

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

CASE NO: 62410/15

In the matter between:

CORRUPTION WATCH

First Applicant

FREEDOM UNDER LAW (RF) NPC

Second Applicant

and

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA

First Respondent

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

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

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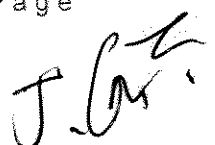
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I, the undersigned

JACOB GEDLEYIHLEKISA ZUMA

Do hereby make oath and state that:

1. I am the President of the Republic of South Africa ("**the President**"), duly elected in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1996 ("**the Constitution**"); first respondent, and with my address of service as care of the State Attorney, SALU building, 316 Thabo Sehume Street Pretoria.
 - 1.1 The facts contained herein are, unless the context otherwise indicates within my own personal knowledge and are to the best of my knowledge and belief both true and correct.
 - 1.2 Any legal submissions that are made by me are made on the advice of my legal representatives, which advice I believe to be correct.
2. I have read the affidavits of **DAVID LEWIS** and **NICOLE FRITZ** in support of the application and wish to respond thereto in a manner outlined hereunder.
3. The broad structure of this affidavit will deal with:
 - 3.1 the nature of the application and the relief sought;
 - 3.2 summary of the answer;



- 3.3 an outline of the legislative framework;
- 3.4 the developments leading to the inquiry and settlement agreement of Mr Nxasana ("**Nxasana**"), the third respondent;
- 3.5 the appointment of Mr Abrahams ("**Abrahams**"), the fourth respondent;
- 3.6 the answer to each and every averment in the first applicant's founding affidavit insofar as it relates to me;
- 3.7 the answer to each and every averment in the second applicant's founding affidavit also as they relate to me; and
- 3.8 the answer to each and every averment in the supplementary affidavit that calls for my answer.

THE NATURE OF THE APPLICATION AND THE RELIEF SOUGHT

- 4. This is an application in which the applicants are seeking *inter alia*,
 - 4.1 to review and set aside:
 - 4.1.1 the settlement agreement entered between the first, second and third respondents dated 14 May 2015 and the monetary consequences arising therefrom;
 - 4.1.2 the appointment of the fourth respondent as the National Director of Public Prosecutions ("**the NDPP**");
 - 4.2 to declare that the:

4.2.1 third respondent is obliged to refund the State, money received in terms of the settlement agreement;

4.2.2 first respondent may not appoint, suspend or remove the NDPP in terms of section 96(2)(b) of the Constitution; and

4.2.3 second respondent is responsible for decisions relating to the appointment, suspension or removal of the NDPP for as long as the first respondent holds office.

SUMMARY OF THE ANSWER

Settlement Agreement: prayer 1.1

5. In so far as the applicants seek to challenge the settlement agreement, entered into between Nxasana and the second respondent in which inter alia, Nxasana vacated his office as the National Director of Public Prosecution. The challenge is bad in law in that:

5.1 I exercised my constitutional power in terms of sections 179(1)(a) of the Constitution and 12(8) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act") in the appointment and the vacating of office of Nxasana.

5.2 I appointed Nxasana as the NDPP on 30 August 2013 under Presidential Minute No. 295, a copy of the minute is attached and marked "JS1".

- 5.3 I informed Nxasana, on 4 July 2014, that after consideration of all the evidence before me, I took the decision to institute an inquiry in terms of Section 12(6)(a) of the NPA Act.
- 5.4 I established an inquiry into the fitness of Nxasana to hold office of the NDPP, on 5 February 2015, by notice in the Government Gazette, No. 38463, Notice 102 of 2015. The Rules for the inquiry were published in the Government Gazette No. 38491, Notice 155 of 2015. The inquiry was to sit on 11 May 2015, when I took the decision to terminate it.
- 5.5 During the period, August 2013 to 9 May 2015, Nxasana and I had various one on one verbal discussions regarding the discord that existed in the National Prosecuting Authority, especially as between Nxasana and the senior management.
- 5.6 The discord was so pronounced, that the senior management was divided and the National Prosecuting Authority was destabilised and haemorrhaging. The looming inquiry into the fitness to hold office of Nxasana also contributed to this discord. The inquiry offered some of the senior management an additional platform to question the authority of Nxasana.
- 5.7 Section 12(8) of the NPA Act provides that the NDPP may request to vacate his or her office for any reason which the President deems sufficient. Nxasana made the request to me to vacate his office. Nxasana made it plain that the discord in the NPA largely rested on the senior management not sharing his strategic views and the disciplinary

steps or criminal charges which he intended taking against certain of the senior managers. This posited intractable disputes paralysing the proper functioning of the NPA.

5.8 I, therefore, deemed the reasons provided by Nxasana, together with the possibility of a protracted litigation and the holding of the inquiry not to be in the best interest of the National Prosecuting Authority, Nxasana and the Republic of South Africa, to be sufficient to allow Nxasana to vacate office.

5.9 It was plain to me that Nxasana was no longer willing to continue as the NDPP and the only outstanding issue remained the financial aspects relating to his vacating his office.

5.10 There were extensive negotiations relating to the financial terms with which he would be agreeable to leave office having made the request to do so. I was informed that there were offers made to Nxasana and counter offers made by him around the amount he contended he was entitled to.

5.11 Subsequently, I was informed that the parties had reached an agreement around the money to be paid to Nxasana which rendered the holding of the inquiry unnecessary. The settlement agreement was therefore the culmination of these events.

5.12 With Nxasana having made it crystal clear to me that he no longer wishes to continue as the NDPP, I am advised that it was within my power to allow Nxasana to vacate office having been satisfied that it

was in the interests of the NPA, Nxasana and the Republic for him to do so.

- 5.13 It is particularly surprising that the applicants find no fault with the appointment of Nxasana by me and want to contend that he is still to be regarded as the NDPP. I appointed Nxasana as the NDPP. It was still during the period that I am perceived to be in "*jeopardy of prosecution*". If that appointment remains untainted there is no reason that any other appointment of an NDPP by me would suffer a challenge on that ground.

Decision to authorise: prayer 1.2

- 5.14 The applicants also seek to impugn the decision to authorise the payment to Nxasana of an amount of R17 357 233.00. This process was undertaken by the fifth and seventh respondents. I am advised that the respondents who are competent to speak on the matter will do so when they file their answering affidavits.

- 5.15 In so far as the Court may find that the payment to Nxasana of the aforesaid amount was unlawful, I intend to abide by the decision of the Court. I need to emphasise however, that the challenge relating to the settlement payment is severable from Nxasana's vacating office as an NDPP.

- 5.16 I am advised that the Court having been satisfied that Nxasana made the request to vacate his office; for reasons which I found sound and sufficient; and his intimation that he has no desire to continue as an

NDPP satisfies the first leg of section 12(8) of the NPA Act. To the extent that the payment to Nxasana is found unlawful, all that needs to happen is that he must be paid in terms of the provisions of section 12(8)(c)(ii) of the NPA Act (meaning that he would be deemed to have retired in terms of section 16(4) of the Public Service Act, and that he shall be entitled to such pension as he would have been entitled to under the pension law applicable to him had he been so retired).

Appointment of the fourth respondent: prayer 1.3

5.17 The applicants want the appointment of the fourth respondent as NDPP to be reviewed, declared invalid and set aside. The argument offered for this relief, is that there was no vacancy. This argument is bad. As a matter of fact and law, I am advised, that Nxasana had vacated his office as from 1 June 2015 having made the request to vacate his office; for reasons which I deemed sufficient and in interests of the Republic. That he may have received payment inconsistent with the provisions of the NPA Act, does not render his vacating office as invalid.

5.18 I am advised that the applicants do not question the fitness or propriety of the fourth respondent to hold office as the NDPP. For this reason I need not address the considerations I took account of in the appointment of the fourth respondent as the NDPP.

Nxasana still as the NDPP: prayer 1.4



5.19 The applicants argue that the Court must declare that Nxasana to still be holding the office of the NDPP. The argument draws its strength from an inference that a challenge on the decision to allow Nxasana to vacate office is unlawful, holds in logic, that Nxasana would be reinstated as the NDPP. This is incorrect. Apart from maintaining that Nxasana relinquished office in accordance with law, he has made it very plain that he does not intend to serve as an NDPP. To have him declared as still holding the office of an NDPP would be bad both in law and fact. I am also informed that a Court cannot order somebody to do that which he plainly does not want to do.

5.20 I am advised further that such a declarator would offend against the rule of law in so far as it would conflate the separation of powers. The constitutional power to appoint an NDPP remains that of Executive. Further legal argument would be made at the hearing of this application.

Third respondent to refund the money he received: prayer 1.5 .

5.21 I abide the decision of this Honourable Court in relation to whether Nxasana is to refund the money he received in terms of the settlement agreement.

Section 96(2)(b) of the Constitution argument: prayer 1.6

5.22 The applicants seek a declarator that I may not appoint, suspend or remove an NDPP. The argument stems from a contention that I am in jeopardy of prosecution and therefore would be conflicted in making

such an appointment. There is no substance to this argument. As a matter of fact, there are no pending criminal charges against me.

- 5.23 I am advised that the only litigation pending in the courts relates to a decision by a former acting NDPP Mr Mpshe, to discontinue the prosecution against me. I am advised that there is no basis for the applicants to contend that that application will be successful and if successful would mean that the NDPP would not make his or her decision without fear favour or prejudice as the law requires.
- 5.24 The applicants' contention in this regard has embedded in it a wanton and veiled accusation that I would act improperly or whoever the NDPP is would equally act improperly. There is no evidence to support what is merely an unfounded suspicion by the applicants.
- 5.25 There is no reason to believe that I will, in the event that actual conflict of interest is shown to exist, act despite the existence of such a conflict, in the exercise of my constitutional power. The applicants are inviting the Court to make a determination on a matter entirely academic and in anticipation that any conflict of interest might in the future be shown to exist.
- 5.26 In any event, the nature of the relief which is sought in relation to this aspect straddles the separation of powers doctrine – which is part of the rule of law. The applicants are inviting the Court to make pronouncements in areas which the Constitution has left exclusively for

the exercise by the Executive. I am told further legal argument will be made at the hearing of this application.

Deputy President to appoint an NDPP: prayer 1.7

5.27 In so far as the applicants seek a declarator that for as long as I am the President the power for the appointment the NDPP should be exercised by the Deputy President. I am advised that the Constitution is very clear as to what must happen if I or the President, is absent from the Republic or otherwise unable to fulfil the duties of President that various members of the Cabinet would perform those duties.

5.28 Without conceding that there is any basis for this declarator, the applicants do not make a case why a Minister designated by me cannot act as President; a Minister designated by the other members of Cabinet; the Speaker, until the National Assembly designates one of its other members to perform the duties of President – all of which the Constitution authorises should be options available and are constitutionally authorised.

5.29 I am advised that the Court has no power to suspend the operation of a constitutional provision which is what the applicants seek by way of a declarator under this relief.

Assignment of Presidential powers: prayer 1.8

5.30 The applicants want the Court to direct me to assign my constitutional power to the Deputy President. They say this must happen in terms of section 98 of the Constitution. This is a power the President has to assign to a Cabinet Member any power or function of another member who is absent from office or is unable to exercise their power or perform that function.

5.31 I repeat what I have said in relation to prayer 1.7 above.

6. I now turn to deal with the Legislative framework.

THE LEGISLATIVE FRAMEWORK

7. The applicants contend that I am conflicted regard being had to section 96(2)(b) of the Constitution which provides for conduct of cabinet members and deputy minister and states that:

"(2) Members of the Cabinet and Deputy Ministers may not –

- (a) undertake any other paid work;
- (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person." (own emphasis)

8. The reading of section 96(2)(b) of the Constitution addresses an entirely different subject. It concerns itself with members of cabinet pursuing private interests which are in conflict with their constitutional obligations. The appointment of the NDPP is a performance of a constitutional duty which is not pursued of any private interest. The Constitution further reposes independence of the office of the NDPP who is to exercise the power to prosecute or not to prosecute without fear, favour or prejudice.
9. There is no suggestion that an NDPP would take a decision tainted purely by who would have appointed him or her. Should there be evidence to support that contention the proper relief would be to set aside the decision by that NDPP on those grounds. To ask the Court in an anticipatory fashion to do so would offend against the doctrine of the separation of powers. Further legal argument would be advanced at the hearing of this application.
10. Regarding the institutional autonomy of the NPA which the Constitution provides in section 179(1)(a) for a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of a NDPP, who is the head of the prosecuting authority and who is appointed by the President, as head of the national executive.

11. The NPA Act regulates matters incidental to the establishment of a single national prosecuting authority and is the Act of Parliament referred to in section 179 of the Constitution and the following sections bear reference:

11.1 Section 10 provides that the President must, in accordance with section 179 of the Constitution, appoint the National Director;

11.2 There is no basis for the Court to remove the constitutional power of the President. What the Court is entitled to do, if a good case is made out, is to set aside any conduct of the President that is inconsistent with the Constitution and which is invalid. The applicants have not made out any case that I have performed any act which is inconsistent with the Constitution.

11.3 I am advised that the question of tenure of an NDPP is regulated by section 12 which in the relevant part reads:

"(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.

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

(8) (a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office –

(i) on account of continued ill-health;

(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 or a Deputy National Director –

(i) ...; 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." (own emphasis)

11.4 As I have earlier indicated I allowed Nxasana to vacate office on the strength of these statutory provisions.

THE DEVELOPMENTS LEADING TO THE INQUIRY AND SETTLEMENT AGREEMENT OF NXASANA

12. The following developments led to the settlement agreement which took place over a period of 18 months and were, in the main, verbal discussions held primarily between myself and Nxasana, which were not minuted or documented. The developments leading to the inquiry took place over a period of 12 months and are documented and will also be dealt with more fully by the second respondent who, in terms of section 179(6) of the Constitution, exercises final responsibility over the National Prosecuting Authority. These events are:

- 12.1 After various media reports, on the 19 June 2014, I addressed a letter to Nxasana, requesting information regarding certain incidents *inter alia*, criminal charges during December 1985; outstanding complaints before the KwaZulu Natal Law Society; the arrest during October 2012; the assault charges proffered against him in the 1980's; the complaint laid with the Public Service Commission by one Prince Mokotedi and the appropriateness of the statements made to the media regarding internal communications¹.
- 12.2 I received a response from Nxasana on 21 June 2014 providing me with the information requested. However, Nxasana prefaced the reply by stating that he may not be in a position to have a clear recollection of events due to the lapse of time, in some instances being more than 28 years, and the time period provided for to furnish a response².
- 12.3 Subsequent to the response received and considering all the events that has transpired together with the media reports³, on 4 July 2014, I caused to be served on Nxasana a notice of the institution of an inquiry⁴.
- 12.4 Nxasana then instituted legal proceedings in the High Court of South Africa, Gauteng Division, Pretoria signed on 8 August 2014 in which I was named as the first respondent. In these court papers, Nxasana sought various relief on an urgent basis, the main being to interdict me

¹ This letter is contained in the Record in terms of prayer 5 ("Record 1") on pages 2 to 3.

² This letter is contained in Record 1 on pages 4 to 13

³ These media reports are contained in Record 1 on pages 84 to 126

⁴ This notice is contained in Record 1 on page 14

from suspending him⁵. This matter was settled out of court between the parties.

12.5 On 5 February 2015, I caused a notice to be published in the Government Gazette notice 102 of 2015, which established the inquiry into the fitness of Nxasana. In this notice I appointed Advocate Cassim SC as the chairperson and Advocate Nkosi-Thomas SC and Advocate Mdladla as the additional members. I also provided the terms of reference for the inquiry⁶.

12.6 On 20 February 2015, the chairperson of the inquiry issued rules for the inquiry in Government Gazette notice 155 of 2015. The Code of Conduct for members of the National Prosecuting Authority under section 22(6) of the NPA Act as provided for in Government Gazette notice 1257 of 2010 was also provided⁷.

12.7 It was during the end of 2014 and the beginning of 2015, that I again had discussions with Nxasana and I had discussions with the Minister. It was during these discussions that Nxasana requested to vacate his position as head of the National Prosecuting Authority, citing the continued discord with the senior members of the National Prosecuting Authority and the inquiry as the primary reasons. I deemed the reasons to be sufficient and accepted the request. This request was not reduced to writing.

⁵ The court papers are contained in Record 1 on pages 15 to 52

⁶ This notice is contained in Record 1 on pages 53 to 60

⁷ These notices are contained in Record 1 on pages 61 to 82

- 12.8 I caused the termination of the inquiry as a settlement had been reached with Nxasana.
- 12.9 The settlement agreement⁸ was signed on 9 and 14 May 2015 between Nxasana and the Minister. The terms of which are contained in annexure "CW12" to the founding affidavit.
- 12.10 The payment arising from the settlement agreement was handled by the Department of Justice and the National Prosecuting Authority in accordance with the Public Finance Management Act, 1999. I am advised that various formula was provided by the National Treasury in relation to the amount to be paid to Nxasana and the method of such payment. After many sessions of negotiations between my office and Nxasana, Nxasana requested the payment of the entire period.

THE APPOINTMENT OF ABRAHAMS

13. The events which led to the appointment of Abrahams are as follows:
- 13.1 After the vacation of office of Nxasana, I appointed Dr Silas Ramaite as acting National Director in terms of section 11(2)(b) of the NPA Act.
- 13.2 The Department of Justice and Constitutional Development, at the request of the Minister, prepared a report regarding possible persons within the NPA who it deemed fit and proper to be appointed to the vacant office of National Director.

⁸ This is contained in the Record in terms of prayer six ("Record 2") on pages 2 to 5.

13.3 I was provided with a submission from the Minister, in relation to the appointment of Abrahams to the position of National Director⁹. I then held an interview with Abrahams together with Mr Hulley. The interview guide notes form the minute of this interview¹⁰.

13.4 I considered all the information before me, and appointed Abrahams as the NDPP. The Presidential Minute no. 162 provides for this appointment as of 1 July 2015¹¹.

14. Mercifully the applicants do not contend that the fourth respondent is not fit for office.

THE CONFLICT OF INTEREST IN TERMS OF SECTION 96(2) OF THE CONSTITUTION

15. The applicants cannot point to any conduct or action on my part, which is inconsistent with the duties of my office nor am I exposing myself to any situation involving the risk of a conflict between my official responsibilities and my private interests.

15.1 The power I exercised is power I derive directly from the Constitution. Therefore acting in terms of that power can never be an act which is inconsistent with the duties of my office.

⁹ This is contained in the Record in terms of prayer seven ("Record 3") on pages 3 to 10.

¹⁰ This is contained in Record 3 on pages 100 to 102

¹¹ This is contained in Record 3 page 1

15.2 The power I exercised in accepting the request from Nxasana I derive directly from national legislation. Therefore acting in terms of that power can never be an act which is inconsistent with the duties of my office.

15.3 There is also no basis to state that I have any conflict of interest in exercising those powers. In fact the applicants have not provided this Honourable Court with any objective facts to show that a conflict of interest exists.

15.4 Therefore section 96(2) of the Constitution does not arise.

15.5 I reiterate that the applicants find no fault with the appointment of Nxasana by me and want to contend that he is still to be regarded as the NDPP. I appointed Nxasana as the NDPP. It was still during the period that I am perceived to be in "*jeopardy of prosecution*". If that appointment remains untainted there is no reason that any other appointment of an NDPP by me would suffer a challenge on that ground.

16. I now turn to deal with such allegations in the affidavits which I am able to respond to.

AD FOUNDING AFFIDAVIT OF THE FIRST APPLICANT

17. **AD PARAGRAPHS 1 & 2**



17.1 I admit the contents of these paragraphs.

17.2 I deny that the facts are both true and correct.

18. AD PARAGRAPHS 3 – 12

18.1 I admit the content of these paragraphs.

18.2 I deny that I “purportedly” appointed Abrahams.

18.3 I am also advised that the position of CEO of the National Prosecuting Authority does not exist.

19. AD PARAGRAPH 13

19.1 I note the content of this paragraph.

20. AD PARAGRAPH 14

20.1 I note the content of this paragraph.

21. AD PARAGRAPHS 15 – 15.4

21.1 I admit the content of these paragraphs.

21.2 With regards to the suspension of Nxasana, I requested reasons as to why he should not be suspended which ultimately resulted in Nxasana instituting proceedings against me in the Gauteng High Court, Pretoria.

22. AD PARAGRAPH 16

22.1 I have explained above, the events which led to the conclusion of the settlement agreement.

23. AD PARAGRAPHS 17 – 17.2

23.1 I deny the content of these paragraphs.

23.2 I aver that Nxasana's vacating of office was in accordance with the empowering provisions contained in section 12(8) of the NPA Act. This provides for a consensual vacating of office of the NDPP, where sufficient reasons exist as was the case in this instance.

23.3 The vacating of office of Nxasana in terms of the NPA Act cannot affect the independence of the National Prosecuting Authority.

23.4 I repeat what I have stated above.

24. AD PARAGRAPHS 17.3 – 17.3.2

24.1 I deny the content of these paragraphs.

24.2 I aver that:

24.2.1 I am not *'in jeopardy of prosecution'* as alleged by the applicants. The Concise Oxford Dictionary, 9th Edition, 1995 defines jeopardy as "*n 1 danger, esp. of severe harm or loss. 2 Law danger resulting from being on trial for a criminal offence.*"

24.2.2 The applicants have not and cannot show that I am in danger as a result from being on trial for any criminal offence. The litigation referred to, which was instituted in 2009, does not place me *"in jeopardy of prosecution."*

24.2.3 The appointment of an NDPP by the President in terms of a constitutionally enshrined power and legislation cannot be inconsistent with the Constitution.

24.2.4 I repeat what I have stated above.

25. AD PARAGRAPHS 18 – 18.2

25.1 I note the content of this paragraph.

25.2 I abide the decision of this Honourable Court in relation to the payment of the R17 357 233.

26. AD PARAGRAPH 19

26.1 I deny the content of this paragraph.

26.2 I aver that:

26.2.1 Nxasana requested to vacate his office, which request I accepted in accordance with section 12(8) of the NPA Act.

26.2.2 Therefore a vacancy was created which was filled by Abrahams after the correct procedures were followed.

26.3 I repeat what I have stated above.

27. AD PARAGRAPHS 20 – 20.2

27.1 I deny the content of these paragraphs.

27.2 I repeat what I have stated above.

28. AD PARAGRAPHS 21 – 21.2.2

28.1 I note the content of these paragraphs.

29. AD PARAGRAPHS 22 – 22.1

29.1 I note the content of these paragraphs.

29.2 I again aver that the vacating of office of Nxasana does not affect the independence of the National Prosecuting Authority.

30. AD PARAGRAPH 23

30.1 I deny the content of this paragraph.

30.2 I aver that:

30.2.1 the removal of Nxasana was in accordance with section 12(8) of the NPA Act.

30.2.2 Mr Selebi was prosecuted and convicted.

30.2.3 Mr Pikoli, through consensual agreement between the parties, vacated his office, after being cleared by the Ginwala Commission.

31. AD PARAGRAPHS 24 - 26

31.1 I note the content of these paragraphs.

32. AD PARAGRAPH 27

32.1 I admit the content of this paragraph.

32.2 I aver that the instability in 2007 in the office of the NDPP and the National Prosecuting Authority has escalated during the period 2013 to 2015 which were reasons I found compelling to allow Nxasana to vacate office.

33. AD PARAGRAPHS 28 - 31

33.1 I deny the content of these paragraphs.

33.2 I am advised further that these allegations are irrelevant to the appointment of Nxasana and Abrahams.

34. AD PARAGRAPH 32

34.1 I admit the content of this paragraph.

34.2 I re-emphasise that the applicants seem to see no fault with me having appointed Nxasana as an NDPP.

35. AD PARAGRAPHS 33 - 41

35.1 I admit the content of these paragraphs to the extent that it accords with the annexures referred therein and with what I have stated above.

36. AD PARAGRAPHS 42 – 42.5

36.1 I admit the content of these paragraphs to the extent it accords with the settlement agreement.

36.2 I wish to point out that the settlement agreement also makes reference, in the preface, to some of the reasons which existed and which reasons I deemed sufficient to accept Nxasana's request to vacate his office. I provide them for ease of reference:

"WHEREAS

1. On 4 July 2014, the President informed the Applicant (National Director of Public Prosecutions herein after referred to as the NDPP) of his decision to institute an inquiry in terms of section 12 (6) (a)(iv) of the National Prosecuting Authority Act 32 of 1998 (the Act).
2. On 30 July 2014, the President gave Notice of Intention to suspend the NDPP in terms of section 12 (6) (a) of the Act.
3. The NDPP brought an urgent application in the North Gauteng High Court to interdict the President from suspending him until the President has provided the NDPP with the requested particularity of the allegations levelled against him, and which allegations were to constitute the subject matter of the inquiry.
4. These proceedings now stand adjourned and the parties subsequently entered into discussions and negotiations in an attempt to resolve the matter.
5. The parties recognize that a protracted litigation process will not be in the interests of the office of the National Director of Public Prosecutions, the functioning of the National Prosecuting Authority nor the Republic of South Africa.

6. The parties are also mindful that the public glare brought on by the holding of the inquiry, whilst necessary for transparency in our democracy, has unintended consequences.
7. The parties are fully cognizant of the costs implications for litigating and/or conducting the inquiry which resources may be better applied given the challenges our country faces." (own emphasis)

37. AD PARAGRAPH 43

37.1 I admit that I appointed Abrahams into the position vacated by Nxasana.

38. AD PARAGRAPH 44

38.1 I deny that I am disqualified in terms of section 96(2)(b) of the Constitution to exercise my constitutional power of appointment, suspension and removal of the NDPP.

39. AD PARAGRAPHS 44.1 – 44.8

39.1 I admit the content of these paragraphs to the extent that it accords with the judgments in the *Democratic Alliance v Acting NDPP* 2012 (3) SA 486 (SCA) and *NDPP v Zuma* 2009 (2) SA 277 (SCA).

40. AD PARAGRAPHS 44.9 – 44.10

40.1 I submit that this matter is currently *sub judicæ*.

41. AD PARAGRAPHS 45 – 45.2

41.1 The content of these paragraphs are denied.

41.2 I submit that:

41.2.1 There is a constitutional doctrine that one is innocent until proven guilty. I am neither charged nor am I found to be guilty by any court of law.

41.2.2 To justify these allegations, the applicants state that there is a potential that I may be in jeopardy of prosecution in respect of which there apparently remains a case against me on the merits. This is speculative at best.

41.2.3 The 2009 litigation deals with the review and setting aside of the decision to discontinue the prosecution.

41.2.4 To speculate as to its outcome and then to deprive me of my constitutional rights would be to hold me guilty without a finding of a court of law.

41.2.5 I have provided the detailed approach adopted when sourcing persons for the appointment of the NDPP and I hold that this process provides for transparency and accountability.



41.2.6 I invite the applicants to furnish evidence that any NDPP having been appointed in accordance with the provisions of the NPA Act and with the constitutional power to perform his or her duty without fear, favour or prejudice, will act contrary to this constitutional duty and will do so purely because I made the appointment to a person who is otherwise fit and proper to hold such office.

42. AD PARAGRAPHS 46 – 47.12.3

42.1 I note the content of these paragraphs.

42.2 I received the letter dated 12 September 2014 from Nxasana and was informed about the recommendations relating to Advocates Jiba, Mrwebi and Mzinyathi.

42.3 I through the Minister referred all these matters relating to these advocates to the NDPP to apprise me whether the facts regarding their continued employment warrants consideration of their suspension. This exercise was conducted by the current NDPP, Abrahams.

42.4 It seemed to me, once I have received all the information that it is prudent to await the outcome of the application by the General Council of the Bar to have these advocates struck from the roll of advocates. The Court would have determined their fitness to hold office. I would clearly be informed by the outcome of those pending applications.

42.5 I believe my decision not to interfere pending judicial pronouncement on the fitness or otherwise of these advocates, to be rational given the constitutional protection enjoyed by the NPA.

43. AD PARAGRAPH 48

43.1 I note the content of this paragraph.

44. AD PARAGRAPH 49

44.1 I deny that I have failed to act in relation advocate Jiba, Mrwebi and Mzinyathi. I am advised that whether an advocate is fit and proper to be an advocate is a matter eminently within the remit of the courts. No doubt the Deputy National Directors hold that office on the strength that their fitness to be advocates is above reproach. There would be no need to hold an inquiry to probe the same issues of whether the advocates are fit to hold offices as Deputy NDPP's.

44.2 There is also a possibility of conflicting outcomes with the inquiry finding the advocates to be fit to hold office and a court of law holding differently that they are unfit to be advocates. Similarly, the court having found them to be fit to hold office, should not be contradicted by an inquiry finding that they not. This should be avoided.

45. AD PARAGRAPH 50

45.1 I deny that Nxasana's vacating of office is unlawful and unconstitutional.

45.2 I refer to what I have stated above.

46. AD PARAGRAPHS 51 – 55.3.2

46.1 I admit the content of these paragraphs to the extent that it accords with the Constitution and the NPA Act.

47. AD PARAGRAPH 56

47.1 I agree that NDPP cannot vacate office pursuant to a golden handshake.

47.2 I deny that the NPA Act does not provide for a consensual removal from office if all the jurisdictional requirements are met.

47.3 Section 12(8) specifically allows for a consensual vacating of office of the NDPP.

47.4 The applicants clearly understand '*a consensual removal*' as indicated in paragraph 55.3 of the founding affidavit. Here the applicants aver that an NDPP can be removed from office '*by agreement*'.

48. AD PARAGRAPHS 57 – 57.2

48.1 I deny the content of these paragraphs.

48.2 I admit that I established an inquiry into the fitness to hold office of Nxasana which inquiry I terminated prior to any finding being made.

48.3 It was a matter to be determined by the inquiry if the allegations were shown to be correct and the decision was made by the inquiry itself. This did not come it pass when the settlement agreement was concluded.

49. AD PARAGRAPH 57.3

49.1 I deny the content of this paragraph.

49.2 I reiterate that the intractable discord that was in the NPA was bleeding the institution and demanded some resolution. Nxasana had indicated unequivocally that he would no longer wanted to continue as an NDPP and the only item for negotiation remained the financial consequence of him vacating office.

50. AD PARAGRAPHS 57.4 – 57.5

50.1 I deny the content of these paragraphs.

50.2 I deny that the vacating of office of Nxasana is *ultra vires* and violates the independence of the National Prosecuting Authority. I have already addressed the reasons for allowing Nxasana to vacate office as an NDPP. I already pointed out that I acted in terms of the powers I have as spelt out in section 12(8)(a) of the NPA Act.

50.3 I admit that the financial payment following Nxasana vacating office may be open to judicial review.

51. AD PARAGRAPHS 58 – 58.2

51.1 I deny the content of these paragraphs.

51.2 I repeat what I have stated above.

52. AD PARAGRAPHS 59 – 59.2

52.1 I admit that objective facts relating to a conflict of interest must be placed before this Honourable Court in order to establish whether there is indeed a conflict of interest as provided for in section 96(2)(b) of the Constitution.

52.2 I aver that the applicants have not provided any objective facts to establish a conflict of interest.

52.3 The exercise of a constitutional and legislative power, for the President to remove an NDPP where all the jurisdictional elements are met, is not an 'act' as contemplated by section 96(2)(b) of the Constitution.

52.4 I am advised that there is no need to prove 'actual manipulation'. What the applicants need to show though is an 'actual conflict of interest'. Such an 'actual conflict of interest' has not been shown on the papers. What the applicants appear to do is to anticipate a future event; namely, that the application to review and set aside the decision of the former acting NDPP, will be successful and that I would appoint an NDPP whose decision will be manipulated in my favour. This is particularly remote where the NDPP enjoys statutory independence.

52.5 If the argument by the applicants was good, I would be disentitled to appoint any Judge in this country who may potentially have to preside over my matter if I ever get to be prosecuted. No such relief is being sought and I am advised for correct reasons.

53. AD PARAGRAPHS 60 – 60.3

53.1 I deny the content of these paragraphs.

53.2 The applicants are relying on speculation at best.

53.3 I repeat what I have stated regarding this aspect earlier.

54. AD PARAGRAPH 61

54.1 I note the content of this paragraph.

55. AD PARAGRAPH 62

55.1 The settlement agreement has at least two aspects to it. The one relates to Nxasana vacating office as an NDPP and the financial consequences of him vacating the office of an NDPP. The first aspect, I am advised, was lawful having considered the request by Nxasana to vacate office, the reasons behind the request being cogent, compelling and rational; and me allowing him to vacate office.

55.2 Regarding the financial consequences of him vacating office, I repeat the averments contained herein and shall abide the finding of the Court in this regard.

55.3 These two elements to the settlement agreement should not be conflated.

56. AD PARAGRAPHS 63 - 64

56.1 I note the content of these paragraphs.

57. AD PARAGRAPH 65

57.1 I admit that Abrahams is a fit and proper person to hold office as the NDPP.

58. AD PARAGRAPH 66 – 66.4

58.1 I deny the content of these paragraphs.

58.2 I aver that:

58.2.1 the vacating of office of Nxasana was in accordance with section 12 of the NPA Act and this necessitated a filling of this vacant post.

58.2.2 Abrahams was appointed in accordance with section 179(1) of the Constitution.

58.3 I repeat what I have stated above.

59. AD PARAGRAPHS 67 - 68

59.1 I deny the content of these paragraphs.

59.2 I aver that the applicants have not laid a basis for any conflict of interest in terms of section 96(2) of the Constitution.

59.3 The applicants admission that there is instability in the National Prosecuting Authority clearly shows an appreciation of the difficulties Nxasana and I faced to try to resolve the instability not only for the National Prosecuting Authority but also to contain its effect on the country at large.

60. AD PARAGRAPHS 69 – 70

60.1 I deny that the applicants are entitled to the relief as set out in the notice of motion.

AD FOUNDING AFFIDAVIT OF THE SECOND APPLICANT

61. AD PARAGRAPHS 1 - 3

61.1 I admit the content of these paragraphs.

61.2 I aver that the deponent has not stated anywhere in the affidavit that the facts contained in her affidavit are to the best of her knowledge both true and correct.

62. AD PARAGRAPH 4

62.1 I note the content of this paragraph.

M-S



63. AD PARAGRAPHS 5 - 9

63.1 I note the content of these paragraphs.

64. AD PARAGRAPH 10

64.1 I deny that I have '*perverted the rules*' or that I '*unlawfully induced*' Nxasana to vacate his office. I invite the applicants to produce evidence of "threat of dismissal" made to Nxasana.

64.2 I am advised that applicants are enjoined by the Rules of Court to furnish this type of evidence in their founding affidavit.

64.3 I refer to what I have stated above.

65. AD PARAGRAPH 11

65.1 I note the content of this paragraph.

66. AD PARAGRAPHS 12 – 13.5

66.1 I have no knowledge of the content of these paragraphs but have noted the content of the annexures as they stand.

67. AD PARAGRAPH 14

67.1 I deny that the second applicant is entitled to the relief in its notice of motion.

AD SUPPLEMENTARY AFFIDAVIT

68. AD PARAGRAPHS 1 - 4

68.1 I admit the content of these paragraphs.

68.2 I deny that the facts are both true and correct.

69. AD PARAGRAPH 5

69.1 I deny the content of this paragraph.

69.2 I aver that the I have the power to shorten the period referred to in section 12(8)(b), which period was duly shortened. It would not have been in the interest of the workings of the NPA, with the disharmony prevailing between Nxasana and senior management to require the six months' notice. To the contrary, there was every reason to waive that notice period to enable the smooth functioning of the NPA.

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[Signature]

70. AD PARAGRAPHS 6 – 6.2

70.1 I have stated that due to the fact that my engagements with Nxasana were verbal they were not documented or minuted. Therefore no documentary evidence exists for me to produce in terms of the Rule 53 record.

70.2 The NPA Act requires me to deem whether the reasons are sufficient to accept Nxasana's request to vacate his office. These reasons are summarised in the preamble to the settlement agreement.

71. AD PARAGRAPH 7

71.1 I note the content of this paragraph.

72. AD PARAGRAPH 8

72.1 I have provided the record as is required in terms of Rule 53.

72.2 I have stated under oath that the verbal discussions which I had with Mr Nxasana were not documented or minuted and therefore I am unable to produce same.

73. AD PARAGRAPH 9

73.1 I deny the content of this paragraph.

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74. AD PARAGRAPHS 10 – 10.6

74.1 I have no knowledge of the content of these paragraphs.

75. AD PARAGRAPHS 11 - 12

75.1 I note the content of these paragraphs.

76. AD PARAGRAPHS 13 - 14

76.1 I deny the content of these paragraphs and repeat what I have stated above.

77. AD PARAGRAPH 15

77.1 I deny that the applicants are entitled to the relief as prayed for.

78. AD PARAGRAPH 16

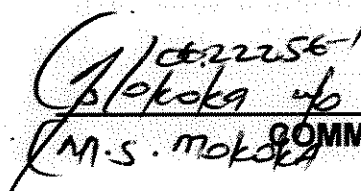
78.1 I note the content of this paragraph.

WHEREFORE I pray that this application be dismissed with costs, which costs include the cost of two counsel.



DEPONENT

THUS SIGNED AND SWORN to before me at PRETORIA on this the 29 day of February 2016, by the deponent, he having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and considers same to be binding on his conscience.



COMMISSIONER OF OATHS

