[13] What inspired the applicant to launch these proceedings, is described as follows on behalf of the applicant by the deponent to the founding affidavit:

> "5. This urgent application is brought on the information collated by the applicant from judicial findings in various High Court and Supreme Court of Appeal ('SCA') judgments (as mentioned); the annual report submitted on behalf of the NPA by the former NDPP, Mr Mxolisi Nxasana, for the year 2014/2015 in terms of section 35(2) of the NPA Act ('the NPA report'); media reports; and correspondence between the

applicant's attorneys and the first and fifth respondents.

6. The applicant also relies on a report compiled by former Constitutional Court Justice Z M Yacoob ('the Yacoob report') into allegations of serious impropriety within the NPA, particularly on the part of the third and sixth respondents. Despite repeated requests, including a formal request under the Promotion of Access to Information Act 2000 ('PAIA') and an internal appeal, the applicant has been denied access to the Yacoob report by the fifth respondent.

7. The applicant has, within the past week, obtained a copy of the Yacoob report from the replying affidavit filed on behalf of the General Council of the Bar on 18 August 2015. The findings in the Yacoob report are startling and show that there is a firm basis for the third and sixth respondents' immediate suspension and institution of disciplinary and other proceedings against them."

[14] With regard to the last mentioned remark about the Yacoob report and when the applicant came into possession thereof, I have to add that this is an important aspect of the argument which came before me as to whether or not the matter should be heard as one of urgency: as can be seen from the passage quoted, it is suggested by the applicant that the Yacoob report contains "startling" findings justifying the "immediate suspension and institution of disciplinary and other proceedings" against no 3 and no 6. It was argued before me on behalf of the applicant that when the latter finally obtained a copy of the Yacoob report on 26 October 2015, the contents thereof inspired the applicant to launch the application on an urgent basis. On the other hand,

the respondents, contending that no case for urgency had been made out, argued that the Yacoob report is, to a large extent, based on the judicial findings mentioned in the reported judgments and I was also invited to take notice of the following passage from the Yacoob report:

> "Our inability to compel witnesses meant that this report has been compiled without access to all possible versions. In particular, certain persons about whom our courts have made comments that cause concern did not come to explain their position and respond to us in person to the comments of the courts. It is mainly for this reason that this report is not conclusive."

It is common cause that no 3, for example, did not testify before the Yacoob Commission, and the same applies to no 6. It was also argued on behalf of the respondents that the Yacoob report was already in the public domain long before 26 October 2015 and, as stated on behalf of the applicant itself, it was attached to the replying affidavit of the General Council of the Bar in proceedings to have no 3 and no 6 removed from the roll of advocates, as long ago as 18 August 2015. I will later briefly revert to this subject.

[15] I now turn to the matter at hand, namely the applicant's decision to launch this application on an urgent basis.

[16] The notice of motion is dated 6 November 2015 and service was effected on all the parties on the same day. It was a Friday.

[17] The application was enrolled for hearing before me on 17 November 2017.

[18] Only six clear court days elapsed between Friday 6 November when the application was launched and the papers served, and Tuesday 17 November when it was on the roll for hearing in the urgent court.

[19] In terms of the strictly enforced practice manual governing the running of the urgent courts in this Division, the roll for this week closed on Thursday, 12 November, at 12:00, three clear court days after the application was launched and the papers served.

[20] In terms of the notice of motion, the respondents were directed to file their notices of intention to defend, if any, by 9 November, which was the Monday after the Friday launch, and their opposing affidavits before 17:00 on Wednesday 11 November, some two and a half court days after launch and service and the day before the 12:00 Thursday deadline.

[21] No provision is made in the notice of motion for the filing of a replying affidavit by the applicant, obviously because the applicant left no time, on these drastic deadlines, for itself to do so.

[22] The founding papers run into some 212 pages. The founding affidavit is a lengthy, finally printed affair of 56 pages brimming with complex, factual and legal detail.

[23] Against this background, I did not find it at all surprising that not one of the

respondents, with the exception of no 6, managed to file a complete answering affidavit, addressing all the issues raised in the founding affidavit, by Wednesday 11 November. I was informed by Mr Ramawele, for no 6, that the fact that a more complete answering affidavit was filed by his client, does not mean that proper justice was done to the task and that no 6 was not prejudiced because of the extremely short time period allowed.

[24] In the time at their disposal, counsel for nos 1, 2, 4 and 5 and Mr Arendse SC, who appeared for no 3, only managed to file opposing affidavits dealing with the question of urgency. No 6 also challenged the question whether a proper case for urgency had been made out by the applicant.

[25] The affidavit on urgency of no 1 was sworn to by the deponent before a Commissioner of Oaths at 09:00 on 12 November, after the 11 November deadline, and a few hours before the roll was scheduled to close at midday. It does not appear as if it was filed timeously before the roll was closed, and properly bound and paginated as part of the full set of papers as required by the Practice Directive, to which I will shortly refer. I make this observation because the index prepared by the applicant, dated 12 November, makes no provision for any of the opposing affidavits.

[26] Mr Abrahams, in his affidavit styled "first respondent's answering affidavit in respect of urgency", illustrates the dilemma, and obvious prejudice, caused to him because of the short period allowed in the notice of motion:

"I was booked to leave for Europe on official business on Saturday evening,

7 November 2015. My involvement was essential in preparing an answering affidavit within the drastically curtailed time periods incorporated by the applicant in its notice of motion. Due to the gravity of the relief sought and the serious consequences which may flow therefrom if such relief were ever to be granted, I cancelled my trip to Europe a few hours prior to my scheduled departure. This was on the advice of counsel that extensive consultation with me would be essential. Counsel immediately set to work on preparing an answering affidavit and worked at a furious pace in an endeavour to meet the unilaterally imposed time lines. However, despite every endeavour, which included working well into the night, it transpired that it was not feasible to prepare the comprehensive required response to this application."

The "gravity of the relief sought and the serious consequences which may flow therefrom" is evident from the prayers in the Part A portion of the notice of motion:

"2. Pending the final determination of the relief sought in Part B below, interdicting the third respondent from discharging any function or duty as a member of the National Prosecuting Authority, including as Deputy Director of Public Prosecutions.

3. Pending the final determination of the relief sought in Part B below, interdicting the 6th respondent from discharging any function or duty as a member of the National Prosecuting Authority, including as Head: Specialised Commercial Crime Unit."

It is not possible to anticipate when the Part B relief will be "finally determined" and

whether this "final determination" will only result from an appeal process some years into the future. The impact of such relief, if it were to be granted, on the lives and careers of no 3 and no 6, let alone the NPA, is obvious. It appears to me that this is a factor which the applicant, when determining the time frames for the notice of motion, ought to have taken into account, with other relevant factors such as the provisions of the strictly applied and enforced Practice Directive, to which I will turn shortly.

[27] In his affidavit, Mr Abrahams (also "no 1" or "the NDPP") offered, as a first argument *in limine*, the attack on the question of urgency and, in addition, a second argument *in limine* on the basis that because the relief sought in Part B concerns the conduct of no 5 (the President) the Constitutional Court enjoys exclusive jurisdiction over the subject-matter. A third argument *in limine* is in the nature of one based on *lis alibi pendens* on the basis that substantially similar issues of law and fact fall to be considered by this court in an application brought by the General Council of the Bar (case no 23576/15) ("the GCB application") and by the Western Cape Division of the High Court in a matter brought by the Democratic Alliance (case no 17782/15) (the "Democratic Alliance application").

I was informed that neither of these two applications are scheduled to proceed on an urgent basis neither are they coupled with urgent interim relief applications aimed at interdicting or suspending no 3 and no 6 pending the outcome of those main applications.

I was informed from the Bar that the Democratic Alliance application is scheduled to

be heard early in February 2016 and counsel in the GCB application (which no doubt will include Mr Arendse and Mr Ramawele because the GCB seeks to have their clients, nos 3 and 6, struck from the roll of advocates) are scheduled to meet the Deputy Judge-President next week with the view to obtaining an allocation of a date for the hearing, presumably early in 2016.

There are some points of similarity between the relief sought in the present case and that contended for in the Democratic Alliance application: that applicant seeks reviewing and setting aside of the President's decision, taken on 1 September 2015 in terms of section 12 of the NPA Act, not to suspend no 3 (who is the fourth respondent in that case) and institute an enquiry into her alleged misconduct and her fitness to hold office. Secondly, the Democratic Alliance seeks an order substituting the President's decision aforesaid with the decision to establish an enquiry to determine whether no 3 (there the fourth respondent) is guilty of misconduct and remains fit to hold the office of Deputy Director of National Prosecutions; and to suspend her pending the outcome of that enquiry.

It also appears, from a general reading of the papers, that the GCB, in its application, will also rely on the same grounds that feature in this and other applications (eg critical observations by the courts, charges of fraud and perjury and so on) in its quest to remove no 3 and no 6 from the roll of advocates. Success for the GCB will, in any event, overtake the present proceedings because such a result will mean that no 3 and no 6 are in any event unfit to continue in their positions.

[28] In the hearing before me, I was not called upon to pronounce on the second and third arguments *in limine*.

[29] In his answering affidavit in respect of urgency, dated 11 November, the second respondent also states that he was unable, due to the short time at his disposal, to deal fully with the contentions in the founding affidavit but he also attacks the applicant's case for urgency, and associates himself with the submissions made by no 1.

[30] The answering affidavit of no 3 was only served on the applicant's attorneys on 12 November and only reached my office on 13 November. For the reasons I have mentioned, it was obviously not included in the bundle of documents submitted by the applicant before the roll closed at noon on 12 November.

[31] This affidavit was not deposed to by no 3 herself, but by her attorney who says the following in the affidavit which is dated 12 November:

> "The third respondent is currently travelling abroad on official NPA business and at the time of deposing to this affidavit she is in Russia. She left South Africa on 7 November 2015 and returns to the country on Sunday, 15 November 2015. This is also in the public domain and was widely reported in various media."

He also states:

> "In the circumstances it has been impossible for counsel and myself to consult with the third respondent, take full instructions and draft a substantive

answering affidavit on her behalf. Despite having requested the applicant to agree to a reasonable time table for the further conduct of this matter, the parties have been unable to reach agreement, and the applicant persists with moving its application on an urgent basis. We had also attempted to reach an agreement with the applicant regarding extended time lines, however, as we understand, that also fell through due to the disagreement therewith by other respondents. That notwithstanding, we had always contended that the matter is not urgent at all."

(The emphasis is that of the deponent.)

[32] Significantly, attached to this affidavit of the attorney for no 3, is a lengthy letter which he wrote to the applicant's attorney on 9 November, the Monday after the Friday launch of the application. In the letter he reminds his counter part of the other two applications of the GCB and the Democratic Alliance, featuring substantially the same issues for determination, and he also records that his client was travelling abroad at the time.

The attorney then states:

"In the circumstances the curtailed time line set out in the notice of motion is completely unreasonable and unnecessary.

Without in any way admitting the urgency or the merits of the application, we invite you to agree to a reasonable time line for the further conduct and hearing of this matter in consultation with all parties involved ..."