ENQUIRY IN TERMS OF SECTION 12(6) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998

ABRIDGED VERSION

1 APRIL 2019

TABLE OF CONTENTS

TABLE OF CONTENTS **2**

LIST OF ABBREVIATIONS **5**

1. INTRODUCTION **7**

1.1. Establishment of the Enquiry *7*

1.2. The Terms of Reference *9*

1.3. Rules of the procedure *11*

1.4. Invitation to submit evidence and the need for cross-examination *14*

1.5. The structure of the report *15*

2. THE PROSECUTING AUTHORITY: IT'S LEGAL FRAMEWORK **16**

3. THE STRUCTURE OF THE NPA **25**

3.1. Roles and functions *25*

3.2. The National Director of Public Prosecutions *29*

4. THE APPOINTMENT AND ELEVATION OF JIBA AND MRWEBI **36**

4.1. Nomgcobo Jiba *36*

4.2. Lawrence Sithembiso Mrwebi *37*

5. THE ALLEGATIONS AND THE EVIDENCE **38**

5.1. The case law *38*

5.1.1. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (1) SA 254 (GNP) ("FUL HC") – decided by Murphy J 38

5.1.2. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (4) SA 298 (SCA) delivered on 17 April 2014 ("FUL SCA") – Brand JA (Mthiyane DP, Navsa, Maya and Ponnan JJA concurring) 44

5.1.3. Booysen v Acting National Director of Public Prosecutions and Others [2014] 2 ALL SA 319 (KZD) delivered on 26 February 2014 – decided by Gorven J 45

5.1.4. Zuma v Democratic Alliance [2014] 4 All SA 35 (SCA) delivered on 28 August 2014 ("Spy Tapes 2") – Navsa ADP (Mpati P, Brand, Ponnan and Tshiqi JJA concurring) 47

5.1.5. General Council of the Bar of South Africa v Jiba & Others 2017 (2) SA 122 (GP) – Legodi J (Hughes J concurring) 49

5.1.6. Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa 2019 (1) SA 130 (SCA) (10 July 2018) – Majority: Shongwe ADP (Seriti and Mocumie JJA concurring); Dissent: Van der Merwe JA (Leach JA concurring) – currently on appeal at the Constitutional Court 50

5.1.7. Freedom Under Law v National Director of Public Prosecutions & Others 2018 (1) SACR 436 (GP) 53

5.2. Evidence surrounding the cases 54

5.2.1. Booysen 54

5.2.2. Mdluli 69

5.2.3. Representations which were made but kept secret by Mrwebi 80

5.2.4. The Spy Tapes 80

5.2.5. GCB 83

5.3 Other evidence and allegations 85

5.3.1. Evidence of other witnesses 85

5.3.2. The CEO Position 90

5.3.3. Jiba's husband's presidential pardon 91

5.3.4. Jiba's legal qualifications 92

5.3.5. Mrwebi's track record as Regional Head of DSO and allegations of disciplinary steps against him 94

5.3.6. Selebi Saga 97

5.3.7. OECD and MacAdam 101

5.3.8. State Capture 102

5.3.9. Plane Ticket 102

5.3.10. NPA under Nxasana 103

6. AN EVALUATION OF THE EVIDENCE 108

6.1. Jiba 109

6.1.1. FUL HC and FUL SCA 109

6.1.2. Spy Tapes 2 110

6.1.3. GCB HC and SCA 111

6.1.4. General comments on the cases relating to Jiba 112

6.1.5. Evidence related to the cases 113

6.1.6. Other evidence 117

6.2. Mrwebi 120

6.2.1. FUL HC, FUL SCA, GCB HC and GCB SCA 120

6.2.2. Evidence related to other matters 125

6.2.3. Other evidence 125

7. FINDINGS AND RECOMMENDATIONS 127

7.1. Jiba: 128

7.2. Mrwebi: 133

7.3. Recommendations 136

8. CONCLUDING REMARKS 137

8.1. Implications for the NPA 137

8.2. Avoiding a recurrence 138

LIST OF ABBREVIATIONS

"ACTT"	Anti-Corruption Task Team
"AFU"	Asset Forfeiture Unit
"AG"	Auditor General
"The BF report"	The report prepared by Breytenbach and Ferreira dated 13 April 2011
"CASAC"	Council for the Advancement of the South African Constitution
"The Code"	Code of Conduct for Members of The National Prosecuting Authority Under section 22(6) of the National Prosecuting Authority Act, 1998 – R. 1257 29 December 2010
"CCC"	Complex Commercial Crime
"C-funds"	DSO's confidential funds, used to pay informants
"CI"	Crime Intelligence Unit
"the CPA"	Criminal Procedure Act 51 of 1977
"DG"	Director General in the Department of Justice and Correctional Services (and predecesssors-in-title)
"Directives"	Prosecution Policy Directives
"DDPP"	Deputy Director of Public Prosecutions
"DNDPP"	Deputy National Director of Public Prosecutions
"DOJCD"	Director General, Accounting Officer of the NPA
"DPCI"	Directorate for Priority Crimes Investigations
"DPP"	Director of Public Prosecutions
"DPSA"	Department of Public Service and Administration
"DSO"	Directorate for Special Operations
"ELs"	Evidence Leaders
"FUL"	Freedom under the Law
"GCB"	General Council of the Bar of South Africa
"IAP"	The International Association of Prosecutors
"IGI"	Inspector General of Intelligence
"I/O"	Investigating officer
"IPID"	Independent Police Investigative Directorate
"the ISO Act"	Intelligence Services Oversight Act 40 of 1994
"Jiba CV"	The curriculum vitae submitted by Jiba to the Enquiry
"JSCI"	Joint Standing Committee of Intelligence
"LAD"	Legal Affairs Division

"the LPA"	Legal Practice Act 28 of 2014
"the Minister"	Minister of Justice and Correctional Services (and his predecessors-in-title)
"MISS"	Minimum Information Security Standard
"Mrwebi CV"	The curriculum vitae submitted by Mrwebi to the Enquiry
"the NSC"	National Security Council
"NDPP"	National Director of Public Prosecutions
"NEEC"	National Efficiency Effective Committee
"NPA"	National Prosecuting Authority
"the NPA Act"	National Prosecuting Authority Act 32 of 1998
"NPS"	National Prosecuting Services
"NSI Act"	National Strategic Intelligence Act 39 of 1994
"OECD"	Organisation for Economic Co-operation and Development
"the OECD Convention	Convention on Combating Bribery of Foreign Public Officials and International Business Transactions
"PDA"	Protected Disclosure Act 26 o 2000
"PCLU"	Priority Crimes Litigation Unit
"PGI"	Prosecutor Guided Investigations
"POCA"	Prevention of Organised Crime Act 121 of 1998
"SAPS"	South African Police Services
"SCA"	Supreme Court of Appeal
"SCC"	State Capture Commission
"SCCU"	Specialised Commercial Crime Unit
"SD"	A DPP appointed under section 13(1)(c) of the NPA Act ("Special Director")
"SIU"	Specialised Investigating Unit
"SMS Handbook"	Senior Management Service Handbook
"SPD"	Special Projects Division
"SSA"	Secret Service Account
"the Standards"	The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors
"The Yacoob Committee"	Yacoob Fact Finding Commission report
"ToR"	Terms of reference
"the UN Guidelines"	United Nations Guidelines on the Role of Prosecutors

1. INTRODUCTION

1. The effective prosecution of crime is instrumental to any state that has the rule of law underpinning its social contract. It being a fundamental value which undergirds our Constitution, duly enforced it could ensure that every individual regardless of social or political standing is treated equally.

2. The Constitution provides for a single prosecuting authority, the National Prosecuting Authority (NPA) and the only institution vested with the power and responsibility to institute charges and prosecute crime on behalf of the state. The Constitution makes it imperative that the NPA performs that critical role and function independently without fear, favour or prejudice - anything less would weaken the rule of law and stymie the nation's constitutional aspirations.

3. To fortify the NPA in fulfilling its constitutional mandate and insulating it from undue pressure and influence the Constitution makes provision for enabling legislation like the National Prosecuting Authority Act 32 of 1998 (the NPA Act) the main instrument in terms of which it executes its constitutional mandate.

4. Moreover, the NPA has over the years created and adopted a Prosecuting Policy, Policy Directives and a Code of Conduct (the code) guiding its members as they execute their mandate and safeguard the independence of the institution. It is thus, as an example, in terms of the NPA Act that only the President may in terms of section 12(6) provisionally suspend a sitting National Director of Public Prosecutions, a Special Director of Public Prosecutions and DNDPP's.

1.1. Establishment of the Enquiry

5. Advocate Nomgcobo Jiba (Jiba) one of four DNDPPs and Advocate Lawrence Sithembiso Mrwebi (Mrwebi) the SDDP who heads the SCCU are both senior officials within the NPA. They had been provisionally suspended by the President on 26 October 2018 in terms of section 12(6) of the NPA Act, following serious criticisms made against them in the courts

during the course of litigation and in other fora. The Enquiry was, as a result, established to look into the fitness and propriety of both Jiba and Mrwebi to hold office.

6. On 26 October 2018, the President provisionally suspended Jiba and Mrwebi from their respective positions pending the completion of this Enquiry. Inferred from the Enquiry's Terms of Reference the action was in all likelihood prompted by particular criticisms and serious allegations levelled against both of them in various fora, including Courts of law, which raised critical questions regarding their fitness and propriety to hold office.

7. The Enquiry and this report are but intermediate steps in the process triggered by the President's suspension of the two officials under section 12(6) of the NPA Act. Once this report is submitted, the President is required to make a decision regarding the future of both Advs Jiba and Mrwebi in their respective positions within the NPA. Moreover, the decision must be made within a time limit of 6 months from the date of suspension of the officials, a prescription read-in recently by the Constitutional Court, which had found aspects of section 12(6) constitutionally wanting. This aspect is covered in greater detail in the concluding remarks of this report.

8. The ToR establishing this Enquiry were published on 9 November 2018 with the President designating me as chairperson assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi. Together we comprise the Panel.

9. Led by N Bawa SC, the evidence team included N Sikhakhane, N Rajab-Budlender and Z Gumede on the instruction of the State Attorney. Jiba was represented by N Arendse SC, T Masuku SC and S Fergus as instructed by Majavu Inc. Mrwebi was represented by M Rip SC and R Ramawele SC instructed by Vilakazi Tau Inc.

10. As soon as the Enquiry was established the evidence team actively engrossed themselves in the arduous task of evidence gathering and the Panel focused on putting in place the Secretariat, the appropriate structure, the rules and format to follow enabling it to execute its mandate with utmost efficiency.

1.2. The Terms of Reference

11. The Enquiry's ToR were published on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette No 42029). According to the ToR, the Enquiry, upon completing its mandate, was required to submit a report containing all supporting documentation and findings to the President.

12. The scope of the ToR was to look into the fitness and propriety of both Jiba and Mrwebi to hold office in their respective capacities. In relation to Jiba, and at the panel's discretion, the Eqnuiry was to consider evidence arising from the cases referred to in in the ToR.

13. Due regard had to be had to all other relevant information, which included but was not to be limited to matters relating to Richard Mdluli and Johan Wessel Booysen.

14. The Enquiry was also required to consider the manner in which Jiba fulfilled her responsibilities as DNDPP, which included considering whether:

- She complied with the prescripts of the Constitution, the National Prosecuting Authority Act, Prosecuting Policy and Policy Directives and any other relevant laws in her position as a senior leader in the National Prosecuting Authority and is fit and proper to hold the position and be a member of the prosecutorial service;
- She properly exercised her discretion in the institution, conducting and discontinuation of criminal proceedings;
- She duly respected court processes and proceedings before the Courts as a senior member of the National Prosecuting Authority;
- She exercised her powers and performed her duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;
- She acted without fear, favour or prejudice;

- She displayed the requisite competence and capacity required to fulfil her duties; and whether,

- She in any way brought the National Prosecuting Authority into disrepute by virtue of her actions or omissions.

15. With regards to Mrwebi, and once again at the Panel's discretion, the Enquiry had to consider matters arising from the cases referred to in the ToR as they relate, directly or indirectly, to his conduct.

16. All other relevant information will also be considered, including but not limited to matters relating to Richard Mdluli.

17. In determining the manner in which Mrwebi fulfilled his responsibilities as SDPP, the Enquiry will consider whether:

- He complied with the prescripts of the Constitution, the National Prosecuting Authority Act and any other relevant laws in his position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service;

- He properly exercised his discretion in the institution, conducting and discontinuation of criminal proceedings;

- He duly respected court processes and proceedings before the Courts as a senior member of the National Prosecuting Authority;

- He exercised his powers and performed his duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;

- He acted without fear, favour or prejudice;

- He displayed the requisite competence and capacity required to fulfil his duties; and

- He in any way brought the National Prosecuting Authority into disrepute by virtue of his actions or omissions.

18. As alluded to above, the Enquiry was required to complete its mandate and furnish its report together with all supporting documentation and recommendations to the President by no later than 9 March 2019 to allow him to make his decision before expiry of the six-month time limit which falls by no later than 25 April 2019. However, as matters turned out, with indulgence from the Presidency, the report was submitted on 31 March 2019.

19. Among the powers delegated to the chairperson in the ToR, were the powers to determine the seat of the Enquiry and the rules by which it would be governed. The South African Law Reform Commission was appropriately and conveniently identified as a most cost-effective seat. Situated at the Spooral Park Building, 2007 Lenchen Avenue South, Centurion Central, Centurion, 0046. The Secretariat carried out its operations here. The oral public hearings, which received regular media coverage, also took place at this location. The rules adopted are discussed in greater detail in the next section.

1.3. Rules of the procedure

20. Putting in place a set of rules was necessary to regulate the Enquiry's operation. Fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. First and foremost, the rules had to enable the Enquiry to best fulfil its mandate according to the ToR. The President, having the statutory power to initiate the process as he deems fit, duly delegated rule-making powers to the chairperson which powers were provided in the ToR.

21. The rules of procedure were drafted in the context of an enquiry, rather than a Commission, disciplinary process or criminal trial. The Enquiry was not required to determine issues of criminal prosecution, civil liability for breach of the law or to determine whether an onus

had been discharged. The procedures adopted were therefore inquisitorial as opposed to accusatorial.

22. Following round-table discussions, the rules were agreed to by the Evidence Leaders and the legal representatives of the concerned parties in a meeting held on 22 November 2018 – this included agreement on the status of documents which were to be admitted as evidence.

23. Unlike a Court of law, where evidentiary laws regarding admissibility apply, the Enquiry was not subjected to the same constraints. Various documents were admitted into evidence, including relevant court records containing affidavits deposed to by the parties; case files/ dockets; official reports; and memoranda. Media reports, in electronic and print form, were also admitted and did not require sworn or affirmed statements from their authors.

24. The Enquiry sought to harness technology to facilitate its operations. To this end, all documents that were received by the Enquiry had to be placed onto a Dropbox folder. The Panel, evidence leading team, parties and witnesses were all provided with access to the Dropbox folder to ensure fairness, openness and transparency. As per the rules, and as was agreed to between all the parties, information that was contained on the Dropbox constituted evidence and parties were free to use that information in structuring their arguments as well as during the hearing phase.

25. As a general rule, the Enquiry followed a flexible approach in admitting new information into evidence throughout its process. Parties were free to, and indeed did, hand new evidence up to the Panel in the course of the hearings. The only proviso was that any newly submitted information had to be availed to all parties and be uploaded onto the Dropbox. The principle was that doing so would better enable the Enquiry to comply with its mandate of submitting all accompanying documents to the President.

26. Where individuals who deposed to affidavits gave oral evidence, the transcripts were regularly uploaded to the Dropbox. The Dropbox included statements and affidavits which

Jiba and Mrwebi filed or which were filed on their behalf in various court applications, and elsewhere, and included representations which they made to the President, as well as documentation and information obtained, in the main, from the Presidency, the Ministry and Department of Justice and Correctional Services and the NPA, which was included at the Evidence Leaders' discretion. To say that the Dropbox was voluminous is an understatement. To wit, there are 5214 files, some of which contain entire records within a single file.

27. Not all the issues therein could conceivably be traversed during oral evidence and the parties were in agreement that they would not necessarily repeat aspects that had been in the past set out in affidavits on their behalf. Given the circumstances and the timeframes, the process that was followed was aimed at being as fair as reasonably possible. All parties were provided with access to the Dropbox and where it was requested, they, and witnesses, were afforded time to consider documentation, as required.

28. The Evidence Leaders received third party evidence and also solicited evidence on affidavit, which witnesses, though not called to give oral evidence were willing to do so, save for the following: Mr Nxasana (*"Nxasana"*), Adv Mamabolo (*"Mamabolo"*) and Mr Muofhe (*"Muofhe"*). Four third parties had sought to place evidence/submissions before the Enquiry: Kathleen Pawson, Mzukisi Ndara, Council for the Advancement of the South African Constitution (*"CASAC"*) and Freedom under the Law (*"FUL"*). Although the affidavits of all third parties were taken into account in considering the question before the Enquiry, only CASAC and FUL were afforded an opportunity to make oral submissions.

29. Closing written and oral argument were made on behalf of the parties. Both for practical reasons, and because of the inquisitorial nature of the proceedings, the Evidence Leaders made their extensive submissions in writing rather than in oral argument, with the representatives for Jiba and Mrwebi being given an opportunity to raise objections in relation thereto.

30. The only witness scheduled for oral evidence, who did not give evidence was Mr Angelo Agrizzi (*"Agrizzi"*). The affidavits and transcripts of the evidence that he had provided to the State Capture Commission (*"SCC"*) is included in the Dropbox. He had agreed to give oral evidence before the Enquiry but after his arrest, he instructed his attorney to inform the Enquiry that on the basis of legal advice received, he was no longer going to do so.

31. The intention was to galvanise the investigative and inquisitorial nature of the process. However, in the end, many features of the judicial process seeped into the enquiry. Parties raised objections, justified and unjustified, and the Panel was called upon to make rulings on more than one occasion, on those objections.

1.4. Invitation to submit evidence and the need for cross-examination

32. The Enquiry did not have the power to compel witnesses to provide evidence or testimony. A section 12(6) enquiry is not imbued with subpoena powers. Information placed before the Panel came from individuals and institutions volunteering to do so.

33. The evidence leaders went through the painstaking process of following sources and making requests for information. Once witnesses that might be able to offer helpful information to the Enquiry were identified and located, the evidence leaders liaised with the Panel. In turn, the Evidence Leaders we would issue formal invitations to those individuals to come forward to provide testimony. Considering that individuals were fully entitled to refuse the invitation, the exercise was remarkably successful. It speaks to the dedication, commitment, courage and forthrightness of those who responded to the call and we are highly indebted and grateful for their cooperation and efforts to assist.

34. After consulting all the parties and giving due regard to the principle of fairness, the Panel decided that for every witness giving oral testimony, each party would be given the opportunity to cross-examine in order to test the veracity of the witness' version. Re-examination by the party who led the evidence would follow.

1.5. The structure of the report

35. In order to find the best way of presenting the large swathes of information and the evidence traversed before the Enquiry a full and rather voluminous version and an abridged or "more consumable" version of the report have been provided. The aim of the latter is to allow a grasp of the salient issues without having to delve into the full version which traverses the evidence in much detail.

36. Adopting a broader and more purposeful approach to our ToR in the closing section of the report, we make our recommendations in light of our findings, articulate their implications for the NPA and propose ways in which a future recurrence may be avoided. We also describe the practical implications that follow the submission of this report to the President and include a short section of acknowledgement

2. THE PROSECUTING AUTHORITY: IT'S LEGAL FRAMEWORK

37. Starting with section 179 of the Constitution which establishes a single national prosecuting authority – the NPA has a hierarchical structure which is comprised of a NDPP as the head of the NPA, so appointed by the President, the DNDPPs, the DPPs and prosecutors as determined by the NPA Act. This is elaborated upon below.

38. Section 179(7) of the Constitution contemplates that all other matters concerning the NPA must be determined by national legislation. The NPA Act is the national legislation so contemplated in section 179 of the Constitution to ensure that prosecutors are appropriately qualified and to give effect to the independence of the NPA. It is trite that provisions of legislation in relation to the NPA must be consistent with section 179 of the Constitution.

39. The NPA is accountable to Parliament and ultimately to the people it serves. Every prosecutor, directly or indirectly, accounts to the NDPP who, in turn, is responsible for the NPA even though the Constitution provides that the Minister who is responsible for the administration of justice must exercise final responsibility over the NPA. In doing so, should the Minister seek to impede the independence of the NPA or in any way interfere with prosecutions being conducted without fear, favour or prejudice, such conduct would be inconsistent with s 179 of the Constitution.

40. The NPA established in terms of section 179 of the Constitution and as determined in the NPA Act consists of -

40.1. the Office of the NDPP; and

40.2. the offices of the prosecuting authority at every seat of the High Court.

41. Two separate offices of the prosecuting authority are created, one central and the other at the seat of the Courts. The former is the Office of the NDPP which operates nationally. The DPPs in the latter do not form part of the Office of the NDPP, but exercise overall

control over their own offices. For that reason, there is a need for the Office of the NDPP to consult DPP's in decisions impacting their geographical area.

42. The NPA is therefore comprised as follows: the NDPP; the DNDPPs; the DPPs; the DDPPs; and the prosecutors. They have a discretion with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within both the letter and spirit of the Constitution.

43. It is critical that every one of them must, on appointment and before commencing in these positions, take an oath or make an affirmation, in the form provided in the NPA Act, that he or she will, in his or her respective capacity, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law of South Africa without fear, favour or prejudice and as the circumstances of any particular case may require.

44. The NDPP must determine a prosecution policy and policy directives to be observed in the prosecution process as they have done over the years. The NPA prosecution policy states that:

"the NPA is a public representative service, which should be effective and respected. Prosecutors must adhere to the highest ethical and professional standards in prosecuting crime and must conduct themselves in a manner, which will maintain, promote and defend the interests of justice".

45. The Policy and Directives as determined **must** be observed in the prosecution process and are binding on the NPA.

46. The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

47. The prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)(a) of the NPA Act.[1] The purpose of the policy, is to set out, with due regard to the law, the manner in which the NPA in general and individual prosecutors should exercise their discretion and to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions in order to make the prosecution process one of fairness, transparency, consistency and predictability.

48. The policy is a guide and ensures a level of consistency. It is for that reason then that the principles it contains were written in general terms to give direction, rather than to prescribe, and to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

49. In practice this means that, in the context of criminal procedure and the law of evidence, a prosecutor has to consider whether in fact the prosecution should be instituted. The policy supplements the law and tells the prosecutors how to go about their business.

50. Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, the prosecution should normally follow, unless public interest demands otherwise. There is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

51. It is important that the prosecution process is and is seen to be transparent and that justice is seen to be done.

52. The Code of Conduct[2] was devised under Simelane as directed by section 22(6) of the NPA Act. Ramaite's evidence was that all members of the NPA, must comply with it,

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1 *Section 21(2) of the NPA Act. The first prosecution policy issued under the NPA Act had to be tabled in Parliament as soon after the NPA Act came into force and not later than six months after the appointment of the first NDPP. Under section 35(2)(a) the NDPP must submit annually, not later than 1 June of each year to the Minister a report referred to in section 22(4)(g) which report must be tabled in Parliament by the Minister within 14 Days if Parliament is in session, or if not in session then 14 Days after its next session ensues.*

2 *Code of conduct for members of the National Prosecuting Authority under section 22(6) of the NPA Act published under GN R1257 in GG 33907 of 29 December 2010.*

irrespective of rank. It is largely modelled on United Nations Guidelines on the role of prosecutors.

53. The Code prescribes the ethical conduct that members of the NPA must display and adhere to. According to Ramaite this deals with *"the issues of integrity and criteria that you would need to comply with to make sure you function independently and without fear, favour and prejudice".*

54. The relevant portions relating to professional conduct provides as set out below, in our view, also apply to both Mrwebi and Jiba. It provides as follows:

"A. PROFESSIONAL CONDUCT

Prosecutors must—

(a) be individuals of integrity whose conduct is objective, honest and sincere;

(b) respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution;

(c) protect the public interest;

(d) strive to be and to be seen to be consistent, independent and impartial;

(e) conduct themselves professionally, with courtesy and respect to all and in accordance with the law and the recognised standards and ethics of their profession;

(f) strive to be well-informed and to keep abreast of relevant legal developments; and

(g) at all times maintain the honour and dignity of their profession and dress and act in a manner befitting their status and upholding the decorum of the court."

55. The NPA must observe the prosecution policy in the course of a prosecution process. In other words, all prosecutions conducted in the country must be in accordance with the prosecution policy that has been devised. The directives must be issued pursuant to the prosecution policy regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act.[3] In addition, the NDPP shall, in consultation with the Minister, and after consultation with the DNDPPs and the DPPs, frame a Code of Conduct (Code) which shall be complied with by members of the NPA. This Code of Conduct may from time to time be amended and must be published in the gazette for general information. The Policy, Policy Directives and the Code are treated in finer detail in the full and more comprehensive report. Section 2.3. are here cross-referenced.

56. Prosecutors in South Africa, like their peers the world over, subscribe to international prosecutorial standards set in the United Nations Guidelines. The preamble to the UN Guidelines provide, *inter alia*, that:

> *"Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,*
>
> *Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions."*

57. The principle that prosecutors must act without fear, favour or prejudice is not only firmly entrenched in South African law, it is an internationally accepted principle. The United Nations Guidelines for the Role of Prosecutors were adopted by the Eighth United Nations

3 *Both the prosecution policy and policy directives had to be issued by 31 March 2008.*

Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba from 27 August to 7 September 1990. Article 12 requires prosecutors to *"perform their duties fairly, consistently and expeditiously"* and requires them to *"respect and protect human dignity and uphold human rights".* Articles 13(a) and (b) provide that, in the performance of their duties, prosecutors must act *"impartially"*, must avoid all forms of discrimination, must act in the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. Section 22(4)(f) of the NPA Act envisages that the NDPP must bring these guidelines to the attention of all prosecutors and promote respect for and compliance with the guidelines.[4]

58. In addition to obligations under international law, South Africa also has a working relationship with the OECD. The OECD is an intergovernmental initiative to stimulate economic growth. Because corruption has a negative impact on economic growth, the OECD seeks to ensure compliance with the Convention on Combating Bribery of Foreign Public Officials and International Business Transactions (*"the OECD Convention"*). The OECD Convention was adopted by South Africa on 21 November 1997 and was ratified in 2007.

59. Every year each States Party is required to make a submission to the OECD detailing its investigations into any breach of the OECD Convention that it has identified. State parties are also expected to give a detailed breakdown of the progress made with their investigations. In addition, the OECD monitors implementation of the Convention by each State Party. The NPA is one of the organs of state which participate in the annual submissions.

60. Turning back to the UN Guidelines, Guideline 1 provides that "persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications".

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4 See also Boucher v The Queen [1955] S.C.R.16 at 23-24; Berger v United States 295 U.S. 78.88 (1935); People v Zimmer 51 NY2d 390 (1980) at 393.

61. Guideline 7 provides that:

"Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures."

62. Guidelines 10 – 16 set out the role of prosecutors in criminal proceedings and it suffices to say, for purposes of this report, provide among other things that:

62.1. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of Court decisions and the exercise of other functions as representatives of the public interest.

62.2. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

62.3. In the performance of their duties, prosecutors shall:

62.3.1. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

62.3.2. Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

63. In addition the IAP was established in 1995 to, among other things, "promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences" adopted a set of standards for prosecutors in 1999. The standards call upon prosecutors to be independent

and to maintain the honour and dignity of their profession. They must conduct themselves professionally and ethically, exercising the highest standards of integrity and care, strive to be, and to be seen to be, consistent, independent and impartial. This must all be done in service to and in protection of the public interest.

64. The Constitution requires that prosecutorial independence must be jealously guarded and must operate independently and in material respects and at all times and no person or organ of state shall improperly interfere with, hinder or obstruct the prosecuting authority or any member of it when they perform their duties and or exercise their powers, duties and functions. There is thus a constitutional guarantee that the NPA would be independent and function effectively without any undue influence. In Glenister, the Constitutional Court, in affirming its earlier decision, stated that:

"The appearance or perception of independence plays an important role in evaluating whether independence in fact exists … We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence…This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence".[5]

65. The LPA defines a legal practitioner as "an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively".

66. Section 24 of the LPA reads:

"(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

5 *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC). para 207*

(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—

(c) is a fit and proper person to be so admitted..."

67. This has always been the position in relation to attorneys and advocates.

3. THE STRUCTURE OF THE NPA

3.1. Roles and functions

68. Section 5(1) of the NPA Act, taking its cue from the Constitution, establishes a National Office of the Prosecuting Authority (known as the Office of the NDPP). It is a hierarchical organisation comprised of the NDPP (who is ***both the head of the office and controls the office***), DNDPPs, investigating directors, special directors, other members of the Prosecuting Authority appointed at or assigned to the office and members of the administrative staff.

69. The Office of the NDPP is separate and distinct from the offices of the Prosecuting Authority which established by the Minister and are located at seats of the High Courts around the country. The latter consists of (1) the head of office, who is either a DPP or DDPP and who exercises control of that office; (2) DDPPs; (3) prosecutors; (4) persons appointed to perform specific functions in terms of the NPA Act, and; (5) the administrative staff of the office.

70. Where the NDPP is absent or unable to perform his/her functions, the NDPP must appoint one of the DNDPPs as an acting NDPP. This should be distinguished from the scenario when the Office of the NDPP is vacant, or the NDPP is for any reason unable to make the appointment. In the latter scenario the President may, after consultation with the Minister, appoint any DNDPP as the acting NDPP. *The point being made here is that, in all scenarios, an Acting NDPP must be selected from within the ranks of the 4 DNDPPs.*

71. The DNDPPs, in turn, are each allocated specific divisions which they are responsible for. One of these divisions is the National Prosecutions Service. It is through this division that ordinary criminal prosecutions are carried out in the courts. As they are situated at every seat of the High Court around the country, the DPPs are ultimately responsible for the prosecutorial work that takes place within their respective jurisdictions. They may institute or discontinue criminal proceedings and carry out any related functions in their area of jurisdiction subject to the control and directions of the DNDPP specifically responsible

for the National Prosecutorial Service. DPPs may conduct criminal proceedings only in relation to offences that have not been expressly excluded from their jurisdiction, either generally or in a specific case by the NDPP.

72. A DDPP exercises his or her functions subject to the control and direction of the DPP concerned. A DDPP may function only in the area of jurisdiction in which he or she has been appointed and in respect of cases and in courts where he or she has been authorised to do so. The authorisation is in writing by the NDPP or by a person designated by the NDPP.

73. Prosecutors commence criminal proceedings, discontinue them or exercise any functions incidental to the conduct of criminal proceedings. They operate within their respective jurisdictions under the auspices of the relevant DPP.

74. To better understand how the NPA is structured, the graphics depicted in the pages which follow offer an overview. Table 1 shows the current structure of the national office. Each DNDPP is responsible for the portfolios that are allocated to them by the NDPP. The DNDPPs can be and have been reshuffled and/or cycled between portfolios at the instance of the NDPP.

75. Table 2 represents the various business units within the NPA as described by its website. However the business units are not structured according to a particular hierarchy in relation to one another.

76. Tables 3 and 4 show the organisational structure of the NDPP as it was in 2013. Two fundamental changes have since taken place. Firstly, the Directorate of Special Operations (or “the Scorpions” as they were known) was scrapped and replaced by the Hawks within the remit of South African Police Service. Secondly, the office of the CEO was removed and its responsibilities subsumed into the administration business unit under the auspices of a DNDPP’s portfolio.

Table 1: NPA - National Office: each DNDPP is responsible for overseeing certain portfolios. As it stands, the portfolios are: Administration, National Prosecutions Service (NPS), Asset Forfeiture Unit (AFU) and the Legal Affairs Division (LAD).

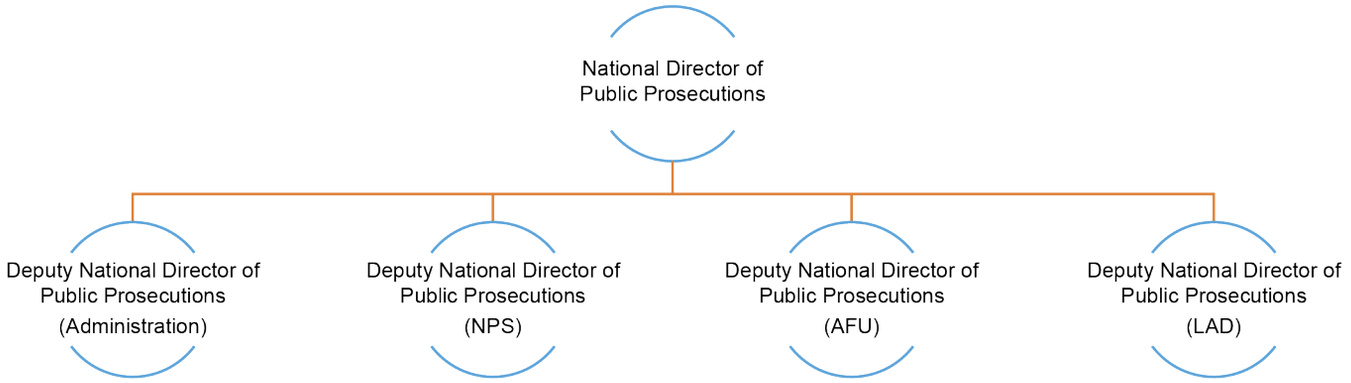


Table 2: NPA - Business Units

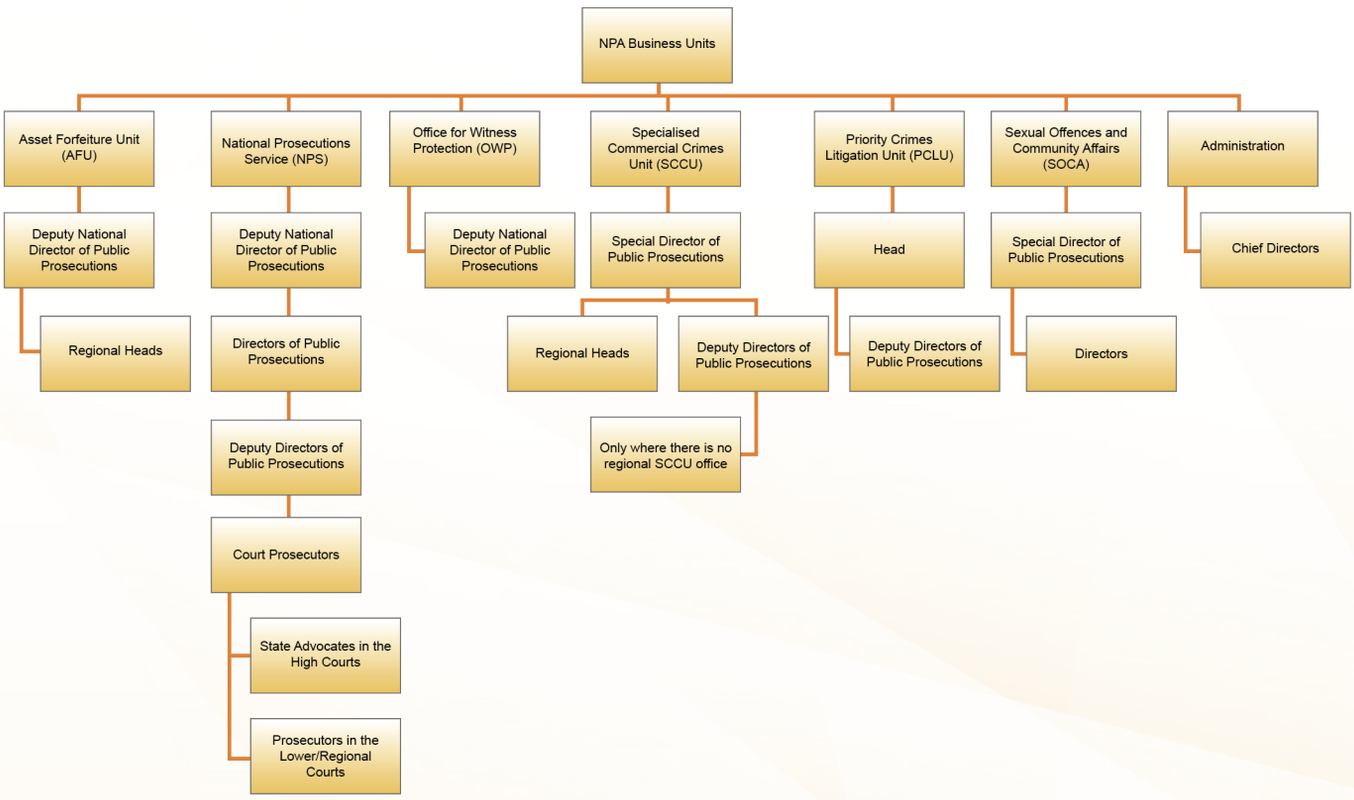


Table 3: taken from a presentation created in 2013 with a hierarchal representation of the NPA Organisational Structure[6]

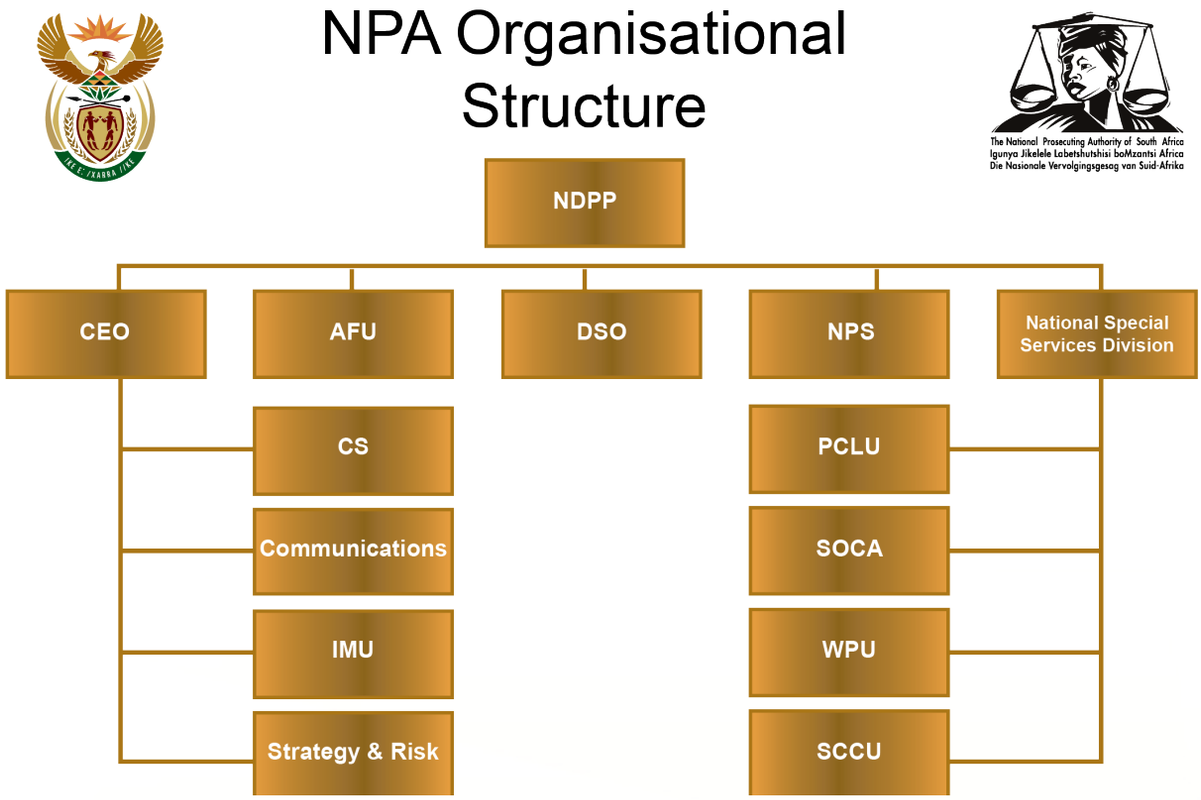
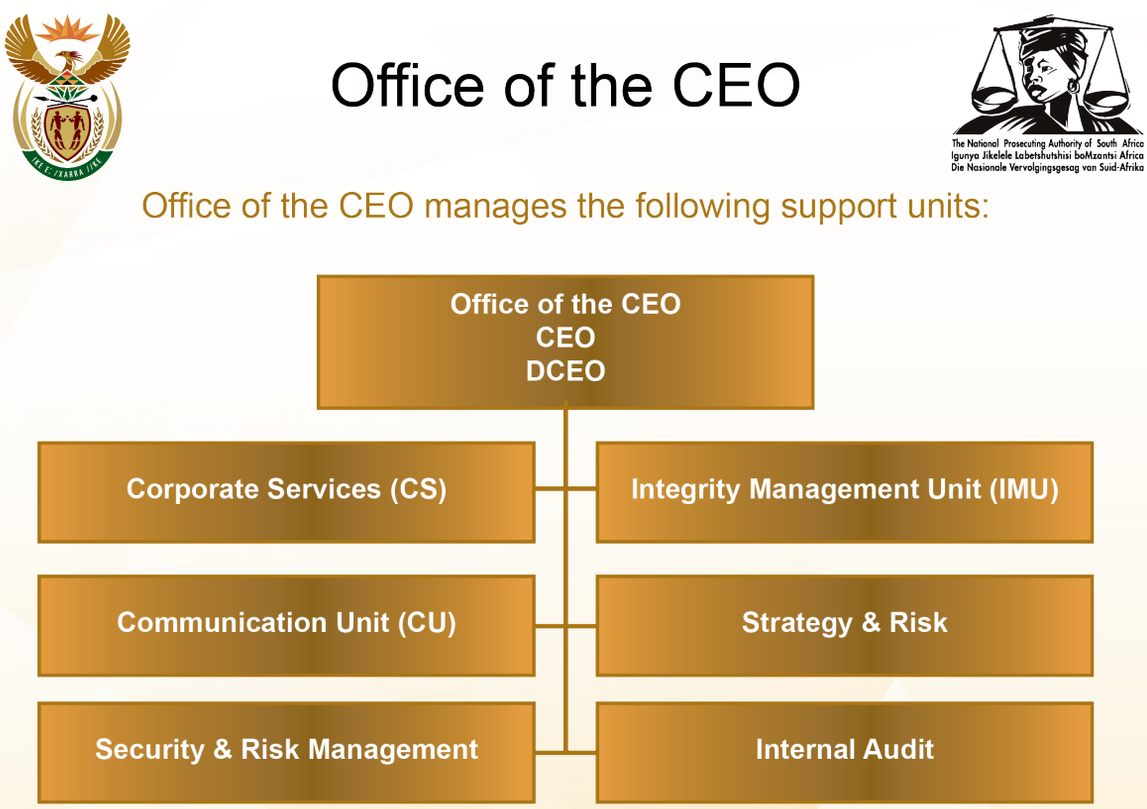


Table 4: Structure within the now defunct CEO office, as it was then in 2013.[7]



6 Source: https://www.slideserve.com/Mia_John/career-opportunities-within-the-national-prosecuting-authority-npa

7 Source: https://www.slideserve.com/Mia_John/career-opportunities-within-the-national-prosecuting-authority-npa

3.2. The National Director of Public Prosecutions

77. The NDPP is appointed by the President as per the Constitution and the NPA Act.

78. Section 9 of the NPA Act prescribes the requisite qualifications and requirements that an NDPP, DNDPP or DPP, must have in order to enable his/her appointment. It reads as follows:

> *"(1) Any person to be appointed as National Director, Deputy National Director or Director must-*
>
> ***possess legal qualifications** that would entitle him or her to **practise in all courts** in the Republic; and*
>
> *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".*

79. In addition to this, the person to be appointed as NDPP must be a South African citizen. The NPA Act proscribes the NDPP's term of office. They are appointed for a non-renewable term of 10 years or up until the age of 65, whichever comes sooner. It is worth noting that, since the adoption of our Constitution, we have yet to see an NDPP complete their 10 year term in office without resigning or being removed. This state of affairs has resulted in a spate of acting appointments.

80. Below is a brief timeline reflecting the various individuals who have held the position of NDPP:

80.1. 1 April 2001 – 31 August 2004: Bulelani Ngcuka

80.2. August 2004 – January 2005: Silas Ramaite (acting)

80.3. 1 February 2005 – 17 February 2009: Vusi Pikoli (suspended and then removed / retired)

80.4. 1 May 2009 – 31 October 2009: Mokotedi Mpshe (acting)

80.5. 1 December 2009 – 1 October 2013: Menzi Simelane (December 2011 Simelane was suspended after the SCA; 8 May 2012 Simelane removed pursuant to the Constitutional Court judgment)

80.6. 20 December 2011 – 30 September 2013: Nomgcobo Jiba in an acting capacity, including her maternity leave which she took between early January and 17 May 2013.

80.7. 1 October 2013 – 31 May 2015: Mxolisi Nxasana

80.8. 18 June 2015 – 13 August 2018: Shaun Abrahams

80.9. 1 August 2018 – 31 January 2019: Ramaite (acting)

80.10. 1 February 2019 – present: Shamilla Batoyi

81. The Constitution delineates the NDPP's functions, explaining that the NDPP:

*(a) **must** determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;*

*(b) **must** issue policy directives which must be observed in the prosecution process;*

*(c) **may** intervene in the prosecution process when policy directives are not complied with; and*

*(d) **may** review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:*

(i) The accused person.

(ii) The complainant.

Any other person or party whom the National Director considers to be relevant."
(Emphasis added)

82. The first two subsections are peremptory whilst the latter two are discretionary.

83. In practice, the scenario in (c) may arise in various ways. For instance, following representations being made to the NDPP, he/she might consider whether the decision was consistent with policy. Alternatively, the NDPP might become aware of an instance where the policy has not been followed and intervene. Intervention might also be brought about through an assessment of a DPP's performance. The NDPP must make sure that policy directives are adhered to.

84. When the NDPP chooses to intervene, reasons are requested from the individual prosecutor for the decision. A distinction is drawn between the power conferred in (c) to that which is set out in (d), the latter dealing with the review of a decision not to prosecute. The scenario in (d) might come to the attention of the NDPP: through inspections; where it is brought to the NDPP's attention; where the NPA has been taken on review; or where there may be differences between a SD and a DPP in respect of a decision to prosecute.

85. According to the NPA Act, the SD prosecutes in consultation with the DPP. Naturally, differences may arise. Situations like this may warrant the NDPP's intervention in the form of a review of the decision. When reviewing a decision to prosecute, the NDPP must take representations from the accused, the complainant and any other party who the NDPP deems to be relevant. This might include interest groups or any other person who has a sufficient interest in the outcome, including the investigating officer.

86. The upshot of this discussion is that the NDPP is not entitled to exercise a discretion to interfere with or stop a prosecution however she/he deems fit. The NDPP's powers in this regard are constitutionally and statutorily circumscribed. In NDPP's review is confined to the boundaries of compliance with the prosecution policy.

87. In addition to the powers described above, the NDPP has the following duties:

87.1. With the view to exercising his or her powers in terms of section 22(2) of the NPA Act,

87.2. the NDPP may conduct any investigation necessary in respect of a prosecution or prosecution process or directives, directions or guidelines given or issued by a DPP in terms of the NPA Act, or a case or matter relating to such prosecution or prosecution process or directives, directions or guidelines;

87.2.1. direct the submission of and receive reports or interim reports from a DPP in respect of a case, matter, a prosecution or a prosecution process or directives, directions or guidelines given or issued by a DPP in terms of this Act; and

87.2.2. advise the Minister on all matters relating to the administration of justice;

87.3. Maintain close liaisons with the DNDPPs, the DPPs, the prosecutors, the legal profession and legal institutions to foster common policies and practices and promote cooperation in relation to the handling of complaints made against the NPA;

87.4. May consider such recommendations, suggestions and requests concerning the Prosecuting Authority as the NDPP may receive from any source;

87.5. Assist DDPs and prosecutors in achieving the effective and fair administration of criminal justice;

87.6. Assist the DNDPP, DPPs and prosecutors in representing their professional interest;

87.7. Bring the United Nation Guidelines on the role of prosecutors to the attention of DPPs and prosecutors and promote their respect for and compliance with the abovementioned principles within the framework of national legislation;

87.8. Prepare a comprehensive report in respect of the operations of the Prosecuting Authority which shall include reporting on:

87.8.1. the activities of the NDPP, the DNDPP, the DPPs and the NPA as a whole;

87.8.2. personnel management within the institution;

87.8.3. financial data relating to the administrative and operational functions of the NPA;

87.8.4. any recommendations or suggestions in respect of the Prosecuting Authority; and

87.8.5. information relating to the training programmes for prosecutors and any other information which the NDPP deems necessary;

87.9. May have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by administrative staff; and

87.10. May make recommendations to the Minister with regard to the NPA or the administration of justice as a whole.[8]

88. The power to investigate which is referred to above is a remnant of the Act which created the DSO. Incorporation of the DSO into the NPA Act permitted criminal investigations. It continues to remain there, but is very limited because, pursuant to the legislated creation of the Directorate for Priority Crimes Investigations (*"DPCI"*), it is now the head of the priority crimes investigations who must request an investigation. Ostensibly, it does not refer to a criminal investigation, but to an investigation into the the prosecution decision itself. This interpretation is supported by the fact that the NDPP has the power to direct DPPs to submit reports to him or her.

8 *Also the NDPP shall, after consultation with the DNDPPs and the DPPs, advise the Minister on creating a structure by regulation in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the Prosecuting Authority in determining the powers and functions of such structure.*

89. The office of the NDPP also has a mechanism called a media monitor, which allows the office to keep a watchful eye as to what is happening across the country. Information emanating from there is distributed to all the NPA members.

90. According to Ramaite, the NDPP should not ask a DPP from one area to evaluate the work of a DPP in another area, because the DPPs are appointed and exercise powers in their particular area of jurisdiction. There is no provision in the NPA Act, policy or directives dealing with this scenario. Ramaite had difficulty with a DPP having to take decisions in respect of another DPP's area of jurisdiction.

91. It should be noted that where the NDPP, or authorised DNDPP, deems it in the interest of the administration of justice that an offence committed wholly or partially within the area of jurisdiction of one DPP be investigated and tried within the area of jurisdiction of another DPP then he or she may, subject to the provisions of section 111 CPA Act, direct in writing that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of another DPP.

92. In practice, the affected DPPs confer and agree on the area of jurisdiction in which the trial will take place. They then request a centralisation. The centralisation must be accompanied by the consent of any DPPs involved.

93. The Enquiry was told that a national project is where prosecutors from different jurisdictions work together on a single project, either because it spans different jurisdictions or because it generates national interest. It is normally be driven from the NPA Head Office. It is managed by the NDPP, not arising out of any specific provision, but because it is in the public interest. The considerations are the same as those which determine whether a matter is in the public interest.

94. The different DPPs provide resources and retain supervisory powers. An example of this was the prosecution of the former President. It was a national project but the DPP in KZN retained the power, yet there was a prosecutor from the Western Cape. More

particularly, in the case of organised crime, it is normally a national project, especially if a large organised crime syndicate operates across provinces. The consent of the DPP from where the prosecutor comes and the DPP where the prosecutor is placed is required.

4. THE APPOINTMENT AND ELEVATION OF JIBA AND MRWEBI

95. This section briefly canvasses the qualifications and experience of Jiba and Mrwebi as evinced from their curricula vitae and personnel records. It seeks to establish the skills and competencies which they themselves acknowledge as being the basis on which they were appointed. During the course of the hearings, various allegations were levelled against them which sought to challenge their competence in the positions that they occupy. These allegations are addressed in the section that follows.

4.1. Nomgcobo Jiba

96. Jiba completed her B Juris in 1987 followed by an LLB in 1989 at the Walter Sisulu University. She later obtained a Diploma in Industrial Relations and a LLM in Commercial Law from the University of Cape Town.

97. Between 1988 and 1997, she served as a prosecutor in the Eastern Cape. She resigned from her job as a prosecutor in 1997 and joined Qunta Ntsebeza Attorneys as a candidate attorney.

98. According to her Curriculum Vitae she had been employed as a Senior State Advocate[9] during the period 1999 – 2000 and was appointed as DDPP in 2001 in the Office for Serious Economic Offenses which later, after various developments, evolved into the Directorate for Special Operations (Scorpions). [10]

99. From 2010 to date she has been serving as a DNDPP. In December 2011 she got appointed as an Acting NDPP, after the Court had delivered judgment against Advocate Simelane. She held this position as acting NDPP until 4 August 2013 when Mxolisi Nxasana was appointed, at which point she returned to her position as DNDPP.

9 *This is simply a position and she does not become an advocate by virtue of holding this position.*

10 *Jiba was appointed as DDPP on 1 February 2002 as apparent from personnel records.*

4.2. Lawrence Sithembiso Mrwebi

100. Mrwebi's Curriculum Vitae reflects that before his appointment in 1998 as a DDPP to the then Office of Serious Economic Offences (OSEO) in Pretoria, he served as a senior state advocate in the then office of the attorney-general.

101. Shortly after the OSEO became the Investigative Directorate for Serious Economic Offences and merged with the then Investigative Directorate for Organized Crime to form the Directorate for Special Operations (DSO – commonly known as the Scorpions) Mrwebi was appointed as its regional head in KwaZulu-Natal (KZN). He states in his CV that while he was regional head in KZN, he retained his position as Deputy Director of Public Prosecution but with different functions and more added responsibilities.

102. When the DSO was disbanded in 2009, Mrwebi joined the office of the Director of Public Prosecutions (DPP) in Pretoria where he managed the office's Specialised Prosecutions Division (SPD), which was responsible for the prosecution of commercial crimes, tax offences, environmental crimes as well as sexual offences.

103. On 1 November 2011 under Proclamation No: 63 of 2011 published in Government Gazette No: 34767 dated 25 November 2011 he was appointed as a Special Director of Public Prosecutions (SDPP) and head of the NPA's Specialised Commercial Crimes Unit (SCCU).

5. THE ALLEGATIONS AND THE EVIDENCE

104. Our ToR mandate us to consider the findings and adverse comments made in made in certain Court decisions. In addition, the ToR calls on us to have due regard to all other relevant information, including information related to the Mdluli and Booysen cases.

105. It is worth reiterating that this Enquiry is not a judicial review process, it cannot and will not review the findings of the Courts in the cases discussed below. Where we consider evidence related to the cases, we in no way seek to undermine or subvert the decisions of the Courts.

106. What follows is a canvassing of the evidence in relation to each particular case. This portion of the report relies extensively on the cases, the evidence in the Dropbox, the submissions from the Evidence Leaders and submissions made by Jiba and Mrwebi.

5.1. The case law

107. The case summaries below highlight specific findings and comments the Courts made about Jiba and Mrwebi and we address them in turn.

5.1.1. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (1) SA 254 (GNP) ("FUL HC") – decided by Murphy J

108. FUL applied for the review and setting-aside of the decisions by or on behalf of Jiba, Mrwebi and the National Police Commissioner relating to the withdrawal of criminal and disciplinary charges against Mdluli and his reinstatement as Head of Crime Intelligence within the South African Police Service (SAPS). FUL also sought an order directing that the charges be immediately reinstated and prosecuted to finalisation. The main issues were the lawfulness of these decisions and the power of the judiciary to review prosecutorial decisions.

109. In assessing whether Mrwebi had complied with the statutory requirement of making a decision to withdraw the charges against Mdluli "in consultation with" the relevant DPP,

namely Mzinyathi, Murphy J concluded that Mrwebi's own interpretation of events bore out the finding that the decision was made without the concurrence of Mzinyathi:

"[56] ….In his answering affidavit, Mrwebi described the purpose of the visit by Breytenbach and Mzinyathi to his office on 9 December 2011 as being "to discuss their concerns that they do not agree with my decision". After discussing the evidentiary issues, according to Mrwebi, they agreed with his position that the case against Mdluli was defective, had been enrolled prematurely and could be reinstated at any time. Breytenbach, he said, agreed to pursue the matter and would come back to him with further evidence. Breytenbach failed to pursue the matter diligently and did not come back to him. He then considered the matter "closed", as he stated in a letter to General Dramat of the Hawks, on 30 March 2012. The court, on the basis of this account, is asked to accept that the reason the prosecution has not been re-instated is that Breytenbach failed in her duty to obtain additional evidence and report back, as she had promised at the meeting of 9 December 2011."

110. Moreover:

"[156] Hence, Mrwebi's claim in paragraphs 27-29 of his answering affidavit that Mzinyathi and Breytenbach agreed on 9 December 2011 that the case against Mdluli was defective and should only proceed with the assistance of IGI and the Auditor General is both irrelevant and improbable. It is irrelevant because Mrwebi by that time on his own admission had already taken the decision to withdraw the charges, without obtaining the consent of the DPP, North Gauteng. It is improbable for the same reasons, and also because it is in conflict with the contemporaneous and subsequent documents prepared by Breytenbach and Mzinyathi, with their conduct and with their testimony on the course of events. On the basis of that evidence it is clear that Mrwebi took the decision to withdraw the fraud and corruption charges without first securing the DPP's consent, which is a jurisdictional prerequisite under the NPA Act. His decision was unlawful for want of jurisdiction and must be set aside for that reason alone in accordance with the principle of legality."

111. In criticising Mrwebi's lack of consistency between his actions and his explanations, Murphy J stated:

"[59]. Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in the case. He implied that had she done her job, the charges would have been re-instated."

112. On 23 September 2013, Murphy J granted the orders setting aside the decisions and ordered that the criminal and disciplinary charges against Mdluli be reinstated.

113. Mrwebi's supplementary affidavit was filed late and his reasons for the lateness were considered by the Judge to be sparse. However, Murphy J allowed it.

114. Mrwebi was criticised for his conduct in relation to the filing of the supplementary answering affidavit. The Court held:

"Motivated in part, as he said, by a need to respond to what he considers to be a withering attack by Justice Kriegler on his integrity, credibility, and the propriety of his decisions, and hence by implication his suitability to hold his office, Mrwebi delivered the supplementary answering affidavit (making averments going beyond the challenge to his integrity) on the day before the matter was enrolled for hearing, two months after the replying affidavit was filed and one month after the applicant filed its heads of argument. His reasons for taking so long are not compelling and pay little heed to the fact that his timing ambushed the applicant and denied it the opportunity to deal with the allegations made in the affidavit.

For the most part, the affidavit does not take the matter further and basically repeats his assertion that the decision was not unilateral and that investigations are continuing. Mrwebi referred for the first time in this affidavit to five written reports from members of the prosecuting authority who are investigating the matter, the contents

of which he was disinclined to share with the court for strategic and tactical reasons on the grounds that disclosure will hamper and prejudice the investigation. He was however prepared to share with the court the fact that the NPA has experienced "challenges" in relation to the declassification of documents. Moreover, on 25 June 2013, three months before the hearing of the application, it was established by investigating prosecutors that the evidence of the main witness (who is not identified by name) will have to be ignored in its entirety because it is apparently a fabrication not reflecting the true version of events. The exact nature of that evidence and the basis for its refutation is not disclosed.

For reasons that should be self-evident, it is not possible to attach much weight to this evidence. The applicant has been denied the opportunity to respond to it, and by its nature it is vague and unsubstantiated. Mrwebi, by his own account, and for reasons he does not explain, sat on this information for three months before disclosing it to the court on the day before the hearing. The averments accordingly can carry little weight on the grounds of unreliability. The conduct of the Special DPP, again, I regret, as evidenced by this behaviour, falls troublingly below the standard expected from a senior officer of this court. [11]*" (our underlining)*

115. In relation to the answering affidavit of Jiba, the Court noted that:

"The Acting NDPP fails to mention the representations made to her by Breytenbach, or that Mdluli's written representations of 26 October 2011 were in fact addressed to her. Nor does she refer to the magistrate's finding that an inference of Mdluli's involvement was consistent with the proven facts."

116. On behalf of Jiba, Adv Hodes (*"Hodes"*) initially argued for the NDPP that the Courts have no power to review any prosecutorial decision, only the NDPP may do so and her decision will be final and not reviewable. The Court rejected this argument:

11 *FUL HC, paras 66 – 68.*

"That can never be; if only because the SCA has already pronounced that prosecutorial decisions are subject to rule of law review. It is inconceivable in our constitutional order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission."[12]

117. Murphy J held -

"For all of the many reasons discussed, the decision and instruction by Mrwebi to withdraw the fraud and corruption charges must be set aside. It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it." (our underlining)[13]

118. Murphy J noted the following in relation to FUL's allegation that the Acting NDPP tacitly confirmed the decisions:

"The Acting NDPP did not make any replicating averment in answer to this plea. In the belatedly filed supplementary answering affidavit, Mrwebi merely re-asserted that the court has no power at all to review prosecutorial decisions, which is patently wrong, and, as Justice Kriegler rightly says, a little worrying to hear from a senior prosecutor. In fairness though, Mrwebi did add that the application was in any event "premature". However, Mrwebi did not take issue with the allegation that the NDPP had tacitly confirmed the decisions to withdraw. She clearly has done exactly that.

The dispute that forms the subject matter of this application has been on-going for more than 18 months since February 2012. Given its high profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by section 179 of the Constitution

12 ***FUL HC***, *para 117.*

13 ***FUL HC***, *para 176.*

to intervene in the prosecution process and to review the prosecutorial decisions mero motu; yet despite the public outcry she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by section 195 of the Constitution to be responsive, accountable and transparent.

Besides not availing herself of the opportunity to review the decision, she waited more than a year after the application was launched before raising the point and then did so in terms that can fairly be described as abstruse. Her "plea" made no reference to the relevant paragraphs of the Prosecution Policy Directives, the relevant provisions of PAJA or the principles of the common law. A plea resting only on an averment that an application is "premature" is meagrely particularised and lacks sufficient allegations to found a complete defence that there had been non-compliance with a duty to exhaust internal remedies. Had we to do here with a set of particulars of claim, they would have been excipiable on the grounds of being vague and embarrassing."[14] *(our underlining)*

119. When dealing with the argument relating to the exhaustion of internal remedies, the Court was critical of Jiba:

"It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted before now to assess them, explain her perception, and, if so inclined, to correct them.

….

14 ***FUL HC***, *paras 196 – 197.*

For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed solely at shielding the illegal and irrational decisions from judicial scrutiny." [15]

120. Similarly, in relation to a remedy:

"The NDPP and the DPPs have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of what has gone before, will be a foregone conclusion, and further delay will cause unjustifiable prejudice to the complainants and will not be in the public interest." [16]

5.1.2. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (4) SA 298 (SCA) delivered on 17 April 2014 ("FUL SCA") – Brand JA (Mthiyane DP, Navsa, Maya and Ponnan JJA concurring)

121. This was an appeal against the High Court's decision (Murphy J's judgment) setting-aside of the decision made by Jiba and Mrwebi to, inter alia, withdraw certain criminal charges against Mdluli. The SCA upheld the High Court's decision setting-aside the impugned decision to withdraw Mdluli's prosecution, on the grounds of legality and rationality. The SCA however, held that the decision was not reviewable under PAJA.

122. In addition, the High Court had ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of the charges were enrolled and pursued without delay and had directed the Commissioner to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings. The

15 ***FUL HC***, *paras 199 – 200.*

16 ***FUL HC***, *para 237.*

SCA agreed with the NDPP and the Commissioner that such mandatory interdicts were inappropriate transgressions of the separation-of-powers doctrine. It held that a Court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons, and that this was not such a case.

123. The SCA concluded that **FUL HC** was correct in concluding that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, was untenable and inconceivable to the extent that it fell to be rejected out of hand. The only inference was that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based and as such the decision could not stand. Having so concluded, the SCA held that it was unnecessary to deal with the other reasons given in the **FUL HC** as to why Mrwebi's impugned decision could not stand.

5.1.3. Booysen v Acting National Director of Public Prosecutions and Others [2014] 2 ALL SA 319 (KZD) delivered on 26 February 2014 – decided by Gorven J

124. Booysen applied for an order for the review and setting aside of two written authorisations to charge him with contraventions of s 2(1)(e) and (f) of the Prevention of Organised Crime Act 121 of 1998 (POCA) and the decision to prosecute him on further counts. He based his application directly on the Constitution and in particular on the principle of legality. It was alleged by Jiba, as Acting NDPP, and the NPA (the respondents) that Booysen participated in the conduct of an enterprise through a pattern of racketeering activity and managed the operations of the enterprise. This had been done whilst he was in charge of a specialised police unit.

125. The Court went on to deal with Jiba's answering affidavit on how she arrived at the first impugned decision, i.e. to prefer charges under POCA against Booysen.

126. The Court pointed out that Booysen was within his rights in reply to deal with inaccurate assertions made by Jiba in her answering affidavit and to issue the challenge and invitation to her to respond thereto. The Court pointed out in relation to the inaccuracies that Jiba 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."

127. The Court held that the first impugned decision was arbitrary, offending legality, and as such was unconstitutional. The Court held further that if the Respondents had properly understood the principle of legality, their response to demands for documents or reasons might have been different. The Court held:

"As mentioned, there is reference to documents and correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The "rhyme or reason" test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the State in its conduct of the future trial. In my view it would therefore not require an exacting, still less an exhaustive, level of disclosure." [17]

128. The Court found that what would have been sufficient was a consideration of a request for authorisation, forwarded to the NDPP under cover of a letter summarising the form and content of the charge sheet, setting out a detailed background to the charges and summarising the evidence. It was not necessary to disclose every detail of the State's case, strategy or evidence where this is not subject to the criminal discovery process.

129. Whilst the Court set aside the authorisations and decision to prosecute, it held that this decision did not preclude fresh authorisations from being issued or fresh decisions to prosecute being taken if there was a rational basis for such decisions.

17 Booysen *Judgment, para 38.*

5.1.4. Zuma v Democratic Alliance [2014] 4 All SA 35 (SCA) delivered on 28 August 2014 ("Spy Tapes 2") – Navsa ADP (Mpati P, Brand, Ponnan and Tshiqi JJA concurring)

130. This matter follows upon the decision of this Court in **Democratic Alliance v Acting National Director of Public Prosecutions.**[18] The appeal was part of a protracted litigation battle involving Zuma, the office of the NDPP and the DA. It concerned the release of audio recordings and transcripts by the office of the NDPP that were used as grounds to justify the withdrawal of criminal charges against Zuma. In respect of her conduct, the Court held:

> *"The Acting NDPP filed an answering affidavit in which, essentially, she took no stance on the confidentiality of the materials sought by the DA, other than the written representations in her possession, and further that confidentiality is not specifically claimed by anyone in respect of any particular document or other materials in the possession of the office of the NDPP. In relation to the internal memoranda, that part of the answering affidavit referred to in para 19 above lacks specificity and the generalisation resorted to by the Acting NDPP, which will be dealt with in greater detail in due course, is, to say the least, disingenuous. Worryingly, much of what the Acting NDPP stated in her answering affidavit appears not to be first-hand knowledge and seems to be based on what she was told by Mr Mpshe, who was the Acting Director of Public Prosecutions at the time of the decision not to prosecute Mr Zuma. Mr Mpshe did not depose to a confirmatory affidavit. It will be recalled that the Acting NDPP decided to abide the decision of the high court and did not make an appearance in this court. Thus, the party that filed an inconsequential affidavit took no part in the argument in either court and the party that did not file an affidavit was the only contestant in both."* [19]

131. The SCA approvingly quoted remarks made by the High Court judgment in relation to the office of the NDPP.

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18 2012 (3) SA 486 (SCA) (**"Spy Tapes 1"**).

19 **Spy Tapes 2**, para 26.

"[The NPA], as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. The first respondent has a duty to explain to the citizenry why and how Mpshe arrived at the decision to quash the criminal charges against the third respondent. In pursuance of its constitutional obligations it is incumbent upon the first respondent to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP. The documents, sought by the applicant, will assist in enquiring into the rationality of the decision taken by Mpshe. It cannot simply be said that all the documents submitted, whether oral or written, are covered by privilege. That would amount to stretching the duty of privilege beyond the realms of common sense and logic" [20]

132. Finally, the Court made the following comment on the conduct of Jiba:

"One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA) criticised the office of the NDPP for being less than candid and forthcoming. In the present case, the then Acting NDPP, Ms Jiba, provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Furthermore, it is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definitive response by the latter or a decision by the NPA on the

20 ***Spy Tapes 2***, *para 35.*

release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry." [21]

5.1.5. General Council of the Bar of South Africa v Jiba & Others 2017 (2) SA 122 (GP) – Legodi J (Hughes J concurring)

133. The GCB applied for an order removing the Jiba, Mrwebi and Mzinyathi from the roll of advocates, on the grounds that they were no longer 'fit and proper' to practice. Its complaints arose from the respondents' conduct in three matters: the Booysen case; the spy-tapes case; and the Mdluli case.

134. The Court found that Jiba had ceased to be a fit and proper person to remain on the roll of advocates, for the following reasons: she failed to comply with rule 53 in respect of the timeous filing of the record relating to the decision to withdraw the charges against Mdluli, and the reasons given for the delay were unreasonable and indicative of bad faith; she supplied an incomplete record without proper explanation; she disobeyed a directive by the Deputy Judge President; she failed to heed the advice of counsel briefed to defend her in her capacity as Acting National Director of Public Prosecutions, and filed affidavits contrary to that advice; she steadfastly, and in the face of legal advice to the contrary, did everything in her power to ensure that the charges against Mdluli were permanently withdrawn, despite the prima facie evidence against him; she deliberately attempted to mislead the review court by failing to disclose the fact that a prosecutor in the Mdluli case had sent her a memo asking her to review her decision to discontinue the Mdluli prosecution, deposing instead that the matter was never brought to her attention.

135. With regards to Mrwebi, the court found that he had ceased to be a fit and proper person to remain on the roll of advocates, because: he had lied about a consultative document he had prepared concerning the Mdluli prosecution; had deliberately failed to disclose a memorandum and consultative note setting out the reasons for discontinuing the prosecution; he discontinued the prosecution of Mdluli contrary to an understanding with

21 ***Spy Tapes 2***, *para 41.*

Mzinyathi, the DPP in charge of the prosecution; in his evidence in disciplinary proceedings he had turned himself into an unreliable and dishonest witness. His related answer in the present proceedings was not only a lie but was intended to mislead the court; he and the first respondent had ignored solid advice by counsel that the decision to discontinue the prosecution of Mdluli would not stand in court; he refused to reinstate the charges against Mdluli in the face of prima facie evidence and in contravention of the NPA Act; and in an affidavit he alleged that he had taken the decision to withdraw the charges against Mdluli in consultation with the third respondent, which evidence was 'patently, dishonestly given'.

136. In respect of Mzinyathi, the court found that there was insufficient information against him to justify the relief sought.

5.1.6. Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa 2019 (1) SA 130 (SCA) (10 July 2018) – Majority: Shongwe ADP (Seriti and Mocumie JJA concurring); Dissent: Van der Merwe JA (Leach JA concurring) – currently on appeal at the Constitutional Court

137. Jiba and Mrwebi appealed the High Court decision, and the GCB cross-appealed the adverse costs order in the Mzinyathi complaint, to the Supreme Court of Appeal. Shongwe ADP wrote the judgment for the majority, and Van der Merwe JA wrote for the minority.

138. The majority agreed with the High Court's view that misconduct could not established based on the Booysen and Zuma matters, but disagreed with the High Court in it finding misconduct based on the Mdluli complaint.

139. In relation to Jiba in the Mdluli complaint, the majority held that the complaint that had been made by the GCB did not support a finding of misconduct against her. The GCB's complaint was premised on the finding that Jiba: had submitted an incomplete record in the review; that she attempted to mislead the court by not disclosing a memo; had refused to internally review the withdrawal of charges against Mdluli; made a statement that she had not received an affidavit, when she in fact had, and; Jiba's disagreement with counsel's view there was a case against Mdluli. However, the majority found that the High

Court had materially misdirected itself by characterising Mdluli in an "egregious manner as if he was already convicted of the allegations against him". In the majority's view, this negatively impacted the High Court's evaluation of the matter.

140. The Court found that Jiba had indeed been acting on legal advice and furthermore the litigation was being handled by the LAD, so a misconduct finding against her in her personal capacity – which is required for removal from the roll of advocates – could not be justified.She did not stand to benefit from filing an incomplete record, nor could it be established that she had acted dishonestly.

141. In relation to Mrwebi, however, the majority was satisfied the alleged misconduct was established. Mrwebi tried to mislead the court about his consultation with Mzinyathi and he had not provided a proper record. They were also satisfied Mrwebi was not fit and proper to practise as an advocate.

142. But in their view the High Court had misdirected itself on the appropriate sanction. This was suspension. In setting out its reasoning, the majority stated:

> *"All these complaints collectively or individually cannot justify the striking off the roll of advocates. These are common mistakes which counsel make in their daily work and are mostly excusable. Moreover Mrwebi was not acting for a client but was a litigant advised by the LAD and counsel. Nowhere in the judgment of the court a quo was it shown that the court considered a suspension instead of the ultimate penalty of striking an advocate off the roll and reasons why a suspension was not an appropriate sanction. I am of the view that considering all the facts and circumstances of this case a suspension of Mrwebi as an advocate would be the appropriate sanction."* [22]

143. The Court ordered that Jiba's appeal be upheld. Mrwebi's appeal on the sanction was upheld as his removal from the roll was replaced with a 6 month suspension. The GCB's cross-appeal was dismissed.

22 ***GCB SCA,*** *para 28.*

144. The minority proceeded to scrutinise the various cases that had been presented before the Court, raising issues around Jiba's "baffling lack of interest in being of assistance to the court" in the Zuma matter,[23] her failure to describe mistakes made under oath despite having an opportunity to do so in the Booysen matter, her "lack of appreciation of the duty of an advocate to assist the Court to come to a speedy and just conclusion" and lateness in filing affidavits with the Court in the FUL matter.[24]

145. The minority highlighted that different versions emerged from Jiba's affidavits in relation to the Mdluli prosecution, with one indicating that she did not wish to "descend into the arena" and another showing that she had taken representations from Mrwebi and Chauke immediately after learning of the withdrawal of charges.

146. The minority found that Jiba's view concerning the memorandum by Breytenbach and Ferreira "could not have been honestly held" and that the memorandum was "certainly worthy of consideration", with the minority ultimately finding that: "[t]he statement that [the memorandum] emanated from a person that was not and should not have been considered relevant, is simply spurious".[25]

147. In the minority's view of the evidence, Jiba's actions extended beyond mere incompetence or unsuitability for the position. They demonstrated a serious lack of appreciation or disregard of an advocate's duty to be of assistance to the Court and uphold the administration of justice. Being a litigant in an official capacity was found to be no excuse. In fact, it was more reason to conduct the litigation with the utmost trustworthiness and integrity. In all three matters, the minority found that Jiba gave untruthful evidence under oath, displaying dishonesty and a lack of integrity.

148. The minority questioned Jiba's persistent denial under oath of misconduct on her part, finding that this displayed a lack of insight into what she had done wrong. This, in turn, reflected adversely on her character. In addition to this, she berated the GCB, making

23 ***GCB SCA,*** *para 42.*

24 ***GCB SCA****, paras 46 – 47.*

25 ***GCB SCA,*** *para 53.*

unsubstantiated allegations against them – a quality, which the minority found, was not consistent with the high standards of integrity expected from a practicing advocate. With regards to Jiba, the minority concluded that the GCB HC was correct in ordering removal of Jiba's name from the roll and there was no basis for interfering with the exercise of that Court's discretion.

149. In relation to Mrwebi, the minority honed in on his decisions in relation to the Mdluli prosecution. In relation to the Breytenbach disciplinary inquiry, Mrwebi's evidence was found to have been patently dishonest. After canvassing events relating to the withdrawal of charges, the minority held that the "inference is irresistible that Mr Mrwebi had throughout used his senior position in the prosecutorial service to advantage Mr Mdluli and to ensure that he not be prosecuted".[26]

150. Concluding on its position regarding Mrwebi, the minority stated as follows:

"Mrwebi lied about the event of both 5 and 9 December 2011 and abused his position. Not only has [Mrwebi shown himself to be seriously lacking in integrity, but has failed in these proceedings to have taken the court into his confidence and fully explained his actions. All of this hallmarks him as a person unfit to practice as an advocate, particularly in light of the authorities already referred to when dealing with [Jiba]. I have no hesitation in endorsing the order of the court a quo that [Mrwebi] should be struck from the roll of advocates." [27]

5.1.7. Freedom Under Law v National Director of Public Prosecutions & Others 2018 (1) SACR 436 (GP)

151. This case concerned a review which was brought against two impugned decisions. The first was a decision to decline to prosecute and withdraw charges of perjury and fraud against Jiba. The decision was found to have been taken by the NDPP at the time, Adv Shaun Abrahams ("Abrahams"), and was based on an opinion provided by one

26 ***GCB SCA***, *para 67.*

27 ***GCB SCA***, *para 68.*

the Regional Heads of the SCCU, Adv Marshall Mokgatlhe ("Mokgatlhe"). The second decision concerned the President's failure to act in terms of section 12(6) of the NPA Act to suspend Jiba and Mrwebi pending enquiries into their fitness to hold office and to institute those enquiries in the first place.

5.2. Evidence surrounding the cases

5.2.1. Booysen

152. This section focuses in on of the Booysen matter and deals with the issue of racketeering authorisations. It is relevant to Jiba and not Mrwebi. The purpose of this evidence is not to evaluate or determine the guilt or innocence of Booysen in relation to the criminal charges he is currently facing, so no conclusions are drawn on that aspect. Rather, the Booysen matter is being considered with reference to the ToR vis-à-vis the lawfulness of the decision taken by Jiba to authorise the prosecution of Booysen for racketeering.

153. Mlotshwa was the Acting DPP in KZN between 17 May 2010 and 9 July 2012. At some point between January and March 2012, he received a call from Jiba whilst on route to Port Shepstone. She informed him that there was a matter which, because of pressure, had to be enrolled urgently. Mlotshwa explained that he would not make a decision before receiving and reading the dockets. Jiba then reiterated that the matter was urgent and that she would call him back. She never did, nor did she identify the nature and source of the pressure.

154. Maema, a DDPP from the North-West, explained the events in March 2012, around the same time Jiba made the call to Mlotshwa, which led to him being brought into the Cato Manor prosecution. He provided an unsigned and a subsequent signed affidavit that had been used in Jiba's criminal investigation to the Enquiry.

155. There was a small discrepancy between the two. In terms of the unsigned affidavit, he explained that he was directly approached by Jiba. She explained that Mlotshwa had appealed to her that he be provided with prosecutors because he was investigating the

Cato Manor Unit but was concerned that his prosecutors may be compromised because of the relationship that they had with members of that unit. The difference with the signed affidavit was that in the signed affidavit Maema explained that Jiba had approached Smit rather than Maema directly. Smit is the DPP in the North-West.

156. However, it is the unsigned affidavit that must be correct, since an email from Smit to Jiba sent on 13 March 2012 indicated that it was Jiba who had approached Maema. In reply to that email Jiba's secretary, Lepinka, explained that the Cato Manor prosecution was a National Project and that the Office of the NDPP would be financing and managing it.

157. Mlotshwa vehemently denied any suggestion that he had made a request for help with the prosecution and explained that he would have been readily able to deal with it, even if it was a sensitive matter.

158. A few months after receiving the call from Jiba, Mlotshwa testified that he had received a call from Chauke, the DPP of South Gauteng, who said that he was instructed by Jiba to send a team of prosecutors to handle the Cato Manor case.

159. On May 2012 at a meeting with all DPPs in the country held at the VGM building in Pretoria, Mlotshwa and Chauke were called to see Jiba. Chauke told Mlotshwa that he could not divulge details regarding the Cato Manor case because of security issues that would result in advocates within Mlotshwa's office being arrested. 7 years later, no arrests have been made and there is no documented evidence indicating that any advocates within Mlotshwa's office had been implicated in the alleged Cato Manor killings.

160. Mlotshwa's testimony was that Jiba told him that she had received an opinion from Nel to the effect that he was entitled to sign a delegation document to allow prosecutors from outside his jurisdiction to prosecute cases within KZN. He was also required to sign the indictment. Mlotshwa agreed to do so, on the condition that he received all the supporting documentation and evidence. He never received any, this, despite a heated exchange between him and Chauke as he had been sent an indictment without any

supporting documentation, memoranda or evidence. There were multiple exchanges and Jiba, together with Thoko Majokweni, were copied in on all of them. Jiba explained that she did not get involved because differences between various DPP's arose frequently and she preferred to let them resolve it themselves.

161. After the exchange, Mlotshwa heard nothing further regarding the Booysen prosecution.

162. Jiba conceded that Mlotshwa did not ask or plead for assistance due to prosecutors being conflicted. This concession was made despite the fact that in her representations to the President she maintained her former position that Mlotshwa had asked her for assistance. However, she denied that she had indicated to him that there was pressure. She further explained that she had in fact been approached by members of IPID who had been assigned to investigate the conduct of the Cato Manor members. IPID was concerned that the case was not moving and requested her assistance, adding that they feared members of the NPA in KZN had a close relationship with the police officials implicated.

163. Jiba's concession must be considered against her signed written submissions to the President made on 10 August 2018 where it was is stated that:

"the reason why a national prosecuting team was established is because the then KZN Acting DPP pleaded that the suspects are known and have worked closely with members of the sub-unit and some of the cases have fallen through the cracks of the provincial prosecutors."

164. Following her concession and when asked by the Panel whether she had investigated the allegations made by IPID regarding certain prosecutors in KZN being compromised, Jiba replied that she had not made any investigations based on IPID's allegations. When asked why she had not followed up, she replied that it was an oversight on her part.

165. Jiba sought to object to the hearing of Booysen's evidence, citing concerns that the matter was still ongoing and that it may jeopardise the criminal proceedings which are underway. Notwithstanding her objection, the evidence was allowed.

166. Booysen's evidence was that at the time that he was arrested and charged, he was the Provincial Head of the DPCI (Hawks). An organogram of the structure of the KZN Hawks for the period of the indictment against Booysen was provided. It shows that between 2008 – 2010, Booysen reported to Major General Brown, Major General Masemola and Lt General Ngidi, as the Provincial Commissioner of the SAPS in KZN. It further shows that the Cato Manor Unit (which is the alleged enterprise that Booysen managed) was in fact headed by a Colonel Olivier who reported in turn to Col Aiyer. Booysen was Aiyer's superior.

167. During the period March 2010 – September 2011, the Organogram shows that Booysen reported to Dramat (National Head of the DPCI) and Ngobeni (Provincial Commissioner, KZN). During this period, there was an even greater degree of separation between Booysen and the Cato Manor unit in reporting structures.

168. In contrast to this structure, when Maema drew up an organogram of the reporting structure of the Cato Manor Unit to prove the enterprise that would form the basis of the racketeering charge against Booysen, he depicted an organogram in his notebook. In Booysen's view, that organogram was incorrect. Not only did it not reflect the entire indictment period but more particularly, it missed out a layer of the reporting structure between Booysen and the Cato Manor Unit. The structure as depicted by Booysen was not challenged.

169. At the time that he was charged, according to both Booysen and Padayachee, Booysen was working on a particularly sensitive and high profile case, namely the Thoshan Panday investigation. This case involved a multi-million-rand corruption investigation against wealthy businessman Thoshan Panday who is alleged to have had business links to direct family members of Jacob Zuma.

170. The case also concerned procurement irregularities within the SAPS. Initial investigations by the investigating officer revealed possible corruption involving senior SAPS officers and a private individual. During this investigation Booysen reported various incidents

during which attempts were made to thwart his investigation from within the SAPS. One of the suspects in the investigation, Colonel Madhoe, subsequently tried to bribe Booysen and pressurise him to compromise the investigation. Booysen set up a sting operation with resulted in Madhoe being arrested for attempting to bribe Booysen with a R2 million payment.

171. Thereafter, the suspect, Thoshan Panday, was arrested in connection with the investigation. The charges against both Madhoe and Panday were subsequently provisionally withdrawn on 11 February 2013 but were later reinstated by Abrahams.

172. It was during this period that an article appeared in the *Sunday Times* stating that Cato Manor SVC section was a *"death squad"*. The article also accused Booysen of being complicit in their alleged actions.

173. Booysen was then suspended from duty and a disciplinary hearing was instituted against him. The hearing was chaired by Nazeer Cassim SC (*"Cassim"*) was held. The issue before Cassim concerned Booysen's conduct in relation to the Cato Manor Unit. The charges of misconduct against Booysen included that he had not properly supervised and controlled the Cato Manor Unit and had brought the SAPS into disrepute. Cassim made the following findings:

173.1. The SAPS had not discharged the onus to demonstrate that Booysen misconducted himself in relation to this charge.

173.2. The witnesses did not directly implicate him in any wrongdoing;

173.3. It was wrong to single Booysen out as being responsible for the Cato Manor Unit when there were two Deputy Provincial Commissioners, namely, Masemola and Brown who were also in positions of authority;

173.4. The evidence of Col Aiyer (*"Aiyer'*) who accused Booysen of controlling the Cato Manor Unit, despite the fact that Aiyer was the direct commander of that Unit, was unpersuasive. Aiyer was found to have been a dismal witness, obsessed with

notions of his own importance. Cassim in fact questioned whether Aiyer should continue to be employed by the SAPS. He also found that Aiyer was determined to tarnish Booysen's reputation irrespective to the overall interests of the SAPS. He hated Booysen and appeared to have a vendetta against him.

174. He successfully challenged his suspension in the Labour Court on two occasions.

175. Booysen further testified that a central part of the charge against him is that he managed and supervised the Cato Manor unit's alleged criminal conduct in return for a monetary award. The monetary award referred to was a once off R10 000 payment awarded by the SAPS for good service by its officers.

176. He asserted that the awards are discretionary and are determined by senior officers, on the recommendation of the provincial commissioner, sitting in a committee nationally.

177. Booysen's evidence was that neither he nor the Cato Manor Unit officers had any guarantee or entitlement to the monetary award. He was awarded a once-off payment of R10 000.

178. In response to the evidence that Jiba had before her when she authorised the prosecution of him, Booysen confirmed that he had seen the dockets provided to him by Maema, the main prosecutor and they indicated as follows:

178.1. Of the 23 dockets, only two mention Booysen.

178.2. Of the 290 statements in the dockets, only 3 statements mention him.

178.3. Two of these statements (by Naidoo and Williams) simply place Booysen at the scene of the incidents after they took place when the police were investigating the scene.

179. In view of the scant evidence against him, and the timing of his suspension and then prosecution, he attributed his prosecution to the fact that he was investigating Thoshan Panday.

180. In addressing how the docket in the Booysen prosecution came before Jiba, it is important to first describe what the ordinary procedures for racketeering investigations are. Within the Head Office of the NPA, a committee was tasked with dealing with racketeering offences. Adv Elijah Mamabolo ("Mamabolo") is a Senior State Advocate in the Special Projects Division (*"SPD"*), dealing with organised crime. In this capacity, Mamabolo was responsible for processing applications for the NDPP for the authorisation of racketeering prosecutions. The SPD was based at the office of the NDPP. Hofmeyr's evidence was that he had worked closely with Mamabolo on certain cases and indicated that the purpose of this committee was to evaluate and interrogate possible racketeering charges before they were placed before the NDPP to authorise. The SPD's work to which Mamabolo refers would include scrutinising applications in detail before writing a report to the NDPP on their findings. This process involved the team, seeking to charge an accused with racketeering coming to Head Office to engage with the racketeering, committee / SPD. It was described as a fairly comprehensive process of interrogating the prosecution team's assumptions and assessing the evidence to ensure that racketeering is used effectively.

181. During her tenure as Acting NDPP Jiba appointed Adv Andrew Mosing (*"Mosing"*), a DDPP, as head of the SPD which was still based at the office of the NDPP. Mamabolo was excluded from working on both the **Booysen** matter and the **Savoi** matter although he was not aware of a reason for this. Mosing exclusively dealt with these cases.

182. In the report, Mamabolo, inter alia, explains that in the normal course, racketeering applications were referred to him before being presented or tabled before the NDPP or Acting NDPP. The **Booysen** matter, the **Savoi** matter and the **John Block** matters were all handled with *"utmost confidentiality or secrecy"* by Mosing and Jiba, and were held in a highly fortified safe under lock and key. When he requested to see the files, he was

informed that the file is kept under lock and key by Mosing, together with other high-profile matters. Everything was shrouded in *"puzzling confidentiality or secrecy."*

183. The team dealing with the **Booysen** matter included Mosing, Maema, Mathenjwa, Moeletsi and Ghangai. They advised Jiba.

184. According to Mamabolo, the case docket and the racketeering authorisation application was never made available or presented to Mamabolo in order for him to make an informed recommendation to the Acting NDPP.

185. Generally, the procedure in relation to racketeering matters was as follows:

186. Mamabolo and Adv JJ Kruger (*"Kruger"*) would be contacted by the regions about the existence of potential racketeering matters;

187. They would set aside a day or two to travel to the particular province, meet with each advocate from the Organised Crime Division and physically go through the docket/s with the individual prosecutor and identify any other potential racketeering matters;

188. On an ongoing basis, Mamabolo and Kruger would liaise with the prosecutors across the regions until a formal racketeering application would be brought to the NDPP for authorisation –either through Mamabolo and Kruger – or through the Organised Crime Office in the Office of the NDPP.

189. Mamabolo and Kruger would then go through the prosecution memorandum. Using their particular skill and expertise, they would scrutinise the memorandum to see if the accused is properly linked and cited. They would then go through the indictment and charge sheet to ensure that the charges and averments are in perfect order. Once they were satisfied that all was in order, including the identification of the enterprise and that each accused committed more than one scheduled offence, they would prepare a certificate to be signed by the NDPP.

190. The prosecutor or advocates concerned would next make a presentation to the NDPP in the presence and with the assistance of Mamabolo and Kruger.

191. This process was referred to by Hofmeyr and corroborated by Mamabolo.

192. This was not the process followed in the **Booysen** matter and no explanation has been provided as to why the accepted process was not followed. Jiba's evidence was that this role was served by Mosing, who was Head of the SPD, the reference being that there was nothing sinister about the process followed.

193. Mokhatla, a DNDPP and the head of LAD, when shown the Exco minutes of 5 March 2014 in which Nxasana raised concerns around the **Booysen** prosecution, recalled the meeting. She also confirmed that it was at that meeting that Jiba indicated that Chauke would provide a report on the **Booysen** matter to Nxasana but that she was not aware whether that report was provided to the NDPP. She confirmed however, that the report stayed on the action log on subsequent exco minutes for some time, indicating that the report was not provided for some time.

194. Mosing deposed to an extensive affidavit, dated 5 May 2015, dealing with several aspects of the Booysen prosecution and Jiba's version on oath in the Booysen matter and thereafter.

195. Of relevance to the Booysen matter is the fact that Mosing does not mention that the standard process of evaluating and vetting potential racketeering charges was ever conducted in the Booysen matter. Instead, Mosing states that one of his duties was to advise the NDPP on all applications for authorisation in terms of section 2(4) of POCA.

196. As part of his duties he attended a meeting on 8 March 2012 with three members of the IPID who were investigating the Cato Manor Unit.

197. At the 9 March 2012 meeting, IPID members referred to the fact that the Minister of Police and the Acting National Commissioner of Police had expressed dissatisfaction with the

slow progress made by the two investigating units since December 2011. They needed to "rope in prosecutors" because prosecutors that had been promised by the Acting DPP KZN, Mlotshwa, were not materialising. Notably, Mosing does not state that Maema and other prosecutors from outside of KZN were also at the meeting and had already been tasked with prosecuting the matter. They therefore decided to meet with the NDPP to ensure that a joint approach would be taken to achieve results. Mosing was subsequently informed (he does not say by whom) that Maema was the lead prosecutor on the team of DDPP's from Gauteng because of his experience in racketeering matters. It remains unclear what that experience was.

198. Mosing indicated that Chauke's role was merely to manage the team as they were mainly from his office but he would not be vested with any decision-making powers regarding prosecutorial decisions as the case fell outside of his jurisdiction.

199. Mosing indicated that he had not involved any other members of his own unit, the SPD, in the matter because he was aware that some of them knew Booysen.

200. His role in the matter was to interact with the prosecuting team and guide them as far as racketeering issues were concerned and to act as liaison between the Acting NDPP and the team and to advise the Acting NDPP on developments as conveyed by the team or as gleaned by him. He was not an integral part of the prosecuting team but he did deliberate with them on the merits of the evidence.

201. On or about 15 August 2012, Mosing received the application for racketeering authorisation from the prosecuting team under cover of the letter from the DPP, KZN (Noko) dated 15 August 2012. At the same time, he received an application for centralisation under cover of a letter from the DPP South Gauteng. He drafted a letter to the Acting NDPP recommending the approval of the application for authorisation of the racketeering prosecution and centralisation on the following day, 16 August 2012. On 17 August 2012, Jiba approved the authorisation and the application for centralisation. It appears that

there was no presentation from the prosecution team in accordance with the practice which Mamabola describes.

202. After the prosecution was authorised, and on 27 August 2012, another application for centralisation was received in respect of an offence committed in the North West Province under cover of a letter from Noko, dated 20 August 2012. It pointed out that the first application for centralisation was erroneously submitted under cover of letter from the DPP: South Gauteng instead of KZN. Mosing wrote a memo to Jiba clearing up this error and a new centralisation directive was issued on 27 August 2012.

203. This raises the question of why a centralisation directive was sought after the authorisation of the prosecution and after months of work had been done by a prosecuting team from outside of the province in which one of the crimes was committed.

204. To the extent that a centralisation directive was required to link the one crime in the North West to the KZN based crimes – this should properly have been sought before the authorisation to prosecute was granted.

205. Jiba indicated in her affidavit that she had regard to the evidence in the dockets. Under cross-examination, Jiba stated that she did not have regard to the dockets in their entirety but only to certain aspects of the dockets that she asked for when they appeared relevant.

206. In relation to what was in fact before Jiba when she took her decision to authorise the prosecution of Booysen, the Prosecution Team compiled an internal memorandum for Counsel in response to the Booysen review application. This had been provided to Adv Hodes SC (*"Hodes"*) and Adv Manaka (*"Manaka"*). The memorandum records that the following information was before Jiba when she took her decision:

206.1. The applicant was the de facto commander of the Cato Manor Unit;

206.2. The monetary awards documents;

206.3. The statements of Ndlondlo, Aiyer and Danikas – which implicated Booysen; and

206.4. Booysen's Affidavit in the Mkhize application in which Booysen's personal knowledge of the Taxi Violence Killings is recorded.

207. That is the extent of the information which the Prosecution Team recorded in their memo to counsel as to what was before Jiba when she took her decision. They do not mention the dockets. This should not be understood to be saying that Jiba for purposes of issuing the authorisation should have considered each page in the docket. It simply sets out what the versions are around what she had in fact considered.

208. The evidence referred to above should be compared with what Jiba stated in her affidavit before Gorven J. There, she said that she had had regard to information under oath and the evidence as contained in the dockets and copies of which were made available to Booysen. She made averments regarding what the evidence established against him but did not refer to the information itself. Booysen successfully disputed that none of the information in docket established any of her averments, as there were only 3 witness statements that referred to Booysen and it was found that all of them did so innocuously. Jiba also made particular reference to the statements of Aiyer, Danikas and Ndlondlo. It was these statements, together with the other information in the docket which Jiba relied on.

209. In her evidence before the Enquiry, Jiba repeatedly referred to photos of the killings – particularly that of Bongani Mkhize (*"Mkhize"*). The photos were gruesome and she expressed a desire to seek justice for those that were killed. However, what was not clear – and Jiba was unable to explain under cross-examination – was what the relevance of the photos were to whether or not the evidence showed a prima facie case of racketeering.

210. Jiba further indicated that she had relied on Booysen's affidavit in the Mkhize application as evidence that he managed the enterprise. Booysen was the Fourth Respondent and deposed to the affidavit on behalf of the SAPS Respondents. She concluded this because the information in the affidavit, it showed that he had knowledge of the operations that were conducted by the people that were under his control. It was pointed out to Jiba

that one would expect the head of the Organised Crime Unit to know what was going on by virtue of the fact that he had been required to depose to an affidavit on behalf of the SAPS – because of his position as head of the Unit. It is what generally happens when one is asked to depose to an affidavit – one looks at all the files and relevant materials, familiarises oneself with the documents and then deposes to an affidavit. Paragraph 2 of Booysen's answering affidavit read inter alia that "the facts stated herein … within my personal knowledge, alternatively have been obtained by me from files and documents under or in the control of SAPS". The proposition was that it could not be suggested from the Booysen affidavit that he had personal knowledge of all the contents of the affidavit. In fact, Booysen's reply rebuts that, indicating that *"As I was not at any of the shooting incidents, I did not have first-hand knowledge and was in fact relying on reports."* Jiba objected to answering this question and indicated that she had already explained her process and thinking.

211. Jiba's evidence was that there was nothing unlawful about the decision she made in issuing a racketeering authorisation to prosecute Booysen. She explained that such an authorisation was done in terms of POCA. The intention, according to Jiba, of the legislation was to *"touch those who will never be touched by the law and by the might of the law precisely because they never get to the scene of crime but they have others that are at the scenes of crime".*

212. Sections 2(1)(e) and (f) require that she must show that there was an enterprise, that there was a manager and that the operations of this enterprise are conducted through a pattern of racketeering activities; the difference was that in 2(1)(f) it was sufficient if the state has evidence to prove the management and the knowledge of what this enterprise is actually doing, whereas in 2(1)(e) the person also had to participate.[28]

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28 Section 2(1) of POCA, in relevant part, provides:

"(1) Any person who-

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

. . .

(f) manages the operation or activities of an enterprise and who knows or ought to reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs though a pattern of racketeering activity;

. . .

Within the Republic or elsewhere, shall be guilty of an offence"

213. Jiba set up a team of prosecutors, senior and junior, from other provinces to run with the case. She requested Mosing, who was then the head of Organised Crime based in North Gauteng, to become part of this team. He was the liaison between her and the team and kept her informed about developments in the case.

214. Jiba described the killing of Superintendent Nhlanhla, a police official responsible for the taxi violence between Kwa-Maphumulo Taxi Association and the Stanger Taxi Association. He was transporting suspects to court when he was attacked and murdered. The persons who killed Superintendent Nhlanhla were then killed by the police. One of the deceased, prior to his death, had instructed attorneys that he would cooperate with the police. Due to eight or nine deaths, the deceased prior to his death, had obtained an interdict against the police from killing the members of Kamapumulo Taxi Association. He was the last remaining suspect in the murder of Superintendent Nhlanhla. He was killed after the interdict was made final.

215. Jiba disputed the evidence of Hofmeyr that there was a committee in place that dealt with authorisations. She had no knowledge of such a committee in her time as DNDPP and acting NDPP. There was a team of advocates in place, led by Mosing, who worked with the prosecutors in a number of provinces, and assisted with the evaluation of applications before they are submitted to the NDPP. The Committee ensures that there is sufficient evidence to cover the elements of racketeering authorisations. As DNDPP, Jiba would invite the prosecutors from Organised Crime to make presentations to her before recommending to the then Acting NDPP to authorise.

216. In cross examination Jiba explained that racketeering applications are normally submitted to the head of the Organised Crime special projects division who assigned them to someone. Jiba agreed that she appointed Mosing to head the unit. it was up to him whether he dealt with the matter alone or with someone. Mosing had dealt with the Booysen matter.

217. Jiba confirmed what she had stated in her affidavit in the Booysen review application. In relation to Gorven J's criticism of her, she explained that the criticisms as premised on the fact that there was insufficient evidence before him, as the Rule 53(3) record had not been filed; Hodes had been of the view that there was no need to file a Rule 53(3) record. The affidavit itself had given a summary of the nature of the evidence which led to the authorisation of the prosecution.

218. Jiba denied that her decision to prosecute Booysen was to get rid of someone in law enforcement who was prepared to do his job properly. She did not even know Booysen.

219. Jiba's evidence was that the prosecution team was adamant that they had a strong case, Maema and Mathenjwa had been in court to oppose an application to have the case struck off the roll.

220. In cross examination Jiba agreed that racketeering is a serious offence and this was why the legislature required the NDPP to make the decision. Further, that whether it was a committee or a team, there was a process in place to ensure that racketeering authorisations were made and that it was done properly. Whatever evidence serves before an NDPP when the decision is made must show a *prima facie* case of racketeering.

221. According to Jiba, the evidence before her was the evidence of Colonel Aiyer, together with the reports that were submitted to him. Jiba explained that the reports meant the *"the report of the operations that have then been conducted by the members of the Cato Manor unit"*.

222. It was put to Jiba that in 4 or 5 of the killings, magistrates had made findings after inquest proceedings that the killings were justifiable, and so one could not be said to have reasonably known that the shootings were unlawful. Jiba said that it was important to establish that Booysen reasonably ought to have known. She gave the example of the Mkhize case, where Booysen had filed an answering affidavit that he knew "how these things have occurred". Booysen's affidavit in the Mkhize case has been dealt with above.

223. At paragraph 16.6 of her affidavit in the Booysen review matter Jiba stated that *"after due and careful consideration of information under oath and the evidence as contained in the dockets"* before her that indicated that Booysen had known or ought to have known that they were killing suspects. Jiba explained that she was referring to the affidavit of Booysen in the Mkhize matter, the reports that Aiyer was referring to and his statement in the one matter that he was involved in the killing of one deceased.

224. Jiba was referred to the motivation for performance rewards which was signed by the provincial head of service detective service KZN, and thus not self-motivated. Jiba said that she had meant that in her environment such motivation was done by the person themselves. She did not take issue with the process that Booysen had explained, that one was nominated for an award, it was sent to the provincial commissioner, a committee then decided and there was a ceremony. It was the higher echelons that made the call who got the awards. Booysen did not compile the document and somebody else nominated him. Jiba said his role was set out in the nomination, which is what she took into account.

225. Jiba agreed that the motivation set out the steps that that they had taken to follow up a lead in respect of finding the person who had assassinated one of the police officers and the only involvement of Booysen was providing the information related to a car chase which resulted in the person in the car being killed. When asked if she read in that there was an instruction to shoot, Jiba said "[i]t is showing the element of his own involvement as well". Jiba accepted that it was part of the ordinary duties of a police officer to share information regarding the pursuit of criminals. Jiba explained that the point she was trying to make was that Booysen could not claim that he did not know, this was not the first killing, *"the pattern of these police officials when they do enforce the law in terms of bringing the suspects before the court it is not what is expected from"* SAPS.

5.2.2. Mdluli

226. Mdluli was charged with alleged unlawful utilisation of funds held in the Secret Service account ("SSA") – created in terms of the Secret Services Act 56 of 1978 – for the private

benefit of Mdluli and his wife, Theresa Lyons ("Lyons"). Broadly stated, it is alleged that one of Mdluli's subordinates, Barnard, purchased two motor vehicles ostensibly for use by the Secret Service but structured the transaction in such a manner that a discount of R90 000 that should have been credited to the SSA, was utilised for Mdluli's personal benefit.

227. Breytenbach and Smith were prosecutors in the matter and they reported to Ferreira. The investigating officers (i/o) were Viljoen (now retired) and Roelofse.

228. Although Mrwebi's direct evidence was that he was appointed from 1 November 2011, as reflected in a letter furnished to him dated 7 November 2011 from Radebe and as also reflected in Mrwebi's CV pursuant to a letter of appointment from Radebe – he accepted under cross-examination that his legal appointment only took effect on publication of the presidential minute in Proclamation 63 of 2011, dated 25 November 2011.

229. He alleges that the Mdluli matter was one of the very first matters that he received representations on when he took office. His evidence before the Enquiry was that he requested a report from Breytenbach and the docket which he did not receive until he had asked for it the second time.

230. Mrwebi alleges that he considered the docket and the representations before he made the decision to withdraw the charges.

231. There were 3 sets of representations:

231.1. hand delivered written representations to Mrwebi, as the Special Director on 17 November 2011 from Mdluli's legal representatives seeking the withdrawal of the fraud and corruption charges because the prosecution constituted an abuse of the criminal justice system and result in an unfair trial. This arrived prior to his appointment having been gazetted (*"Nov 2011 reps"*);

231.2. hand delivered written representations to Simelane as the then NDPP dated 26 October 2011 in relation to the matter pending in South Gauteng; and

231.3. Representations made to Mrwebi, both in writing and orally, (which he did not disclose to Mzinyathi and Breytenbach) which emerged during cross-examination at the Breytenbach disciplinary enquiry and again during the Enquiry (cross-examination) though this had not been dealt with by Mrwebi as representations.[29]

232. The Nov 2011 reps alleged that the charges arose from a conspiracy against Mdluli involving the most senior members of the SAPS.

233. Little mention is made of the merits of the corruption and fraud charges. In this regard it bears noting:

1. Mdluli denied the allegations and expresses the view that there is no case again him.

2. The alleged breach of security legislation raised by Mrwebi is not apparent from the representations.

3. There was no allegation that SAPS was not entitled to investigate, or that only the Inspector-General of Intelligence (*"IGI"*) could investigate.

4. There was no reference to abuse of process by SAPS acting illegally or any fabrication of evidence.

5. Accepted that Barnard was responsible for the purchase of vehicles and that he would have to answer if there was criminality with regard to the transactions.

234. Mrwebi agreed that the representations made no mention of the IGI – he said he did not think that it had to be mentioned.

29 *This is dealt with under a separate heading below.*

235. He accepted that the representations were made to him on behalf of Mdluli and not Barnard. Though he had testified that Barnard's fingerprints were all over the transactions, he still mentioned that the withdrawal against both Mdluli and Barnard was correct. Mrwebi explained that the fact that the transactions were made by Barnard did not mean that there was evidence against him. There were complications in Barnard's case too and he felt that the case should be done as a whole and not piecemeal.

236. It was put to Mrwebi that there was no evidence in the representations of an abuse of the criminal justice system. Mrwebi responded that he would only be able to determine that once he read and looked at the evidence. Similarly, he would only be able to determine the allegations related to infringement of a fair trial by looking at the evidence.

237. Following the representations, Mrwebi prepared a memorandum and consultative note which was dated 4 December 2011. The letter sent by Mrwebi to Mdluli's attorneys withdrawing the charges was also dated 4 December 2011. The issues raised in the representations do not appear to have any connection to reasons set out in Mrwebi's consultative note regarding the alleged breach of security legislation.

238. The consultative note of 4 December 2011 stated that whether there was evidence or not was not important for the decision to withdraw, the reason for the decision was that the matter was in the exclusive preserve of the IGI;

239. A handwritten note by Mrwebi dated 5 December 2011 stated that the police had no mandate and was *"Nolle at this stage"*. *"Nolle*" refers to *"Nolle Prosequi"*, which means decline to prosecute as there is no or insufficient evidence that a crime was committed.

240. On 5 December 2011 Mrwebi and Mzinyathi met to discuss the Mdluli matter. The meeting that took place between Mrwebi and Mzinyathi was not lengthy. There was no discussion of the merits in any great detail. Mrwebi had brought along the proclamation of his appointment and further indicated that the matter required further research.

241. Mzinyathi stated that when he spoke to Mrwebi on 5 December 2011, he was of the opinion that Mrwebi had no firm view and was still going to investigate the matter. Mrwebi had a copy of the Intelligence Services Act and informed Mzinyathi that he had received representations from Mdluli's attorneys. Mrwebi told Mzinyathi that a SD needs to consult with a DPP before making a decision but had stated that he was still looking into the matter.

242. The consultation was indeed perfunctory – Mrwebi says that he did not discuss the merits "in any detail" with Mzinyathi but had reference to the facts "by way of background." Mrwebi told Mzinyathi that he was "busy with this matter of Mdluli", and was still doing research which he was hoping to finish before the end of that day. Mrwebi testified that he did that and then prepared the consultative note "recording the fact that I consulted Mzinyathi" and then drafted a letter to Mdluli's lawyers.

243. On receiving the consultative note which Breytenbach went to see Mzinyathi. She was aware that he shared her view that there was a case against Mdluli. He was the DPP who had jurisdiction over the matter which could not be withdrawn without his *"final say"* and she was not aware that he had been consulted.

244. After considering the docket Mzinyathi confirmed that there was a prima facie case and the prosecution should continue.

245. On 8 December 2011 Mzinyathi, Breytenbach and Brig Van Graan went to see Adv Jay Govender (*"Govender"*), the legal advisor to the IGI. Govender indicated that the IGI had no mandate to investigate criminal matters.

246. Mzinyathi sent an email on 8 December 2011 to Mrwebi in which he explained that he did not agree with Mrwebi about the withdrawal of the charges and passing on the matter to the IGI. He also pointed out that Mrwebi had no mandate to instruct prosecutors in the DPP's office, irrespective of Mzinyathi's views on the matter. (It may also be apposite at

this juncture to point out that at no stage did Jordaan in his evidence indicate that he had done so.)

247. The meeting commenced on 9 December 2011 with Mrwebi stating, *"colleagues I presume you are here to test my powers"*.

248. Mzinyathi and Breytenbach told Mrwebi that they did not agree with his decision, that he had no authority to take the decision and there was no consensus and that Mrwebi had not consulted him or Breytenbach.

249. Mrwebi's stance initially was that his meeting with Mzinyathi on 5 December 2011 was a consultation and that he was *functus officio* and could not change his decision.

250. To avoid the NPA facing embarrassment if the prosecutor informed the Court that the DPP had instructed the opposite to the SD, Mzinyathi and Breytenbach agreed to the matter being withdrawn on a provisional basis to sort out the impasse.

251. When giving evidence at Breytenbach's disciplinary enquiry, Mrwebi identified what the matters were that were identified for further investigation as SAPS approached the IGI either to investigate or to direct SAPS where to investigate. Breytenbach was to approach the police to do the necessary.

252. The prosecutor provisionally withdrew the charges on 14 December 2011.

253. Breytenbach's evidence was that Mrwebi did not give her any instructions on 9 December 2011 to investigate further. He was not in a position to do so as she reported to Mzinyathi and he was also at the meeting. At no stage did Breytenbach relay to Ferreira that further investigations were required by Mrwebi.

254. Breytenbach and Ferreira opposed the withdrawal of the charges against Mdluli and co-authored a 24-page memorandum dated 13 April 2012 *("the BF memo"*), addressed to Jiba requesting that she review Mrwebi's decision to withdraw charges against Mdluli.

They indicated that what had been a provisional withdrawal had now become a final withdrawal.

255. The BF memo sparked off the letter dated 30 March 2012 from Mrwebi to Dramat wherein he states: "The NPA took a principled and considered decision on this matter without fear, favour or prejudice, as it is required to do in terms of the law. That decision stands and this matter is closed."

256. In the memorandum of 26 April 2012 Mrwebi referred to his response to Breytenbach dated 26 April 2012 to the BF memo and stated at page 3:

"It is my considered view that it will therefore ***not be in the interest of justice for the NPA to be further involved in the matter.*** *I once again emphasised that the Inspector -General is the appropriate functionary to handle the matter."*

257. According to Mrwebi, this was a high profile matter. Mrwebi did not have an obligation to keep track of progress, he did not get involved, only received reports. He did not view the suspension of the regional head (who was charged with overseeing the investigation) on his recommendation as exceptional circumstances which required him to follow up on the progress.

258. When asked why he took no steps between April and the request to Mokhatla in August, Mrwebi said that he had no reasons to believe that the *"prosecutors or anybody else is not doing anything about this matter"*. He only got to know this after Dramat advised him so.

259. In cross examination, it was put to Breytenbach that it was not Mrwebi's intention in his letter of 30 March 2012 to convey that the prosecution would not continue, what he had in mind was that the debate about the IGI, and who must investigate, was closed. Breytenbach disputed this, she said that any reasonable person on a reasonable reading of that letter would understand that that was not what Mrwebi had written. Further, the letter was not capable of being read to sustain Mrwebi's version that the reference to

investigation was not a police investigation but an investigation of the paper trail in respect of confidential or classified documents.

260. It was testified that the BF memo was an unprecedented step. Ex facie the BF memo was in addition sent to the other DNDPPs, Mrwebi and Mzinyathi on the assumption that it would be discussed with senior management. This was not so.

261. It was delivered to Mzinyathi, Mrwebi and Jiba. Jiba was not in office and it was left there on either 23 or 24 April 2012. Mrwebi undertook to provide it to the persons on the list but they gave it to Hofmeyr. Mrwebi denied that he gave this undertaking but may have said he would give it to Ramaite. Mokhatla never received it.

262. Jiba discussed the BF memo with no one other than Mrwebi and based on what he told her did nothing further about it. Her evidence was that as she had been told the matter was provisionally withdrawn no further steps needed to be taken. Other than Mrwebi's memo dated 26 April 2012 there was no other response to the BF memo.

263. Murphy J noted:[30]

> *"63. The memo is a credible indication that the decisions were indeed brought to the attention of the Acting NDPP for consideration. The NDPP in her answering affidavit, though not dealing directly with the memo, maintained that the decisions to withdraw charges had not come to her office for consideration "in terms of the regulatory framework". Be that as it may, the memo leaves no doubt that Breytenbach did not consider the case against Mdluli to be "defective"."*

264. Mrwebi responded in a memo dated 26 April 2012. He suggested that the NPA was being *"used or abused"* for purposes unconnected to the interest of justice or the rule of law and drew a distinction between what he referred to as acts of maladministration and acts of criminality. He concluded that if they continued to insist that nothing had changed, then they were being *"deliberately ignorant"* because the police had been engaging in *"obvious*

30 ***FUL HC***, *para 63.*

illegal actions" by *"accessing classified / privileged information"* and placing it in the public domain. He regarded this to be contrary to applicable laws – though none are identified – and indicates that this makes the state's case *"even more suspicious"*. Mrwebi added that he had been provided with further information on the matter and had been privy to *"other classified, confidential and high-level discussion[s] with police management"*. He expressed concern that the prosecution would justifiably be seen as an abuse of legal process and motivated by ulterior purposes. Mrwebi indicated that he expressed this "view/conclusion" in addition to considerations that the evidence was either inadmissible or that its admissibility had been compromised.

265. Ferreira denied that the police (or prosecutors) were in breach of any security legislation as alleged by Mrwebi. He testified that a police officer investigating the crime, Roelofse, went to another police officer who gave him certain documentation. They were both appointed in terms of the same Act and the document never left the hands of the police. Roelofse had the necessary power to access the documents required. The documents in the docket had been voluntarily handed over from one police department to another. The prosecutors remained steadfast that the case was about acts of criminal corruption and not maladministration.

266. Mrwebi concludes that it *"will therefore not be in the interests of justice for the NPA to be further involved in this matter"*, and again indicated that the IGI is the appropriate functionary to handle the matter in light of the classified and privileged information and given that the *"AG, JSCI and Parliament have already considered that matter in terms of section 3"* of the ISO Act.

267. It was put to Breytenbach that prosecutors have different opinions and that Mrwebi was convinced that the evidence needed to prove the case would be *"under lock and key as part of the intelligence community"* and that was where the IGI came into it. Breytenbach differed *"very strongly"* with this view.

268. Ferreira was one of the authors of the April 2012 memorandum, and he and Smith were the primary prosecutors in the case but were removed from any further participation in it by the appointment of other prosecutors without any reason or excuse.

269. In the face of a *prima facie* case it is not so that in each and every instance investigations are finalised before charges are preferred. In relation to the initial charges which had been withdrawn by Mrwebi there was no, or very little further investigation required for purposes of the prosecution. The delay in prosecuting is therefore, in his view, as a result of further charges that had arisen and which required declassification of documentation by the National Commissioner of Police, which was not forthcoming.

270. Breytenbach, Louw, Smith, Ferreira, the investigating team and Mzinyathi thought that there was a prima facie case and the matter should proceed. Ferreira was not sure whether the LAD team and Jiba considered the April 2012 memorandum and if so, why it was ignored.

271. Ferreira notes that contrary to what is indicated in Jiba's affidavit in the GCB matter, the withdrawal was because Mrwebi mistakenly believed that the police had no mandate. Ferreira attaches a note by Mrwebi dated 5 December 2012 to his affidavit as JF1. The note is signed by Mrwebi and the final sentence of the note states as follows:

"Be that as it may, the main issue is fact that police did not have mandate in this matter."

272. Ferreira was removed as prosecutor from the Mdluli matter. He states that he had done nothing to warrant such removal nor was he ever informed of reasons for that removal. He notes that serious new possible offences were discovered after December 2011 which had to be investigated. The new offences were the reason the case took so long to finalise. Ferreira notes that the matter was derailed by the failure of the SAPS Commissioner to declassify documents.

273. Ferreira submits that this paragraph supports his conclusion that Jiba never decided not to review Mrwebi's decision. He submits that Jiba should, as Acting NDPP, have reviewed the decision when she became aware that it was unlawful and/or not taken in consultation with Mzinyathi.

274. Ferreira notes that Jiba's GCB affidavit does not address the content of the April 2012 memorandum, particularly the view of two senior NPA officials that the decision was unlawful.

275. Murphy J held:

> *"175. As discussed earlier, in his reasons filed pursuant to Rule 53 and in his answering papers, Mrwebi took a different tack. He there claimed that there was insufficient evidence to support a successful prosecution against Mdluli and that he referred the matter to the IGI so that she could investigate or facilitate access to the privileged documentation required.* ***The withdrawal of the charges, he said, was merely provisional, to allow for further investigation to take place. This version is at odds with the contemporaneous reasons Mrwebi gave for his decision****, and the evidence of Breytenbach and Mzinyathi in the disciplinary proceedings. Even if the charges were supposedly provisionally withdrawn in court,* ***Mrwebi's pronouncements at the time evinced an unequivocal intention to stop proceedings altogether. He considered the referral to the IGI as "dispositive"****; and in his letter of 30 March 2012 to General Dramat he referred to the matter as "closed". In the circumstances, his new version is implausible and probably invented after the fact, in what FUL submits was "a last-ditch attempt to explain his otherwise indefensible approach". But even if the decision was in fact "provisional", its qualification as such does not save it from illegality, irrationality and unreasonableness. A provisional decision which languishes for two years without any noticeable action to alter its status may be inferred to have acquired a more permanent character."*

5.2.3. Representations which were made but kept secret by Mrwebi

276. There is evidence that a letter found in Mrwebi's safe from Eta Szyndralewics Attorneys which contained representations made to Mrwebi on behalf of certain officials in crime intelligence at a meeting in February 2012 which were kept secret by Mrwebi. The letter made mention of Mrwebi's reply to those representations in March 2012. In that letter concerns were raised about intensified investigations that were continuing and a request was presented to Mrwebi's office to take a security conscious decision on the matter to avoid state secrets being uncovered to the embarrassment of South Africa.

277. Advocate Rip on behalf of Mrwebi advanced that the letter confirmed that Mrwebi's version that the charges against Mdluli were withdrawn provisionally to allow for further investigations to take place. It was submitted on behalf of Mrwebi that Mrwebi had not instructed the investigating officers to stop investigating.

5.2.4. The Spy Tapes

278. As explained in the case summary above, the appeal was part of a protracted litigation battle involving Zuma, the office of the NDPP and the DA. It concerned the release of audio recordings and transcripts by the office of the NDPP that were used as grounds to justify the withdrawal of criminal charges against Zuma. The Court levelled certain criticisms against Jiba as referred to above.

279. In her answering affidavit in the **GCB HC** matter, Jiba states that she was at all times represented by a team of experienced counsel, Kennedy and Maenetje ("the Kennedy team").

280. Jiba notes that in the application to compel the production of the record, although the High Court held that confidentiality did not extend to the transcripts, the Court agreed that affording Zuma an opportunity to raise his concerns was in line with the SCA order and she was not found to be in contempt of Court.

281. The SCA criticised Jiba for failing to file a confirmatory affidavit by Mpshe. She notes that this was indeed done and attaches a copy to her affidavit. The affidavit does not have a date stamp but was signed three months prior to the hearing. Jiba notes that it must have been erroneously omitted from the record on appeal. Consequently, the comment by Navsa J regarding the lack of an affidavit was incorrect as was the comment that *"affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent."*

282. Jiba then turns to the criticism of both the High Court and the SCA that she adopted a "supine attitude" and/or a neutral position regarding the transcripts. She states as follows:

> *"I accept that the SCA has criticised me for not taking an "independent view" about confidentiality. I respectfully submit that this was a result of adopting a cautious approach, in order to ensure that I did not unwittingly infringe on the rights of either of the parties · in the Democratic Alliance matter. I respectfully submit that this does not amount to conduct that is less than objective, honest and sincere and does not render me not fit and proper to practice as an advocate."*

283. Further, Jiba explains that the NPA could not take sides in the matter and it was in everyone's interests that the SCA order to clarified:

> *"The qualification that it made in its order to exclude written representations if production thereof would breach confidentiality attaching to representations is what turned out to be the bone of contention between the parties. It is for this reason that even Mathopo J ruled that this matter should be referred to an independent arbitrator to determine which material this was. This was also the same approach adopted by the SCA in appointing a retired Judge Hurt to arbitrate on this issue.*
>
> *I respectfully do not agree that the criticisms by the SCA were well founded in light of this. If anything this proves that the advice of the NPA legal team to abide the decision of the court and not be party to their contestation about which material forms part of the representations and which did not was quite sound and correct. I*

also submit that the order was not simple hence the appointment of Judge Hurt to assist in this matter."

284. The NPA abided the decision of the SCA and was not before the SCA. The decision to abide was informed by advice from counsel and was not the case of a lack of interest in being of assistance to the SCA.

285. Jiba disputed the allegation that the NPA took no steps to ensure a response from Zuma's legal team:

"We did so through the office of the State Attorney on several occasions. I do not have copies of that correspondence. We even called one Mr Seleka to attend an EXCO meeting to discuss this matter. He undertook in that meeting to send more correspondence to Mr Zuma's legal representatives."

286. Jiba responded to the allegations in relation to the **Spy Tapes 2** matter in her answering affidavit in the **FUL** application to have the failure to suspend her and institute an enquiry into her fitness to hold office set side along similar lines as in the GCB answering affidavit.

287. Jiba pointed out that the SCA judgment (at para 98) drew a distinction between the "Acting NDPP" and "the office of the NDPP". She continues:

"In particular the Court criticised the "office of the NDPP" for not taking an independent view about "confidentiality, or otherwise, of documents and other materials with in its possession".

288. Jiba concluded:

"Ultimately the judgment of the SCA in the Zuma/DA matter does not demonstrate that my conduct was less than objective, honest and sincere. It certainly does not support the contention that I should be suspended. The fact that the SCA itself ended up appointing Judge Hurt as an arbitrator to deal with the judgment in determining which documents formed part of the reduced record, shows that the

previous directive of the SCA, in respect of which the application for contempt of court was initially heard before Mathopo J, was not a simple one."

289. In her affidavit before the Enquiry dated 14 January 2019, Van Rensburg notes that Mokhatla stated in an Exco meeting that both Jiba and Hofmeyr bypassed her in decision-making in the **Spy Tapes** case.

290. The stance adopted by Jiba in the **Spy Tapes 2** matter, as indicated by Kennedy, was indeed so adopted on his advice.

5.2.5. GCB

291. In this part of the report, Jiba's evidence as set out in her affidavit in both the **GCB** matter and the affidavit to which she deposed in the Breytenbach Labour Court matter is dealt with. As a point of departure, we first:

291.1. summarise some of the basic principles which our Courts have set down in relation to the expectations of officers of the Court; and

291.2. detail the evidence of other witnesses which provides some of the background to the evidence of Jiba.

292. In addition to what is required of prosecutors as set out in the legal framework section of this report, officers of the Court are required to act with honesty and personal integrity.[31]

293. The SCA in **Geach** held as follows:

*"… after all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard-won freedoms is without parallel. As **officers of our Courts**, lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute **personal integrity and scrupulous honesty are demanded***

31 *Kekana v Society of Advocates of SA 1998 (4) SA 649 (SCA) para 13; Law Society of the Cape of Good Hope v Randell [2015] 4 All SA 173 (ECG) paras 70 to 74.*

of each of them. *It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the Roll."* [32]

294. Moreover, the NDPP is not an ordinary litigant – as both an officer of the Court and the head of the NPA, the duty on the NDPP is a more stringent one. This was been clarified by the SCA:

"The NDPP is no ordinary litigant. She is an officer of the court, who is duty-bound to take the court into her confidence and fully explain the facts so that an informed decision can be taken."[33]

295. In taking this approach, the SCA cited its own decision in **Kalil NO v Mangaung Metro Municipality**[34] to the effect that:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance…."

296. This is the standard against which affidavits deposed to by officers of the Court must be assessed.

32 *General Council of the Bar of South Africa v Geach & Others 2013 (2) SA 52 (SCA) para 87.*

33 *Maharaj and Others v M&G Centre of Investigative Journalism NPC and Others 2018 (1) SA 471 (SCA) para 24. See also: Mulaudzi v Old Mutual Assur Co (SA) Ltd 2017 (6) SA 90 (SCA) para 42.*

34 *2014 (5) SA 123 (SCA) para 30.*

5.3 Other evidence and allegations

5.3.1. Evidence of other witnesses

297. The Legal Affairs Division (*"LAD"*) is the internal legal advisory body in the NPA. Both Ramaite and Mokhatla confirmed that not all cases of civil nature are dealt with by LAD. Not all Court papers reach LAD and where the NDPP is cited, it is up to the NDPP to determine whether advice is needed on how to deal with the case and to what extent a member of LAD would assist. The documents would not be supplied to LAD *"in the ordinary course"*. These were cases driven at the discretion of the NDPP from the office of the NDPP. It was up to the NDPP to decide whether to seek the advice of LAD and who in LAD would assist him or her. This was also substantially corroborated by the evidence of Hofmeyr.

298. Under Jiba's leadership, the mandate and personnel of LAD was reduced substantially with most senior prosecutors being deployed elsewhere with a number of them now reporting to the Adv Thoko Majokweni (*"Majokweni"*) in her capacity as the head of the National Prosecuting Services (*"NPS"*). As a result, the LAD component was reduced. LAD members would assist with compiling briefs for Counsel, ensuring the timeous filing of Court documents, arranging and attending consultations with Counsel, securing witnesses, requesting and providing evidence and information and tracking Counsel's invoices where necessary. LAD would sometimes choose Counsel who would then be briefed by the State Attorney.

299. Advocates M Motimele SC, VS Notshe SC and S Phaswane (*"the Motimele team"*) were initially briefed and prepared a short memorandum for the State Attorney in relation to the filing of the Rule 53 record in the Mdluli matter. The date on which the memorandum was prepared is unclear.

300. After explaining that Rule 53(4) renders filing of records for decisions under review mandatory, **precedent is cited to show that failure to file the record forming part of**

the decision may jeopardise the NDPP's case, as the decisions would not be supported by anything.

301. Two options are suggested. The first involves raising a point in limine to argue that it is not necessary to file the record at that stage. The worst that could happen, in the Motimele team's view, would be that the officials would be required to file it. However, the memorandum explains that this option is *"fraught with risks and negative publicity"*.

302. The second option, which the memorandum recommends, is to file a truncated record. This truncated record, in their view, need only contain reasons and a summary of the record and would purportedly suffice as the record of proceedings. They recommended that the officials scrutinise the relevant dockets to ensure that the dockets cannot be despatched. The memorandum states *"[i]t will serve no purpose to refuse to despatch the present dockets if no harm will be suffered"*. It is unclear from the memo what the nature of the harm is or how it would be suffered. Presumably what is meant is that the criminal proceedings planned are not jeopardised by disclosing a full docket as part of a Rule 53 record.

303. During an interview which Van Rensburg, acting on Nxasana's instruction, had with Motimele, he explained that he had been made aware that Jiba had called the State Attorney in and had asked why it was taking so long to debrief counsel. As the client, Jiba was not satisfied with Motimele because there was an affidavit but Motimele was refusing to finalise it without a consultation. Jiba was of the view that there was no need for consultation because her and Mrwebi had made written comments and she considered that sufficient. Jiba stated that the best way to proceed would be to appoint another counsel. The Motimele team's mandate was then terminated.

304. In Motimele's view, the consultation was needed because as counsel, he had serious concerns about Jiba's comments because some of them included saying *"why say take note of this?"* or comments to the effect that certain statements in affidavit would be brought up on review.

305. The Motau team was briefed very late in the matter and instructed to produce an answering affidavit, which was due on 24 June 2013. A draft was produced and circulated on Friday, 21 June 2013 and comments were requested by mid-morning Sunday, 23 June 2013. Motau confirmed in an email dated 26 June 2013 that the requested comments were not received. They did, however, receive an email from the NPA *"to the effect that an affidavit be prepared in the name of Adv Mrwebi which [the Motau team] advised has been incorrect"*.

306. Despite this, Motau, in the same email, requested that comments be provided on the draft he had sent for comment and that a condonation affidavit be furnished to explain the failure to comply with the filing period as set out in the DJP's directives. The matters of splitting the affidavits, privilege and the draft affidavits were to be discussed at a consultation to be scheduled.

307. While waiting for the NPA's input, the Motau team perused the transcript from Breytenbach's disciplinary hearing and noticed contradictions between the evidence given there and the contents of the draft affidavits as split by the NPA. The Motau team wished to add these concerns to the other issues to be discussed at the intended consultation, but before the consultation took place, the State Attorney advised that the NDPP had decided to sign the split affidavit and had instructed the attorneys that it had to be filed.

308. Because of this, as well as the inclusion of a paragraph from the original affidavit that the NPA had acted on the legal advice of its representatives, when in fact they had disregarded the advice rendered by the Motau team, the team withdrew from the brief.

309. The Motau team was replaced by the Halgryn team, consisting of Advocates L Halgryn SC, J C Uys and E Mahlangu, briefed to proceed with the matter.

310. On the ELs' request to address certain statements made by Jiba in her **GCB** affidavit, Halgryn submitted a statement to this Enquiry. In it, he explains that after they had accepted the brief in the **FUL HC** matter, they received numerous documents and held

a series of meetings between 5 and 8 August 2013. In addition, the Enquiry was also provided with Uys' notes of those consultations.

311. In her answering affidavit in the **GCB HC** matter, Jiba explains why she and the NPA team could not agree with the advice given by Halgryn's team. She states that the team had made several assumptions:

311.1. that there was a *prima facie* case against Mdluli which had to be enrolled;

311.2. that Chauke's decision not to proceed with the other charges while referring the murder charge to a formal inquest was incorrect, and;

311.3. that Jiba had "stood back and [done] nothing since the withdrawal of the charges". She also states that the filing of a complete Rule 53 record was a "relatively uncertain position of the law at that time".

312. Halgryn disputes these allegations to the extent that they do not strictly accord with the contents of their 12 August 2013 memorandum. He states:

312.1. No assumptions were made. The advice given was based on the facts as they appeared from the evidence and upon proper interpretation of the law;

312.2. It was *"patently obvious"* that a proper record meant that the entire record had to be filed. This was not done. The docket consisted of 3 level arch files, yet the record which was submitted consisted of only 67 pages; and

312.3. During their consultation with Jiba on 8 August 2013, she did not mention anything regarding a meeting or engagement with Mrwebi or Chauke despite averring so in paragraph 112 of her affidavit.

313. The Halgryn team had told Jiba of the need to file the complete Rule 53 record in no uncertain terms, explaining that a review Court *"cannot conceivably review a decision without the full record of the proceedings being provided to it"*. Not doing so can only

be either negligent (which is inexcusable) or deliberate, which will amount to deliberate misrepresentation to a Court.

314. The Halgryn team's mandate was also terminated.

315. According to the Hodes team, they were briefed to represent Jiba in her capacity as the Acting NDPP in the Booysen matter. In an affidavit dated 3 February 2015, Hodes sought to explain the contents of Jiba's answering affidavit. This includes explaining the origin of paragraph 17 of the answering affidavit, which came under criticism in Gorven J's judgment.

316. Hodes explains that, despite Gorven J's judgment mentioning several concessions made by him during the course of proceedings, he only made a single concession relating to the Court's jurisdiction. He disavows the judgment's indication to the contrary and states that the record of proceedings can corroborate his version.

317. Together with his junior, Hodes prepared an application for leave to appeal against Gorven J's judgment and filed it on behalf of the Acting NDPP. However, on 25 March 2014, the newly appointed NDPP (Nxasana) decided not to appeal the judgment. The application was withdrawn.

318. Jiba's evidence in relation to the Legal Affairs Division ("LAD") is that it was the division that handled all matters pertaining to civil litigation. she had been cited as a respondent in her representative capacity only which meant that she did not personally instruct attorneys and counsel to represent her. The DNDPP responsible for LAD is Mokhatla. Jiba explains that Mokhatla is supported by a team of DDPPs and Senior State Advocates and Senior Prosecutors.

319. Jiba explains that when the NPA and its officials are joined in proceedings, they behave "as any client" in their representative capacity and rely on the advice of the State Attorney and the advocates that are briefed. She states that she does not personally or alone take

part in the litigation on behalf of the NPA. At no point had she "acted on a frolic" of her own. Mokhatla denies this.

5.3.2. The CEO Position

320. Jiba's evidence in relation to the CEO matter is dealt with at paragraphs 62-68 of her GCB affidavit. She alleges that Van Rensburg was purporting to be the CEO and that the NPA Act makes no provision for a CEO.

321. Van Rensburg disputes this and refers to Nel's affidavit which explains that she was in fact appointed as CEO (with Jiba's knowledge). She admits that she was indeed a DDPP. She again refers to the affidavit of Nel which attaches the relevant documents explaining the creation of the position of CEO.

322. The duties of the CEO did not include prosecutorial functions and she not been involved in prosecutorial decisions or how civil litigation should be conducted.

323. Section 15(1)(c) provides that the Minister may, subject to the laws governing the public service in section 16(4) and after consultation with the National Director",

"In respect of the office of the National Director, appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers and carry out certain duties and perform certain functions, conferred or imposed on or assigned to him or her by the National Director".

324. Van Rensburg was appointed pursuant hereto in the office of the NDPP to perform those specific functions. She suggests that Jiba's allegation that Van Rensburg was not the CEO of the NPA at the time is misleading.

325. Van Rensburg advises that she acted on the instructions of Nxasana when addressing the letter to the GCB. The referral to the GCB was not disciplinary action.

5.3.3. Jiba's husband's presidential pardon

326. Jiba's husband, Sikhumbuzo Booker Nhantsi (*"Nhantsi"*), was convicted for theft of estate money in the amount of R193 000 while practising as an attorney. He was sentenced to five years imprisonment, two of which were suspended. He had been in prison for 9 months in prison when his imprisonment was converted to correctional supervision on 27 August 2007.

327. On 3 November 2009 he applied for presidential pardon and attached the testimonials from Adv Ntsebeza (*"Ntsebeza"*) and Prince Mokotedi (*"Mokotedi"*) to his application. The Chief Directorate: Legal Affairs, Department of Justice received Nhantsi's application and sent a memorandum with a recommendation to the Minister, Jeff Radebe on 11 November 2009. The Minister and three other officials signed the memorandum and the recommendation and sent it to the president with a report.

328. The report attached to the application for pardon sent to the President from the Minster recommended that the pardon be refused. The reasons for the recommendation were that the nature and seriousness of the offence, the shortness of time that had lapsed since the conviction and that no exceptional circumstance had been shown to exist made it imprudent for pardon to be granted. Under normal circumstances the comment of the NPA would be sought before pardon is granted. The Minister noted that due to the urgency of the matter, the report and recommendation were submitted before Nhantsi's representations could be received. It does not seem like further representations were made or sought.

329. The power to pardon as conferred by the Constitution to the President is a discretionary instrument, subject to the President's control. At around the time that Jiba's husband was granted pardon by the President, the Zuma / spy tapes saga was an ongoing matter. Jiba had just been elevated by the President to the position of DNDPP in December 2010.

330. In light of this Jiba was asked whether she did not deem it prudent to refrain from participating in any discussions, making comments or taking part in anything that had to do with the Zuma / Spy Tapes matter to avoid inferences and perceptions of bias. Her response was that she did not think that she should have recused herself from the Zuma / Spy Tapes matter because the decision to withdraw the prosecution had already been taken by Adv Mshe. She pointed the Enquiry to Mr Hofmeyr's affidavit which discussed at length why the prosecution could not stand. She pointed out that her role related only to the "submission of some record" and that she could not see how her participation could have saved the President and how she could be biased.

5.3.4. Jiba's legal qualifications

331. Jiba's curriculum vitae shows that she was appointed as DDPP in 2001 in the Office for Serious Economic Offenses which later, after various developments, evolved into the Directorate for Special Operations (Scorpions) which was disbanded in 2008.[35]

332. Documents showing that Jiba is an admitted advocate since June 2010 were provided to the Enquiry. Before these documents were provided information from the Legal Practice Council, Western Cape indicated that Jiba had passed the attorney's board exams in 1998 but that she was never admitted as an attorney. Jiba was asked during cross-examination how she got to be appointed as a DDPP since the NPA Act lists the "right to appear in any court in the Republic" as one of the requirements for appointment to the position of DDPP yet she was never admitted as an attorney or an advocate.

333. Evidence leaders pointed out in their written submissions that documentation and representations made by Jiba indicated that by her having passed her board exams she had qualified as an attorney. This could be seen also from a report prepared during her probationary period indicating that she had served articles and *"eventually qualified as an attorney"*.

35 *Jiba was appointed as DDPP on 1 February 2002 as apparent from personnel records.*

334. In addition, the evidence leaders in their submissions pointed out that before June 2010, and even after her appointment as DDPP, it was not clear whether in fact she was an attorney or an advocate. Correspondence sent to her indicated that she was addressed as "advocate" and that she in turn represented that she was an advocate in correspondence that she sent to others and other documents that she signed. It is noted from a DSO skills audit, 2002 completed by Jiba, that she identified her *"official job title (e.g. special investigator, prosecutor, etc.) as "advocate (DDPP)"*.

335. In response to the revelation, Jiba's legal team provided the Enquiry with two documents from the NPA signed by Ms Mathsidiso Modise, Chief Director: Human Resources Management Development at the NPA ("Modise") confirming the requirements for appointment as DDPP. The documents explained that a person would meet the minimum requirements if they had a right to appear in any court or were, at the least, able to obtain the right of appearance. According to Modise, if a person who does not have the right of appearance is admitted, the newly appointed individual may be afforded an opportunity to obtain the right of appearance.

336. One of the documents bearing the title, "Re: Confirmation of Legal Job Titles in the NPA" explained further the legal job titles within the NPA. It states:

> *"As part of the organisational process of developing a structure, each job once defined will need to be given a proper title. For legal posts, we have for the lower courts retained the position of prosecutor as defined in the Act where we titled the jobs according to the court in which the posts are placed. We have* ***District Court Prosecutors*** *and* ***Regional Court Prosecutors*** *and we then introduced* ***Senior and Chief Prosecutors*** *for management of the lower courts.*
>
> *For the High Court we defined and titled the posts* ***State Advocate*** *and* ***Senior State Advocate*** *and then moving to the* ***Deputy Director of Public Prosecutions*** *as titled in the Act. The positions are named State Advocate deliberately to separate the position from a practising advocate who will require admission as an advocate.*

. . . [O]ur requirement is just the right of appearance and the person can only be a state advocate whilst working for the state and should he or she terminate to practise privately, the person will have to pursue the process of admission."

337. Jiba did not deny that at the time of her appointment she had not been admitted as an advocate or attorney but said that she did not know what those who had appointed her considered when she was appointed.

5.3.5. Mrwebi's track record as Regional Head of DSO and allegations of disciplinary steps against him

338. In the course of his evidence, Mrwebi explained the reasons behind an attempt to institute displinary processes against him as regional head of the DSO in Kwa-Zulu Natal.

339. According to Mrwebi, the DSO had confidential funds, like the SSA (C-funds), used to pay informants.

340. His office was directed to pay informants who had not been paid for their services. They were instructed to effect these payments before the end of the financial year in March 2004. Further, the NPA head office indicated that there was a particular informant by the name of Patel who needed to be paid. In response to this instruction Mrwebi indicated that he only was aware of one informant who did not get paid. That informant according to him was committing the crimes that he was reporting and was afterwards convicted and imprisoned for those crimes and the NPA was not going to pay him. He stated that he did not have knowledge of another (or other) informant(s) that needed to be paid.

341. Mrwebi stated that he was then instructed to prepare a document. In the process of his investigations he discovered that a person who did not have anything to do with the investigation had been paid. This payment implicated people at head office in irregularities relating to informants and the fund. He asserts that his troubles at the NPA began when he filed a report alerting the NDPP of his findings about the irregularities. It was then, according to him, that he was suddenly accused of non-performance and became a target

of "all sorts of victimisation". He alleges that there were instructions given that he was going to be removed from his office for poor management. He claims that the allegations came from his direct supervisor at the time and from the then acting NDPP but that no disciplinary processes were instituted against him for poor work performance.

342. Advocate Malala Ledwaba (*"Ledwaba"*) was charged with multiple counts of fraud in relation to the DSO funds. It was alleged that Ledwaba was unlawfully taking money for himself from these funds. Mrwebi testified against Ledwaba in a criminal trial in respect of R150 000 which was paid to an unknown informer.

343. The Court held:

"[T]he appellant [Ledwaba] requested Mrwebi to compile a memorandum for payment of a fee to Patel. Mrwebi initially claimed that the appellant was the one who decided on an amount of R150 000-00 which was to be paid to Patel but later conceded that he was the one who decided on the amount. According to Mrwebi he had used the principle of value for money when he decided on the amount

Mrwebi in taking this decision could not have done so without having been briefed by the appellant about the nature of the information supplied by Patel. Mrwebi's evidence was filled with contradictions and inconsistencies, and was premised on an attack of the character of the appellant. It was put to Mrwebi during cross-examination that during the trial of the late Police Commissioner, Mr Selebi, he had already alleged that the appellant stole from the NPA. Mrwebi blamed the appellant for all his problems. It was never Mrwebi's evidence either in chief or cross examination that the appellant tried to convince him to drop the investigations against him. The impression Mrwebi gave during his evidence is that the appellant had a personal vendetta against him. There were obvious issues in the office of Mrwebi for example the incident in the Drakensberg. Mrwebi, however conceded that no disciplinary charges were proffered against him by the appellant. It was put to Mrwebi in cross examination that he "lied" and he conceded that he had "lied".

As to the memorandum, he ultimately conceded under cross-examination-that he could not dispute the version of the appellant and the truth of what the appellant had told him when he was requested to compile the memorandum in question when he decided on the amount. It was further never disputed that Mrwebi was to accompany the appellant when payment to Patel was to be made. The court a quo acknowledged this, in its judgment. This is a crucial admission by Mrwebi."

344. The judgment was brought to the attention of the Evidence Leaders by Ledwaba after the first day of Mrwebi's evidence before the Enquiry. Mrwebi had mentioned him in his evidence and Ledwaba took issue with his testimony. The ELs were able to obtain the full transcript of the evidence, independent of Ledwaba, and this was provided to the parties.

345. During the oral hearing before this Enquiry, Mrwebi questioned the accuracy of the Transcript provided and stated that he would attempt to verify its authenticity and accuracy. He thereafter filed a statement before the Enquiry indicating as follows:

345.1. He objected to the production of the Ledwaba evidence.

345.2. During or about 2004 and 2005, he made allegations of theft of C-Fund against Ledwaba, which led to Ledwaba's prosecution.

345.3. Mrwebi subsequently testified about these allegations in the Selebi trial in the South Gauteng High Court. During that testimony, Mrwebi used words such as "theft", "stole" and "stealing" in relation to Ledwaba's conduct. Those words were used to accuse Mrwebi of lying during the Ledwaba trial. Mrwebi denies that he lied or conceded to lying.

345.4. During 2015, Mrwebi gave evidence in the criminal prosecution of Ledwaba and was subjected to lengthy cross-examination. During cross-examination, Ledwaba took him to task about saying that he "stole" funds, more so that he was not there to defend himself when Mrwebi made such statements. Mrwebi conceded that his

use of terminology was too general and that he should have said "alleged theft" in describing the conduct.

345.5. He further denied agreeing with Ledwaba about paying an informer any amount of money. He also states that he did not know what information the informer had provided.

345.6. Mrwebi denies that the transcript is accurate as it does not include "certain aspects of his debate with Ledwaba."

345.7. Finally, he denies that he made any concession that he lied, and he disputes:

345.7.1. The correctness of the record filed; and

345.7.2. The findings of the Court of Appeal with specific reference to paragraph 30 of the judgment.

346. He therefore submits that the Enquiry ought to take no further cognisance of the judgment. Mrwebi disputed before this Enquiry that the court transcript was correct. The transcript as put before this Enquiry is an official transcript of Court proceedings as well as a High Court judgment of two judges confirming the transcript and proceedings.

5.3.6. Selebi Saga

5.3.6.1. Jiba's Disciplinary

347. On 10 January 2008 Jiba was suspended from her position as senior DDPP for alleged misconduct and disciplinary measures were taken against her. The basis for the suspension and the disciplinary proceedings included: dishonesty, an attempt to defeat the course of justice, unprofessional conduct, contravening the public servants' code of conduct and conduct bringing the NPA into disrepute.

348. It began in September 2007 when Prince Mokotedi (*"Mokotedi"*) of the NPA's Integrity Management Unit (*"IMU"*) requested Jiba to assist the police with regard to a criminal investigation involving Gerrie Nel (Nel). The police had received information relating to

criminal activities perpetrated by senior members of the NPA from Captain Mano (*"Mano"*) and Director Mabula (*"Mabula"*) who were authorised to conduct the investigation.

349. As subsequently reported by Mzinyathi, Mano had apparently been briefed by a source on 18 September 2007 of illegal activities by senior members of the DSO, including Nel. Mano was informed that evidence of the illegal activities was apparent from the judgment handed down in the Tshavhungwa matter. It is substantially this judgment that informed the belief that criminal activities were being committed.

350. According to a supporting affidavit filed by Mdluli, who was Deputy Provincial Commissioner at the time and exercised oversight responsibility over the investigation, he had approached Jiba and had a private meeting with her to brief her on the investigations. According to Mdluli they contacted Jiba on several occasions during the investigation to clarify what they required to advance the investigations against Nel and that they wished to obtain a statement from her.

351. Jiba provided them with an affidavit some weeks after the investigation had already ensued. It reflected that Jiba had been provided with the judgment in the Tshavhungwa matter and indicated that she had been asked to explain the manner in which the DSO functioned and its structure. In her affidavit she provided them with knowledge on how the Gauteng Regional Office operated; the staffing of that office; the methodology adopted in investigations at this office and how authorisations were granted for investigations.

352. The statement or affidavit that Jiba provided to the police did not relate to Nel, nor did it raise any impropriety.

353. The docket used to secure Nel's warrant of arrest was scant. Around the time when this was happening Nel happened to be the lead prosecutor in the Selebi matter. Coincidentally, after Nel's arrest Selebi brought an application for a permanent stay of the proceedings.

354. Hofmeyr believed that Nel had been arrested so that he would be unable to help defend Selebi's urgent application. He also indicated that Jiba had not brought it to the attention of the NDPP or invoked the internal integrity mechanisms.

355. According to Nemaorani, Jiba had introduced him to Mdluli and Mabula. Mdluli said they had a copy of the judgment in the Tshavhungwa matter and that they were investigating Nel. They had obtained the judgment from Jiba. They were worried that they did not have a complainant statement. Nemaorani suggested they ask Nel's supervisor, but Mdluli said that he had been told by Jiba that Mngwengwe would not complain against Nel. Nemaorani told Jiba this and she was upset and said that Mdluli was dragging the matter. Three weeks later, Jiba called Nemaorani because she wanted to arrange for a prosecutor for the police who were applying for a warrant of arrest for Nel.

356. MacAdam reasoned on this basis that if the source of the police complaint was said to be a senior member of the DSO and Jiba's presence in assisting the Investigating Officers, then on a balance of probabilities, Jiba had more to do with the securing of the warrant of arrest of Nel than simply making an affidavit, as she describes. MacAdam also draws the conclusion that she was the source of the police investigation into Nel. On the basis of the Nemaorani affidavit the motive attributed to her for doing this being that Nel had a role to play in her husband's criminal conviction.

357. These events led to the suspension and institution of disciplinary action against Jiba. Her conduct and alleged role as described above formed the basis of the charges relating to misconduct that were levelled against her.

358. A week before the disciplinary hearing began, Jiba sent a letter indicating that she would be lodging a referral of an unfair labour practice alleging that she had made a protected disclosure. She described her suspension and disciplinary action taken against her as an occupational detriment in terms of the PDA. In her PDA application she sought to have the decision to bring disciplinary proceedings against her reviewed and set aside.

359. She proceeded to lodge an urgent application at the Labour Court asking the court to interdict the disciplinary proceedings until her PDA – occupational detriment application was finalised. Her application was successful. The Court rules that the disciplinary proceedings be stayed pending the finalisation of the PDA application.

360. Jiba stated in her founding affidavit in the PDA application in the Labour Court that:

360.1. She was charged for misconduct in order to further a criminal conspiracy involving senior officials in management positions in the Office of the NDPP. The charges were false and meant to protect Gerrie Nel ("Nel") who was being investigated for alleged criminal conduct.

360.2. She had assisted the police SAPS in their investigations against him and had given a statement. As such, she *"had been a State witness in the criminal case against him"*.

360.3. Mdluli filed an affidavit in support of Jiba. He stated in that affidavit that Nel lied under oath in order to influence the outcome of a criminal case to favour Tshavhungwa, who had been employed at the DSO. Mdluli attached to his supporting affidavit, intercepted communications which he alleged indicated unlawful activities by senior members of the NPA.

5.3.6.2. Mrwebi's disciplinary

361. After the emergence of the Browse Mole report in July 2007, Mrwebi was approached by representatives from the NIA, CI and the Presidency who alleged that the Browse Mole report emanated from his office. After he refuted the claim the representatives left.

362. They returned sometime later to enquire about a meeting that had taken place on 25 July 2007. They explained that the scope of their investigation was very broad and that the contents of the meeting in question were relevant to their investigation. They asked Mrwebi to provide a statement detailing all that occurred in that meeting. Mrwebi was asked not to tell anyone as this was a top secret investigation.

363. Mrwebi complied with the request. He alleges that when he deposed to that affidavit he believed that he was acting in line with the instructions of the NDPP who had warned them that a presidential task team formed to investigate the origins of the Browse Mole report would be approaching them and that they should cooperate.

364. 364. Later on, the affidavit that Mrwebi had deposed to was declassified and provided to Selebi who sought to use it to his benefit in his criminal trial. Mrwebi was subpoenaed to give evidence at the Selebi trial in 2010 which he did. He claims that he did not know Selebi or anyone close to him at the time and never discussed the application with him.

365. The NPA asked Mrwebi to explain how his affidavit came about and how it landed on Selebi's hands. He was later put on special leave and charged with various counts of misconduct, including, misrepresentation of the facts and gross dishonesty, perjury, failure to comply with the NPA provisions by leaking confidential information pertaining to the DSO, failure to comply with the policies and procedures of the DSO, as well as the provisions of the SMS Handbook and conduct that brought the NPA into disrepute.

366. Mrwebi said that he gave the information in confidence but "if it happened to be disclosed obviously it must be covered by protected disclosure".

367. Mrwebi's reliance on the provisions of the PDA was attacked on the basis that it contained untruthful statements about what really transpired at the meeting. He had also not obtained consent in terms of section 42(6) of the NPA Act.

368. The disciplinary proceedings against him were subsequently abandoned and a settlement agreement was reached between him and the NPA.

5.3.7. OECD and MacAdam

369. Evidence was tendered on the work of the OECD and its importance to our international obligations in relation thereto. Macadam asserted that during his tenure, investigations into international foreign bribery were being dealt with diligently and appropriately, but he

was then removed. Macadam stated that there was no satisfactory progress made after this had occurred. Mrwebi denies this.

5.3.8. State Capture

370. Both Agrizzi and Muofhe were invited to give evidence to this Enquiry after their evidence at the State Capture Commission implicated Jiba and Mrwebi. Based on legal advice received, Agrizzi indicated to the Enquiry that he would not be available to give evidence. His affidavit and the transcript of the evidence given before the State Capture Commission is nonetheless in the Dropbox and constitutes evidence before the Enquiry. Likewise, Muofhe's statement and transcript of his evidence to the State Capture Commission is in the Dropbox and before this Enquiry.

371. Agrizzi's statement goes into detail regarding money and information exchanged. However, considering his inability to give oral evidence, and the fact that both Jiba and Mrwebi have denied the contents of his affidavit, there is no further evidence in relation to this matter before the Enquiry.

5.3.9. Plane Ticket

372. In summary, Roelofse's evidence in relation to this issue was as follows:

372.1. A confidential informant indicated to him that someone from the NPA – a high ranking official – was on a flight to Durban with Mdluli. Roelofse couldn't remember whether the informant told him this directly but he states that it was through this conversation with the informant that he discovered this information.

372.2. Roelofse investigated this information and looked at the passenger manifest of the flight in question. He discovered that there was a Mr N. Jiba on the flight in economy class. Mdluli was on the flight in business class.

372.2.1. Documentation obtained from the travel agent identified the passenger as *"Mr"* with first name as *"Nomqobo"* and/or *"Nomgobo"*. SAA did not have the identity numbers of passengers.

372.2.2. Enquiries at Home Affairs which indicated that there were only 2 Nomgcobo Jiba's in the country (both female) – one who was born in 1974 and Jiba. There were no others persons (male or female) with the name *"Nomqobo"* or *"Nomgobo"* on the population register.

372.2.3. He had obtained Jiba's voyager number from SAA but it had been issued after September 2010. Roelofse was presented under cross-examination with Jiba's voyager number which differed by one digit to the voyager number reflected in his affidavit. He accepted that he could have made a mistake on the voyager number. The actual flight documentation including details of the boarding pass was in the docket – which is missing.

373. In answer to the allegation that she was the recipient of a plane ticket for return flight between Johannesburg and Durban on 9 September 2010 paid for from the secret service account (*"SSA"*) Jiba denied and pointed out that there was nothing in the bundle of documents presented by Roelofse to the Enquiry that suggested that she was the person on the flight.

374. Pursuant to a declassification application, it was confirmed to the Enquiry that Jiba was / is not a secret agent

5.3.10. NPA under Nxasana

5.3.10.1. Yacoob fact finding committee

375. The *"Yacoob Fact Finding Committee report"*[36] was commissioned on 31 July 2014 at the instance of the CEO of the NPA on the instruction of the NDPP, Nxasana. The Committee was comprised of retired Constitutional Court Justice ZM Yacoob and Mr TK Manyage,

36 *Folder F, Item 1, Item 1,2 "Report of the committee appointed by Mrs Karen van Rensburg, the Chief Executive Officer of the National Prosecuting Authority, to investigate and gather evidence on certain aspects of the functioning of the National Prosecuting Authority" (Yacoob Fact Finding Committee report)*

a member of the Johannesburg Bar. Their task was to investigate allegations regarding leaking of information by NPA employees to the media and other interested parties, as well as to look into allegations of unethical and unprofessional conduct on the part of NPA employees. Nxasana had request all NPA officials to co-operate with the Yacoob Committee.

376. The Yacoob report placed the credibility and integrity of Mrwebi in doubt and put his understanding of the law and the legal process in question.

377. Mrwebi explained his reasons for non-cooperation with the committee to include that he had been informed by the NPA that a decision had been taken to lay criminal charges against him for his decision to withdraw the prosecution against Mdluli and for perjury.

378. The Committee lamented the fact that certain persons who had been the subject of concerning comments made by the Courts did not come forward to explain their position and respond in person to the comments made about them. By implication Jiba and Mrwebi both fell within that category of "certain persons".

379. In respect of Jiba the Committee stated:

"Ms Jiba is the Deputy National Director of Public Prosecutions and was the Acting National Director at the time of the withdrawal of prosecutions against Major-General Mdluli. She said in the High Court that she knew nothing about the withdrawal of these cases and the court found it difficult to believe her. We agree with the High Court on the basis suggested by Murphy J. We find it quite incredible that she did not know about these cases, involving as they did, a high ranking Major-General. The Supreme Court of Appeal rightly criticised her in the Mdluli case for doing nothing about Ms Breytenbach's representations to her. She must have known about them. Finally, in the Democratic Alliance case in the Supreme Court of Appeal she was again criticised, with justification, in our view, for adopting a supine approach to court order to deliver certain material to the applicants.

There are other decisions of the National Prosecuting Authority of which the National Director is aware in relation to which we cannot motivate further than saying that the information available concerning why charges were brought or withdrawn fill us with considerable unease."

380. Jiba explained that she took legal advice which was to the effect that she was under no obligation to appear before the committee and that, in any event, the process was voluntary.

5.3.10.2. Handover

381. Nxasana addressed a letter dated 1 July 2014 to Jiba thanking her for the period she had acted as the NDPP and requesting that she provide a handover report by 15 July 2014. The report was to give Nxasana the background he needed to inform decisions with specific regard to a number of high-profile cases.

382. He also requested separate reports relating to the *FUL, Mdluli, Booysen, Amigos* and *Bosasa* matters requesting specific details

383. Nxasana also asked Jiba for the keys to the safe, including the safe in the armoury of the NPA which she had in her possession as the Acting NDPP in which the details of former informers of the Scorpions were kept.

384. Nxasana sent several letters and follow up letters to Jiba requesting information and documents. Jiba testified that she requested the prosecutors who were intimately involved to prepare and furnish reports on the matters.

385. A similar request dated 1 July 2014 was made to Mrwebi to which Mokhatla was included. He sought a report in respect of the *FUL* matter relating to the background to the matter within his personal knowledge; Mrwebi's views on the interpretation of *"in consultation with"* as set out in section 24(3) of the NPA Act; the findings specifically as they relate to

him as well as the recommendations he would like to make on how the NPA should go forward and he sought these details before 15 July 2014.

386. Mrwebi responded in a memo and commented on the findings insofar as they related to him and made certain recommendations as sought by Nxasana. He did not provide any annexures to the Report.

387. Nxasana requested information from Mzinyathi in a letter dated 1 July 2014. Mzinyathi furnished a report dated 14 July 2014 indicating that his involvement in the **FUL** matter only related to the fraud and corruption charges and he furnished Nxasana with the BF memo with supporting documents, indicating that this memo "put the matter in its proper perspective". He advised that he had been a witness in the Breytenbach disciplinary inquiry and referred to the **FUL HC** and **FUL SC** decisions briefly.

388. Nxasana also sought a report from Noko in respect of the *Amigos* and *Booysen* matters. With regards to the *Booysen* matter she was asked specifically to provide the legal grounds for instituting the prosecution; her views on the judgment, particularly as they pertained to her actions; her recommendations on how to deal with the matter. In relation to the *Amigos* matter, whether she acted within her powers to review the decision of Mlotshwa; whether she informed Jiba of her decision to review it and what Jiba's views were on the matter; and what her views were in respect of the findings of the Court, specifically as they relate to the powers of the DPP to withdraw a matter in which he had no delegation to make the original decision.

389. She responded in a memorandum and attached a copy of her affidavit deposed to in the matter of *DA v Acting DPP, KZN*, in which she explained that in relation to the representations received from the MEC, Nkonyeni, that had been sent to her by Jiba, she had withdrawn the charges in relation to nine of the accused. She also made it clear that the representations had been sent to the Minister because the representor had not wanted to send it to either Simelane or Mlotshwa as both of them had been involved in her prosecution.

390. Noko indicated that she was not aware of any judgment that mentioned her actions as she had only recently been given this matter to deal with.

391. Van Rensburg testified that that Nxasana indicated on several occasions that Jiba was undermining him by not responding to his correspondence and not providing him with all the relevant information. Nxasana filed an affidavit in his litigation with Corruption Watch explaining that he had been experiencing difficulties with Jiba and Mrwebi while he was NDPP.

6. AN EVALUATION OF THE EVIDENCE

392. This section of the report considers the body of evidence that was set out in Part 5. We evaluate that evidence against the standards that are expected of senior officials within the NPA. The first part will focus on Jiba. The second part will consider the evidence relating to Mrwebi

393. As we have stated a number of times in this report and do so here once more, we do not review the findings of the Courts in the cases referred to in the ToR. This Enquiry is an executive-mandated process and to use it to usurp the role of a court of law would be contrary to the doctrine of separation of powers. That said, attention is drawn to the fact that none of the Courts in those cases were seized with the question of the fitness of Jiba as DNDPP and Mrwebi as SD.

394. We first consider the criticisms and findings in the cases as grounds for considering fitness and propriety in and of themselves. We then evaluate separately the other evidence tendered in the enquiry.

395. It is pertinent that we express some preliminary views on the GCB cases as they reveal the difference between the question determined by the Courts and that which this Enquiry must respond to. Jiba's legal representatives asked that this Enquiry accept that the fit and proper test as it relates the two remaining on the roll of advocates, was determined in the GCB SCA case, is the same test that applies to the fit and proper evaluation in terms of the NPA Act. However, that view is incorrect. Both the SCA and the High Court in the GCB matters established as much. This position was further bolstered by FUL 2018 where the Court explained the difference clearly and at great length.[37]

396. In sum, while an official may be removed or found to be not fit and proper to remain in the NPA, they may still remain fit and proper to remain on the roll of advocates. However, the converse is not true. Should an individual be struck from the roll of advocates they will,

37 ***GCB SCA***, *para 18;* ***GCB HC***, *paras 19-23;* ***FUL 2018***, *paras 96-99.*

by operation of the law, also cease to be fit and proper to hold office in terms of the NPA Act.[38]

397. It is worth reiterating the SCA in *Kalil NO* where it was stated that:

> *". . . where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."* [39]

6.1. Jiba

6.1.1. FUL HC and FUL SCA

398. The criticisms levelled against Jiba in these judgments are fully set out in part 5 above. For purposes of our evaluation, we hone in on the findings that: she had been lackadaisical in complying with court processes; that her submissions lacked transparency; her defences for shortcomings in her conduct were technical and hidden behind formalities, and; her submissions reflected a failure to appreciate judicial powers of review and could be seen asdirected at shielding illegal and irrational decisions from judicial scrutiny.

399. With these preliminary comments made, we proceed to evaluate the remarks made in the ToR cases insofar as they relate to both Jiba and Mrwebi.

400. One does not need to be overly investigative to come to the conclusion that these observations by the Court reflect Jiba's conduct as unbecoming of an official occupying the highest office in the NPA at the time and falls far short of the standard expected of an official who performs her functions competently and diligently – which in turn impacts the assessment of her conscientiousness, which in the context of section 9 of the NPA Act, has been defined in the following terms:

38 *Id.*

39 ***Kalil NO v Manguang Metro Municipality*** *2014 (5) SA 123 (SCA), para 30.*

"The notion of integrity is one that does not attract much debate in this case. The notion relates to the character of a person – honesty, reliability, truthfulness and uprightness. Conscientiousness, on the other hand, addresses something related but different. It relates to the manner of application to one's task or duty – thoroughness, care, meticulousness, diligence and assiduousness." (Emphasis added)[40]

401. Section 195 of the Constitution obliges all public officials to be accountable and transparent in accordance with the democratic values enshrined in the Constitution. Section 165(4) of the Constitution obliges organs of state to assist and protect the courts to ensure, amongst others, effectiveness. The prosecuting authority is no exception to these constitutional imperatives. Jiba, in her capacity as the Acting NDPP at the time, was required to perform her duties and functions assiduously and forthright – anything short of that standard would reflect an incapacity and / or unwillingness to carry out the duties of office as efficiently as required by section 22(4) of the NPA Act.[41]

402. As an officer of the Court, she failed in her duty to assist the Court in establishing the truth. By the Court's own account, Jiba had neither sought to fully explain the facts, nor had she taken the Court into her confidence. This speaks to the principle stated in *Khalil NO* above.

6.1.2. Spy Tapes 2

403. FUL SCA had already criticised her for being less than candid and forthcoming – she did very little in this matter to allay the concerns, providing an opposing affidavit in "generalised, hearsay and almost meaningless terms". The Court decried the fact that the office of the NDPP had opted to take an independent isolated view about the confidentiality of documents in its possession in the face of a court order. By so doing the NPA had displayed a "lack of interest in being of assistance" to any of the courts in the litigation as they should have. Nor did the NDPP's office take steps to assert themselves and put

40 *Para 71 of the Ginwala Enquiry Report.*

41 *This section provides that the National Director must adhere to the duties imposed by, inter alia, the provisions of the Constitution.*

Zuma's representatives on terms. Its conduct was found to be unworthy of the office of the NDPP, undermining its esteem in the face of the citizenry of the country whom they serve.

404. This criticism of the NDPP's office leads to the inescapable conclusion that it is just as much a criticism of Jiba herself who was at the helm of the office at the time as the Acting NDPP. A leader's choice to lead or to be led still amounts to a choice made by that leader and is one for which the leader is accountable. The criticism is exacerbated by the fact that she herself deposed to the affidavit but seemed oblivious to the implications of the order and what was expected of her office.

405. The SCA avers that the office of the NDPP, under Jiba's command, had certainly damaged its reputation in the eyes of the public. The public's perception of the NPA and its independence, through the office of the NDPP, had been tarnished. In Glenister, the Constitutional Court held:

"'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[42]

6.1.3. GCB HC and SCA

406. The GCB decisions present themselves with particular nuances that ought to be considered. In the first instance the High Court had unanimously found that both Jiba and Mrwebi should be struck off the roll of advocates. On appeal the SCA found that Jiba's explanation for what had transpired behind the scenes in the various reviews absolved her from the allegations of misconduct. However, questions relating to her competence were left open.[43] As matters currently stand, the appeal against the SCA judgment has just recently been ventilated in Constitutional Court. Quite importantly, the decisions that flow from that appeal will be responding to questions which do not concern the fitness

42 ***Glenister v President of the Republic of South Africa and Others*** *2011 (3) SA 347 (CC), para 207.*

43 ***GCB SCA****, para 18 where the Court explains that: "Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates";*

and propriety of Jiba and Mrwebi to hold their NPA positions. This is a question which is central to this Enquiry. The question of the removal from the roll of advocates is distinct from the question of fitness and propriety to hold office in the NPA.

407. Jiba's counsel quite correctly pointed out that in the SCA's assessment of the facts, no case of misconduct could be established against her. The Court supported the GCB HC's finding that no mala fides or ulterior motive could be shown in Jiba's authorisation as contemplated in POCA. In relation to the delays in the FUL matter, the Court explained that Jiba may have been a trained lawyer, but her opinion would have been secondary to that of her counsel and of LAD. Differences of opinion in relation to the Halgyn memo which could not be said to have established that Jiba was not fit and proper to remain on the roll of advocates, simply because she had been advised otherwise. This of course must be distinguished from the fit and proper evaluation as it applies to NPA officials. The SCA acknowledged as much, explaining that an inference regarding her incompetence with regards to her duties as DNDPP may be inferred, which would then be a ground for her to be removed from her position of DNDPP.

6.1.4. General comments on the cases relating to Jiba

408. We ought to be circumspect in the factual value that the GCB HC, GCB SCA and the FUL 2018 decisions can have in our evaluation of Jiba's conduct in relation to the FUL HC, FUL SCA, Spy Tapes 2 or Booysen judgments. The reason was spelled out by the Court itself in FUL 2018. None of the three subsequent decisions constituted appeals against the Spy Tapes 2, Booysen or FUL cases. The SCA in GCB had premised its interference with the factual findings of GCB HC on the strength of the fact that the latter had relied on information that had rendered it unable to bring an unbiased view to bear.

409. This is not to say that due regard cannot be had to the comments made by the Courts in the GCB matters or FUL 2018 in relation to Jiba, but they cannot be regarded as superseding the findings of the decisions which had not been appealed.

410. As a general view, the Courts' observations of Jiba's attitude and conduct throughout the course of the various reviews was characterised by non-responsiveness and irreverence towards the Courts. Furthermore, Jiba lacked accountability and sought to shift responsibility when she was expected to act under an order. The conduct she exhibited in her official capacity may be seen as subversive to the symbiotic relationship that ought to be enjoyed between the NPA and the judiciary. As a critical cog in the administration of justice it is incumbent for the NPA, an institution that is established under the very same constitutional chapter, to operate harmoniously with the courts. For that reason it is not a mere coincidence that members of the NPA as advocates are officers of Court and must assist the Courts to be effective in upholding the rule of law and dispensing justice. The NPA plays a critical role in that regard.

411. Institutional independence means that the NPA's fidelity should be to the rule of law. But this does not mean that the NPA can be a law unto themselves. The Courts are vested with the responsibility of upholding the rule of law and the NPA is constitutionally duty-bound to assist them in doing so.

412. As a senior leader of that institution, Jiba has a responsibility to diligently and competently manage that relationship and take all steps to set the record straight and assist the court when called upon to do so. When this is not done, it has an impact on her competence, which the courts have to have been found wanting in all the relevant judgments.

6.1.5. Evidence related to the cases

6.1.5.1. The Booysen prosecution

413. Multiple evidentiary issues arise out of Jiba's handling of the Booysen prosecution that warrant evaluation and closer examination. First, it must be pointed out that the scope of information presented before this Enquiry is significantly broader than what had been placed before the Courts in the Booysen and the FUL 2018 judgments. While we evaluate Jiba's propriety and conduct in light of this broader scope of information, it should in no way be seen as undermining the findings of the Courts. Nor should it in any way be seen

to suggest that the Courts would have come to a different conclusion had this information been presented before them.

414. The evidence establishes that Jiba did not understand how her authority operates in respect of assigning prosecutors from outside of a particular DPP's jurisdiction to prosecute crimes within that jurisdiction. In her defence, she sought to rely on an interpretation of section 20(4) of the NPA Act to suggest that she could, through written authorisation, make those assignments. Furthermore, she relied on the Shabir Shaik and Zuma prosecutions as examples of instances where it had been done before.

415. On a reading of section 20(4) of the NPA Act, together with Nel's legal opinion which was solicited by Mokhatla and its interpretation supported by Hofmeyr, Jiba's view does not appear to be correct. This is a simple matter of statutory interpretation where the word "and" rather than the word "or" is used. Jiba's examples of Downer being used in the Shabir Shaik prosecution and outside prosecutors being brought in for the Zuma prosecution are not relevant as they appear to relate to the now defunct DSO unit. Needless to say, there is also a paucity of evidence to support her averment.

416. The evidence suggests that something unusual transpired in the process of authorising the racketeering charges against Booysen. More specifically, that the authorisation and prosecution of Booysen took place outside of the ordinary procedures that were in place at the NPA.

417. Mamabolo explained that there was a dedicated team that dealt with the vetting of racketeering charges. He also detailed the process. The existence of which was supported by Hofmeyr, although he called it a "committee". Mosing also acknowledged that there was a team dedicated to dealing with racketeering charges which he decided to exclude on the basis that Booysen had worked closely with the team in various cases.

418. It is clear that the prosecution of the Cato Manor unit was not initiated from the KZN office. This is so because Mlotshwa received a call from Jiba of her intention to prosecute the matter.

419. The facts establish that Jiba had been directly approached by members of IPID to deal with the prosecution of certain matters, this much she conceded when questioned in cross-examination. It is important to note that her concession directly contradicts her signed written submissions to the President. The question is whether she was the first point of contact. On the evidence, her meeting with the IPID members must have predated the establishment of a prosecution team. In light of the fact that in her evidence she refers to the visit of IPID which prompted her to constitute a national team of prosecutors. Mosing explains that he was first approached by IPID on 8 March 2012 with six dockets which he was instructed to consider and make a decision on by the next day. Within a day, on 9 March 2012, an entire team of prosecutors had been brought in from various parts of the country to be briefed by on the prosecutions by IPID.

420. The explanation given to Mosing by IPID was that prosecutors had to be roped in because what was promised by Mlotshwa was not materialising. Jiba conceded calling Mlotshwa. There is no evidence of Mlotshwa being contacted by IPID. It was Jiba who had set up the special team of prosecutors.

421. The IPID members put a significant amount of pressure on the prosecutors to decide on the dockets and to report back within a day.

422. Jiba had appointed Mosing to head the SPD division, who then exclusively dealt with the Booysen charge, to the exclusion of Mamabolo and Kruger, in a manner which was at odds with the examination process that would ordinarily be followed. Mosing had received the racketeering authorisation application on 15 August 2012, drafted the recommendation to Jiba on 16 August 2012 – without examining the docket –[44] and Jiba had approved it on 17 August 2012.

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44 This is established in his own affidavit.

423. Gorven J had later found these authorisations to have been irrational.

6.1.5.2. The Spy Tapes 2 SCA order

424. Jiba explained that she was simply acting on advice that had been obtained from the Kennedy team. In her affidavits she states that her conduct does not render her unfit or improper to practice as an advocate. The Court's findings in this respect are set out in 5.1.4. above. Having heard Jiba's explanations, we concur with the Court on the concerns it had raised about her.

6.1.5.3. The FUL litigation

425. The evidence establishes that Jiba played an active role in managing and steering the litigation process. Four different sets of counsel had been deployed to attend to the matter. Where counsel had raised concerns in relation to a particular course of action, they were either removed or withdrew themselves from the brief. In a meeting that was attended by Jiba, among others, Halgryn had forewarned that the litigation was bound to fail. As the findings in the FUL judgments show, the decisions were set aside in both Courts.[45]

426. Needless to say, what has been adduced is particularly concerning. It shows that Jiba had not been frank about the depth of her involvement in accepting or following advice – both in her GCB affidavit and before the Enquiry. She overrode the advice of counsel on more than one occasion if one has regard to the memorandums from counsel. She misled the Courts and failed to make full and frank disclosure in her affidavits. Her integrity is compromised and this serves as a clear basis for a finding that she is not fit nor proper to hold office.

45 *Jiba's counsel submitted that the litigation was a success since the SCA in the FUL matter indicated that the review was only possible through the principle of legality rather than under PAJA and further that it amended the order of the High Court compelling the NPA to reinstitute charges against Mdluli, opting rather to revert the matter to the decision maker. However, this was done due to separation of powers concerns. It did not change the outcome.*

6.1.6. Other evidence

6.1.6.1. Qualifications: The right of appearance.

427. The evidence establishes that at the time that she was appointed to the post of DDPP she was neither an admitted attorney nor an admitted advocate. Section 15(2) of the NPA Act would suggest that one of the prerequisites for the post is to have the right of appearance as contemplated in the Right of Appearance in Courts Act.[46] During the course of the hearings, reference was made to section 25(2) of the Act which provides that notwithstanding the provisions of the Right of Appearance in Courts Act, a prosecutor obtains the right to appear in all courts once he/she has obtained at least three years' experience as a prosecutor of a magistrates' court of a regional division.

428. However, as a matter of statutory interpretation, a distinction should be drawn between obtaining the rights to appearance under the NPA Act by virtue of section 25(2) and obtaining the right through the legislation specifically referred to in section 15(2). A sensible interpretation would suggest that the right as it arises under the Act would be a pragmatic measure to empower prosecutors to carry out their prosecutorial functions in the Courts. The right to appear in terms of specific legislation as required by section 15(2) on the other hand, would suggest that the purpose would be to have either an admitted attorney or admitted advocate occupy a more senior role within the NPA, since an admitted professional has additional legal and ethical obligations and would thus also have professional accountability.

429. In response to the EL's written submissions, Jiba objected to any possible suggestion that she had misrepresented her qualifications when she had applied for the post of DDPP. Stating that she was not aware of the criterion used by those who had appointed her, she attached letters from Ms Matshidiso Modise, who identifies herself as the Chief Director: Human Resources Management and Development at the NPA, which sought to explain the process for appointing DDPPs. According to the letters, advertised DDPP posts require right to appearance but provide that it may arise either through the Rights

46 *Act 62 of 1995.*

of Appearance Act or by virtue of section 25(2) of the NPA Act. The NPA's approach to appointing DDPPs may be tenuous, but we are satisfied that the clarification establishes that there was no wrongdoing on Jiba's part. Even if the appointment was invalid in law, *Oudekraal* establishes that it remains valid in fact until such time that it is taken on review and set aside.[47]

430. On why she then chose to refer to herself as "advocate" in various correspondences, Jiba's counsel explain that it was in reference to her title as "State Advocate", a formal position within the NPA rather than a practising advocate who is admitted on the roll as such. This explanation does not address why the "advocate" references continue even after she is appointed to the post of DDPP. Even so, in a practical social setting, it could simply amount to nothing more than the title becoming a customary moniker. Consequently, no adverse findings can be made on the strength of this evidence.

6.1.6.2. The presidential pardon

431. Nhantsi's application for presidential pardon was granted by Zuma, despite sensible apprehensions being raised by the ministerial recommendation – specifically around the short period of time that had lapsed since the conviction and the bearing that this had on certain exclusions for individuals convicted of theft. That said, it was and is the President's prerogative to pardon whomever he deems fit.

432. In light of the fact that a pardon is an act of generosity from the President, Jiba's proximity to her husband and her involvement in subsequent Zuma-related cases raises concern. While it may be that she had limited participation in **Spy Tapes 2** and did not feel that she would be bias in her role, she was the Acting NDPP, the most senior official within the NPA and she deposed to an affidavit in the matter. Whether or not there was actual bias, our Courts have recognised that the perception of bias plays an equally important role when it comes to assessing impartiality for judicial officers.[48] This principle is equally apposite when it comes to officials within the NPA, given the pivotal role that they play in the

47 ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** *2004 (6) SA 222 (SCA), para 27.*

48 *S v Jaipal 2005 (4) SA 581 (CC), para 41: where the Court explains that the test is objective and that it involves determining whether there is an apprehension of bias rather than a suspicion.*

administration of justice and the fact that both the Courts and the NPA are constitutionally obliged to be independent institutions.

433. In the circumstances, and given the course of action that the NPA chose to follow in **Spy Tapes 2**, Jiba had a duty to safeguard the image of the NPA as an institution and to mitigate negative perceptions relating to its independence. These perceptions are indeed established in the judgment itself which points to the fact that, through its conduct in the course of litigation, the office of the NDPP had damaged its esteem in the eyes of the citizenry. Her deposing to an affidavit in the matter rather than recusing herself, whether or not the decision had already been made by other officials, has a bearing on her integrity.

6.1.6.3. SSA plane ticket

434. The evidence put forward by Roelofse suggests that Jiba, one day after her husband was pardoned by the President and three months before being appointed as DNDPP, had been on a flight with Mdluli which was paid for out of the secret service account. Jiba denied that this had ever taken place. Roelofse admitted to certain discrepancies in the evidence, such as references to title, misspelling of the first name in the passenger manifest and a single digit discrepancy in the voyager number.

435. The information that was placed before the Enquiry, is insufficient for purposes of evaluation. We believe that this matter must be investigated further as it may relate to live matters involving Mdluli.

6.1.6.4. Accountability, handover reports and cooperation with the Yacoob Fact Finding Commission

436. When Nxasana took up the mantle of NDPP, he had made no fewer than 6 written requests to Jiba between 1 July 2014 and 24 October 2014 to provide him with an account on various matters that he was looking into. She did not provide a written response to any of those requests. Nor did she reply to a request from Justice Yacoob to come forward and provide information. On the face of it, the evidence would be indicative of incompetence and insubordination. In her oral evidence before the Enquiry, and when asked about the

first letter, Jiba indicated that she had gone in to speak to Nxasana and had informed him that he had already received reports from individuals who were better informed in those respective cases. She also bemoaned the prevailing environment of hostility at the NPA, suggesting that there was a plot to oust her and that her silence was prompted by legal advice she had received.

437. Jiba's acknowledging the shortcomings of the Office of the NDPP, including her own, is laudable. However, it does not absolve her in the course of the fitness and propriety assessment. It demonstrates that there were serious problems permeating throughout the institutional culture of the NPA but also shows that she was just as much a part of the problem. Whatever her fears may have been regarding a potential ouster, she failed to distinguish her personal interests from her responsibilities as the DNDPP. The latter is duty bound to account and to provide information to ensure that the organisation can function the way in which it is meant to.

6.2. Mrwebi

6.2.1. FUL HC, FUL SCA, GCB HC and GCB SCA

438. The sequence of events together conflicting versions put forward by Mrwebi in various fora should be considered in light of the adverse findings that have been made against him by the Courts. On 26 October 2011, a Presidential Minute is signed appointing Mrwebi as SD. That same day, the NDPP receives representations from Mdluli's attorneys. Mrwebi explains that he received his appointment letter on 1 November 2011. His official appointment, however only takes effect on 25 November 2011, the date that his appointment is published in the Government Gazette. Before knowledge of Mrwebi's appointment was been made public through the Gazette, Mrwebi personally received representations from Mdluli's lawyers on 17 November 2011 for the charges to be withdrawn. Four days later, on 21 November 2011, Mrwebi forwards those representations to Breytenbach and requests that she submit a full report by 25 November 2011. He receives the report on 24 November 2011 explaining that Mdluli's representations are unsubstantiated.

439. On the 28th of November, Mrwebi sends a letter to Breytenbach and Ferreira requesting the docket and evidence analysis in the Mdluli matter. On 4 December 2011 Mrwebi sends a consultative note to Breytenbach and Mzinyathi explaining that the charges against Barnard and Mdluli should be withdrawn.[49] That very same day, 4 December 2011, he sends a letter to Mdluli's attorneys stating that the charges have been withdrawn.

440. Mrwebi stated that the date on the consultative note was made in error. He offered two conflicting reasons for the error. The first was that it was a Sunday and he could not have possibly sent it on that day because he does not work on Sundays. The second was that the date must have been copied over with a previous letterhead by accident. The contradiction is self-evident. He cannot claim that he does not work on Sundays yet have a pre-existing letterhead with a date that falls on a Sunday. However, both explanations are untrue, as the 4 December 2011 date appears several times in the consultative note.

441. On 5 December 2011, Mrwebi met with Mzinyathi and aired some of his concerns regarding declassification but stated that he would have to investigate further. Mzinyathi subsequently learnt that Mrwebi had already taken the decision. On 8 December 2011, Mzinyathi wrote a letter to Mrwebi to voice his disagreement regarding charges being withdrawn. On 9 December 2011, Mzinyathi and Breytenbach met with Mrwebi and disagreed with his decision to withdraw the charges. Mrwebi explained that he had already sent the letter and was *functus officio*.

442. Mrwebi's various explanations, regarding compliance with the "in consultation" requirement, are set out in the cases. The concessions he made in the Breytenbach disciplinary while being cross-examined directly contradicted the averments he had made before the Court under oath. In his consultative note, he explained that whether or not there was evidence in the Mdluli prosecution was irrelevant because the investigation fell within the remit of the IGI. Yet, before the Enquiry, he sought to suggest that it was the absence of evidence at the time which prompted the withdrawal. The upshot of Mrwebi's conduct is that he had been dishonest and he persisted with his dishonesty before the Enquiry.

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49 Mzinyathi claims that he only received the note on 6 or 8 December 2011.

443. The issues which were raised in the cases and the criticisms levelled against Mrwebi are fully set out in part 5 above. In short, **FUL HC** took issue with his conduct in respecting court processes. More importantly, it found that he had been dishonest regarding his compliance with the "in consultation" requirement which was a prerequisite for the prosecution being withdrawn. **FUL SCA** did not meddle with **FUL HC's** finding and **GCB HC** as well as **GCB SCA** both found that the misconduct was well-founded based on Mrwebi's conduct in the **FUL HC** matter.

444. Among the documents that were not included in the record, was the consultative note sent by Mrwebi to Mzinyathi setting out Mrwebi's decision to withdraw the prosecution of Mdluli and his reasons for doing so. This shall be discussed in more detail below.

445. It was alleged that Mrwebi was determined to withdraw the fraud and corruption charges against Mdluli and prepared a memorandum and a "consultative note" setting out his reasons. The consultative note was dated 4 December 2011. The real issue as it became apparent in the GCB-HC regarding the 4 / 5 December 2011 dispute is whether the memo was prepared before Mzinyathi was consulted or whether Mrwebi did in fact consult with Mzinyathi in accordance with section 24(3) of the NPA Act, before taking the decision to withdraw the prosecution against Mdluli. The GCB-HC was of the view that Mrwebi had already drafted the document reflecting his decision to withdraw the prosecution when he met with Mzinyathi on 5 December 2011.

446. Mrwebi's answer was that he made a mistake when he put 4 December 2011 as the date on which he had prepared the consultative document that and that he should have put 5 December 2011 as the correct date since it was on that date that the consultation with Mzinyathi happened. Before the Enquiry, Mrwebi further advanced that he could not have worked on the documents on 4 December 2011 because it was a Sunday and no documents are prepared on Sunday, he does not work on Sunday and was not at work that particular Sunday.

447. Mrwebi knew that in terms of the law, he had to consult Mzinyathi. Whether he knew what the consultation entailed is unclear.

448. That he was not being truthful when he said before this Enquiry that the date 4 December 2011 as reflected on the documents was a mistake can be seen from a handover report that he prepared to Nxasana on the Mdluli matter. In that report he said that, "during the week of 28 November 2011, I worked on the matter up to and including the weekend of 4 December 2011."

449. Mrwebi's explanation that he used a pre-existing document to draft the memo since he did not have the letter head and that he simply forgot to change dates cannot be true as that would mean that the document that he used as a template was dated 4 December 2011. He could not have had a pre-existing document dated 4 December 2011 since according to his evidence before the Enquiry he was not at work that Sunday and did not prepare documents that day.

450. At paragraph 1 of the consultative note Mrwebi stated that "[a]s required by section 24(3) of the NPA Act I have consulted with" Mzinyathi, "with the purpose of conveying my views on the matter", summarising as follows:

> *"Essentially my views* ***related to the process that was followed in dealing*** *with the matter particularly in view of the fact that the* ***matter fell squarely within*** *the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is* ***authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigations can never be complete without access to such documents and information.*** *In my view the process followed is* ***possibly illegal*** *as being in contravention of the said provisions of the Intelligence Services Oversight Act, 40 of 1994." (our emphasis)*

451. This perpetuated the position adopted by Mdluli in his submissions to SAPS and the disciplinary proceedings held on 21 November 2011 that any investigation without the

IGI's involvement would be unlawful. As a matter of law, Mrwebi is incorrect in relation to the mandate of the IGI, who can access classified documents and that the ISO Act had been contravened in the process followed. Not having had any discussions with any member of SAPS involved in the process, it is astonishing that Mrwebi reached that conclusion.

452. In the Breytenbach disciplinary hearing and while under-cross examination, Mrwebi conceded that he took the decision to withdraw charges before seeing Mzinyathi on 5 December 2011. Furthermore, he conceded that he had prepared the documents before ascertaining what Mzinyathi's views were. The Court in **FUL HC** explains it fully in its judgment. Mzinyathi stated that on 5 December 2011 Mrwebi merely informed him that he was dealing with representations from Mdluli and that he was going to conduct research on the Intelligence Services Oversight Act.

453. Mrwebi's conduct is inconsistent with the obligation imposed by the Prosecution Policy Directives which requires prosecutors to act in a balanced and honest manner. The code of conduct for members of the prosecuting authority requires that prosecutors be individuals of integrity whose conduct is objective, honest and sincere.

454. Additionally, the 2004 practical guide to the ethical code of conduct for members of the NPA calls upon prosecutors to be honest. It provides in relevant parts that "prosecutors shall at all times exercise the highest standard of integrity and care, [they] must be and perceived to be honest sincere and truthful". The need for integrity is absolute, prosecutors must be scrupulously honest in providing information.

455. The failure to comply with this obligation by one holding such a high and respectable leadership office within the NPA is objectionable and severely damages the institution's reputation. It infringes on the integrity and conscientiousness obligations imposed on prosecutors by the NPA Act, Prosecuting Policy and other instruments that govern the NPA.

456. Both the SCA and the HC in the GCB matter were satisfied that misconduct on the part of Mrwebi had been established.

6.2.2. Evidence related to other matters

6.2.2.1. Representations which were made but kept secret by Mrwebi

457. What is concerning about these representations is that neither Mzinyathi nor Breytenbach had been told about visits from senior Crime Intelligence officials not to mention representations and requests for investigations to be stopped. When Mrwebi was asked whether he did not find it worrying that implicated individuals from Crime Intelligence made secret representations to him and asked that investigations be stopped, he replied in the negative and added that he had not told the investigating officer to halt the investigations.

458. That Mrwebi does not find it concerning that suspects were sending representations to him and requesting him to order that investigations be stopped presents a serious problem. The problem is compounded by the fact he kept all this to himself and did not communicate it to Mzinyathi, Breytenbach or Roelofse who were also involved in the case. Mrwebi's response to the memorandum presented by Breytenbach and Ferreira was dated 26 April 2012. In it he cites non-compliance with security legislation. It is these very same concerns that he raised in that response that form the substance of the representations which he failed to disclose.

459. This shows that Mrwebi's independence has been compromised and therefore he cannot be trusted to carry out his duties as SDDP without fear, favour or prejudice.

6.2.3. Other evidence

6.2.3.1. Ledwaba's Case

460. It emerged during Mrwebi's testimony that the NPA proposed to take disciplinary steps against Mrwebi for, among other things, poor performance of his office, unprofessional conduct and unbecoming and inappropriate behaviour on the part of Mrwebi. In an

attempt to answer to this allegation, Mrwebi told a story about how he became subject of victimisation in the NPA because he had uncovered some improprieties on the part of those who were in senior management positions. These individuals included Adv Ledwaba who was later charged with multiple counts of fraud in relation to the DSO C-Funds.

461. The Appeal Court noted that at the Ledwaba trial Mrwebi was found to have lied and contradicted himself numerous times. The Court states that Mrwebi's evidence before that Court was premised on an attack of the character of Ledwaba. Part of Mrwebi's evidence was that Ledwaba had told Mrwebi to pay an informer that was unknown to Mrwebi and that he did not believe should have been paid. It also emerged during the Ledwaba trial that Mrwebi had earlier in the Selebi trial accused Ledwaba of stealing funds from the C-Fund account of the DSO for his personal benefit.

462. Before this Enquiry, Mrwebi questioned the accuracy of the transcript in the Ledwaba trial and asked for audio transcripts of the proceedings in that matter and objected to the production of the Ledwaba evidence altogether. His legal team undertook to find the audio recordings of the proceedings in the Ledwaba matter but such audio recordings were never provided to the Enquiry. The Evidence Leaders managed, however, to obtain a full transcript which was then made available to the legal representatives of the parties.

463. Since no evidence has been provided to the enquiry to prove that the transcripts were inaccurate, we find no reason to exclude the Ledwaba evidence. We therefore accept the Court's finding that Mrwebi lied under oath.

7. FINDINGS AND RECOMMENDATIONS

464. In view of the totality of evidence, and in light of the evaluation in part 6, we find that both Jiba and Mrwebi are not fit and proper to hold their respective offices.

465. Central to the question of whether a person is fit and proper to practice as an advocate, is whether that person is a person of *"complete honesty, reliability and integrity"*.[50] This quality must be present throughout a person's practice as an advocate.[51]

466. It is the function of the Court to determine what is or is not improper conduct for an advocate. The Court will take cognisance of the rules of conduct laid down by the society of advocates of a particular division and by the General Council of the Bar (*"GCB"*).[52] The Court may prohibit conduct which, though not in itself immoral or fraudulent may in its opinion be inconsistent with the proper conduct of a legal practitioner and calculated, if allowed, to lead to abuses in the future.[53]

467. The Court must take account of all the circumstances of the case with due regard to the demands of the proper administration of justice, and the interests of the profession and the public.[54]

468. The application involves a three-stage enquiry:[55]

468.1. First, the Court will decide whether the alleged offending conduct is established on a balance of probabilities.[56]

468.2. Only once this is established, will the Court decide whether, objectively, the advocate is a fit and proper person to continue practising as such.[57]

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50 Geach *supra para 126.*

51 *Ibid para 127.*

52 Beyers v Pretoria Balieraad *1966 (2) SA 593 (A) at 605G.*

53 De Freitas *supra at 763, per Cameron JA at para 8.*

54 *Ibid.*

55 Jasat v Natal Law Society *2000 (3) SA 44 (SCA) at 51. See also:* Geach *supra paras 50 – 51;* Cape Bar Council v Noordien *(14514/2012) [2013] ZAWCHC 138 (30 August 2013) para 17.*

56 Kekana v Society of Advocates of South Africa *1998 (4) SA 649 (SCA) at 654C-E.*

57 *Ibid.*

468.3. Finally, if the Court concludes that the person is not fit and proper to practice as an advocate, then it has a discretion either to grant an order striking the person's name off the roll of advocates or to suspend the person from practice.[58]

469. In fact, it has now been definitively established that the "fit and proper" test as it applies to legal practitioners is distinct from the "fit and proper" test which is applied to NPA officials under section 9 of the NPA Act. While there is a direct relationship, the standards which are applied are idiosyncratic. For example, it is possible for a senior NPA official who is found not to be fit and proper under the NPA Act to nevertheless remain fit and proper as a legal practitioner. The converse is of course not possible in that a legal practitioner who is struck off their respective roll will, by operation of law, cease to be fit and proper under the NPA Act.[59]

470. In *Jiba v General Council of the Bar, Mrwebi v General Council of the Bar*[60] the SCA overturned the High Court's ruling that Jiba & Mrwebi were unfit to practise as advocates.

471. The Court in doing so, distinguished between the fitness to practise as an advocate and fitness to hold public office. The Court held that:

"Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates".

7.1. Jiba:

472. In considering whether, in her capacity as Deputy National Director of Public Prosecutions / Acting National Director of Public Prosecutions, she had complied with the Constitution, the National Prosecuting Authority Act and any other relevant

58 *Ibid; Jasat supra at 51G-I: "Whether a Court will adopt the one course or the other will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession (Incorporated Law Society, Transvaal v Mandela 1954 (3) SA 102 (T) at 108D - E), the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree."*

59 *GCB HC at paras 19-23; FUL 2018 at para 97.*

60 *2018 JDR 1035 (SCA).*

laws in her position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service:

472.1. The evidence shows that she had not been frank when engaging under oath with the Court in **FUL HC**. Further evidence led before the Enquiry showed that she had not been frank in her affidavit before the Courts in the **GCB HC** and **GCB SCA** matters either, making general propositions regarding the functioning of the NPA knowing full well that that process had not been followed in the specific matters which she was called upon to account for. Furthermore, failing to explain the exact process that had been followed in the FUL and Booysen prosecutions. Her approach to the litigation was misleading and in following that approach, she compromised her integrity and consequently cannot be entrusted with the responsibilities of the office that she holds. In addition, and as will be canvassed in the findings below, her conduct in multiple instances indicates a lack of conscientiousness. Her actions do not accord with the requirements set out under section 9(1) of the NPA Act.

472.2. With regards to the Booysen prosecution, the evidence establishes that she allowed, and in fact enabled, the independence of the NPA to be compromised.

472.3. Furthermore, in the Booysen matter, despite initiating the prosecution, she did not consult with the DPP whose approval was required. And, when a dispute ensued between Mlotshwa and Chauke, she refused to get involved and assist in resolving the issue. This reflects a lack of leadership.

472.4. As an official in the public service, her actions in the course of her dealings with the Courts, as specifically explained by Murphy J in the **FUL HC** judgment, have undermined the principles espoused in section 195 of the Constitution with regards to maintaining a high standard of professional ethics, accountability and transparency. This has had the further effect of undermining the injunction in section 165(4) of the Constitution to assist the Courts to ensure their effectiveness.

473. With regard to whether she properly exercised her discretion in relation to instituting and conducting criminal proceedings on behalf of the State; carrying out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinuing criminal proceedings:

473.1. Her refusal/failure to consider the extensive memorandum presented to her when charges against Mdluli were withdrawn, as an Acting NDPP function in the discontinuation of criminal proceedings, demonstrated a failure to properly exercise her discretion. The GCB SCA observed that she was not bound to follow the advice contained in the memorandum and that no misconduct could be established on that basis. This cannot be disputed. As far as properly exercising her discretion is concerned, however, as the Acting NDPP, she was required to have a rational explanation as to why she opted not to consider the memorandum at all.

473.2. The procedure followed in authorising the prosecution against Booysen, considering that she had herself initiated the prosecution process, was found to have been irrational and was set aside. In her capacity as Acting NDPP, she failed to properly exercise her discretion in authorising the proceedings. We make this finding without any suggestion as to the guilt or innocence of Booysen.

474. Whether she duly respected Court processes and proceedings before the Courts as required by applicable prescripts and as a senior member of the National Prosecuting Authority:

474.1. In her capacity as Acting NDPP, she failed to comply with Court processes within the stipulated time frames and drew strong criticism for displaying a lack of candour in her submissions and for failing to take the Court into her confidence.

474.2. She has been labled “supine” in several judgments for failing to act in instances where she had been expected to do so.

474.3. We find that as a senior member of the NPA, Jiba has displayed irreverence to the Courts and indifference to their processes, resulting in adverse comments being made about her.

475. Whether she exercised her powers and performed her duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act:

475.1. The policy explains that prosecutors are given discretionary powers by the law in performing their functions, exercising their powers and carrying out their duties. The discretion must, however, be exercised according to the law and within the spirit of the Constitution. With specific regard to the principles of accountability and transparency which undergird the constitutional ethos of all state institutions, Jiba's conduct is found wanting. She was not forthcoming with the Courts and did not take them into her confidence.

475.2. The policy obliges all its members to serve impartially and to exercise, carry out and perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. In compromising the independence of the NPA, we find that Jiba dishonoured this obligation.

475.3. The adverse remarks made against Jiba in the various decisions, including legal submissions which lacked a constitutional basis (**FUL HC**) which she made in her official capacity which drew scathing criticisms from the Court, together with her involvement in the series of decisions which were all set aside on review for irrationality, were unbecoming for any official, let alone an official of her seniority. We find that Jiba's conduct had the effect of seriously damaging public confidence in the NPA.

476. With regard to whether she acted at all times without fear, favour or prejudice:

476.1. The visit by IPID to herself and Mosing, the pressure exerted on Mosing to review six dockets and make a decision within a day and Jiba's reasons in her affidavits, the representations to the President and before this Enquiry indicate that:

476.1.1. She allowed pressure to influence the manner in which the NPA dealt with this matter.

476.1.2. The inconsistencies in the reasons she gave for establishing a national prosecuting team indicates that she acted with favour and with prejudice to the NPA.

477. In relation to whether she displayed the required competence and capacity required to fulfil her duties:

477.1. Jiba failed to attend to review as requested, the decision taken by Mrwebi to withdraw the charges against Mdluli;

477.2. She failed to competently apply the prescripts of POCA, the NPA prosecution policies and the law in the Booysen prosecution;

477.3. Once she had initiated the process, she failed to manage the dispute between Mlotshwa whose jurisdiction the matter fell and Chauke on a critical procedural aspect, relating to the indictment;

477.4. Jiba also failed to competently and timeously comply with court orders, time frames and directives as set by the courts.

477.5. Having regard to the above, Jiba failed to display the required competence and capacity required to fulfil her duties.

478. On the question of whether she in any way brought the National Prosecuting Authority into disrepute by any of her actions or omissions:

478.1. The series of Jiba's decisions taken in her capacity as ANDPP, which were all set aside on review, the comments and criticisms levelled against her by the courts have brought the NPA into disrepute

7.2. Mrwebi:

479. Whether, in fulfilling his responsibilities as Special Director of Public Prosecutions, he complied with the Constitution, the National Prosecuting Authority Act and any other relevant laws in his position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service:

479.1. The Constitution is the supreme law of the Republic and conduct inconsistent with it is invalid. It calls on all organs of state to among other things, assist and protect the courts through various means in order to safeguard their dignity, independence, accessibility and effectiveness. The NPA is bound by this obligation as an organ of state.

479.2. The Courts have levelled criticisms and concerns in the manner in which Mrwebi has discharged the duties of his office and conducted himself towards the Courts. Mrwebi's conduct was openly at variance with what is expected of a person in his position.

479.3. In taking the decision to withdraw the prosecution of Mdluli without consulting with Mzinyathi, Mrwebi acted contrary to the provisions of the NPA Act.

479.4. Mrwebi did not act with integrity as required under section 9 of the NPA Act. This is evident in his attempt to justify his conduct where he inadvertently referred to a judgment which directly established his dishonesty under oath. This was evident from his representations regarding Ledwaba.

480. In considering whether he *properly exercised* his discretion in instituting and conducting criminal proceedings on behalf of the State; carrying out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinuing criminal proceedings:

480.1. In light of the adverse findings by the Courts about the manner in which Mrwebi exercised his discretion to discontinue the prosecution of Mdluli we are of the view that Mrwebi did not properly exercise his discretion.

480.2. Mrwebi gave contradictory versions when seeking to explain what was meant by the phrase "in consultation with", Mrwebi showed himself to lack an understanding of the law and the legal process.

480.3. Furthermore, Mrwebi's lack of appreciation regarding his behaviour in keeping secret the representations from criminal suspects implicated in the investigation carried out by the NPA into alleged improprieties perpetrated by officials of Crime Intelligence and his admission that he took those representations into account without verifying the truthfulness of their contents, confirms that his decision to withdraw the prosecution of Mdluli was irrational and unlawful.

480.4. Mrwebi therefore did not properly carry out his functions incidental to instituting and conduction such criminal proceedings and discontinuing criminal proceedings.

481. Whether he duly respected court processes and proceedings before the Courts as required by applicable prescripts and as a Special Director of Public Prosecutions in the National Prosecuting Authority:

481.1. By filing court papers out of time without a proper explanation or application for condonation and showing disregard and indifference to directives issued by the Judge President in **FUL HC**, Mrwebi showed that he did not consider it obligatory to obey court directives and to comply with court deadlines. His attitude shows that he did not respect court processes and proceedings as expected from a SD.

482. In relation to whether he exercised his powers and performed his duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act:

482.1. Mrwebi's conduct in withdrawing the prosecution of Mdluli when there was a prima facie case and his flawed reasoning for withdrawing that prosecution were inconsistent with the provisions of the Prosecution Policy Directives.

482.2. The Policy Directives require that extensive police investigations be shown to have been carried out before a prosecution is withdrawn on the ground that there is no reasonable prospect of a successful prosecution. As established by the evidence, Mrwebi cared little about the merits of the Mdluli case or whether a successful prosecution was reasonably possible, he simply decided that the matter fell within the jurisdiction of the IG and that it should be withdrawn and given to the IG.

483. Whether he acted at all times without fear, favour or prejudice:

483.1. The circumstances surrounding the withdrawal of the prosecution of Mdluli show that:

483.1.1. he took office on 01 November 2011 (proclamation indicates that the appointment was with effect from 25 November 2011), received representations on 17 November 2011, immediately called for the docket and memoranda and took a decision on 4 or 5 December 2011 without reference to his colleagues and police and without consultation with Mzinyathi.

483.2. It is therefore evident that he failed to act without favour and to the prejudice of the NPA.

484. In determining whether he displayed the required competence and capacity required to fulfil his duties:

484.1. His lack of understanding of the law and legal processes surrounding the Mdluli prosecution, show that he did not display the required competence and capacity required to fulfil his duties.

485. Whether he in any way brought the National Prosecuting Authority into disrepute by any of his actions or omissions:

485.1. Mrwebi's decisions taken in his capacity as Special Director of Public Prosecutions, which was set aside on review, the comments and criticisms levelled against him by the courts have brought the NPA into disrepute.

485.2. The lie he told under oath in the Ledwaba matter which he further perpetuated before this enquiry, all point to Mrwebi bringing the NPA into disrepute.

485.3. By sending a letter to Mdluli's representatives prematurely and without any basis, he brought the NPA into disrepute.

485.4. The manner in which he withdrew the Mdluli charges and his representations to the Courts in relation thereto drew severe judicial criticism. So severe were the findings that he has been found guilty of misconduct.

7.3. Recommendations

486. Jiba and Mrwebi have been involved in litigation in both their personal and official capacities over the years. They have, however, failed to introspect and reflect on the issues which have beset the NPA with their involvement, as reflected in this report.

487. In the result, we recommend that:

487.1. the President remove Nomgcobo Jiba from office as DNDPP and

487.2. the President remove Lawrence Sithembiso Mrwebi from office as SDPP.

8. CONCLUDING REMARKS

8.1. Implications for the NPA

488. Over the years, the NPA has been beleaguered by allegations of malfeasance and political interference. A chorus of Court decisions, civil society, media and NPA members themselves have attested to the fact that there have been serious concerns of impropriety within the institution. This is particularly troubling, given the critical role that the NPA plays in ensuring that the rule of law, the very foundation of our constitutional democracy, is both respected and safeguarded.

489. In the face of South Africa's painful history and its continuing struggle with inequality, it is the rule of law that holds every individual to the same standard and, in so doing, recognises the inherent dignity within every individual. Whether one wields power or is of the most vulnerable, the rule of law guarantees equal treatment. Without it, the vision of a constitutional democracy is dead in the water. Appreciating that the NPA plays a critical role in upholding the rule of law, it is crucial that it is seen to be free from all external pressures which might threaten prosecutorial independence.

490. NPA officials are required to be completely devoted to the rule of law without fail. Our country depends on it. As the sole entity constitutionally mandated to prosecute on behalf of the State, in the face of the scourge of crime, the confidence that the public enjoys in the NPA is what prevents individuals from taking the law into their own hands. This confidence underpins the social contract. It lies in the belief that the State can offer protection where laws are not respected.

491. The NPA's Code of Conduct ensures that there is public confidence in the integrity of the criminal justice process and that the NPA maintains its legitimacy. The code holds individuals within the NPA to a high standard – to uphold justice, human dignity and fundamental rights, as well as to be consistent, independent and impartial. When dealing with the Courts, prosecutors are personally accountable for their cases, may not mislead

the Court or suppress evidence and should assist the Court in arriving at a just verdict – refraining from violating the decorum of the Court.

492. Citizens are right to expect this of the NPA and its members. In turn, the NPA must ensure that it communicates effectively with the public – for it is the public interest which the NPA must act in the name of. This must not be understood to mean that members of the NPA should play to the whims of popular opinion, but rather that they have a duty to perform their work with integrity, conscientiousness and accountability. Clandestine decision-making and impunity characterised the pre-democratic period, but has absolutely no place rearing its ugly head in this constitutional democracy.

493. The NPA must execute its mandate diligently and without fear, favour or prejudice. It must be independent and be seen to be independent. It has been stated before, but bears repeating here:

"'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[61]

494. Where officials are mired in controversy and are consistently being taken on review for irrational decision-making, and being found wanting by the Courts, it damages the public confidence. The NPA must instil a strong sense of constitutional values and belief in the rule of law. When these values are internalised and fought for vociferously from within the NPA, only then will the institution enjoy the confidence of the citizenry and become the prosecuting authority that South Africans deserve.

8.2. Avoiding a recurrence

495. Towards the close of her evidence before the Enquiry, Jiba expressed her concerns on the independence of the prosecutors. She implored the panel to suggest ways in which prosecutorial independence may be strengthened and urged that it would be well

61 ***Glenister v President of the Republic of South Africa and Others*** *2011 (3) SA 347 (CC), para 207.*

if the same independence that is afforded to members of the judiciary can be afforded to members of the NPA. She also expressed her concerns about the risk that Enquiries of this nature and other disciplinary mechanisms may be abused to intimidate prosecutors from exercising their prosecutorial discretion.

496. The recent history of the NPA demonstrates that the NPA may be vulnerable to executive and political interferences. The Constitution, the NPA Act and other instruments provide for some measures that seek to safeguard the independence of the NPA. It is worth noting however that neither the Constitution nor the NPA Act expressly use the word "independence" in relation to the NPA. The non-use of the word "independence" by the Constitution is significant when one considers that that word is expressly used in reference to the judiciary and chapter 9 institutions. Those institutions are expected to exercise their functions "independently" and "without fear, favour or prejudice", however, the NPA is to exercise its functions only "without fear favour or prejudice."[62]

497. There are various means provided for in the NPA that safeguard the independence of the NPA. Those means include the provisions of section 12(6)(a) which require that an Enquiry such as this one be instituted in order to determine the fitness and propriety of the NDPP or a DNDPP to hold office before they are removed. Section 12(6)(a) - (7) provide that within 14 days after the decision to suspend has been taken by the President, the National Assembly must be notified accordingly. Upon receipt of this message, the National Assembly must within 30 days say whether person suspended be restored to their position or removed. If the National Assembly resolves that they must be removed the President must remove them, yet if the National Assembly says that they must be restored, the President must restore. It would appear therefore according to this section that the President is not on the whole free to remove or suspend as he deems fit, his decision is subject to confirmation by the National Assembly.

62 *Selabe The independence of the National Prosecuting Authority of South Africa: fact or fiction? (M Phil Thesis, University of the Western Cape, 2015)*

498. The NPA has demonstrated also that it has the capacity to address some of its challenges through other means such as instituting fact-finding enquiries as it did when the Yacoob fact finding committee was set up.

499. The NPA Act provides that it is a crime to interfere with the workings of the NPA. Serious measures must be taken against politicians and members of the executive and other private persons / entities who seek to influence unduly the NPA in the performance of its functions. "Institutions and office bearers must work within the law and must be accountable" because, "ours is a government of laws and not of men or women."[63]

500. The Constitution and the NPA Act provide that the Minister of Justice exercises final responsibility over the NPA. However, his role is only limited to the determination of the prosecution policy.

"The Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the he or she is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority." [64]

Justice Yvonne Mokgoro
Chairperson

Advocate Kgomotso Moroka SC
Panelist

Ms Thenjiwe Mtintso
Panelist

1 April 2019

63 *DA v President of South Africa 2012 (1) SA 417 (SCA) at para 66.*

64 *National Prosecuting Authority v Zuma 2009 2 SA 277 (SCA) para 32.*