REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

Date: 08/12/2017 **obo** **FULL COURT**

CASE NO: 62470/2015

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

DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Eighth Respondent

and

CASE NO.: 93043/2015

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

NATIONAL PROSECUTING AUTHORITY Third Respondent

MXOLISI SANDILE NXASANA Fourth Respondent

SHAUN ABRAHAMS Fifth Respondent

DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Sixth Respondent

THE HELEN SUZMAN FOUNDATION Amicus Curiae

CENTRE FOR DEFENDING DEMOCRATIC RULE NPC Amicus Curiae

Dates hearing: 20 and 21 November 2017

Date judgment: 8 December 2017

Judgment

The Court:

Introduction

[1] Before us are two parallel applications for orders declaring invalid and setting aside the written settlement agreement reached on 14 May 2015, between the President of the country, Mr JG Zuma, the Minister of Justice and Correctional Services, and the predecessor to the current National Director of Public Prosecutions ("NDPP"), Mr MSO Nxasana, for being incompatible with the Constitution,[1] and relief ancillary to the main relief. In one of the applications, that by Council for the Advancement of the South African Constitution ("CASAC"), there is also a challenge to the constitutionality of two provisions of the National Prosecuting Authority Act 32 of 1998 (the "NPA Act").

[2] The contentious settlement agreement recognises *"... the important and pivotal role that the National Prosecuting Authority occupies in our constitutional democracy and the functioning of the rule of law..."*. The parties to the agreement agree that Mr 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."* And they agree that he would relinquish his post as NDPP as from 1 June 2015 for R17 357 233.

[3] It was common cause before us that the amount of R17,3 million far exceeded what Mr Nxasana's financial entitlement would have been had his office been lawfully vacated in terms of s.12(8)(a)(ii) of the NPA Act. For this reason the parties, including the President and the Minister, all accepted that the agreement should be declared invalid in terms of s.172(1)(a) of the Constitution. The central issue was what followed upon such a declaration.

The parties and preliminary matters

[4] Two separate applications were launched: one by Corruption Watch (RF) NPC ("CW") and Freedom Under Law (RF) NPC ("FUL"), under case number 62470/15; and one by Council for the Advancement of the South African Constitution ("CASAC") under case number 93043/15. In the former, the President was joined, as were the Minister of Justice and Correctional Services, Mr Nxasana, Adv Abrahams (the current NDPP), the Director General of the Department of Justice and Constitutional Development, the Chief

[1] S.172(1)(a) of the Constitution provides that when deciding a constitutional matter within its power, a court *"... must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."*

Executive Officer of the National Prosecuting Authority, and the Deputy President of the country. In the latter application all of these respondents, except the Director General and the Chief Executive Officer, were joined. The parties were agreed that the two applications ought to be consolidated, and we made such an order.

[5] Two *amici curiae* were joined: by order dated 14 August 2017, the Helen Suzman Foundation ("HSF") and, after opposition before us on the first day of the hearing, Centre for Defending Democratic Rule NPC ("CDDR"). We are grateful for their helpful written and oral submissions.

[6] There was also an opposed interlocutory application in the following circumstances. On 12 April 2017, Mr Nxasana filed what he called a *"Notice to abide"*. In it he said that he abides the decision of the Court. The notice continued: *"Be pleased to take notice further that the affidavit of Mxolisi Sandile Oliver Nxasana will be used to explain the position of the Third Respondent (Mr Nxasana himself) herein."* Attached to the notice was an affidavit by Mr Nxasana dated 11 April 2017, called: *"Explanatory Affidavit by the Third Respondent"*. In it he deposed to his version of the central factual dispute between the President and the applicant.

[7] This affidavit came long after the last affidavit in the main applications had been filed on 19 December 2016, and even after the CW and FUL applicants had filed their heads of argument. The affidavit purported to support the factual inferences that these two applicants had sought to draw in their heads of argument against the President's version of the interchanges between the President and Mr Nxasana. The President opposed the admission of this affidavit and, after the exchange of a full set of affidavits and subsequently oral submissions from the Bar on the first day of the hearing we refused the admission of the affidavit with costs.

[8] There were primarily two reasons for our ruling. One was that the explanation for the delay in filing the affidavit was not persuasive, and the other was that it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position.

The disputes identified

[9] The relief sought by the applicants was attenuated during the course of the hearing. The respondents too refined their positions, given the concession about the unlawfulness of the settlement agreement. We therefore asked the parties at the end of the hearing to

furnish us with their proposed draft orders, which they did, and for which we are grateful. In essence, the applicants all ask[2] for a setting aside of the settlement agreement, including a setting aside of Mr Nxasana's vacating of his office; reinstatement of Mr Nxasana as NDPP, alternatively, a declaration that the office is vacant and directing the Deputy President within 60 days to appoint a permanent NDPP on the basis that the President himself is declared *"unable"* in terms of s.90(1) of the Constitution to act for his conflict of interest; (only CASAC) a declaration of unconstitutionality[3] in respect of s.12(4) and (6) of the NPA Act; and costs.

[10] The respondent parties' contestation was essentially threefold. First: the respondents all agreed with a setting aside of the settlement agreement. But they did not agree to an

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[2] The draft order of CW, FUL and CASAC reads as follows: *"1. The settlement agreement between the first, second and third respondents dated 14 May 2015 ("the settlement") is reviewed, declared invalid and set aside. 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. 3. The appointment of the fourth respondent as National Director of Public Prosecutions ("NDPP") is reviewed, declared invalid and set aside. 4. Decisions taken and acts performed by the fourth respondent in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment. 5. It is declared that the third respondent holds office as the NDPP. 6. It is declared that the third respondent is obliged to refund to the state all the money he received in terms of the settlement. 7. It Is declared that, in terms of s 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the NDPP. 8. 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. 9. The costs of this application must be paid jointly and severally by the first to third and fifth respondents."* An alternative draft order was presented: *"1. The settlement agreement between the first, second and third respondents dated 14 May 2015 ("the settlement") is reviewed, declared invalid and set aside. 2. The termination of the appointment of Mr Nxasana as National Director of Public Prosecutions ("NDPP") is declared unconstitutional and invalid. 3. 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. 4. The appointment of the fourth respondent as NDPP is reviewed, declared invalid and set aside. 5. Decisions taken and acts performed by the fourth respondent in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment. 6. It is declared that the third respondent is obliged to refund to the state all the money he received in terms of the settlement. 7. It is declared that, in terms of s 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the NDPP. 8. 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. 9. The orders of invalidity in paragraphs 2 and 4 above are suspended for a period of 60 days or until such time as the Deputy President has appointed a NDPP in terms of prayer 7 above, whichever is the shorter period. 10. The costs of this application must be paid jointly and severally by the first to third and fifth respondents."*

[3] The CASAC proposed draft order reads as follows: *"1. It is declared that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is unconstitutional and invalid. 2. It is declared that section 12(6) of the NPA Act is unconstitutional and invalid to the extent that it permits the President to suspend the NDPP unilaterally, indefinitely and without pay. 3. The order of invalidity in prayer 2 is suspended for 18 months. 4. During the period of suspension: 4.1 An additional subsection shall be inserted after s 12(6)(a) that reads: "(aA) The period from the time the President suspends the National Director or a Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director shall not exceed six months."; and 4.2 Section 12(6)(e) shall read: "The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, his or her full salary [no salary or such salary as may be determined by the President]." 5. Should Parliament fail to enact legislation remedying the defect identified in prayer 2, the interim order in prayer 4 shall become final. 6. The First, Second and Third Respondents shall pay the Applicant's costs, including the costs of two counsel."*

order setting aside Mr Nxasana's vacating of his office, which would have implied his reinstatement. The President[4] and the Minister[5] argued that the President, acting lawfully in terms of s.12(8)(a)(ii) of the NPA Act, accepted a request made to him by Mr Nxasana in terms of s.12(8)(a), and that their decision consequent upon the request, since it was discrete and severable from the unlawful and invalid settlement agreement, lawfully terminated Mr Nxasana's term of office.

[11] The NPA and Adv Abrahams agreed with the President and the Minister, but for slightly different reasons. They too accepted unqualifiedly that the settlement agreement was unlawful, and in fact criticised Mr Nxasana's conduct as reflected in the agreement. But they submitted that, as a matter of fact, Mr Nxasana had vacated his office, and that, as a matter of law, he was entitled to have done so. On their argument Adv Abrahams was thus duly appointed and, since these proceedings were not concerned with whether he was qualified to have been appointed, his position as NDPP should remain unscathed.

[12] The second area of dispute concerns the questions whether the President is conflicted and thus *"unable"*[6] to appoint, suspend or remove a NDPP. That issue arises in this way. There are multiple criminal charges pending against the incumbent President. The applicants contend that for that reason he is conflicted in terms of s.96(2)(b) of the Constitution and thus *"unable"* to act in terms of s.90(1) of the Constitution. This issue will arise pertinently, if the setting aside as invalid of the settlement agreement is not followed by the automatic reinstatement of Mr Nxasana but instead by a declaration that the position of NDPP is vacant. The applicants' argument was however not dependent on this result.

[13] The respondents disputed that the President was *"unable"* to act in terms of s.90(1) of the Constitution. They submitted that that section envisages the Deputy President being

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[4] The President's proposed draft order reads: *"It is ordered that: 1.The settlement agreement between the first, second and third respondents dated 14 May 2015 ("the settlement") is reviewed, declared invalid and set aside. 2. The decision to authorise payment to the third respondent of an amount of R17 357 233.00, in terms of the settlement, is reviewed, declared invalid and set aside. 3. Mr Nxasana is to repay the amount of R17 357 233.00. 4. The Minister is to pay Mr Nxasana the amount in section 12(8)(c)(ii) of the National Prosecuting Authority Act. 5. Costs."*

[5] The Minister's proposed draft order reads: *"1.If the court finds that Mr Nxasana has made a request to leave office in terms of section 12(8)(a)(ii), then the following order should be made: 1.1.That the monetary part of the order is severed from the rest of the Settlement Agreement; 1.2.The Settlement Agreement is lawful only to the extent that the President has allowed Mr. Nxasana to vacate office. 2. It is declared that there existed a vacancy in the Office of the National Director of Public Prosecutions. 3. The recommendation for appointment and appointment of Adv Abrahams is declared lawful. 4. The application to declare Sections 12(4) and (6) of the NPA Act (unconstitutional) is declined. 5. If court finds that Nxasana did not ask to vacate office within the meaning of 12(8), but that he intended to resign: 5.1.The Settlement Agreement is declared invalid. 5.2. It is declared that Nxasana vacated the Office. 5.3. There was a vacancy in the Office."*

[6] A condition referred to in s.90(1) of the Constitution. We quote the sub-section below.

sworn in as acting President and acting as sole President of the country instead of the President. The section does not envisage two Presidents, a permanent one and an acting one, both being present and available to act at the same time. So, if a vacancy in the office of NDPP arises, the President himself must make the appointment.

[14] The President submitted that in any event no criminal charges are pending against him. The charges were withdrawn in a Court and so their current status is that the NDPP must decide whether or not he will press them.[7] And the NPA and Adv Abrahams submitted that even if the President was conflicted, that conflict will effectively dissolve when the President makes the appointment with his cabinet members, because they are not conflicted.

[15] The third issue concerns the CASAC attack on the constitutionality of s.12(4) and 12(6) of the NPA Act. Here the President did not resist the substance of the attack but, relying on *South African Reserve Bank and Another v Shuttleworth and Another*[8], submitted that the relief sought was academic in the context of the present matter. These three issues all arise within a greater context and background, and it is necessary first to sketch it.

The context and the background (before the conclusion of the settlement agreement)

[16] The Constitution provides that there is a single national prosecuting authority in this country, in which vests the power to institute criminal proceedings on behalf of the State.[9] In terms of s.179(4):

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

[17] The head of that authority is the National Director, and s/he is appointed by the President. The NPA Act establishes the Office of the National Director.[10] The NPA Act sets the qualifications for the appointment as a National Director:

"9 Qualifications for appointment as National Director, Deputy National Director or Director

(1) Any person to be appointed as National Director, Deputy National Director or Director must-

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[7] Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public P; Zuma v National Director of Public Prosecutions 2009 (1) SA 141 (CC); 2008 (2) SACR 557(CC); (CCT 90/07, CCT92/07 [2008] ZACC 14; 2009 (3) BCLR 309 (CC).

[8] 2015 (5) SA 146 CC.

[9] S.179 of the Constitution.

[10] S.5.

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned."

[18] The term of office of the NDPP is a non-renewable ten years, but the office must be vacated when the incumbent becomes 65 years old.[11] S.12(4) gives the President the power to extend the term of office beyond age 65, but not beyond ten years in all. The NPA Act no doubt envisages that, in the interests of stability, each ten year term would be occupied by a permanent appointee, yet in the last ten years there have been four permanent NDPPs and for nearly half of that period, an acting NDPP.

[19] The parties are agreed that, as these frequent changes presaged, the recent history at the National Prosecuting Authority has been one of paralysing instability. It began in September 2007 when the then NDPP, Adv Vusi Pikoli, was suspended pending an enquiry in terms of s.12(6)(a) of the NPA Act into his fitness to hold office. The precursor to that event was his indictment two years earlier on 20 June 2005 of the incumbent President on corruption charges. Six days earlier, on 14 June 2005, President Mbeki had relieved the then Deputy President Zuma of his office. Subsequently, on 31 July 2006, when the criminal case against Mr Zuma was called, it was struck off the roll because the NPA was not ready to proceed.

[20] Reverting to 2007: at the end of that year, on 18 December 2007, Mr Zuma was elected as President of the African National Congress. Thereafter, the Acting NDPP, Adv Mpshe, indicted Mr Zuma on 18 counts of racketeering, corruption, money laundering, tax evasion and fraud. On 12 September 2008 Nicholson, J set aside that decision on the basis that it was tainted by political interference.[12] On 4 November 2008 the enquiry into Adv Pikoli's fitness to hold office, chaired by Dr Frene Ginwala, recommended that Adv Pikoli's suspension be uplifted. However, on 8 December 2008, Adv Pikoli was removed from office by President Motlanthe.

[21] On 12 January 2009 the Supreme Court of Appeal ("SCA") overturned the judgment of Nicholson, J.[13] In that judgment the SCA said: *"[2] The litigation between the NDPP and Mr Zuma has a long and troubled history and the law reports are replete with judgments*

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[11] S.12(1) of the NPA Act.

[12] Zuma v National Director of Public Prosecutions [2009] 1 All SA 54 (N); (8652/08) [2008] ZAKZHC 71; 2009 (1) BCLR 62 (N).

[13] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA); (573/08) [2009] ZASCA 1.

dealing with the matter." On 1 April 2009, Adv Mpshe withdrew the charges against Mr Zuma, and on 7 April 2009 the Democratic Alliance ("DA") brought proceedings to review and set aside his decision to withdraw these charges. On 6 May 2009, Mr Zuma was elected President of the country.

[22] It is necessary to leave the chronology for a moment to say that the review application of the DA, which became known colloquially as the "spy tapes case", was eventually heard on its merits on 1 to 3 March 2016 by a Full Court of this Division sitting as Court of first instance. On 29 April 2016 this Court reviewed and set aside Adv Mpshe's decision to withdraw the charges against the President.[14] The President appealed that judgment, but just recently on 13 October 2017 the SCA dismissed that appeal.[15]

[23] From the judgment of the SCA dismissing the appeal, we cite the following passage as it is pertinent to the present matter (emphasis supplied):

"[3] The current applications are part of the continuing litigation saga that has endured over many years and involved numerous court cases. It is doubtful that a decision in this case will be the end of the continuing contestations concerning the prosecution of Mr Zuma. Minutes into the argument before us counsel for both Mr Zuma and the NPA conceded that the decision to discontinue the prosecution was flawed. Counsel on behalf of Mr Zuma, having made the concession, with the full realisation that the consequence would be that the prosecution of his client would revive, gave notice that Mr Zuma had every intention in the future to continue to use such processes as are available to him to resist prosecution."

[24] This notice by the President's counsel was given in open Court on 14 September this year, when the matter was argued before the SCA. The NPA referred to in this passage was represented in the appeal by Adv Abrahams. The concessions made by Adv Abrahams, and his aligning himself in that matter with the President, appear from the judgement of the SCA.

[25] Reverting to the chronology: the President was appointed to that position on 6 May 2009. On 11 August 2009 Adv Pikoli obtained an order against the President interdicting him from appointing any successor in the office of the NDPP, pending Adv Pikoli's application to review and set aside his removal from office.[16]

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[14] Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/2009) [2016] ZAGPPHC 255; 2016 (2) SACR 1 (GP); [2016] 3 All SA 78 (GP); 2016 (8) BCLR 1077 (GP) (29 April 2016).

[15] Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017).

[16] Pikoli v President of the RSA and Others 2010 (1) SA 400 (GNP).

[26] On 21 November 2009 the President and Adv Pikoli reached a settlement agreement in terms of which the President acknowledged that Adv Pikoli had the requisite integrity to hold a senior public position and Adv Pikoli agreed to resign for R7, 5 million.[17] CASAC say that that settlement agreement *"... is strikingly similar to the settlement agreement between the President, the Minister and Mr Nxasana that is the subject of this application,"* and the President does not dispute this.[18]

[27] On 25 November 2009, the President appointed Adv Menzi Simelane as NDPP. But in subsequently setting aside his appointment two years later on 1 December 2011, the SCA held[19]:

"[57] In order to fully appreciate the importance of the NPA and the NDPP in our constitutional democracy it is necessary, first, to bear in mind that the Constitution empowers those who govern and imposes limits on their power and, second, to consider the wider constitutional scheme in which both the institution and the individual are dealt with. A good starting place is an examination of the founding provisions of the Constitution. Section 1(c) of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded, among other values, on the supremacy of the Constitution and the rule of law. Section 1(d), commits government to democracy and to accountability, responsiveness and openness. Section 2 of the Constitution reaffirms that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. Thus, every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation."

[28] Concerning the power of the NDPP, it said:

"[72] To understand the importance of the office of the NDPP and the power that he or she wields, regard should be had, first, to the provisions of s 179(2) of the Constitution, set out in para [69] above. The prosecuting authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings. This power is echoed in s 20(1) of the Act. Section 20(1)(c) of the Act gives the prosecuting authority the power to discontinue criminal proceedings. It hardly needs stating that these are awesome powers and that it is central to the preservation of the rule of law that they be exercised with the utmost integrity. That

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[17] Casac founding affidavit, p16, para 35; President's answering affidavit, p374, para 27.1 (not disputed).

[18] Ibid.

[19] Democratic Alliance v The President of the RSA & Others (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2013 (3) BCLR 291 (SCA) (1 December 2011).

must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice."

[29] On 5 October 2012 the subsequent appeal to the Constitutional Court was unsuccessful.[20] That Court endorsed the reasoning of the SCA, and held:

"[49] The provisions of the Constitution and the Act must be taken together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power upon the President was to ensure that the person appointed as National Director is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office. In particular, to ensure that —

(a) the prosecuting authority performs its functions honestly and without fear, favour or prejudice;

(b) decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;

(c) prosecution policy is determined honestly and is appropriate to the needs of our country;

(d) the criminal justice system insofar as it concerns prosecutions is fairly administered;

(e) any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and

(f) all Directors of Public Prosecutions carry out their functions honestly and fairly.

It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director."

[30] These decisions had thus all been handed down when the President appointed Mr Nxasana as NDPP on 30 August 2013, with effect from 1 October 2013. In the meantime, following the SCA's judgment regarding Adv Simelane on 1 December 2011, the President had suspended Adv Simelane, and had appointed Adv Nomgcobo Jiba as Acting NDPP.

[31] But on 23 September 2013 this Court made adverse findings against advocates Jiba, Mrwebi and Mzinyathi, relating to the withdrawal of criminal charges, including murder, attempted murder, kidnapping, assault, fraud and corruption, against Major General Richard Mdluli.[21] Those adverse findings were later confirmed by the SCA.[22]

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[20] Democratic Alliance v President of the RSA and Others 2013 (1) SA 248 (CC);2012 (12) BCLR 1297 (CC); CCT122/11) [2012] ZACC 24.

[21] Freedom Under Law v National Director of Public Prosecutions 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP; 26912/12 [2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP).

[22] On 14 April 2014: National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA) (67/2014 [2014] ZASCA 58; 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA).

[32] Early in 2014, on 26 February, in *Booysen v Acting National Director of Public Prosecutions and Others*,[23] the KwaZulu-Natal Division of the High Court said of Adv Jiba:

"[34] Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively."

[33] Two and a half years later, on 16 September 2016, on the application by the General Council of the Bar ("GCB"), a full bench of this Division would strike the names of advocates Jiba and Mrwebi from the roll of advocates.[24] In the meantime, on 4 July 2014, less than a year after he was appointed, Mr Nxasana received a letter from the President advising him that he intended instituting an enquiry into his fitness to hold the office of NDPP. On 7 July 2014 senior counsel in private practice, on brief by the NPA, advised it that there was compelling justification for disciplinary proceedings against advocates Jiba, Mrwebi and Mzinyathi.

[34] On 18 July 2014 Adv Willie Hofmeyr, then Acting NDPP, wrote to the Minister asking him to forward the contents of a memorandum he had prepared capturing this advice to the President, and asking him to request the President provisionally to suspend advocates Jiba, Mrwebi and Mzinyathi, pending an enquiry into their fitness to hold office. On 31

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[23] (4665/2010) [2014] ZAKZDHC 1; [2014] 2 All SA 391 (KZD); 2014 (9) BCLR 1064 (KZD); 2014 (2) SACR 556 (KZD) (26 February 2014).

[24] General Council of the Bar of South Africa v Jiba and Others (23576/2015) [2016] ZAGPPHC 833; [2016] 4 All SA 443 (GP); 2017 (1) SACR 47 (GP); 2017 (2) SA 122 (GP) (15 September 2016).

July 2014, the CEO of the NPA informed the Minister that the NPA had appointed a committee headed by retired Constitutional Court Justice Yacoob, to investigate unethical and unprofessional conduct by NPA staff, including advocates Jiba, Mrwebi and Mzinyathi.

[35] On 1 August 2014 Mr Nxasana made representations to the President in a ten page letter as to why he should not be suspended. In it he gave a full explanation concerning what the press was asserting as the complaints against him, but he also asked that the President give him reasons for conducting an enquiry. On 8 August 2014 the President wrote saying that he did not deem it appropriate to engage on matters that would form the subject-matter of the enquiry.

[36] On the same day, 8 August 2014, the Minister wrote to Mr Nxasana, responding to the Hofmeyr memorandum, and enquiring: whether the negative judicial comment about advocates Jiba, Mrwebi and Mzinyathi had been put to them for comment; whether Mr Nxasana had put in place measures to prevent a recurrence of the events leading to the negative comments; and whether the CEO was acting under his instruction when she appointed the Yacoob committee.

[37] On 11 August 2014 Mr Nxasana launched an application against the President compelling him to provide particulars of the allegations against him, and interdicting the President from suspending him until the particulars had been furnished. In his affidavit he forthrightly asserted his fitness for the office of NDPP. On the same day he wrote to the Minister saying that the two of them had not yet discussed matters in the NPA since the Minister's appointment, and saying it was his "*humble view*" that the two should meet to discuss matters generally, but also the issues raised in the Minister's letter. The Minister brushed aside this request on 12 August 2014, saying he was awaiting a response to his letter.

[38] On 12 September 2014 Mr Nxasana personally handed the Hofmeyr memorandum, recommending the suspension of advocates Jiba, Mrwebi and Mzinyathi to the President, and on 17 September 2014 he wrote to the Minister, saying that Adv Jiba had ignored requests concerning the Mdluli matter, and to provide an official handover report on matters that she had dealt with as Acting NDPP.

[39] In October 2014 the Yacoob committee reported. It said that the withdrawal of charges against Major General Mdluli was a matter of grave concern. Negative comments about the credibility of advocates Jiba, Mrwebi and Mzinyathi were made.

The correspondence and events surrounding the conclusion of the settlement agreement

[40] On 3 November 2014, Mr Nxasana's attorney wrote to the President's attorney, saying that Mr Nxasana was willing to participate in the mediation process that the President had proposed. On 10 December 2014 Mr Nxasana's attorney wrote to the President, marked for the attention of Ms Mokhene. This letter of fourteen paragraphs featured prominently in the parties' submissions, and best be quoted in full:

"1.We refer to the above matter and particularly to the meeting we held on the 8th instant at Mahlambanlomfu wherein it was discussed, advised and agreed as follows:

1.1 Following the settlement proposal that you presented to us, we requested you to furnish us with the NDPP's total unexpired term package in line with the annexure to the presentation.

1.2 You requested the NDPP to furnish you with information regarding:

1.2.1 Leave balances; and

1.2.2 Pension benefits (5.1.2 (8) cc (11)(sic)[25] of the NPA Act 32 of 1998 (NPA Act);

1.3 We will furnish you with the above information by no later than the close of business on Thursday the 11th December 2014.

2. Following our discussions of the 8th instant and the subsequent instructions from client regarding the proposed settlement, we would like to place the following on record:

2.1 We are of the firm view that the prescripts which you rely on pertaining to settlement are not applicable in the present case for the following reasons:

2.1.1 The provisions of the NPA Act which you seek to rely upon deal with a scenario where the NDPP is removed from office in terms of Section 12 (6)(a).

3. The procedure thereof is succinctly spelt out in Section 12 subsections 6, 7, 8 and 9 of the NPA Act.

We would consequently like to draw the following to your attention:

3.1 That it has never been the NDPP's intention to resign from his position since he considers himself to be a fit and proper person to hold this position.

4. The proposed settlement was triggered by the discussions which the NDPP had with the President following the latter's announcement of his decision to hold an enquiry into the NDPP's fitness to hold office and the possible suspension pending the enquiry.

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[25] This was no doubt a reference to s.12(8)(c)(ii) of the Act.

5. Our instructions further are that the meeting between the NDPP and the President only took place after numerous attempts by the by the NDPP to seek audience with the President without success.

6. It must be remembered that the only time the President agreed to meet the NDPP was after the latter had lodged a court application, inter alia, interdicting the President from suspending the NDPP before the President provided further and sufficient particularity to enable the NDPP to respond or show cause why he should not be suspended.

7. We are advised that during the discussions the NDPP had with the President, the NDPP made it very clear that he will only consider stepping down from office if he is fully compensated for the remainder of his entire contract as head of the National Prosecuting Authority.

8. We reiterate that here is no factual or legal basis for our client to step down from his position.

9. It is our considered view, in light of the above that the Provisions of the NPA Act read with the Provisions of the Public Service Act, which you have alluded to, do not apply to this proposed settlement.

10. In the circumstances, our client will only consider the option of leaving office, as the President would want him to, if he is fully compensated for the remainder of his contract.

11. We confirm that the President advised us that the Minister of the State Security Agency (the Minister) has confirmed that he has upheld the NDPP's appeal against the refusal to grant him the security clearance and he has already issued it but is waiting to hand it over to the NDPP upon finalisation of settlement between the parties.

12. While we do appreciate and welcome the Minister's decision to uphold the NDPP's appeal, it is our respectful view that the granting of the security clearance certificate to the NDPP is and/or should not be a condition for any proposed settlement.

13. We are accordingly bringing it to your attention that we are dispatching a letter to the Minister to release the Security Clearance Certificate to the NDPP.

14. We await to hear from you."

[41] On 11 December 2014 Mr Nxasana's attorney responded to the President's legal advisor, providing Mr Nxasana's estimated pension benefits (before tax) as of 31 December 2014, as well as his entitlement to leave days as of this date. On 12 December 2014 the President responded through his legal advisor to Mr Nxasana's letter of 10

December 2014. In it she wrote that the President had intervened in the *"negotiated settlement pertaining to your client's employment as NDPP"* because reservations had been expressed about the Minister. She wrote too: *"Notwithstanding such intervention, the President is not at liberty to depart from accepted prescripts which regulate government conduct."*

[42]She concluded that accordingly the parties were unable to resolve their dispute between themselves, and Mr Nxasana was invited to indicate by 18 December 2014 whether he was agreeable to embark on an independent and negotiated mediation process. Mr Nxasana's attorney responded on 15 January 2014, saying that he was agreeable to mediation, but not a confidential one. He recorded too that the settlement negotiations had been initiated by the President, not Mr Nxasana. The President's response on 23 January 2014 was to say that he was proceeding with an enquiry into Mr Nxasana's fitness to hold office. Mr Nxasana responded on 26 January 2014, inviting the proposed terms of reference.

[43]On 9 February 2015, an enquiry in terms of s.12(6)(a) of the Act, headed by Adv Nazeer Cassim, SC was appointed in terms of General Notice 102, *"to determine the fitness of ... Nxasana to hold office as National Director of Public Prosecutions."* On 26 February 2015, Adv Cassim directed the Minister to file his submissions by 27 March 2015, and on the next day, 27 February 2015, the NPA informed the Minister of the Yacoob committee findings.

[44]On 4 March 2015, in tandem with the enquiry process Mr Hulley, for the President, sent a draft settlement proposal to Mr Nxasana, proposing compensation of R10 519 188. On 26 March 2015, Mr Hulley sent another draft, again proposing the R10, 5 million. On the next day, 27 March 2015, Mr Hulley sent a further draft, this time leaving the settlement amount blank. On 1 April 2015 Adv Cassim issued a ruling to say that the enquiry would

still proceed on 11 May 2015, and directing that the Minister must do his best to file his submissions by 20 April 2015. These were not forthcoming.

[45]On 11 May 2015 the Cassim enquiry was terminated, and on 14 May 2015 the settlement agreement concluded. Mr Nxasana *"relinquished"* his post, as required in terms of the settlement agreement, on 1 June 2015. On the same date Dr Silas Ramaite was appointed as Acting NDPP, and on 18 June 2015, Adv Abrahams was appointed as NDPP. Shortly after his appointment, Adv Abrahams withdrew the criminal proceedings that the NPA had instituted against Adv Jiba. And the President has not taken any steps against advocates Jiba, Mrwebi and Mzinyathi.

[46]Against this background one may now turn to deal with the three contentious issues identified above.

The first issue: does the setting aside of the settlement agreement leave the office of National Director of Public Prosecutions vacant?

[47] The discussion starts with s.172(1) of the Constitution:

"Powers of courts in constitutional matters

172. (1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[48] The parties are all agreed, as we have said, that the settlement agreement must be set aside. There was no debate either that the reason why it has to be set aside, is that there was no statutory or other power to have concluded it. The parties were unanimous too in their demand that Mr Nxasana should repay all amounts he received under the settlement agreement. It follows that the first substantive declaration must be that the settlement agreement between the President and Mr Nxasana must be reviewed,

declared invalid, and set aside, and that Mr Nxasana must be ordered to repay what he had received under it.

[49] The applicants, the President and the Minister are agreed to that, unless Mr Nxasana *"requested"* in terms of s.12(8)(ii), to be allowed to vacate the office of NDPP, the President had no power to allow him to vacate the office; but they are divided as to whether on the facts there had been such a request.

[50] The applicants submitted that, on the facts, there was no such request. The President on the other hand submitted that, on the President's version which stood uncontested on the affidavits, there was such a request by Mr Nxasana. That request, which was accepted by the President, was prior to, independent of and severable from the settlement agreement, and so does not fall with it.

[51] The NPA and Adv Abrahams submitted, relying on *Government Employees Pension Fund v Strydom*,[26] that there was scope for Mr Nxasana, lawfully vacating the office of NDPP outside the reach of the NPA Act. In other words, no *"request"* as envisaged in the NPA Act was necessary as a precondition to Mr Nxasana lawfully vacating the office of NDPP.

[52] The President, the Minister, the NPA and Adv Abrahams[27] joined in submitting that the unlawfulness of the settlement agreement thus lay in the amount that was agreed, would be paid to Mr Nxasana.

[53] And beyond this point, the parties were then all agreed again that, whatever their respective positions concerning a *"request"* and its acceptance by the President, Mr Nxasana could never lawfully have received more money for vacating the office than that which is provided for in s.12(8) and (9) of the NPA Act. That is why he has to repay what he received.

[54] We deal with these submissions in turn, but begin by quoting s.12(8) and (9) of the NPA Act:

"(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; 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 or a Deputy National Director-

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[26] (271/2000) [2001] ZASCA 49; 2001(3) SA 856 (SCA); [2001] 3 All SA 263 (A).

[27] Counsel for the NPA and Adv Abrahams called the settlement agreement *"unconstitutional and irrational."*

(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 or a Deputy 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, or a Deputy 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."

[55] Counsel for CW and FUL submitted that the NPA Act generally, but these provisions in particular, were to be interpreted strictly so that it fitted the constitutional imperative of prosecutorial independence. Counsel referred to s.179(4) of the Constitution (quoted above), as well as s.32(1)(a) and (b) of the NPA Act:

"32 Impartiality of, and oath or affirmation by members of prosecuting authority

(1) (a) 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.

(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."[28]

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[28] S.32(2) lays down the oath of office in terms of which the incumbent NDPP undertakes to uphold and protect the Constitution and the fundamental rights entrenched therein, and to enforce the Law of the country without fear, favour or prejudice and in accordance with the Constitution and the Law.

[56] It was submitted that, consonant with this approach, s.12 of the NPA Act accords security of tenure to the office of the NDPP, and to the same end s.12(1) provides for the term of office of ten years to be non-renewable. And so the concept of a *"request"* in s.12(8)(a)(ii), if it is to fit this legislative scheme, as it must, should be interpreted as referring to an incentive that emanates wholly and bona fide from the office holder, and not as referring simply to a negotiated attitude of the NDPP, procured and compromised by promise of reward.

[57] As it happens, the respondent parties all deferred to this interpretative approach to s.12(8)(a), and the meaning to be attributed to *"request"*, as envisaged in that sub-section. We too subscribe to that view.

[58] Indeed, even the unlawful settlement agreement itself records the *"pivotal role which the National Prosecuting Authority occupies in our constitutional democracy."* If the office of the NDPP is to stand alone, apart from and independently of the Executive, Parliament and the Courts, in service only of the Constitution and the rule of law, then its independence must be real, and must be supported by a statutory structure that protects the office from outside pressure of any kind.

Was there a *"request"*?

[59] Was there then a *"request"* from Mr Nxasana in this sense? The case for CW and FUL is that the record of the President's decision to conclude the settlement agreement is destructive of any such notion; and, relying on *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[29], they submitted that the President did not raise a real, *bona fide* dispute of fact, in regard to this issue, on the papers.

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[29] (66/2007) [2008] ZASCA 6; 2008(3) SA 371 (SCA); [2008] 2 All SA 512 (SCA): *"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the*

[60] The President submitted that s.12(8)(a)(ii) and s.12(8)(c)(ii) of the NPA Act envisaged two discrete concepts: first comes the request and its acceptance (*"the President may allow ... to vacate"*) under s.12(8)(a)(ii), and upon that, then follows the deeming provision in s.12(8)(c)(ii), which is determining of the financial entitlement of the vacating office holder. In this case, there was a request that emanated wholly from Mr Nxasana, which was accepted by the President, and which was factually independent of and unrelated to the ultimately agreed R17 million. The ultimately agreed R17 million was not lawful, because it was not justified by s.12(8)(c)(ii), and thus the settlement agreement had to be set aside. But the prior request and its acceptance were severable, and they stood.[30]

[61] It is necessary then to consider the three sources of available material: the President's reasons, the record, and the President's affidavit. Starting with the Presidents' reasons for the decision: the first observation is that the reasons that the President furnished were the reasons for the decision to enter into the settlement agreement; that is what was asked[31] and furnished. The reasons furnished explain how it came about that Mr Nxasana made the request to be allowed to vacate the office, and why the President accepted the request. This questions the asserted severability in fact between the request (and its acceptance) and the settlement agreement.

[62] The second observation concerns the internal logicality of the version put up, and it flows from the following. The reasons commence by setting out that on 4 July 2014 the President, after consideration of all the evidence before him, had decided to institute an enquiry in terms of s.12(6)(a) of the NPA Act. Then, during the period 4 July 2014 to 9 May 2015 (the date on which Mr Nxasana signed the settlement agreement), the President and Mr Nxasana had various discussions *"regarding the discord that existed in the National Prosecuting Authority between Mr Nxasana and senior management."*

[63] This discord was pronounced, senior management divided, and the NPA destabilised. The looming enquiry contributed to the discord. The reasons then continue:

"6. ... Mr Nxasana made the request on those grounds.

7. The President therefore deemed the reasons provided by Mr Nxasana, together with the anticipated protracted litigation and the holding of the inquiry not to be in the best interest of the National Prosecuting Authority, Mr Nxasana and the public at large, to be sufficient to allow Mr Nxasana to vacate office."

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answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[30] President's heads of argument, para 57and 58.

[31] Case no.62410/15, p3, paragraph 5.2; *"Reasons furnished in terms of rule 53(1)(b)"*, p471.

[64] Assuming that the grounds on which Mr Nxasana made his request refer to the discord in the NPA, Mr Nxasana must have made his request to vacate just before he signed the settlement agreement on 9 May 2015, since according to these reasons, the discussions were had during the period 4 July 2014 to 9 May 2015.

[65] There are clear problems with this version. If the request was as late as that, then the negotiations concerning the financial settlement must have been had by then, because these were concluded by 9 May 2015. And then it is not possible that the request and its acceptance came first, unrelated to the financial settlement that came only afterwards. There could then not have been a separate, earlier, request as an incentive that emanated wholly and *bona fide* from Mr Nxasana.

[66] But more importantly, generally, when the reasons furnished for a decision being reviewed do not fit the record of the decision being reviewed, then usually the decision-maker's mere say-so does not survive.[32] And that is the case here. Mr Nxasana's attorney's letter of 10 December 2014 quoted above records that the President presented a settlement proposal to Mr Nxasana, and not the other way round. The letter expressly records that it has never been the NDPP's intention to resign from office, because he regards himself as fit and proper for office.

[67] Mr Nxasana had attempted to meet the President to discuss the inquiry that the President had announced, but without success. It was only when Mr Nxasana brought the application to interdict his being suspended that the President agreed to see him. But Mr Nxasana made it clear in the letter that he *"will only consider the option of leaving office, as the President would want him, if he is fully compensated for the remainder of his*

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[32] Minister of Justice v Hofmeyr (240/91) [1993] ZASCA 40; 1993 (3) SA 131 (AD); [1993] 2 All SA 232 (A) (26 March 1993) at 59-60: *"In this connection King J reminded himself (at 131 C-D) that the ipse dixit of an administrative official exercising a discretion is not decisive; and that the legitimacy of the latter's actions had to be tested against all the available evidence. King J stated (at 131 F-G) his final conclusions in the following words:-'If there is an onus on plaintiff to show a failure to exercise discretion, he has in my view - in the respects outlined above - satisfied it. I thus hold that the segregated manner in which plaintiff was detained for the bulk of his period of detention, the fact that he was not allowed some form of indoor exercise, that he was not allowed access to books and magazines from outside the prison and that he was not allowed some form of access to radio broadcasts constitute wrongful and unlawful conduct as alleged by plaintiff.' I find myself, with respect, in general agreement with all of the remarks just quoted."* See also Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895: *"In the second place, the drawing of such an inference may, depending upon the circumstances, be the more difficult if the chairman of the Commission has filed a helpful affidavit consisting not merely of the ipse dixit of a bare denial. One does not lightly infer dereliction of duty and untruthfulness from a responsible body. Still, the Court must not flinch from an examination of such affidavit, in the light of all of the circumstances, in order to ascertain whether it is reliable. The degree of proof required of an applicant on review is that of a preponderance of probability."*; 907: *"But in review proceedings the Supreme Court is, in my view, called upon to examine the ipse dixit of a statutory functionary (that he has duly applied his mind) in the light of all relevant considerations with a view to determining its objective accuracy."*; Fakie NO V CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at [55]-[56].

contract." There is no scope here for a version that first came a request to vacate, accepted by the President; and having agreed that part, next commenced the negotiations for an exit package.

[68] Thus the record of the decision[33] as embodied in the correspondence, particularly the negotiations reflected there and the subsequent decision to proceed with the enquiry, is not compatible with a request to vacate office having emanated from Mr Nxasana at all, nor with the decision to resign being substantively unconnected with the reward recorded in the settlement agreement.

[69] The President's retort on 12 December 2014, that mediation would have to follow and his response on 23 January 2015, that the enquiry would have to proceed, are likewise incompatible with an earlier standalone request to vacate having been made and accepted early in December 2014: then Mr Nxasana vacating his office would have been a *fait accompli*, and a mediation/enquiry would have served no purpose.

[70] If the request to vacate only came later, in 2015, in the run-up to the signing of the settlement agreement by Mr Nxasana on 9 May 2015, then that is destructive of the version that the request to resign came first and was uncoupled from the financial negotiations.

[71] The reasons furnished for the decision to enter into the settlement agreement and the record of the decision are thus internally incompatible as concerns the central factual issue in this matter, namely whether there was a request incentivised by Mr Nxasana, emanating wholly and *bona fide* from him, to be allowed to vacate the office.

[72] We turn next to the President's answering affidavit. Part of the answer, from paragraphs 5.3 to 5.8, follows the written reasons for the decision closely. But the contents of paragraph 5.10 are different (emphasis supplied):

"There were extensive negotiations relating to <u>the financial terms with which he would be agreeable to leave office</u> 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."

[73] The answering affidavit does not say when and where the request to vacate was made by Mr Nxasana, nor when and where it was accepted by the President. The closest it comes is in paragraph 12.7 (emphasis supplied):

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[33] Case no.62470/2015, p3, paragraph 5.1, read with supplementary affidavit in terms of rule 53(4) (p476 ff) and further supplementary affidavit in terms of rule 53(4) (p634ff), especially p638 paragraph 16, p639 paragraph 24, p640 paragraph 32, 35).

"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. The request was not reduced to writing."

It is in our view particularly telling that the request was not referred to in the contemporaneous written record of the decision to enter into the settlement agreement.

[74] In this paragraph the President suggests the discord and the enquiry (threatened by the President himself) were the primary reasons advanced by Mr Nxasana. Concerning the discord: the senior members who were implicated were advocates Jiba, Mrwebi and Mzinyathi. The adverse findings that had by then been made against them in the Courts were a matter of public knowledge. In respect of them the Hofmeyr memorandum had drawn attention to the need for disciplinary action to be taken against them, and Mr Nxasana had himself ensured that the memorandum had reached the President. The President must have known about the judgments.[34]

[75] Further, the Yacoob committee had been appointed, and had found that advocates Jiba and Mrwebi had a great deal to answer for. This conclusion had been given to the Minister by 27 February 2015, within the very time-frame covered by the above paragraphs of the President's affidavit.

[76] The President's version comes down to this: that Mr Nxasana, who had been trying to get an inquiry off the ground into the fitness for office of these three impugned advocates, requested – without any incentive, financial or otherwise - to be allowed to vacate office on the basis of the discord that these three were causing. But the integrity of the three advocates had been impugned, not that of Mr Nxasana: why would he for no discernible reason throw up his hands, as it were? In our view, that version does not meet the *Wightman* test[35] and, the President not having applied to go to evidence,[36] may be rejected on the papers.

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[34] Compare Freedom Under Law v National Director of Public Prosecutions and Others (26912/2012) [2013] ZAGPPHC 271; 2014 (1) SA 254 (GNP); [2013] 4 All SA 657 (GNP); 2014 (1) SACR 111 (GNP).

[35] Reference may be had here also to PMG Motors Kyalami (Pty) Ltd and Another v FirstRand Bank Ltd, Wesbank Division 2015 (2) SA 634 (SCA); [2015] 1 All SA 437 (SCA); [2014] ZASCA 228: *"[23] This court has held that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed'. It has also held that where a 'version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or . . . clearly untenable' the court is justified in rejecting it merely on the papers."*

[77] The same applies to the suggestion that Mr Nxasana had requested to vacate office because of the enquiry. Throughout the period during which, according to the President, he and Mr Nxasana were engaged in the discussions which led to Mr Nxasana requesting to be allowed to vacate, Mr Nxasana maintained that he was fit and proper to hold office, and preferred a public rather than a confidential mediation/enquiry. It was also during this period that his security clearance was approved. And indeed, the President and the Minister acknowledge in the settlement agreement that Mr Nxasana is fit and proper, giving the lie to the *raison d'être* for the Cassim enquiry.

[78] It is difficult in the light of these facts to comprehend why Mr Nxasana would have given as a reason for asking to be allowed to vacate his office, the fact of the enquiry. One supposes that it is theoretically possible that Mr Nxasana could have had a *volte face*, but then one would have expected some evidence, some inkling or at least explanation for this conduct. Absent such, the version does not meet the *Wightman* test.

[79] Rather, it seems to us that the record of the decision to enter into the settlement agreement as embodied in this correspondence, is compatible only with that which it expressly conveys: Mr Nxasana wished to speak to the President about the intended enquiry into his fitness to hold office, to no avail, at least not before his application for the interdict against the President. Then the initiative came from the President's office to persuade Mr Nxasana to agree to resign. Mr Nxasana's response was, only if the price was right. And eventually he got his price. To the extent then that the President's affidavit does not fit the record, it must defer to the latter.

[80] But even if it were assumed, in favour of the President, that Mr Nxasana took account of the Presidential inaction concerning advocates Jiba, Mrwebi and Mzinyathi, and of the harassment of an unnecessary and unfounded public enquiry, in arriving at his decision to be prepared to resign if the price was right, that is still a far cry from a *"request"* in terms

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[36] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) ([1984] ZASCA 51) at 634 in fin: *"In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A)."*

of s.12(8)(a) of the NPA Act to be allowed to vacate the office of NDPP, in the manner in which this concept is to be interpreted as set out above, for these reasons.

[81] First, on the facts there was no request at all. There was a negotiated agreement in terms of which Mr Nxasana would vacate the office if he was paid a price not permitted by the NPA Act. But second, again in favour of the President, even if the President's affidavit version were accepted of an actual request and the reasons for it, then on the facts here it did not emanate from Mr Nxasana at his incentive; rather, the "*request*" flowed from the confluence of three objectively established factors: an unjustified threat of a public enquiry, inaction by the President in respect of three senior persons in the NPA whose integrity had already been impugned by Courts and, ultimately, the payment of an exorbitant amount of money not permitted by law.

[82] It follows that in our view the settlement agreement is invalid because Mr Nxasana did not request to be allowed to vacate the office of the NDPP as required by s.12(8)(a) of the NPA Act, but rather because he was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law.

<u>To vacate or not to vacate</u>

[83] Does this conclusion result in the office being vacant? The applicants argued that the default position that follows, as a matter of logic, would be that Mr Nxasana be reinstated and that Adv Abrahams be vacated. The Constitution and with it, the imperative of prosecutorial independence must be vindicated and that is achieved by restoring the position that pertained, had the invalid act not been performed; thus restitution of the *status quo ante,* as it were, in accordance with the general law. In the alternative, the applicants contended for an order that would declare the office vacant, requiring that it be filled in 60 days.

[84] The other parties argued that Mr Nxasana should not be reinstated given that he knew that he was not entitled to the extent of the reward for which he was holding out, perhaps for a moment forgetting that it was the President and the Minister who were equally prepared to pay him his price. According to the argument, Adv Abrahams should be retained in the position of NDPP, particularly since no-one contended that he was not fit and proper to hold the office.

[85] In a sense, both proposals are unsatisfactory from a perspective of what is just and equitable. The applicants' primary proposal would no doubt vindicate the Constitution

and its relevant values as pertains to the President's conduct, but not as pertains to Mr Nxasana's conduct. Assuming the latter knew full well that he was holding out for a position that he knew was not permitted by law, his unlawful conduct will have been rewarded by achieving for him what he had wanted all along: back in the saddle, with no unjustified threat from the President.

[86] The respondents' proposal on the other hand will not have vindicated the Constitution as pertains to the President's conduct because his unlawful conduct will then have procured for him, a position even better than what he had wanted all along: being rid of Mr Nxasana, at a price much lower than Mr Nxasana's demand, and with Adv Abrahams in the saddle. And Mr Nxasana will have lost the office of NDPP without having been found to be not fit for office.

[87] It seems to us to be relevant in the context of what is just and equitable to inquire into the state of mind of the President and Mr Nxasana, relative to the unlawfulness of their conduct: were they unaware of the unlawfulness of their conduct, or did they know it was unlawful, or were they reckless as to whether their conduct was unlawful?

[88] Beginning with the President, there are the following considerations. First, there is the broader pattern of the President's conduct in litigation, of defending what ultimately turns out – on the President's own concession - to have been the indefensible all along, banking on any advantage that the passage of time may bring. This pattern has played out in well-publicised cases in the Courts, and would be naïve to ignore. We refer here particularly to the Nkandla case[37] and the spy tapes case[38].

[89] Second, the President's letter of 12 December 2014 (*"the President is not at liberty to depart from accepted prescripts which regulate government conduct"*) already raises a red flag. Third, the President must have known that he can only act within the law; he heads up a modern, constitutional state where the law rules. So he must have known that the law prescribes what Mr Nxasana is permitted to be paid. Despite this, he paid Mr Nxasana what Mr Nxasana wanted. And so his attitude must have been that he is allowed freely to use the public purse to secure the removal of Mr Nxasana.

[90] Fourth, in these proceedings the President proposes that the settlement agreement that he himself negotiated and concluded was unlawful, and should be declared invalid and be

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[37] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

[38] See footnote 14 above.

set aside. He does not suggest that his knowledge about the unlawfulness of the agreement is a recent discovery, and we are not able to infer that.

[91] In these circumstances the inference that the President knew all along that his conduct was not permitted by law, beckons strongly. But this would be an inferential conclusion on affidavit concerning the President's state of mind, without having had the advantage of the President's *viva voce* testimony. We prefer therefore to conclude, as we do, that the President was simply reckless as to whether his conduct was unlawful, given the factors referred to above.

[92] Mr Nxasana too must have known that the bargain he was driving was unlawful. First, he was after all the NDPP and the NPA Act was ultimately his charge to administer; he must have been aware of its provisions. Second, his attorney's letter of 10 December 2014 shows that he was fully aware of the specific statutory provisions relative to his financial entitlement; but that he thought that since he was not offering voluntarily to resign, they did not apply to him – the President was at large to agree to his demands. Third, he abided the decision of the Court as to the lawfulness of the settlement agreement, but was not prepared to say when the realisation of potential unlawfulness came to him.

[93] As in the case of the President, the inference that Mr Nxasana knew that he was acting without lawful foundation is strong; but, as in the case of the President, for the reason there articulated, we prefer to conclude that he was reckless as to whether his demand was lawful.

[94] In our view, given then the conduct of these two main protagonists and the considerations to which we have alluded, it is not just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate Mr Nxasana.

[95] Is it just and equitable to leave Adv Abrahams untouched in the office? We do not believe it is, for these reasons. First, if the vindication of the Constitution is paramount, an order which leaves Adv Abrahams' position intact does not serve that objective. As remarked above, the President will have achieved, through unlawful means, precisely what he had wished to attain all along.

[96] Second, we bear in mind the remarks of the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*:[39]

"[85] The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the

[39] (CCT 39/2010) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229; .

law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case."

We take from this passage the notion that, if the invalid act cannot wholly be undone, respect for the rule of law would require that nonetheless it must be undone in such a manner that the result still projects respect for the Constitution and the rule of law. We suggest that in this case this implies a result that underscores the imperative of non-interference in the independence of the NPA and its National Director.

[97] Third, in this litigation – as in the President's and the NPA's appeal to the SCA - Adv Abrahams has associated himself, inconsistent with the imperative of prosecutorial independence, on all material issues with the position of the President. An example is the three points he argued: the vacancy issue, the conflict issue, and remedies.

[98] Fourth, his conduct in the litigation went even further. He attacked the case of the applicants, non-profit organisations, in language such as: *"I submit that the relief sought is unmeritorious, illogical, incompetent and amounts to an absurdity."*[40] He had little reserve in casting sweeping aspersions: *"I established that there were some serious criticisms of Adv Jiba in the court judgments, but much of the material placed before the courts had been manipulated and actuated by ulterior motives with a view to getting rid of Adv Jiba."*[41] In the same vein: *"I ascertained that the criminal proceedings and the GCB application were not initiated by disinterested persons who wished to protect the integrity of the institution. In fact, they could be traced to officials within the NPA, centred around Mr Nxasana who had long been at loggerheads with Adv. Jiba."*[42]

[99] This is disconcerting language and, on the face of it, suggesting of a lack of appreciation for whether or not the complaints that were raised for instance against Adv Jiba were meritorious, irrespective of their source. The judgments that questioned the integrity of

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[40] Answering affidavit in the CASAC application, p315, para 52.2.
[41] Answering affidavit in the CW and FUL application, p514, para 37.12.
[42] Answering affidavit, op cit, para 37.13.

advocates Jiba, Mrwebi and Mzinyathi were judgments of the High Court, and Adv Abrahams should not have questioned but should instead have acted on their result. And in the event, the judgment of Legodi J in the GCB matter vindicated the complaints.

[100] That leaves, as regards the position of Adv Abrahams, the argument put up on his behalf, namely that Mr Nxasana was entitled lawfully to relinquish his position, outside of the framework of the NPA Act. As stated, he relied on *Strydom supra*, in which a magistrate had resigned before his full term of office had expired.

[101] There s.13(5) of the Magistrates' Act 90 of 1993 applied, and provided as follows:

"(5) (a) The Minister may, at the request of a magistrate, allow such magistrate to vacate his or her office –

(i) on account of continued ill-health; or

(iA) ...

(ii) for any other reason which the Minister deems sufficient."

The Court there held that a magistrate was entitled lawfully to resign, unilaterally and without the Minister's concurrence.

[102] Adv Abrahams submitted that that was the proper interpretation also of s.12(8) of the NPA Act, and that Mr Nxasana could resign unilaterally. Counsel for CW and FUL distinguished that judgment from the present matter on the bases that s.13 deals with many magistrates, and not a single NDPP; and that there the magistrate had a right to resign under the previous regime, and it was held he should not be prejudicially affected by the new statutory regime, whereas the NPA Act is a completely new regime. In our view the essential points of distinction between that case and this are the differences in the two legislative backgrounds, and the current legislative milieu.

[103] We refer here first to the entitlement of magistrates to have resigned under the previous legislative regime and the general approach to interpretation that requires explicit language before taking away rights previously conferred.[43]

[104] Second, and perhaps more important, we refer to the current legislative milieu and the paramount position that the prosecutorial authority and prosecutorial independence assumes in our constitutional arrangement. It would be surprising if, given this context, a unilateral resignation with no need for approval were permissible despite the clearly higher bar of a request to vacate, coupled with expressed reasons that are (reasonably) deemed by the President to be sufficient.

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[43] Compare LC Steyn, Die Uitleg van Wette, 5th ed, p 10 ff.

[105] There is another consideration. Adv Abrahams relied on *Strydom supra* to support the proposition that a resignation other than in the terms of s.12(8) was not unlawful. But *Strydom* does not assist Adv Abrahams' contention, because *Strydom's* resignation was unilateral, whereas that of Mr Nxasana was procured by promise of unlawful reward. *Strydom* is therefore distinguishable.

[106] In these circumstances we do not believe that it would be just and equitable either to reinstate Mr Nxasana or to leave Adv Abrahams as permanent NDPP. In our view it would be just and equitable if the position were declared vacant for a short period of say 60 days, for it to be filled by appropriate appointment within that period.

Is the current President conflicted?

[107] The applicants submit that President Zuma is disqualified from appointing a NDPP, given the raft of criminal charges he is facing. Their argument founds on the following two provisions of the Constitution:

"90. Acting President

(1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:

(a) The Deputy President."

[108] The provision that deals with conflicts of interests is s.96:

"96. Conduct of Cabinet members and Deputy Ministers

(1) ...

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

(a) ...

(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; ...".

[109] The interests that are said to be conflicted are the President's private interests resulting from the host of criminal charges against him, specifically given his concession and the finding by the SCA that the decision to withdraw them was irrational; and as against that, his official responsibility to appoint the NDPP in terms of s.10 of that Act.

[110] The President argued that he is not conflicted because he is not actually facing the charges yet; the NDPP must first decide again to arraign him, since the charges were

actually withdrawn. He submits too that s.90 envisages the appointment of the Deputy President instead of the President, and not together with the President, and thus does not apply to the facts here. Adv Abrahams, the NDPP who has to decide whether or not again to charge the President, makes common cause with the President, explicitly "*endorsing*" the submissions made on his behalf. He submits that even if the President were conflicted, the Constitution does not assist, because s.90 was intended to address a different situation.

[111] But he went further. He submitted that even if the President were conflicted, that matters not because when he appoints the NDPP, he acts as head of the national executive, and thus in cabinet.[44] Since the members of the cabinet are not similarly conflicted, his being conflicted will be so diluted as to disappear.

[112] We cannot agree with either the President's submissions or those of Adv Abrahams. In a rights-based order it is fundamental that a conflicted person cannot act; to act despite a conflict is self-evidently to pervert the rights being exercised as well as the rights of those affected. And s.96(2)(b) makes that clear beyond the pale. If conflicted, the individual simply cannot act, is *"unable"* to act, whether s.90 was there or not.

[113] In this light, all s.90 does is to identify the person who must act whenever the President, by virtue of a conflict, is unable. And it is the Deputy President, who does not get sworn in; s/he simply performs the act which the President himself is unable to perform.

[114] In our view President Zuma would be clearly conflicted in having to appoint a NDPP, given the background to which we have referred, particularly the ever-present spectre of the many criminal charges against him that have not gone away. There is no longer any obstacle in the way of the criminal charges proceeding.

[115] The President told the SCA that he "*...had every intention in the future to continue to use such processes as are available to him to resist prosecution,*" in other words not to stand trial at all, and this would place the incumbent NDPP firmly on the spot. It seems incongruous that under those circumstances President Zuma should then be seen to be appointing the NDPP, since his conflict both actual and perceived is self-evident. Judges decline routinely to sit in matters in which they are conflicted.

The constitutional challenge by CASAC

[116] It is necessary to quote the two sub-sections being challenged:

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[44] Compare s.85(2)(e) of the Constitution.

"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)...

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

(a) the National Director or Deputy 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) ...

(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 or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy 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 or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy 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."

[117] The applicant submitted that s.12(4) was inconsistent with the Constitution, relying by parity of reasoning on *Justice Alliance of South Africa v President of the Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*.[45] There the Constitutional Court held that s.8*(a)* of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 (Remuneration Act) which allowed the President to request a Chief Justice who is about to be discharged from active service to continue in office as the Chief Justice for an additional period, determined by the President, if the Chief Justice acceded to that request, as unconstitutional.

[118] The Court said:

"[68] Accordingly, s 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference."

and

"[75] In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in s 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious institutional attribute of impartiality and the public confidence that goes with it."

[119] Thus the Constitutional Court held that powers of extension of tenure were inimical to judicial independence, which implies in turn freedom from external interference. The

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[45] (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

applicant relied too on *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others,*[46] which was concerned with adequacy of structural and operational independence of the Hawks in the South African Police Service Act 68 of 1995:

"[81] ... Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to 'behave' in anticipation of renewal."

[120] The same principle, that of jealously guarding against external muscling by the Executive was applied. This is of course powerful but also binding authority, if it applied with equal constitutional justification to the position of the NDPP. The applicant submitted that it did, given amongst others the impartiality exacted of the NDPP in terms of s.32(1) of the NPA Act.

[121] The respondents did not challenge the conceptual founding of the applicant's argument. Rather, they argued that the declaration of constitutional invalidity sought was academic and thus untoward, on the authority of *Shuttleworth*:[47]

"[75] Mr Shuttleworth also seeks leave to mount a challenge to the constitutional validity of regs 3(1), 3(3), 3(5), 10(1)(b), 18, 19(1) and 22. The Supreme Court of Appeal refused to entertain the challenge on the ground that it would not be in the interests of justice to do so. It held that if it were to make an order of invalidity, it would be in the abstract and without regard to its implications on people other than Mr Shuttleworth and other considerations beyond the facts of the present case. That court warned that its order would be without a proper consideration of its effect on the exchange control regime and on the economy as a whole.

[76] I agree with the Supreme Court of Appeal that the challenge against the specified regulations would be academic, hypothetical and speculative. Mr Shuttleworth has not demonstrated how the claim of constitutional infringements would have a material bearing on him and others similarly situated. He has not pointed to any practical usefulness of the outcome he contends for. He has not placed before the Supreme Court of Appeal or this court any factual context within which to evaluate the constitutional challenge. This, I should note, is fatal to both aspects of Mr Shuttleworth's cross-appeal:

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[46] (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC).
[47] Op cit.

the attempt to impugn specific provisions, as well as the attempt to attack the entire exchange control system. Mr Shuttleworth has not shown that, in the cross-appeal, he was genuinely acting in the public interest or that any of the people or groups affected by the exit charge may not be able to take up the challenge themselves. It is needless to add that the group he seeks to represent, being people who are desirous of externalising their wealth, may not be vulnerable or crave for his intervention.

[77] It is not in the interests of justice to grant Mr Shuttleworth leave to cross-appeal against the decision of the Supreme Court of Appeal on the broad constitutional attack against the Regulations. This means I need not consider the substance of the constitutional attack. Let it suffice to remark that the specific provisions targeted by Mr Shuttleworth are well and truly archaic and may very well be at odds with the tenets of our Constitution. The state parties are nudged to take appropriate steps to review the provisions in issue."

[122] It seems to us that *Shuttleworth* was a very different case altogether for the following reasons. First, there is the ambitious reach of *Shuttleworth's* case: not only were a number of provisions of the exchange control regulations targeted, but the boundaries of the fall-out of an order of unconstitutionality were not evident. Here, two sub-sections only, are targeted and its effect – in both cases – is clear. Second, *Shuttleworth's locus standi* to act in the public interest had not been shown; here it is not disputed. Third, *Shuttleworth's* contentions were disputed; here they are not. And fourth, there are in this case – wholly absent in *Shuttleworth* – Constitutional Court authority that if not directly certainly is close to being in point.

[123] In the result the challenge to the presidential power under s.12(4) to extend the tenure of the NDPP is upheld, and we make an appropriate order below.

[124] That leaves s.12(6) and its allegedly objectionable features of a unilateral presidential power to suspend, for an indefinite period, and without pay. Here the applicant relied on the *Helen Suzman Foundation* case:[48]

"[85] But for 'as the Minister deems fit' and the possibility of a suspension without pay and benefits provided for in ss (2)(c), I can find no reason to attack the bases on which this subsection empowers the minister to suspend the national head. These are specific, objectively verifiable and acceptable grounds for suspension and removal. Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the audi alteram partem rule and unfairly undermines the national head's ability

[48] *Op cit.*

to challenge the validity of the suspension by the withholding of salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably the minister's mind would already have been made up that the national head is guilty of what she is accused. Personal and familial suffering that could be caused by the exercise of that draconian power also cries out against its retention. It is also the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay."

[125] It relied too on *McBride v Minister of Police and Another*:[49]

"[40] Without adequate independence, it would be easy for the Minister to usurp the power of the Executive Director under the guise of exercising political accountability or oversight over IPID in terms of section 206(1) of the Constitution. In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him. Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution. It follows that it is invalid and must be set aside."

[126] Thus the power to suspend without pay *"... defies the exceedingly important presumption of innocence until proven guilty or the audi alteram partem rule."* In this matter to the President did not attack the principle underlying the argument, but argued that the declaration would be academic. But for reasons already given, we do not agree. The Minister argued that the fact of a potential review of the irrational exercise of presidential power was a complete answer to the constitutionality attack. But, submitted the applicant, this proposition has been rejected by the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*,[50] and we agree.

Costs and order

[127] Since the applicants are successful, it is unnecessary to engage on the applicability of the *Biowatch*[51] principle.

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[49] (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016).
[50] (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) at [247] and [222].
[51] Biowatch Trust v Registrar, Genetic Resources, and Others (CCT 80/08) [2009] SACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009) at [21], [22], [24] and [28].

[128] In the result we make the following order on the application of Corruption Watch and Freedom Under Law:

1. The settlement agreement between the President, the Minister of Justice and Mr Nxasana dated 14 May 2015, is reviewed, declared invalid and set aside.
2. The termination of the appointment of Mr Nxasana as National Director of Public Prosecutions is declared unconstitutional and invalid.
3. The decision to authorise payment to Mr Nxasana of an amount of R17 357 233, in terms of the settlement is reviewed, declared invalid and set aside.
4. The appointment of Adv Abrahams as National Director of Public Prosecutions is reviewed, declared invalid and set aside.
5. Decisions taken and acts performed by Adv Abrahams in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.
6. Mr Nxasana is ordered forthwith to repay to the State all the money he received in terms of the settlement.
7. 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 or someone in an Acting capacity as such.
8. 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 National Director of Public Prosecutions or, in terms of s.11(2)(b) of the National Prosecuting Authority Act, someone in an Acting capacity as such.
9. The orders of invalidity in paragraphs 2 and 4 above are suspended for a period of 60 days or until such time as the Deputy President has appointed a National Director of Public Prosecutions in terms of paragraph 8 above, whichever is the shorter period.
10. The costs of this application must be paid jointly and severally by the President, the Minister of Justice, Adv Abrahams and the National Prosecuting Authority.

[129] In the result we make the following order on the application of Council for the Advancement of the South African Constitution:

1. It is declared that s.12(4) of the National Prosecuting Authority Act 32 of 1998 is unconstitutional and invalid.
2. It is declared that s.12(6) of the National Prosecuting Authority Act is unconstitutional and invalid to the extent that it permits the President to suspend the National Director of Public Prosecutions unilaterally, indefinitely and without pay.
3. The order of invalidity in paragraph 2 is suspended for 18 months.
4. During the period of suspension:

4.1. An additional subsection shall be inserted after s.12(6)(a) that reads:

"(aA) The period from the time the President suspends the National Director or a Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director shall not exceed six months."; and

4.2. S.12(6)(e) shall read:

"The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, his or her full salary [~~no salary or such salary as may be determined by the President~~]."

5. Should Parliament fail to enact legislation remedying the defect identified in paragraph 2, the interim order in paragraph 4 shall become final.
6. The President, the Minister of Justice and the National Prosecuting Authority shall pay the Applicant's costs, including the costs of two counsel.
7. The orders of invalidity made above relating to the National Prosecuting Authority Act are referred to the Constitutional Court in terms of s.165(5) of the Constitution for confirmation.

D MLAMBO

JUDGE PRESIDENT OF THE HIGH COURT

GAUTENG DIVISION

N RANCHOD

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

WHG VAN DER LINDE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

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	Adv. M Bodlani
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