

**IN THE HIGH OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

CASE NO:

In the matter between:

CORRUPTION WATCH (RF) NPC

First Applicant

FREEDOM UNDER LAW (RF) NPC

Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

**THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

MXOLISI SANDILE NXASANA

Third Respondent

SHAUN ABRAHAMS

Fourth Respondent

**DIRECTOR GENERAL: DEPARTMENT OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Fifth Respondent

**CHIEF EXECUTIVE OFFICER OF
THE NATIONAL PROSECUTING AUTHORITY**

Sixth Respondent

NATIONAL PROSECUTING AUTHORITY

Seventh Respondent

**THE DEPUTY PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Eighth Respondent

INDEX

No	Description	Index
1.	Notice Motion	1 - 7

No	Description	Index
2.	Founding Affidavit of First Applicant	8 - 42
3.	Annex "CW1" (Memorandum of Incorporation of First Applicant)	43 - 60
4.	Annex "CW2" (Memorandum of Association and Articles of Association of Second Applicant)	61 - 108
5.	Annex "CW2a" (Certificate of Change of Name of Second Applicant)	109 - 112
6.	Annex "CW3" (Letter from the President to Mr Nxasana dated 4 July 2014)	113
7.	Annex "CW4" (Letter from the President to Mr Nxasana dated 30 July 2013)	114 - 115
8.	Filing Sheet in case no 59160/14 in High Court of South Africa (North Gauteng Pretoria)	116 - 117
9.	Annex "CW5" (Notice of Motion in case no 59160/14 in High Court of South Africa (North Gauteng Pretoria))	118 - 121

No	Description	Index
10.	Annex "CW6" (Founding Affidavit and annexes in case no 59160/14 in High Court of South Africa (North Gauteng Pretoria))	122 - 154
11.	Annex "CW7" (Mail & Guardian article dated 17 October 2014)	155 - 158
12.	Annex "CW8" (Government Gazette notice 102 of 2015)	159 - 164
13.	Annex "CW9" (Government notice 209 of 2015)	165
14.	Annex "CW10" (Media statement dated 11 May 2015)	166
15.	Annex "CW11" (Statement issued by the Presidency dated 11 May 2015)	167
16.	Annex "CW12" (Settlement agreement)	168 - 171
17.	Annex "CW13" (Notice of Withdrawal of application in case no 59160/14 in High Court of South Africa (North Gauteng Pretoria))	172 - 173
18.	Annex "CW14" (Extract from annual report 2014 /	174 - 177

No	Description	Index
	2015 of National Director of Public Prosecutions	
19.	Second Applicant's Founding Affidavit	178 - 184
20.	Annex NF1 (Confirmatory Affidavit of Moray Howard Hathorn)	185 - 187
21.	Annex "NF2" (Webber Wentzel letter to First, Second and Seventh Respondents dated 15 June 2015)	188 - 190
22.	Annex "NF3" (Letter from State Attorney to Webber Wentzel dated 18 June 2015)	191
23.	Annex "NF4" (Letter from Webber Wentzel to State Attorney dated 22 June 2015)	192
24.	Annex "NF5" (Letter from Webber Wentzel to State Attorney dated 1 July 2013)	193 - 194

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case

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FREEDOM UNDER LAW NPC

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and

THE PRESIDENT

First Respondent

THE MINISTER OF JUSTICE

Second Respondent

MXOLISI SANDILE OLIVER NXASANA

Third Respondent

SHAUN KEVIN ABRAHAMS

Fourth Respondent

**DIRECTOR GENERAL: DEPARTMENT OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Fifth Respondent

THE CHIEF EXECUTIVE OFFICER OF THE NPA

Sixth Respondent

THE NATIONAL PROSECUTING AUTHORITY

Seventh Respondent

THE DEPUTY PRESIDENT

Eighth Respondent

APPLICATION FOR REVIEW

PLEASE TAKE NOTICE

1. The applicants intend to apply to this court for the following orders:

- 1.1. The settlement agreement between the first, second and third respondents dated 14 May 2015 (the "settlement") is reviewed, declared invalid and set aside.
- 1.2. The decision to authorise payment to the third respondent of an amount of R17 357 233, in terms of the settlement, is reviewed, declared invalid and set aside.
- 1.3. The appointment of the fourth respondent as National Director of Public Prosecutions is reviewed, declared invalid and set aside.
- 1.4. It is declared that the third respondent still holds office as the National Director of Public Prosecutions.
- 1.5. It is declared that the third respondent is obliged to refund to the state all the money he received in terms of the settlement.
- 1.6. It is declared that, in terms of s 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the National Director of Public Prosecutions.
- 1.7. It is declared that, as long as the incumbent President is in office, the Deputy President is responsible for decisions relating to the appointment, suspension or removal of the NDPP.

- 1.8. To the extent that it is necessary for the purposes of prayer 1.7 above, the President is directed to assign to the Deputy President under section 98 of the Constitution all powers and functions relating to the appointment, suspension or removal of the NDPP.
 - 1.9. The costs of this application must be paid by any party who opposes it.
 - 1.10. The applicants are granted further or alternative relief.
2. The accompanying affidavits of David Lewis and Nicole Fritz and the annexures to them will be used in support of this application.
3. The applicants have appointed the addresses of their attorneys mentioned below at which they will accept notice and service of all documents in these proceedings.
4. The respondents are called upon to show cause why the settlement agreement, the decision to authorise the payment to the third respondent and the appointment of the fourth respondent should not be reviewed, declared invalid and set aside.
5. The first and second respondents are called upon to despatch to the Registrar, within 15 days of receipt of this application,
 - 5.1. the record of the decision to enter into the settlement; and
 - 5.2. such reasons for the decision to enter into the settlement as they are required by law or wish to give.

6. The first, second, fifth and sixth respondents are called upon to despatch to the Registrar within 15 days of receipt of this application,
 - 6.1. the record of the decision to authorise payment to the third respondent of an amount of R17 357 233; and
 - 6.2. such reasons for the decision as they are required by law or wish to give.
7. The first respondent is called upon to despatch to the Registrar within 15 days of receipt of this application,
 - 7.1. the record of the decision to appoint the fourth respondent as the National Director of Public Prosecutions; and
 - 7.2. such reasons for the decision as he is by law required or wishes to give.
8. Once the Registrar has made the records of the decisions available to the applicants, they may, in terms of rule 53(4), amend their notice of motion and supplement their founding affidavits within 10 days.
9. If you wish to oppose this application, you must,
 - 9.1. within 15 days after receipt of this notice of motion or any amendment thereof, file a notice of your intention to oppose and, in the notice, appoint an address within 15 kilometres of this court at which you will accept notice and service of the documents in these proceedings; and
 - 9.2. within 30 days of expiry of the period within which the applicant may supplement its founding affidavit, deliver your answering affidavit, if any.
10. If the respondents do not oppose the relief claimed by the applicants, the application will be heard on a date determined by the Registrar.

Dated at Johannesburg on this the 3rd day of August 2015



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And to:
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C/O the State Attorney
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The Deputy President of the Republic of South Africa
Eighth Respondent

THE STATE ATTORNEY, PRETORIA

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**CHIEF EXECUTIVE OFFICER OF
THE NATIONAL PROSECUTING AUTHORITY**

Sixth Respondent

NATIONAL PROSECUTING AUTHORITY

Seventh Respondent

**THE DEPUTY PRESIDENT OF THE REPUBLIC
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Eighth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

DAVID LEWIS

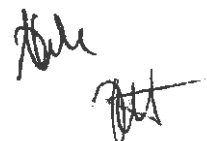
do hereby make oath and state that:



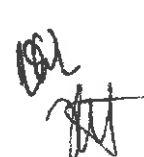
1. I am an adult male of full legal capacity, and am the executive director of the First Applicant. I am duly authorised by the First Applicant to depose to this affidavit.
2. The facts contained herein are, to the best of my knowledge and belief, true and correct and, unless the contrary appears from the context, are within my personal knowledge. Where I make submissions of a legal nature, I do so on the advice of the First Applicant's legal representatives.

THE PARTIES

3. The First Applicant is Corruption Watch, a non-profit company incorporated in accordance with the Companies Act 2008 and having its principal place of business at No. 87 De Korte Street, Braamfontein, Johannesburg. A copy of the memorandum of incorporation of the First Applicant is attached as Annexure "CW 1".
4. The Second Applicant is Freedom Under Law, a non-profit company incorporated in accordance with the Companies Act 2008 with offices of record in South Africa and in Switzerland. Its registered offices are at PWC, 19 Oewer Park, Rokewood Avenue, Stellenbosch. A copy of the memorandum of incorporation of the Second Applicant is attached as Annexure "CW 2", and its certificate of change of name as "CW2a".
5. The First Respondent is the President of the Republic of South Africa ("the President") who is cited in his official capacity, care of the State Attorney, Pretoria.



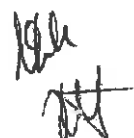
6. The Second Respondent is the Minister of Justice and Correctional Services ("the Minister") who is cited in his official capacity, care of the State Attorney, Pretoria. The Minister is cited by virtue of the interest he has as a party to the agreement which the Applicants seeks to invalidate in prayer 1.1 of the notice of motion.
7. The Third Respondent is Mxolisi Nxasana ("Mr Nxasana"):
 - 7.1. Nxasana is a major male person of 137 Garden Road, Summerset Estate, Kyalami Hills Extension, Midrand and a former National Director of Public Prosecutions of South Africa ("NDPP").
 - 7.2. Nxasana left his position as the NDPP of South Africa pursuant to a settlement agreement that was entered into between himself and the President and the Minister in May 2015 (the "settlement agreement").
8. The Fourth Respondent is Mr Shaun Abrahams. The Fourth Respondent is an adult prosecutor employed at Victoria and Griffiths Mxenge Building, 123 West Lake Avenue, Silverton, Pretoria, Gauteng, and has purportedly been appointed by the President as the NDPP.
9. The Fifth Respondent is the Director General of the Department of Justice and Constitutional Development. The Fifth Respondent is cited as the accounting officer of the Department of Justice and Constitutional Development and of the NPA. The Fifth Respondent is accordingly the organ of state obliged to authorise payment to Nxasana of the amount of R17 357 233 purportedly due under the settlement agreement.



10. The Sixth Respondent is the Chief Executive Officer of the National Prosecuting Authority of Victoria and Griffiths Mxenge Building, 123 West Lake Avenue, Silverton, Pretoria, Gauteng. The Sixth Respondent is cited
- 10.1. by virtue of the authority that has been delegated to her by the Fifth Respondent in respect of the accounts of the NPA, and
- 10.2. as an organ of state who may purported to have taken the decision to authorise payment to Nxasana of the amount of R17 357 233 pursuant to the settlement agreement.
11. The Seventh Respondent is the National Prosecuting Authority of Victoria and Griffiths Mxenge Building, 123 West Lake Avenue, Silverton, Pretoria, Gauteng.
12. The Eight Respondent is the Deputy President of the Republic of South Africa ("the Deputy President") who is cited care of the State Attorney, Pretoria. The Deputy President is cited by virtue of the interest he has in the relief sought in prayers 1.7 and 1.8 of the Notice of Motion.
13. No order of costs is sought against any of the respondents unless they oppose the relief sought in the notice of motion.

AN OUTLINE OF THIS APPLICATION

14. This application is concerned, in the first instance, with the removal from office of Mr Nxasana pursuant to the settlement agreement, secondly, the purported appointment of the fourth respondent.
15. Prior to conclusion of the settlement agreement,



- 15.1. Mr Nxasana had served only 17 months of his 10 year appointment as NDPP,
 - 15.2. The President had initiated proceedings to remove Mr Nxasana from office for misconduct alternatively on the basis that he was not a fit and proper person to hold the position of NDPP,
 - 15.3. The President had purported to suspend Mr Nxasana, and
 - 15.4. The President then withdrew the inquiry into the fitness of Mr Nxasana to hold office, the day before it was due to commence public proceedings.
16. The settlement agreement provides for Nxasana to be paid R17 357 233 which is the full amount that he would have earned if he served his full 10 year term of office. In other words, under the settlement agreement, Mr Nxasana receives a "golden handshake" equivalent to the salary that would have been due to him for the remaining period of more than 8 years of his original term of office after his appointment as NDPP was purportedly terminated.
17. The Applicants maintain that the removal from office of Mr Nxasana was unlawful and unconstitutional because it
- 17.1. was effected in a manner that is inconsistent with the constitutionally enshrined independence of the NPA,
 - 17.2. was *ultra vires* section 12(5) of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), read with subsections (6) to (8) of section 12 of the NPA Act, in that the relevant provisions of the



NPA Act do not allow consensual termination of the appointment of the NDPP by means of a golden handshake like that which Mr Nxasana received under the settlement agreement, and

- 17.3. was effected by the President in breach of his duties under section 96(2)(b) of the Constitution not to act in a manner that exposes himself "to any situation involving the risk of a conflict between [his] official responsibilities and private interests" when regard is had to the facts that

17.3.1. in his personal capacity the President is currently in jeopardy of prosecution under charges which were withdrawn by a previous NDPP for reasons unrelated to the strength of the case against him, and

17.3.2. there is currently litigation pending against the President and the NDPP to have the decision to withdraw those charges set aside and the prosecution of the President reinstituted.

18. There is no legal authority for the payment to Mr Nxasana of R17 357 233. The Applicants accordingly seek orders

18.1. reviewing and setting aside the decision to authorise such payment, and

18.2. directing Nxasana to repay the amount to the State.

19. The invalidity of the removal from office of Mr Nxasana means that there was no vacant office of NDPP to which the Fourth Respondent could be



appointed. Moreover, the section 96(2)(b) disqualification of the President from taking decisions relating to the removal of the NDPP, applies equally to decisions relating to the appointment of the NDPP. For both these reasons, the Applicants seek an order reviewing and setting aside the appointment of the fourth respondent as the National Director of Public Prosecutions.

20. Finally, the disqualification of the President will apply not only to decisions involving Mr Nxasana and the Fourth Respondent but to all decisions involving the appointment, suspension or removal of the NDPP. The Applicants accordingly seek orders declaring that

20.1. the President may not take any such decisions , and

20.2. the decisions in question must be taken by the Deputy President who is the functionary required by the Constitution to be vested with authority to take such decisions in the absence or unavailability of the President.

LOCUS STANDI

21. As appears from Annexure "CW1",

21.1. the First Applicant was formed with the following objects:

"To undertake activities aimed at the combating of corruption in all forms in South Africa in order to ensure integrity and accountability in both the public and private sector in the conduct of their functions and operations"

21.2. the purposes of the First Applicant include the following:

21.2.1. *"To engage in litigation..."*

21.2.2. *"To liaise with law enforcement authorities as well as state investigative and prosecution authorities to ensure that appropriate actions are taken in relation to all matters referred for either further investigation and/or prosecution"*

22. The removal of Mr Nxasana from office is a matter of importance to the First Applicant and one which affects its primary objects because:

22.1. the independence of the NPA is indispensable for the fight against corruption.

23. The removal of Mr Nxasana from office pursuant to a settlement agreement contrary to the provisions of the NPA Act, expressly intended to preserve the independence of the NPA is the second recent case of the Government's ridding itself of unwanted NDPP's. As is set out below, Mr Nxasana's predecessor, Mr Pikoli, who had resisted pressure from the Executive not to prosecute National Police Commissioner Jackie Selebi, was removed from office for reasons relating to his refusal to bow to executive pressure in this regard.

24. In the circumstances, I respectfully submit that the First Applicant has standing in its own interest to bring this application.

25. In the alternative, I submit that the First Applicant is entitled to bring this application in the public interest. In this regard, I submit that

25.1. the central issues in this application, as set out above, are clearly issues in which the public has a substantial interest, and

25.2. as a public benefit organisation with the primary object of combatting corruption to ensure integrity and accountability in both the public and private sectors, the First Applicant is an appropriate litigant to bring these proceedings in the public interest.

26. The Second Applicant addresses its *locus standi* in its own founding affidavit.

THE BACKGROUND

27. There has been ongoing instability in the office of the NDPP since September 2007.

28. In September 2007, the then NDPP, Mr Vusi Pikoli was suspended from office after he had resisted pressure from the executive not to prosecute the National Commissioner of Police, Mr Jackie Selebi for corruption related offences.

29. The then President established an inquiry under section 12(6)(a) of the NPA Act to inquire into allegations that Mr Pikoli was not a fit and proper person to hold office as the NDPP. That inquiry was chaired by the former Speaker of Parliament, Dr Ginwala. Dr Ginwala found that the allegations against Mr Pikoli were unsubstantiated and she recommended his reinstatement as NDPP.

30. Notwithstanding the recommendation of Dr Ginwala, Mr Pikoli was purportedly removed from office by President Motlanthe. In *Pikoli v President of the RSA* 2010 (1) SA 400 (GNP), Mr Pikoli successfully interdicted the President from appointing any successor in the office of NDPP pending a review application that he brought to set aside his

removal from office. Mr Pikoli's review application was ultimately settled in terms of an agreement which provided for a substantial settlement payment to Mr Pikoli, contrary to the relevant provisions of the NPA Act which is designed to protect and preserve the independence of the NDPP.

31. Following the settlement of Mr Pikoli's review proceedings, on 25 November 2009, the President purported to appoint Mr Menzi Simelane as NDPP. That appointment was ultimately set aside by the Constitutional Court on 5 October 2012 in *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).
32. Following the decision of the Constitutional Court, the NPA functioned without a permanent NDPP for just under a year. Then, on 30 August 2013, the President announced the appointment of Mr Nxasana as the NDPP, with effect from 1 October 2013 (the "appointment"). In terms of section 179 of the Constitution read with section 10 of the NPA Act, the appointment was for a period of 10 years. During 2013, the Council for the Advancement of the South African Constitution (CASAC) had brought an application in the Constitutional Court to compel the President to make an appointment of a permanent NDPP. In his answering affidavit, the President undertook to do so by the end of August 2013. Having regard to his compliance with his undertaking, the case proceeded no further.
33. In less than a year of Mr Nxasana's assumption of office, allegations emerged that Mr Nxasana had failed to disclose his past criminal convictions. These allegations came to the President's attention and apparently raised concerns over whether Nxasana was fit to hold the office of the NDPP. I do point out that the basis for removal of an NDPP in



terms of section 12(6)(a)(iv) is on account of the NDPP being 'no longer a fit and proper person to hold the office concerned.'

34. On 4 July 2014, the President wrote a letter to Mr Nxasana informing him that, after careful consideration of the allegations made against him, he had taken a decision to institute an enquiry in terms of section 12(6)(a) of the NPA Act. Section 12(6)(a)(iv) of the NPA Act provides that the President may provisionally suspend the NDPP from his office, pending an enquiry into his fitness to hold office. The letter also advised Mr Nxasana that the details of the establishment of the inquiry would be communicated to him shortly thereafter. I attach a copy of this letter as Annexure "CW3".
35. On the 30 July 2014 Mr Nxasana received a letter from the President informing him that a decision had been taken to suspend him with full pay, pending the finalisation of an inquiry. This letter invited Mr Nxasana to provide representations as to why he should not be suspended. A copy of this letter is attached to this affidavit as Annexure "CW4".
36. Following receipt of Annexure "CW4", Mr Nxasana requested certain details relating to the allegations that were made against him from the President. This, he said, was necessary in order for him to make representations per the President's invitation. The President did not provide Mr Nxasana with the details. As a result, on or about the 15 August 2014 Mr Nxasana approached this Court on an urgent basis to challenge his suspension, under case number 59160/14. Copies of his notice of motion and founding affidavit in those proceedings are attached marked "CW5" and "CW6" respectively.



37. In October 2014, the media reported that there were settlement negotiations between Mr Nxasana and the President. I refer in this regard to an article in the Mail and Guardian of 17 October 2014, a copy of which is attached as Annexure "CW7".
38. On 9 February 2015, and in terms of notice number 102 of 2015, the President established a Commission of Inquiry (the "inquiry") to determine the fitness of Mr Nxasana to hold the office of the NDPP. The President appointed:
- 38.1. Advocate Nazeer Ahmed Cassim SC as the Chairperson of the inquiry; and
- 38.2. Advocates Lindi Nkosi-Thomas SC and Stembiso Mdladla as additional members thereof.
39. The notice by which the inquiry was promulgated also contained the terms of reference for the inquiry and the specific allegations that were levelled against Mr Nxasana. The inquiry had to be completed within six (6) weeks from the date of its commencement, namely 11 May 2015. I attached a copy of the notice as Annexure "CW8".
40. On 9 March 2015, and in terms of government notice number 209 of 2015, an invitation was issued to the public to make submissions to the inquiry. Interested persons or institutions who wished to make submissions to the inquiry, were invited to do so before 27 March 2015. I attached a copy of this notice as Annexure "CW9".
41. On 11 May 2015 the inquiry did not commence as was expected. Instead, Advocate Cassim SC announced that the inquiry into Mr Nxasana's fitness



to hold the office of the NDPP had been terminated. Advocate Cassim SC indicated that he had been instructed by the President's lawyers to stop the inquiry and that, his mandate had been terminated. Statements issued in this regard on 11 May 2015 on behalf of Advocate Cassim and the President are attached as Annexures "CW10" and "CW11" respectively.

42. During the month of May 2015 the President, the Minister and Mr Nxasana concluded the settlement agreement that is attached as Annexure "CW12". It was filed of record in case no 59160/14 in the High Court of South, North Gauteng Pretoria, under the notice attached marked "CW13". I note that the settlement agreement appears to have been signed by Mr Nxasana on 9 May 2015 which was before the scheduled commencement date of the inquiry. The settlement agreement provides *inter alia* that:

- 42.1. The President recognises that [Mr Nxasana] is professionally competent, sufficiently experienced and conscientious has the requisite integrity to hold a senior public position both in the public and private sector (clause 2);
- 42.2. Mr Nxasana shall relinquish his post as the NDPP on 1 June 2015 (clause 3);
- 42.3. Mr Nxasana shall receive an amount of R17 357 233.00, within 60 days of signature of the agreement in full and final settlement of all the claims which arose out of his employment as the National Director Public of Prosecutions (clause 4);



42.4. Mr Nxasana shall withdraw his application under case number 59160/2014 (clause 6); and

42.5. The government was to pay all of Mr Nxasana's legal costs in relation to his application under case number 59160/2014 and the inquiry before Advocate Cassim SC (clause 8).

43. On 18 June 2015, the President announced the appointment of the Fourth Respondent as NDPP to take the position purportedly vacated by the removal of Mr Nxasana.

THE CONFLICTED POSITION OF THE INCUMBENT PRESIDENT

44. The Applicants submit below that the incumbent President was (and is) disqualified under section 96(2)(b) of the Constitution from taking any decisions in relation to the appointment, suspension or removal of the NDPP because of a personal conflict of interest. In this regard, the following facts are a matter of public record (*inter alia* from the judgments of the Supreme Court of Appeal in *Democratic Alliance v Acting NDPP* 2012 (3) SA 486 (SCA) and *NDPP v Zuma* 2009 (2) SA 277 (SCA))

44.1. On 23 August 2003 Mr Bulelani Ngcuka, the then NDPP, announced his intention to indict Mr Schabir Shaik on two counts of corruption, but stated that he would not indict Mr Zuma (who now holds the office of the President), who was said to have been the recipient of alleged corrupt payments from Mr Shaik,

44.2. In June 2005, Mr Shaik was convicted of corruption in respect of payments made to Mr Zuma,

- 44.3. On 20 June 2005, Mr Pikoli, the then NDPP indicted Mr Zuma on charges of corruption.
- 44.4. On 31 July 2006 the matter was called for trial on two corruption counts which mirrored two corruption counts on which Mr Shaik was convicted. When the NPA was not ready to proceed with the trial, the matter was struck from the roll.
- 44.5. In December 2007, Mr Mpshe who was now the Acting NDPP following the removal from office of Mr Pikoli, took a new decision to indict Mr Zuma on 18 main counts of racketeering, corruption, money laundering, tax evasion and fraud. The indictment was, for the most part, based on the same subject matter that was dealt with in the Shaik trial.
- 44.6. In September 2008, Nicholson J set aside the decision taken by Mr Mpshe on grounds that it was not an independent decision and was tainted by political interference.
- 44.7. In January 2009, the SCA overturned the judgment of Nicholson J, leaving the decision to charge Mr Zuma intact.
- 44.8. On 6 April 2009, Mr Mpshe decided to withdraw the charges against Mr Zuma.
- 44.9. Later in April 2009, the Democratic Party brought proceedings to review and set aside the decision of Mr Mpshe to withdraw the charges against Mr Zuma.



44.10. That application was subject to several interlocutory disputes and the NPA filed its answering affidavits only in June 2015. In order not to burden the record of this application unnecessarily I do not attach those answering affidavits to my affidavit but I undertake to make them available on request from the Court or any of the respondents. For present purposes, I merely emphasize that in those answering affidavits, it is not suggested that the decision to withdraw the charges against Mr Zuma had anything to do with the merits of the case against him.

45. The President is accordingly, still potentially in jeopardy of prosecution on charges in respect of which there apparently remains a case against him on the merits. In the circumstances,

45.1. the decision whether or not the President is ultimately prosecuted is one which may well turn on a discretionary decision taken by the NDPP, or an official of the NPA acting under the authority of the NDPP, and

45.2. the President has an objective interest in ensuring that the person who occupies the office of NDPP is someone who will be sympathetic to his interests if s/he is called upon to make such a discretionary decision.

**THE CONCURRENT FAILURE OF THE PRESIDENT AND THE MINISTER TO
TAKE ACTION AGAINST SENIOR MEMBERS OF THE NDPP**

46. The Applicants submit below that the removal of Mr Nxasana from office violated the constitutionally protected independence of the NPA. The

appearance of a violation of the independence of the NPA is reinforced when regard is had to other facts concerning the conduct of the President and the Minister in relation to the attempts by Mr Nxasana to take action against three senior NPA officials against whom the Courts have made adverse findings, namely

46.1. Advocate Nomgcobo Jiba, the Deputy NDPP and a former Acting NDPP,

46.2. Advocate Lawrence Mrwebi (Mrwebi), a Special Director of Public Prosecutions and the Head of the Specialised Commercial Crimes Unit (SCCU) within the NPA, and

46.3. Advocate Sibongile Mzinyathi, the Director of Public Prosecutions for North Gauteng.

47. This Court made adverse findings against Advocates Jiba, Mrwebi and Mzinyathi in *Freedom Under Law versus National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP). The relevant facts in this regard are disclosed by Mr Nxasana in the 2014/15 Annual Report of the NPA. A copy of the relevant extract from this Annual Report is attached as Annexure "CW14". It records the following:

47.1. In *Freedom Under Law versus National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) this Court (per Murphy J) made unfavourable credibility findings against Advocates Jiba, Mrwebi and Mzinyathi.

- 47.2. The judgment of Murphy J was confirmed by the Supreme Court of Appeal (SCA) in **National Director of Public Prosecutions versus Freedom Under Law 2014 (4) SA 298 (SCA)**.
- 47.3. Following the above-mentioned decisions of the High Court and Supreme Court of Appeal, the NPA, via the office of the State Attorney, briefed senior counsel to furnish a legal opinion as to whether, among others, disciplinary steps ought to be taken against Advocates Jiba, Mrwebi and Mzinyathi.
- 47.4. The opinion was furnished to the State Attorney on 7 July 2014. In the opinion, senior counsel concluded that the findings of Murphy J in the High Court, as confirmed by Brand JA in the Supreme Court of Appeal, constituted compelling justification for disciplinary proceedings against Advocates Jiba, Mrwebi and Mzinyathi. The fact that they misled the Court and were prepared to lie under oath not only indicates a strong prima facie case of serious misconduct, but also casts grave doubt on their fitness to hold office. Senior Counsel recommended that
- 47.4.1. the President should, in terms of section 12(6)(a) of the NPA Act, consider provisionally suspending the mentioned senior NPA managers pending an inquiry into their fitness to hold the office.
- 47.4.2. A criminal investigation for perjury be opened against all three members of the NPA and



- 47.4.3. The findings against the mentioned NPA members made in the judgments be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against them in terms of section 7 of the Admission of Advocates Act.
- 47.5. Having considered the opinion, Mr Nxasana concluded that Advocates Jiba, Mrwebi and Mzinyathi should be suspended from their offices.
- 47.6. On 18 July 2014 he addressed a memorandum to the Minister of Justice and Correctional Services, explaining the need for the suspension of the three officials and requesting the Minister to forward the contents of the memorandum to the President with a request for the President provisionally to suspend the three senior NPA members from their offices pending an enquiry into their fitness to hold such offices and finalisation of the envisaged criminal investigations and outstanding inquiries and investigations and action of the General Council of the Bar.
- 47.7. In a memorandum dated 31 July 2014, the CEO of the NPA informed the Minister that the NPA had appointed a fact finding committee headed by retired Constitutional Court Judge Justice Yacoob to investigate allegations that certain employees of the NPA, including senior members, had committed unethical and unprofessional conduct and to advise on appropriate remedies if contraventions had occurred.



- 47.8. The committee of Justice Yacoob concluded its proceedings and made certain unfavourable credibility findings against Advocates Jiba, Mrwebi, and Mzinyathi.
- 47.9. On 27 February 2015, the CEO informed the Minister about the findings and recommendations of the committee.
- 47.10. In the meantime, at the beginning of September 2014, it came to the attention of Nxasana that the Minister had publicly indicated that he had not yet approached the President regarding the recommendations of Nxasana in relation to Advocates Jiba, Mrwebi and Mzinyathi. Accordingly, in a letter dated 12 September 2014, the National Director wrote directly to the President and brought the matter to his personal attention. The National Director personally handed this letter to the President.
- 47.11. In a letter dated 17 September 2014, Mr Nxasana informed the Minister of his direct approach to the President and about further instances of misconduct committed by, and adverse findings made against, Advocates Jiba and Mrwebi;
- 47.12. Mr Nxasana also pointed out to the Minister that
- 47.12.1. After the High Court judgment in April 2014, Mr Nxasana requested reports from Advocate Jiba regarding the Mdluli corruption matter, which request was ignored,
- 47.12.2. Mr Nxasana has repeatedly requested an official handover report on matters being dealt with by Advocate Jiba, without any response, and



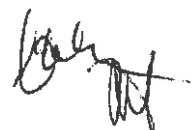
47.12.3. Mr Nxasana regarded such insubordination as intolerable.

48. The relevant section of the NPA Annual Report concludes as follows:

"At the time of finalising this report, the position relating to the conduct of Advocates Jiba, Mrwebi and Mzinyathi was as follows:

- (a) The fact finding committee has finalised its work and submitted a report to the National Director. As indicated above, on 27 February 2015 the CEO informed the Minister about the findings and recommendations of the committee*
- (b) The General Council of the Bar has already brought an application in the High Court, Gauteng Division, for an order striking the names of each of the respondents (Advocates Jiba, Mrwebi and Mzinyathi), from the roll of advocates, alternatively, to suspend them from practising as advocates for such period as the court may deem appropriate. Advocates Mrwebi and Mzinyathi have already indicated that they will oppose the application*
- (c) Criminal proceedings have been instituted against Advocate Jiba in the Regional Court, Pretoria. The charges are fraud and perjury and the case has been postponed to 10 June 2015*
- (d) Perjury charges have been laid against Advocates Jiba, Mrwebi and Mzinyathi. This case is still under investigation by the South African Police Service*
- (e) Criminal proceedings are also outstanding against Advocate Mrwebi for contravening section 32(1)(b), read with sections 1, 20, 24, 25, 32(1)(a) and 41(1) of the NPA Act*

In spite of the above-mentioned urgent requests directed to the Minister and the President, and the outstanding criminal proceedings against Advocates Jiba, Mrwebi and Mzinyathi, no feedback has been received from the Minister or the President. As emphasised by the High Court,



"the respondents are unbecoming of persons of such high rank in the public service, and especially worrying in the case of the (acting) NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold."

Therefore, it is important for the Minister and the President to fulfil their constitutional mandate and to act as a matter of urgency."

49. The unfortunate appearance created by the failure of the President and the Minister to act in relation to Advocates Jiba, Mrwebi and Mzinyathi is amplified when regard is had to the facts of **Freedom Under Law versus National Director of Public Prosecutions and Others** 2014 (1) SA 254 (GNP). That case concerned a successful attempt to review decisions by the NPA and the National Commissioner of the SAPS respectively to withdraw murder and fraud charges and disciplinary proceedings that had been instituted against Lieutenant General Richard Mdluli who headed the SAPS Criminal Intelligence division. These decisions were taken in the period December 2012 to March 2013, shortly after Lieutenant General Mdluli had made representations to the President. In this regard, the Supreme Court of Appeal noted the following in paragraph 10 of its judgment:

"On 3 November 2011 Mdluli wrote a letter to President Zuma, the Minister of Safety and Security and the Commissioner, stating that the charges against him were the result of a conspiracy among senior police officers — including the then Commissioner, General Bheki Cele, and the head of the Hawks, General Anwar Dramat. The letter also

stated, rather inappropriately, that, (i)n the event that I come back to work, I will assist the President to succeed next year', which was an obvious reference to the forthcoming presidential elections of the ruling African National Congress in Mangaung towards the end of 2012."

THE BASIS FOR REVIEW

The Setting Aside of the Settlement Agreement: Independence and Legality

50. In terms of the settlement agreement, Mr Nxasana has been removed from office. I respectfully submit that this removal from office is unlawful and unconstitutional.

51. Section 179 of the Constitution deals with the NPA.

51.1. Subsection (4) entrenches the independence of the NPA by providing that

"National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

51.2. Subsection (7) provides that all matters concerning the prosecuting authority other than those addressed in section 179 itself must be determined by national legislation.

52. The NPA Act is the legislation contemplated by subsections (4) and (7) of section 179 of the Constitution. The NPA Act provides for

52.1. the appointment of the NDPP and his/her deputies,

- 52.2. the remuneration, conditions of service, powers and duties of other employees of the NPA, and
- 52.3. the manner and circumstances under which a NDPP may be removed from office.
53. The constitutional guarantee of the independence of the NPA is reflected in several provisions of the NPA Act:

53.1. The preamble records that the Constitution "*provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice*";

53.2. Section 32(1)(a) states that

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

53.3. Section 32(2) provides that the NDPP must take an oath of office in the following terms before the most senior Judge of the High Court in the Division where his/her office is located:

"I

(full name)

do hereby swear/solemnly affirm that I will in my capacity as National Director ... of Public Prosecutions, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic



without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law."

54. Because of the constitutional guarantee of the independence of the NPA, the removal of the NDPP from office is a matter which is regulated in close detail by the NPA Act. In this regard, Section 12 of the NPA Act states the following in relevant part:

"12. Term of office of National Director and Deputy National Directors.

(1) The National Director shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.

(2) ...

(3) If the National Director ... attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4) If the President is of the opinion that it is in the public interest to retain a National Director ... in his or her office beyond the age of 65 years, and—

(a) the National Director ... wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue,

the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in

the aggregate exceed, two years: Provided that a National Director's term of office shall not exceed 10 years.

(5) The National Director ... shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6)(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the National Director ..., the reason therefor and the representations of the National Director ... (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director ... so removed, is recommended.

- (d) *The President shall restore the National Director ... to his or her office if Parliament so resolves.*
- (e) *The National Director ... provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.*
- (7) *The President shall also remove the National Director ... from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.*
- (8)(a) *The President may allow the National Director ... at his or her request, to vacate his or her office—*
 - (i) *on account of continued ill-health; or*
 - (ii) *for any other reason which the President deems sufficient.*
- (b) *The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.*
- (c) *If the National Director ...—*
 - (i) *vacates his or her office in terms of paragraph (a) (i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or*

- (ii) *vacates his or her office in terms of paragraph (a) (ii), he or she shall be deemed to have been retired in terms of section 16 (4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.*

(9) If the National Director ..., immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of this Act or the Public Service Act do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the National Director, ... and if at that date he or she has not reached the age at which he or she would in terms of the Public Service Act have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post."

(Emphasis added).

55. I respectfully submit that the effect of section 12(5) of the NPA Act read with subsections (6) to (8) is that there are only three ways in which the NDPP may be removed from office:

55.1. By the President in terms of subsection (6) on grounds of misconduct, continued ill health, incapacity or no longer being a fit and proper person. Removal on this basis can only be made following an inquiry and is subject to confirmation by resolution of Parliament.

55.2. By the President at the instance of Parliament in terms of subsection (7) if he receives an address from each of the respective Houses of Parliament in the same session praying for such removal on one or more of the following grounds:

55.2.1. misconduct;

55.2.2. continued ill health;

55.2.3. incapacity; and/or

55.2.4. no longer being a fit and proper person.

55.3. By agreement with the NDPP in cases of continued ill-health or other reasons accepted by the President. When the NDPP is being removed on this basis

55.3.1. it is required that a 6 (six) month notice period be given by the NDPP, subject to the relaxation of that notice period by the President, and

55.3.2. the benefit to which the NDPP is entitled on removal from office is only the pension benefit to which s/he is entitled in terms of subsection (8)(c)(i) or (ii).

56. In particular, I have been advised and respectfully submit that there is no scope within the NPA Act for the "consensual" removal from office of the NDPP pursuant to a golden handshake agreement of the sort concluded by the President, the Minister and Mr Nxasana.

57. I respectfully submit that the facts of the present matter illustrate why this is the case:

57.1. Mr Nxasana was suspected by the President of being unfit to hold the office if the NDPP of South Africa and the President went as far as appointing a Commission of Inquiry into that issue.

57.2. However, the inquiry was terminated without any negative finding against Mr Nxasana, and in terms of clause 2 of the settlement agreement, the President expressly recognises that Nxasana

"is professionally competent, sufficiently experienced and conscientious and has the requisite integrity to hold a senior public position both in the public and private sector"

57.3. That being the case, the independence of the NPA demanded that Mr Nxasana should have been restored to his position forthwith.

57.4. Instead, he has been removed from office pursuant to the settlement agreement which provides him with a payment equivalent to more than eight years' salary which is a payment to which he would never have been legally entitled as damages and which he could only have claimed as long as he continued to tender his services as NPA.

57.5. In effect, the removal of office of the NDPP appears to have been purchased by means of a golden handshake. This is not only *ultra vires* section 12 of the NPA Act, it is also a clear violation of the independence of the NPA which is protected by section 179(4) of the Constitution and the pre-amble to the NPA Act.



58. I therefore respectfully submit that the removal of Mr Nxasana from office and the decision to conclude the settlement agreement for this purpose is

58.1. Unconstitutional and invalid because it is unlawful and *ultra vires* section 12 of the NPA Act,

58.2. Unlawful, unconstitutional and invalid because it is inconsistent with the guarantee of the independence of the NPA in section 179(4) of Constitution and the pre-amble, section 12(5) and section 32 of the NPA Act.

The Setting Aside of the Settlement Agreement: Section 96(2)(b) of the Constitution

59. The provisions of section 96(2)(b) of the Constitution have been set out above. I respectfully submit that

59.1. in the interpretation and application of section 96(2)(b), a Court must have regard to objective facts relating to a conflict of interest; and

59.2. an applicant relying on section 96(2)(b) does not need to prove any actual manipulation of decisions because of a conflict of interests.

60. The incumbent President remains in jeopardy of being prosecuted for corruption relating to the allegations made against him in the previous indictments with which he has been served. In this regard, because it is not suggested by the NPA that there is no *prima facie* case against him, the incumbent President is peculiarly dependent on discretionary

decisions made in relation to his case by the NDPP or an NPA prosecutor acting on the authority of the NDPP. I respectfully submit that in the circumstances

60.1. The incumbent President faces an objective conflict of interest in taking decisions relating to the appointment, suspension or removal of the NDPP,

60.2. Any such decision taken by the incumbent President is inconsistent with section 96(2)(b) of the Constitution and invalid,

60.3. The decision to conclude the settlement agreement is unconstitutional and invalid.

The Decision to Authorise Payment of R17 357 233

61. The decision to authorise payment to Mr Nxasana of the amount of R17 357 233 purportedly due under the settlement agreement was a decision which, in terms of the provisions of the Public Finance Management Act 1 of 1999, had to be authorised by the Fifth Respondent in her capacity as the accounting officer of the NPA, alternatively by the Sixth Respondent acting under the delegated authority of the Fifth Respondent.

62. For the reasons set out above, there was no lawful basis for the conclusion of the settlement agreement. Accordingly, there was no lawful basis for the authorisation of payment to Mr Nxasana of the amount of R17 357 233 purportedly due under the settlement agreement, and the



decisions of the Fifth, alternatively Sixth Respondents in this regard fall to be reviewed and set aside.

The Obligation of Nxasana to Repay the Amount of R17 357 233

63. For the reasons set out above, any payment to Mr Nxasana of the amount of R17 357 233 would have been unlawful and unconstitutional.
64. In the circumstances, if the amount of R17 357 233 or any part thereof has already been paid to Mr Nxasana, he is obliged to refund it to the State.

Review and Setting Aside of the Appointment of the Fourth Respondent

65. The Applicants do not suggest that the Fourth Respondent is not a fit and proper person to be appointed to the office of the NDPP.
66. Nevertheless, for the reasons set out above
- 66.1. The decision to conclude the settlement agreement with Mr Nxasana and thus to remove him from office as NDPP was unlawful, unconstitutional and invalid,
- 66.2. There was accordingly no vacancy in the office of the NDPP to which the Fourth Respondent could lawfully be appointed, and
- 66.3. The purported appointment of the Fourth Respondent is unconstitutional and invalid.
- 66.4. Moreover, the purported appointment of the Fourth Respondent by the President was unconstitutional and invalid for the additional reason that it was an appointment made in a manner inconsistent

with section 96(2)(b) of the Constitution because, as has been set out above, the incumbent President faces a conflict of interest in relation to any decisions in relation to the appointment, suspension or removal of the NDPP.

Declaratory Relief in Relation to Decisions Relating to the Appointment, Suspension or Removal of the NDPP

67. For the reasons set out above, the incumbent President is precluded by section 96(2)(b) of the Constitution from making any decisions in relation to the appointment, suspension or removal of the NDPP.
68. In order to bring stability to the NPA and to prevent future decisions in relation to the appointment, suspension or removal of the NDPP being vulnerable to challenge under section 96(2)(b) of the Constitution, it is in the public interest for this Court to grant the declaratory relief sought by the Applicants in prayers 1.6 to 1.8.
69. In relation to prayers 1,7 and 1.8, I respectfully submit that
 - 69.1. Given the disqualification of the incumbent President under section 96(2) of the Constitution from making decisions in relation to the appointment, suspension or removal of the NDPP, the function in this regard is one that the Constitution requires to be performed by the Deputy President as Acting President in terms of section 90(1)(a) of the Constitution; alternatively
 - 69.2. In the event that this Court finds that section 98 of the Constitution applies to the President's inability to make decisions in relation to the appointment, suspension or removal of the NDPP, given the

nature of those decisions and the constitutional protection of the independence of the NPA, the Constitution demands that the function of making such decisions be assigned to the Deputy President by virtue of his/her constitutional status.

CONCLUSION

70. For the reasons set out above, the Applicants ask for an order in the terms set out in the notice of motion.


DEPONENT

I certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at JOHANNESBURG this day of , the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended and Government Notice No. 1648 of 19 August 1977, having been complied with.

COMMISSIONER OF OATHS

Full names:

R.V. M... ..

Business Address: *15 STANLEY AVE, ROBERTSON*

Designation:

COMMISSIONER (2072527)

Area/Office:

ROBERTSON



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Memorandum of Incorporation

of

Corruption Watch NPC ("RF")

which is referred to in the rest of this Memorandum of Incorporation as "the Company."

The Company is a Non Profit company without members, with the following objects:

To undertake activities aimed at the combating of corruption in all forms in South Africa in order to ensure integrity and accountability in both the public and private sector in the conduct of their functions and operations.

The Company has eight (8) directors, to be appointed in the manner contemplated in clause 8 of this Memorandum of Incorporation.

Adoption of Memorandum of Incorporation

This Memorandum of Incorporation is adopted by the incorporators of the Company, in accordance with section 12(1), as evidenced by the following signatures made by each of them, or on their behalf:

Signature	Ident. No. of Registrant	Signature	Date
Zwelizima Vavi	821220 5782 084	[Signature]	2/09/11
Mavuso Msimang	411019 5436 087	[Signature]	2/09/11
Catherine Mary Elizabeth O'Regan	570917 0011 085	[Signature]	2/09/11
Robert Michael Godeff	520914 5113 082	[Signature]	2/09/11
David Harris Lewis	490802 5110 085	[Signature]	2/09/11
Archbishop Winston Njongo Ndingane	410402 5440 088	[Signature]	2/09/11
Adila Hassim	730114 0212 080	[Signature]	2/09/11
Mary Ellen Metcalfe	541109 0202 080	[Signature]	2/09/11

NY: [Signature]

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC ("RCF")**

In this Memorandum of Incorporation—

- a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;
- b) words that are defined in the Companies Act, 2008 bear the same meaning in this Memorandum as in that Act;
- c) words importing the singular include the plural and vice versa;
- d) any Schedules attached to this Memorandum are part of the Memorandum of Incorporation.



PART 1 – INCORPORATION AND NATURE OF THE COMPANY

1 Incorporation

- 1.1 The Company is incorporated as a Non Profit company, as defined in the Companies Act, 2008.
- 1.2 The Company is incorporated in accordance with, and governed by—
 - 1.2.1 the unalterable provisions of the Companies Act, 2008 that are applicable to Non Profit companies;
 - 1.2.2 the alterable provisions of the Companies Act, 2008 that are applicable to Non Profit companies, subject to any limitation, extension, variation or substitution set out in this Memorandum; and
 - 1.2.3 the provisions of this Memorandum of Incorporation.

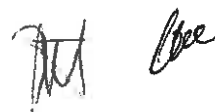
2 Objects and Purpose

- 2.1 The Objects of the Company are as set out on the cover sheet.
- 2.2 Purpose describing the main business:
 - 2.2.1 To receive complaints and information from the public relating to acts of general corruption.

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC ("RF")**

- 2.2.2 To establish communication platforms that will enable citizen participation in the combating of corruption.
 - 2.2.3 To conduct preliminary legal and forensic investigations.
 - 2.2.4 To publicise complaints that are found to have substance, where appropriate.
 - 2.2.5 To submit dossiers to the relevant authorities for further investigation and prosecution.
 - 2.2.6 To engage in litigation, which shall include impact litigation, private prosecutions, civil claims, administrative reviews and access to information applications, where appropriate.
 - 2.2.7 To undertake limited research, with particular emphasis on policy based advocacy, which shall include broad advocacy initiatives aimed at the general public.
 - 2.2.8 To conduct fundraising activities in order to ensure that the financial needs of the Company are met on an annual basis and to ensure its long term financial sustainability.
 - 2.2.9 To liaise with key stakeholders in the public and private sector.
 - 2.2.10 To liaise with law enforcement authorities as well as state investigative and prosecution authorities to ensure that appropriate actions are taken in relation to all matters referred for either further investigation and /or prosecution.
 - 2.2.11 To put in place the necessary measures to ensure the confidentiality and security of information in the custody of the Company.
 - 2.2.12 To liaise with international institutions engaging in similar activities as the Company to elicit both support and best practice advice.
- 2.3 The Company must apply all of its assets and income, however derived, to advance its stated objects and purpose, as set out in this Memorandum of Incorporation.



**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC (FRP)**

3 Powers

- 3.1 The Company must exercise its powers to advance its stated objects and purpose, as set out in this Memorandum of Incorporation.
- 3.2 The Company may directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated Objects.
- 3.3 The Company may acquire and hold securities issued by a profit company.
- 3.4 The Company may conduct fundraising activities in order to ensure that the financial needs of the Company are met on an annual basis and to ensure its long term financial sustainability.
- 3.5 The specific powers or part of any powers of the Company which are subject to restriction, limitation or qualification are:
- 3.5.1 The Company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless of how the income or asset was derived, to any person who is or was an incorporator of the Company, or who is a member or director, or person appointing a director, of the Company, except -
- 3.5.1.1 as reasonable remuneration for goods delivered or services rendered to, or at the direction of, the Company;
 - 3.5.1.2 as reasonable payment of, or reimbursement for, expenses incurred to advance a stated objects of the Company;
 - 3.5.1.3 as a payment of an amount due and payable by the Company in terms of a bona fide agreement between the Company and that person or another;
 - 3.5.1.4 as a payment in respect of any rights of that person, to the extent that such rights are administered by the

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC ("RC")**

Company in order to advance a stated objects of the Company; or

3.5.1.5. In respect of any legal obligation binding on the Company.

3.5.2 The Company may not amalgamate or merge with, or convert to, a profit company.

3.5.3 The Company may not dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

3.5.4 Any proposal to dispose of all or the greater part of its assets or undertaking or to amalgamate or merge with another non-profit company must be submitted to the Board for approval and must be done in the manner contemplated in the Act.

4 Conditions

Any conditions, which apply to the Company and the requirements for their amendments, if any, additional to those prescribed in the Act are set out below: -

4.1 The Company is prohibited from accepting any donation which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof, provided that a donor may not impose conditions which could enable such donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation.

4.2 The Company will not knowingly be a party to, and does not knowingly permit itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy, which, but for such transaction, operation or scheme, would have been or would have become payable by any person under

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC (Pty)**

the Income Tax Act 58 of 1962, as amended, or any other Act administered by the Commissioner of the South African Revenue Services.

- 4.3 Funds available for investment may only be invested with registered financial institutions as defined in section 1 of the Financial Institutions (Protection of Funds) Act 2001; in securities listed on a licensed stock exchange as defined in the Stock Exchanges Act, 1985 (Act No 1 of 1985), as amended; or in such other prudent investments in financial instruments and assets as the Commissioner of the South African Revenue Service may determine.
- 4.4 The Company will comply with such reporting requirements as may be required by the Companies Act and as determined by the Commissioner of the South African Revenue Services.
- 4.5 The Company will take reasonable steps to ensure that the funds which it may provide to any association of persons as contemplated in section 30(3)(b)(iii) of the Income Tax Act 58 of 1962, as amended, are utilised for the purpose for which they are provided.
- 4.6 The Company must ensure that any books of account, records or other documents relating to its affairs:
 - 4.6.1 are maintained in written form for a minimum of seven years; or
 - 4.6.2 If the Company has existed for a shorter time period, then the records need to be kept for that time period.
- 4.7 The Company must ensure that it has not and will not use its resources directly or indirectly to support, advance or oppose any political party.
- 4.8 The sole object of the Company is to carry on one or more public benefit activity as defined in section 30(1) of the Income Tax Act 58 of 1962, as amended, in a non-profit manner.
- 4.9 At least three of the persons who accept fiduciary responsibility for the Company will not be connected persons, as defined in the Income Tax Act 58 of 1962, as amended.

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC (PBF)**

- 4.10 The Company will take reasonable steps to ensure that its funds are utilised for the purpose for which they have been provided.
- 4.11 A copy of all amendments to the Memorandum of Incorporation will be submitted to the Commissioner for the South African Revenue Service.
- 4.12 The Company will submit the required Income Tax Returns together with the relevant supporting documents.
- 4.13 The Company will, within such period as the Commissioner of the South African Revenue Services may determine, register in terms of section 13(5) of the Non-profit Organisations Act, 1997 (Act No. 71 of 1997), and comply with any other requirements imposed in terms of that Act.
- 4.14 Where the Company has been approved in terms of section 18A of the Income Tax Act, 75% of the funds received by or accrued to the organisation by way of donations which qualify for a deduction, will be distributed (or an obligation will be incurred to so distribute) within twelve months from the financial year and during which such donations were received.
- 4.15 The Company shall be wound up in accordance with the procedure in clause 5 to this Memorandum of Incorporation.

5 Winding-up

- 5.1 Upon the winding-up or dissolution of the Company –
 - 5.1.1 No past or present director of the Company, or person appointing a director of the Company, is entitled to any part of the net value of the Company after its obligations and liabilities have been satisfied.
 - 5.1.2 The entire net value of the Company must be distributed to one or more non-profit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts, that are also public benefit organisations for the purposes of the Income Tax Act, 1962, as applicable, having objects similar to its main object, in a manner determined-

**MEMORANDUM OF INCORPORATION
OF CORRUPTION WATCH NPC ("MIP")**

- i) by its Board at or immediately before the time of its dissolution; or
- ii) by the court, if the Board fail to make such a determination.

6 Amending Memorandum of Incorporation and Rules of Company

6.1 This Memorandum of Incorporation may be amended or altered-

- 6.1.1 in a manner consistent with the Act;
- 6.1.2 in compliance with a court order in the manner contemplated in the Act;
- 6.1.3 at any other time if a special resolution to amend it --
 - i) is proposed by 25% of the Board of the Company; and
 - ii) is adopted at a meeting of the Board.

6.2 Notwithstanding the provisions of clause 6.1 amending clauses 3 and 4 of this Memorandum of Incorporation is prohibited, unless such amendment is required by law.

6.3 The Board may make, amend or repeal any necessary or incidental rules relating to the governance of the Company in respect of matters that are not addressed in the Act or this Memorandum of Incorporation, in the manner consistent with in the Act.

6.4 The Board must publish any rules made by delivering a copy of those rules to each director by ordinary mail and electronic mail.

6.5 The Company must publish a notice of any alteration to the Memorandum of Incorporation or the Rules, by delivering a copy of those rules to each director by ordinary mail and electronic mail.