IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: CCT 333/17

In the matter between:

CORRUPTION WATCH NPC	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CORRECITONAL SERVICES	Second Respondent
MXOLISI SANDILE OLIVER NXASANA	Third Respondent
SHAUN ABRAHAMS	Fourth Respondent
DIRECTOR GENERAL OF JUSTICE	Fifth Respondent
CHIEF EXECUTIVE OFFICER OF THE NPA	Sixth Respondent
NATIONAL PROSECUTING AUTHORITY	Seventh Respondent
THE DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent

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THIRD APPLICANT'S HEADS OF ARGUMENT

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I INTRODUCTION

1. This matter concerns the independence of the National Prosecuting Authority (**the NPA**) and its ability to act without fear, favour or prejudice.

2. The NPA is no ordinary statutory body. It is established by the Constitution[1] with the National Director of Public Prosecutions (**NDPP**)[2] as its head. While the President is empowered to appoint the head of the NPA, the President can remove the head of the NPA only with the approval of Parliament.

3. In the High Court, the applicants brought two challenges to protect the independence of the NPA.

   3.1. The first related to the settlement agreement entered into by Mr Nxasana (the former NDPP), the President and the Minister of Justice (**the Settlement Agreement**). In terms of that agreement, Mr Nxasana would vacate the office of the NDPP in return for a golden handshake of approximately R17 million. The applicants sought an order reviewing and setting aside the Settlement Agreement, directing Mr Nxasana to repay the R17

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[1] Section 179 of the Constitution of the Republic of South Africa, 1996.

[2] Section 179(1)(a) of the Constitution.

million, restoring Mr Nxasana to his position, and preventing the President from taking decisions regarding the NDPP while criminal charges against him are pending in the courts.

3.2. The second challenge was brought solely by the Third Applicant (**CASAC**). It related to the constitutional validity of sections 12(4) and 12(6) of the NPA Act. These provisions empower the President:

3.2.1. To suspend the NDPP and Deputy National Directors of Public Prosecution (**DNDPP**) unilaterally, indefinitely and without pay; and

3.2.2. To extend the tenure of the NDPP and the DNDPP's.

4. The High Court found that the Settlement Agreement was unlawful and set it aside. That finding concerns the constitutional validity of the President's conduct in entering into the Agreement. The Court also granted ancillary relief that flowed from its finding in respect of the Agreement. It reviewed and set aside the appointment of Mr Abrahams (the current NDPP) because there should never have been a vacancy for him to fill. Lastly, it ordered that the then President, Mr Zuma, was not permitted to fill the vacancy in the office of NDPP because the NDPP would shortly decide whether he should

face criminal charges.

5. With regard to the challenge to the NPA Act, the High Court declared sections 12(4) and 12(6) of the Act unconstitutional and invalid. It severed some words, and read in others in order to cure the invalidity.

6. The applicants seek confirmation of the High Court's orders of constitutional invalidity. In these submissions, CASAC confines itself to two issues:

   6.1. The constitutional invalidity of ss 12(4) and 12(6) of the NPA Act, including the appropriate remedy; and

   6.2. The just and equitable remedy if this Court confirms that the Settlement Agreement is unconstitutional and invalid.

7. The merits of the attack on the Settlement Agreement are addressed in the written submissions of the First and Second Applicants (**Corruption Watch** and **FUL**). CASAC endorses those submissions and will not repeat them.

II APPLICABLE LEGAL FRAMEWORK

8. In this section, we set out the Constitutional and legal framework governing the NPA and the need to ensure its independence.

The Constitution and the Independence of the NPA

9. The NPA is established in terms of section 179 of the Constitution. Section 179(1)(a) provides that the responsibility to appoint the NDPP falls on the President as the head of the national executive. There is no constitutional provision concerning the removal of the NDPP.

10. The NPA is given the power in section 179(2) to *"institute criminal proceedings on behalf of the state."* [3] In order to achieve this, the independence of the NPA is constitutionally and statutorily enshrined. Section 179(4) reads: "*National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."*[4] The NPA Act is the legislation intended to secure the necessary independence for the NPA to act as it is constitutionally instructed to do.

11. The impact of s 179(4) was underscored in the *First Certification Judgment*.[5] This Court held that s 179(4) establishes "*a constitutional guarantee of independence, and any legislation or executive action*

[3] Section 179(1)(a) of the Constitution.

[4] Section 179(4) of the Constitution.

[5] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

inconsistent therewith would be subject to constitutional control by the courts."[6]

12. The independence of the NPA is particularly important given its place in the criminal justice system and its role in combatting crime and corruption. In *Glenister v President of the Republic of South Africa and Others (Glenister II),*[7] this Court emphasised that corruption is detrimental to the protection and promotion of rights in the Bill of Rights and to the foundational principles of constitutional democracy.[8] It reiterated the NPA's duty to prosecute crimes involving corruption. It held—

> *"It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law. In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices."*[9]

13. The Court recognised that in order effectively to perform its functions, an agency involved in fighting corruption must be adequately independent. When considering the meaning of 'adequate

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[6] *Ibid*at para 146 (our emphasis).

[7] 2011 (3) SA 347 (CC) at 174.

[8] Glenister at para 175 - 176.

[9] Glenister II at para 176 (Footnotes omitted, emphasis added).

independence' in relation to the Directorate of Priority Crimes Investigation (**the Hawks**), Ngcobo CJ observed that:

> *"The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibilities effectively', as required by the Constitution*."[10]
>
> "*Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence."*[11]

14. In *Helen Suzman Foundatio*n,[12] this Court again considered the adequacy of the independence of the Hawks. The Court held that the "*overriding consideration*" is whether the autonomy-protecting features in the legislation enable members of the institution to carry out their duties vigorously, without fear of reprisals.[13]

15. This Court has held that the appearance or perception of independence plays a central role in evaluating whether independence in fact exists. In *Glenister II* the Court explained that:

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[10] Ibid at para 125.

[11] Ibid at para 121. While Ngcobo CJ was in the minority, the majority agreed about the appropriate standard. The difference was only in the application of that standard.

[12] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) at para 32.

[13] Ibid at para 32.

> *"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. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."*[14]

16. These standards apply with equal force to the NPA, given its function, which includes prosecuting crimes involving corruption (including high-level political corruption). Hence, the NPA must be protected from undue political interference in the performance of its functions. In *Democratic Alliance*, the Constitutional Court emphasised that the NDPP is "*non-political*". Yacoob ADCJ explained:

> "*It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.*"[15]

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[14] *Glenister II* at para 207 (emphasis added), with reference to *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 and *Valente v The Queen* [1986] 24 DLR (4th) 161 (SCC) at 172.

[15] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 26 ("*Democratic Alliance*").

Need for independence of the NDPP

17. The independence of the NDPP, as the head of the organisation, is equally vital.

18. The NDPP has extensive powers and responsibilities under the Constitution and the NPA Act:

    18.1. In terms of s 179(5) of the Constitution, the NDPP determines prosecution policy. He issues *"policy directives which must be observed in the prosecution process"*, and may intervene when those directives are not followed. And he may review any "*decision to prosecute or not to prosecute*".

    18.2. The NDPP, as the head of the NPA, has authority over the exercising of all powers, and the performance of all duties assigned to any member of the prosecuting authority by the Constitution, the NPA Act or any other law (section 22(1));

    18.3. The National Director may conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives or guidelines issued by a Director (section 22(4)(a)(i)).

19. The NDPP is central to the NPA's ability to function effectively and to

fulfil is constitutional mandate. The NPA's independence therefore depends on the NDPP being sufficiently insulated from political interference. Without adequate protection against interference, the NDPP might be pressured into dropping charges to protect the interests of powerful individuals, or into pursuing prosecutions to advance a political agenda.

20. The NPA Act goes some way to securing the necessary independence of the NDPP. It limits the power of the President to remove the NDPP in three ways:

20.1. He may only do so on a ground listed in s 12(6)(a);

20.2. He must hold an inquiry before deciding to remove him; and

20.3. The President's decision must be confirmed by Parliament before it takes effect.[16]

Security of tenure and removal from office

21. A fundamental aspect of the structural and operational autonomy of an institution is the security of tenure of its members, particularly its

[16] NPA Act ss 12(6)(a)-(d).

Director.[17] Security of tenure requires protection against termination of employment or suspension at the discretion of the Executive. The importance of security of tenure in securing the independent functioning of an agency was explained in *Glenister II*:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.*"[18]

22. The Court observed that the employees of the DPCI's predecessor (the Directorate of Special Operations, better known as **the Scorpions**) enjoyed far greater security of tenure, and explained that

> "*The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.*"[19]

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[17] *Glenister II* at para 213. In *Mcbride v Minister of Police and Another* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at paras 35-6 which considered with the independence of the Independent Police Investigative Directorate (IPID), the body mandated to investigate corruption involving the police. The Constitutional Court listed various criteria for determining the independence of an anti-corruption body, including: "*Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."*

[18] *Glenister II* at para 222.

[19] Ibid at para 226.

23. The NPA Act contains provisions to secure the tenure of the NDPP. These include:

23.1. Section 12(1) of the NPA Act, which provides that in the ordinary course, the term of office of the NDPP is for a non-renewable period of ten years or until he or she attains the age of 65 years.

23.2. There are limited grounds which the President may remove the NDPP. The four grounds provided for in the NPA Act include:

(i) Misconduct;

(ii) On account of continued ill health;

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

(iv) On account thereof that he or she is no longer a fit and proper person to hold the office concerned.[20]

23.3. The President may also provisionally suspend the NDPP from office pending an inquiry into his fitness to hold office and may thereupon remove the NDPP on one of those listed grounds.[21] The President's decision to remove the NDPP must be referred

[20] NPA Act s 12(6)(a).

[21] NPA Act s 12(6)(a).

to Parliament within 14 days[22] and confirmed or rejected within 30 days. [23]

23.4. Section 12(8) of the NPA allows the NDPP voluntarily to vacate his office. It provides:

> "*(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—*
>
> *(i) on account of continued ill health;*
>
> *(ii) for any other reason which the President deems sufficient.*
>
> *(b) The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.*
>
> *(c) If the National Director or a Deputy National Director—*
>
> *(i) vacates his or her office in terms of paragraph (a) (i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill health occasioned without him or her being instrumental thereto; or*
>
> *(ii) vacates his or her office in terms of paragraph (a) (ii), he or she shall be deemed to have been retired in terms of section 16 (4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if*

[22] NPA Act s 12(6)(b).

[23] NPA Act s 12(6)(c).

he or she had been so retired."

23.5. The important elements of section 12(8) of the NPA are the following:

23.5.1. The NDPP must make a request;

23.5.2. The request must relate to his or her health or another reason the President deems adequate;

23.5.3. The request must be made 6 months before the date of the resignation, unless the President orders otherwise; and

23.5.4. The departing NDPP is only entitled to the amount ordinarily available to retiring or medically boarded civil servants.

24. As the High Court found on the challenge to the Settlement Agreement, these limitations ensure independence. They prevent the President from enticing an NDPP to leave office by promising a massive golden-handshake. It appears to be common cause amongst the parties (except perhaps Mr Abrahams) that the Settlement Agreement was unlawful because it was contrary to this provision, which is structured to protect independence.

III THE CHALLENGE TO SECTIONS 12(4) AND 12(6)

25. We address first the power to extend the NDPP's tenure in s 12(4), and then the power of unilateral, indefinite and unpaid suspension in s 12(6).

Extension of tenure

26. Section 12(4) makes it possible for the President to extend the term of the NDPP beyond 65 years. It provides:

> "*(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and—*
>
> > *(a) the National Director or Deputy National Director wishes to continue to serve in such office; and*
> >
> > *(b) the mental and physical health of the person concerned enable him or her so to continue,*
>
> *the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director's term of office shall not exceed 10 years.*"

27. On its face, section 12(4) undermines security of tenure. In *Justice Alliance of South Africa v President of the Republic of South Africa*

and Others,[24] this Court explained why a similar provision in relation to the Chief Justice was inconsistent with independence:

> *"In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that an extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it."*[25]

28. In *Justice Alliance*, the Constitutional Court confirmed that such extension of tenure provisions could be seen as benefits and a form of political favour to the person who is given the extension. This could reasonably be seen as impairing independence and impartiality of the Chief Justice, and therefore the Judiciary.

29. This reasoning was confirmed in *Helen Suzman Foundation v President of the Republic of South Africa and Others* with regard to the head of the Hawks:

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[24] 2011 (5) SA 388 (CC)

[25] *Justice Alliance of South Africa* at para 75.

> *"Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal."*[26]

30. That reasoning applies equally to section 12(4) of the NPA Act.

31. There is nothing to distinguish section 12(4) of the NPA Act from the provisions that were declared unconstitutional in *Justice Alliance* and *Helen Suzman Foundation.* The NDPP sits between the judiciary and the executive. Like the judiciary and the anti-corruption force, the NDPP enjoys a constitutional guarantee of independence. The principles that apply to the Chief Justice and the head of the Hawks apply with equal force to the NDPP.

32. Section 12(4) of the NPA Act allows the President to extend the tenure of the NDPP and the DNDPP. This may incline an NDPP and a DNDPP who is approaching the age of 65, and wishes to remain in office, to ensure that he remains in the President's good books and does not do anything to earn the disapproval of the President.

33. CASAC submits that this Court should confirm the High Court's

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[26] *Helen Suzman* at para 81 (emphasis added).

declaration that section 12(4) is constitutionally invalid. The provision cannot be saved.

34. There is no need for any additional relief to limit the impact of the declaration. Extension of tenure in any form is constitutionally intolerable. The section should be declared invalid in full, without any suspension. The Respondents have not contended otherwise.

Unilateral, indefinite suspension without pay

35. In this section, we deal with the attack on s 12(6) under three headings:

35.1. The constitutional flaw;

35.2. The Respondents' defences; and

35.3. Remedy.

The Constitutional Flaw

36. Section 12(6) reads in full:

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

(i) for misconduct;

(ii) on account of continued ill-health;

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

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

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

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

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

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, ***no salary or such salary as may be determined by the President***."

37. The constitutional flaw in s 12(6) arises from the combination of three factors:

37.1. It permits the President to suspend the NDPP or DNDPP **without any form of parliamentary oversight.** While removal can only happen with the agreement of Parliament, suspension is the prerogative of the President alone. That is the case, even if we accept that the President may only suspend the NDPP for one of the reasons set out in s 12(6)(a).[27]

37.2. There are **no timeframes** for when the President must initiate the formal inquiry after he has suspended the NDPP or DNDPP. There is also no time limit for the conduct of the inquiry, or for the President to take a decision following a finding by the inquiry. This allows for a situation where the NDPP can be suspended for a lengthy period before his fitness to hold office is actually determined. This is starkly inconsistent with the strict time frames in the NPA for the President to inform Parliament that he or she wants the NDPP removed and for Parliament to vote on the matter.[28] Those sections show that Parliament recognised that these matters must be resolved speedily in order to protect the NPA.

37.3. Section 12(5)(e) of the NPA Act provides that **the default is**

[27] See *Helen Suzman Foundation* at para 84.
[28] See section 12(6)(b) and (c).

<u>that the NDPP receives no salary,</u> unless the President decides otherwise. Even then, the NDPP will only receive "*such salary as may be determined by the President*". This discretion as to whether to afford the NDPP a salary, and of so how much, is untrammelled and unguided.

38. Combined, these elements mean that the President has the power unilaterally and indefinitely to suspend the NDPP and DNDPP without pay. That is unconstitutional.

39. In *Helen Suzman Foundation*, the Constitutional Court confronted very similar provisions with regard to the independence of the head of the Hawks – s 17DA(2) of the South African Police Service Act.[29] Those provisions, like s 12(6), permitted the Minister of Police to:

39.1. Unilaterally suspend the Head of the Hawks;

39.2. Determine whether he would receive a salary during his suspension; and

39.3. Determine the length of the suspension.[30]

40. Mogoeng CJ held that the power to suspend for reasons like

[29] Act 68 of 1995.

[30] *Helen Suzman Foundation* at para 83.

misconduct and inability was consistent with independence. But the holding of an inquiry "*as the Minister deems fit*" and "*the possibility of a suspension without pay and benefits provided for in subsection (2)(c)*" were not.[31] As the Chief Justice explained:

> "*Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the* audi alteram partem *rule and unfairly undermines the National Head's ability to challenge the validity of the suspension by withholding the salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably, the Minister's mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of that draconian power also cry out against its retention. It is the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay.*"[32]

41. The SAPS Act also permitted suspension and removal initiated by Parliament. In those instances, there was no possibility of suspension without pay. "*This suspension by the Minister and removal through a parliamentary process*", unlike unilateral, indefinite, and unpaid suspension under s 17DA(2), "*guarantees job security and accords with the notion of sufficient independence for the anti-corruption entity the state creates.*"[33] The NPA Act allows

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[31] *Helen Suzman Foundation* at para 85.

[32] Ibid.

[33] Ibid at para 91.

Parliament to compel the President to remove the NDPP, but makes no provision for a suspension pending the outcome of that process.

42. Because of both the possibility of limitless suspension without pay, and removal without parliamentary oversight, the Constitutional Court declared the whole of s 17DA(2) of the SAPS Act invalid.

43. A similar result was reached in *McBride*. The High Court had found that the legislative provisions regulating the suspension and removal of the Executive Director of the IPID were inconsistent with the constitutional guarantee of IPID's independence in s 206(6) of the Constitution. While the provisions required the Executive Director to be paid during his suspension, the court still found that they were unconstitutional:

> "*The Minister's power to unilaterally suspend or remove the Executive Director poses substantial risks to the independence of IPID and its ability to investigate corruption and other abuses of power within the police service. An Executive Director who constantly fears for his or her job will be less inclined to carry out these responsibilities where this threatens to embarrass or expose the Minister or other high-ranking politicians. Furthermore, the absence of security of tenure undermines public faith in IPID, as a reasonable person would have grounds to believe that IPID lacks the independence to pursue its mandate vigorously.*"[34]

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[34] *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) at para 55 (our emphasis).

44. Kathree-Setiloane J stressed the risk that indefinite suspension poses to independence:

> "*The impugned legislative provisions sadly fall short of the standard of independence established internationally in that they permit the Minister of Police to remove the Executive Director without parliamentary oversight, without substantive constraints on the power of removal or suspension, and in circumstances where the Minister may suspend the Executive Director indefinitely*."[35]

45. She declared the relevant sections unconstitutional invalid "*to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director*".[36] In order to cure the defect, the learned judge read-in the provisions of s 17DA of the SAPS Act which, following the Constitutional Court's judgment in *Helen Suzman Foundation* invalidating s 17DA(2), only permitted suspension following the initiation of an investigation by the National Assembly.

46. Her judgment and order were upheld by this Court. As Bosielo AJ explained:

> "*In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him.*

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[35] Ibid at para 58 (our emphasis).

[36] Ibid at para 77.1.

> *Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution.*"[37]

47. Precisely the same considerations as were present in *Helen Suzman Foundation* and *McBride* apply in this matter. The NPA Act permits indefinite suspension, without pay, at the sole discretion of the President. That is not constitutionally defensible.

48. The only difference is that, unlike the Hawks and IPID, the removal of the NDPP is subject to parliamentary approval – either through the ability to restore the NDPP, or by initiating his removal. But that does not affect the impact of the suspension power on the independence of the NDPP. As both *Helen Suzman Foundation* and *McBride* make clear, the risk of lengthy suspension without pay is sufficient to affect independence, particularly where that power is placed solely in the hands of the Executive. An NDPP's decisions may be coloured to avoid the risk of months or years of unpaid suspension, even if he has faith that Parliament will not ultimately remove him.

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[37] *McBride CC* at para 40.

Respondents' Defences

49. The Minister, who is responsible for the NPA Act, raised only one defence in the High Court. He argued that the provision is not problematic because "*[t]he NDPP has a right to challenge his suspension*" and "*the President has a duty in terms of the constitution to exercise his powers in accordance with the constitution.*"[38]

50. These arguments were roundly rejected by this Court in *Glenister II*:

50.1. First, it held that the possibility of an *ex post facto* review "*does not constitute an effective hedge against interference.*"[39] The Court held:

> "*In short, an ex post facto review, rather than insisting on a structure that* ab initio *prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.*"[40]

50.2. Second, it pointed out that by holding that the structural

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[38] Minister's AA at para 35, Record Vol 13, page 1244.

[39] *Glenister II* at para 247.

[40] Ibid.

mechanisms in place were inadequate to protect independence, it was not assuming that those powers would be abused:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.*"[41]

51. The same analysis applies to the independence of the NDPP.

52. In the High Court, the NDPP advanced one further ground to defend s 12(6). He argued that in terms of the common law, the President is obliged to afford the NDPP a hearing before making a decision to suspend, and before deciding whether to grant the NDPP a salary.[42] This argument is equally misguided:

52.1. First, it is uncertain whether the NDPP has a right to be heard before the President takes a decision. In *Masetlha*, this Court held that the President was not required to grant the head of

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[41] Ibid at para 222. See also paras 234-236.

[42] NDPP's AA at paras 54.4-54.6, Record Vol 12, page 1135 - 1136.

the NIA a hearing before suspending or dismissing him.[43] The President appears to argue that he is not required to comply with the *audi* principle before suspending the NDPP.[44] The President may be mistaken. The suspension of the NDPP is different from suspension of the Head of the NIA because the NDPP's suspension is limited to the listed grounds in s 12(6)(a), and the law on procedural rationality has moved on since *Masetlha*.[45]

52.2. But, even if the President is required to afford the NDPP a hearing, the same would undoubtedly have been true of the exercise of the power to suspend in both *Helen Suzman Foundation* and *McBride*. Yet in both cases this Court found the provisions unconstitutional. Indeed, the Court did not even mention the right to a hearing as a relevant consideration.

53. Lastly, the President argued that the High Court should not consider the constitutional challenge because it does not arise on the facts of the case.[46] It is correct that Mr Nxasana was suspended with pay

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[43] *Masetlha* at paras 77-78.

[44] President's AA at para 76, Record Vol 13, page 1208.

[45] See *Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 293 (CC)* and *Democratic Alliance*.

[46] President's AA at para 18, Record Vol 13, page 1185 – 1186.

and that he has, subsequent to his suspension, left office. But that is irrelevant for two reasons.

54. First, it is not necessary for the constitutional challenge to arise directly from specific facts in order for this Court to determine it:

54.1. Our law permits abstract constitutional challenges to legislation. In *Lawyers for Human Rights*, this Court held that although abstract challenges are generally undesirable, they are permissible in appropriate circumstances. The relevant factors to consider are:

> "*whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.*"[47]

In this matter, all those factors point to the need to consider an abstract challenge.

54.2. When the alleged unconstitutionality relates to independence, abstract challenges are vital. As the Constitutional Court has

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[47] Ibid at para 16, quoting with approval *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234 (O'Regan J).

repeatedly held, the problem is not only the actual exercise of unconstitutional powers, but the subtle ways in which the mere existence of those powers undermines independence. The NDPP will refrain from acting independently because he fears indefinite, unilateral, unpaid, suspension, and the "*factual predicate*" will never arise.

54.3. If courts must wait until the *"factual predicate"* arises, the damage will already have been done. The NDPP will have been suspended and will have to litigate for several years, and seek confirmation in the Constitutional Court, to attack the underlying power to suspend him. That is what occurred in *McBride* and *JASA*, and is obviously undesirable. It would have been preferable if an NGO had pre-emptively challenged the relevant statutory provisions so that Chief Justice Ngcobo's term was never extended and Mr McBride was never unconstitutionally suspended. That would have better protected the integrity and independence of both the Judiciary and IPID.

54.4. That is why in both *Glenister II* and *Helen Suzman Foundation*, there was no factual predicate to the challenge. The challenges were raised in the abstract because the law was

perceived to fall short of the constitutional requirement for an independent corruption fighting body. Indeed, in *Helen Suzman Foundation* this Court declined to consider a range of evidence about the supposedly corrupt motives for enacting the challenged legislation because it was irrelevant to the constitutional attack.[48] That attack had to be determined by looking at the terms of the law itself. That is all CASAC asks here.

54.5. In oral argument in the High Court, the Respondents called in aid this Court's decision in *South African Reserve Bank and Another v Shuttleworth and Another*.[49] In that matter, Moseneke DCJ refused to consider constitutional challenges to exchange control regulations because the applicant had not demonstrated how the alleged unconstitutionality "*would have a material bearing on him and others similarly situated*".[50] As the High Court pointed out, this situation is vastly distinguishable:

> "*First, there is the ambitious reach of Shuttleworth's case: not only were a number of provisions of the exchange control regulations*

[48] *Helen Suzman Foundation* at paras 28-30.

[49] [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC).

[50] Ibid at para 76.

> *targeted, but the boundaries of the fall-out of an order of unconstitutionality were not evident. Here, two sub-sections only, are targeted and its effect - in both cases - is clear. Second, Shuttleworth's locus standi to act in the public interest had not been shown; here it is not disputed. Third, Shuttleworth's contentions were disputed; here they are not. And fourth, there are in this case - wholly absent in Shuttleworth - Constitutional Court authority that if not directly certainly is close to being in point."*[51]

55. Second, there is no real substantive defence of the provisions. In oral argument in the High Court, the respondents largely conceded the provisions were invalid. None of them have appealed against the declarations of invalidity. It is cynical in the extreme to agree that a provision is unconstitutional, but argue it should be retained on the statute books merely because it has not yet been employed.

56. Third, the stories of Mr Nxasana and Mr Vusi Pikoli demonstrate the risks posed by unilateral, indefinite and unpaid suspension. In this respect, the following is relevant.

57. Vusi Pikoli was appointed as NDPP by President Mbeki on 1 February 2005.[52] Mr Pikoli was suspended on 27 September 2007 on allegations related to charges of corruption against the National

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[51] HC Judgment at para 122: Record Vol 15, p 1388.

[52] CASAC FA para 26, Record Vol 10, page 900.

Commissioner of Police Mr Jackie Selebi. [53] Mr Mkotedi Mpshe was appointed as Acting NDPP pending the Ginwala Inquiry.[54]

58. The Ginwala Commission released its findings more than a year later, on 4 November 2008. It found that the allegations against Mr Pikoli were baseless. It made serious findings against Mr Menzi Simelane, who was subsequently appointed as the NDPP. Despite this, President Motlanthe relied on some mild criticism in the Ginwala Report and sought Mr Pikoli's removal from office, which the National Assembly confirmed.[55]

59. Mr Pikoli launched a review application, but eventually withdrew it on 21 November 2009, following the conclusion of a settlement agreement in which President Zuma acknowledged that he had the requisite integrity to hold senior public position, and agreed to a golden handshake of R 7.5 million. Under the settlement agreement, Mr Pikoli resigned from his position. That agreement is strikingly similar to the settlement agreement between the President, the Minister and Mr Nxasana that is the subject of this application.[56]

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[53] CASAC FA para 27, Record Vol 10, page 900.

[54] Ibid.

[55] CASAC FA para 30, Record Vol 10, page 900.

[56] CASAC FA para 35, Record Vol 10, page 901.

60. President Zuma threatened to suspend Mr Nxasana on 4 July 2014. It was only by approaching the High Court that Mr Nxasana managed to remain in office. President Zuma only appointed the inquiry into Mr Nxasana's fitness on 5 February 2015, seven months after he had initially threatened to suspend the NDPP.

61. Mr Nxasana eventually agreed to leave office, in an unconstitutional fashion. The threat of a lengthy and costly inquiry, with the possibility of suspension always hanging over his head, certainly played a role in encouraging Mr Nxasana to agree to accept the golden handshake he was offered.

62. Both instances demonstrate the potential for unilateral, indefinite, unpaid suspension to be used to push out an independent NDPP.

For all these reasons, the attack on s 12(6) of the NPA Act must succeed.

Remedy

63. The High Court granted the following relief in relation to section 12(6):

63.1. A declaration that section 12 of the NPA Act is unconstitutional to the extent that it permits unilateral, indefinite and unpaid suspension.

63.2. An order suspending the declaration of invalidity for 18 months to allow Parliament to remedy the constitutional defect;

63.3. An interim order of severance and reading in providing that during the suspension: -

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

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

63.3.2. Section 12(6)(e) shall read:

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

63.4. An order declaring that, should Parliament fail to remedy the defect within 18 months, the interim order will become final.

64. CASAC submits that such an order balances the need to respect Parliament's role in determining how best to secure the independence of the NPA, while protecting the independence of the institution in the interim.

65. This is substantially similar to the approach adopted in the most recent comparable case: *McBride*. There, the Constitutional Court endorsed the High Court's remedy of: (a) suspending the order of invalidity; and (b) temporarily reading the section so that the provision in s 17DA of the SAPS Act applied.[57]

66. That section provides that the Head of the Hawks can only be removed if a committee of the National Assembly makes a finding of misconduct, incompetence or incapacity, and that decision is confirmed by the National Assembly as a whole. The Minister can only suspend the Head "*at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person*". The trigger for suspension is a decision by Parliament, not the executive.

67. Such an approach may also be appropriate in the case of the NDPP. However, in our view, reading in s 17DA of the SAPS Act would be inappropriate in this matter:

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[57] *Helen Suzman Foundation* at para 58.3. The relevant part of the order reads:

"*3. Pending the correction of the defect(s):*

3.1 Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows:

'Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context.'"

67.1. The NPA Act does require parliamentary approval to remove the NDPP, but in a different manner than the SAPS Act. Under the NPA Act, the inquiry is held by the President, and the findings confirmed by the National Assembly. The constitutionality of that mechanism has not been challenged. Reading in the sections applicable to the Hawks would interfere in that mechanism in a manner that would be an improper interference with the legislation.

67.2. It would be institutionally inappropriate to apply legislation regulating SAPS to the NPA. This could be done in *McBride* because IPID – while independent – is still part of the same organisation. The NPA is not.

68. However, CASAC accepts that a measure like s 17DA would adequately protect the independence of the NDPP. If this Court deems that a remedy akin to that granted in *McBride* is more appropriate, CASAC would be satisfied.

IV JUST AND EQUITABLE REMEDY

69. In addition to declaring the Settlement Agreement (and the conduct of those who concluded it) unconstitutional and invalid, and ordering Mr Nxasana to repay the R17.3 million, the High Court granted the

following just and equitable relief:

69.1. It reviewed and set aside the decision to appoint Mr Abrahams as NDPP.

69.2. It suspended the orders setting aside the removal of Mr Nxasana and the appointment of Mr Abrahams for 60 days, or until a new NDPP was appointed; and

69.3. It ordered that President Zuma could not appoint, remove or suspend the NDPP, and that the Deputy President should exercise those powers for as long as President Zuma remained in office.

70. While we submit that the last part of that relief was correctly granted, that issue has become moot.

71. The only real debate is what should happen to Mr Nxasana and Mr Abrahams. There are three possibilities:

71.1. Mr Nxasana is returned to his position as NDPP;

71.2. Mr Abrahams retains his position as NDPP; or

71.3. Both are removed and a new NDPP is appointed by the new President.

72. Unsurprisingly, Mr Nxasana and Mr Abrahams both believe it is just and equitable that they should occupy the office of NDPP. Initially, the three Applicants agreed with Mr Nxasana. However, CASAC always contended that, in the alternative, there should be a temporary vacancy and a new NDPP should be appointed by an independent person (then the Deputy President, now the new President).[58] CASAC now submits that the High Court's remedy is just and equitable. It makes that submission for the following reasons.

73. First, the setting aside of the appointment of Mr Abrahams is the default position. Where a public act is declared invalid, the ordinary rule is that subsequent acts that depend on the invalid act for their legality should also be set aside. As the SCA held in *Oudekraal*: "'the proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts."[59] Whether the initial act must be substantively valid or formally valid depends on the proper construction of the statute.

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[58] CASAC NoM at paras 6-7: Record Vol 10, p 887. Although the relief is formulated in slightly different terms, the effect is the same.

[59] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA). For a recent analysis, see D Freund & A Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184, particularly at 196-9.

74. As a matter of interpretation of the NPA Act in light of the Constitution, it must be the case that the removal of the NDPP is substantively valid in order for the appointment of the new NDPP to be lawful. Otherwise, it would permit the President to unlawfully remove an NDPP, appoint a new NDPP, and then insulate that new NDPP from removal. The substantive validity of the removal (not merely its factual existence) is a precondition for the validity of the appointment of the appointment.

75. Of course, this Court can depart from that default position if it is just and equitable to do so. But it is the default position for a reason: it protects the fundamental value of the rule of law.[60]

76. Second, in deciding what is just and equitable, the primary interests at stake here are not those of Mr Abrahams or Mr Nxasana. This is not an employment dispute between an employee and a private employer. This is a constitutional dispute about an attempt to undermine one of our central crime-fighting institutions through what amounted to a bribe to Mr Nxasana to leave office. While fairness to both of them is a relevant consideration, the primary concern must be

[60] HC Judgment at para 96, quoting *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) at para 86.

whatever best serves to preserve the independence of the NPA.

77. Third, Mr Nxasana's position is at best ambiguous.

77.1. On the one hand he was put in a difficult situation. He faced the threat of suspension and removal for what seemed like spurious grounds. But he was given the option of a massive payout to avoid that outcome. Many people – even honest people – would make the decision Mr Nxasana made when faced with that stark choice. It is precisely because the NDPP should never be placed in that position that the applicants challenged the Settlement Agreement, and CASAC challenged ss 12(4) and 12(6) of the NPA Act.

77.2. But at the same time, Mr Nxasana took the money. He should have known that doing so was unlawful, or at least that taking the money would undermine the appearance of independence of the NPA. Yet he took it anyway. The correspondence between him and the President demonstrates that he was always willing to resign, as long as he received a substantial payout.

78. While one should not judge Mr Nxasana too harshly, it would not

serve the interests of the NPA to return him to office. He is a man who has a price. Even if it may appear unfair to Mr Nxasana, the institution is best served if he is not reinstated.

79. Third, the same is true of Mr Abrahams. He has done no direct wrong. When this application was launched, there was no evidence that he lacked independence or impartiality. He had no hand in Mr Nxasana's removal or his own appointment.

80. But it is vital to understand the context within which he was appointed, and what that means for the appearance of independence of the NPA. Mr Nxasana was removed unlawfully. The alleged grounds for his suspension and the inquiry into him appear entirely spurious. The Settlement Agreement records that the President accepted that Mr Nxasana was a fit and proper person. It is entirely legitimate to suspect that there was some ulterior motive for why the President (and the Minister) were willing to pay R17.3 million of taxpayers' money to remove him from office. Several possibilities spring to mind:

80.1. President Zuma was facing the possibility that multiple criminal charges would be reinstated against him.

80.2. There was disunity within the NPA. President Zuma's conduct clearly seems to indicate that he took sides in that conflict – Ms Jiba's side over Mr Nxasana's.

81. Whatever the reason, Mr Abrahams was appointed to fill a position which was tainted by the unlawful removal of Mr Nxasana. Whomever had been appointed as the new NDPP would reasonably be perceived as being more amenable to President Zuma's interests than Mr Nxasana was. And that fundamentally undermines the perception of independence of the NPA, and therefore the actual independence of the NPA.

82. Moreover, Mr Abarahams should have been aware of that fact. He knew, when he accepted the appointment, that he was stepping into an office that had a vacancy only because the previous incumbent had been paid R17.3 million to vacate it. Yet he accepted the position regardless.

83. Fourth, when this application was launched, there was no evidence that Mr Abrahams lacked independence or impartiality. That was not part of CASAC's case. But the manner in which Mr Abrahams has conducted himself in this litigation casts serious doubt on his personal

fitness for the office. As the High Court explained:

> "*[H]is conduct in the litigation went even further. He attacked the case of the applicants, non-profit organisations, in language such as: "I submit that the relief sought is unmeritorious, illogical, incompetent and amounts to an absurdity." He had little reserve in casting sweeping aspersions: "I established that there were some serious criticisms of Adv Jiba in the court judgments, but much of the material placed before the courts had been manipulated and actuated by ulterior motives with a view to getting rid of Adv Jiba." In the same vein: "I ascertained that the criminal proceedings and the GCB application were not initiated by disinterested persons who wished to protect the integrity of the institution. In fact, they could be traced to officials within the N PA, centred around Mr Nxasana who had long been at loggerheads with Adv.Jiba."*
>
> *[99] This is disconcerting language and, on the face of it, suggesting of a lack of appreciation for whether or not the complaints that were raised for instance against Adv Jiba were meritorious, irrespective of their source. The judgments that questioned the integrity of advocates Jiba, Mrwebi and Mzinyathi were judgments of the High Court, and Adv Abrahams should not have questioned but should instead have acted on their result. And in the event, the judgment of Legodi J in the GCB matter vindicated the complaints.*"[61]

84. Mr Abrahams' support of Adv Jiba is even more damning in light of the recent judgment of the High Court setting aside the President's decision not to suspend her. In *Freedom Under Law (RF) NPC v*

[61] HC Judgment at paras 98-99.

National Director of Public Prosecutions and Others[62] a full bench found that Mr Abrahams' conduct in defending Ms Jiba "*raises serious questions of credibility*",[63] was "*bizarre in the extreme*",[64] and was "*disingenuous and lacks integrity*".[65] It held that, despite purporting to place Ms Jiba and Mr Mrwebi (who had been struck from the roll) on special leave, Mr Abrahams "*allowed them to take their official computers and granted them access to their offices. … This was as good as they continuing with their functions in the normal way.*"[66]

85. To repeat: It seems that one of the reasons that Mr Nxasana was removed was that he was seeking to take action against Ms Jiba. Mr Abrahams has now been severely criticised for protecting Ms Jiba. This Court does not need to decide the correctness of the High Court's findings, but the public perception is obvious. Keeping Mr Abrahams in office will be perceived as undermining the independence of the NPA. President Zuma would have achieved the replacement of Mr Nxasana with Mr Abrahams. The only difference

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[62] [2017] ZAGPPHC 791.

[63] Ibid at para 55.

[64] Ibid at para 57.

[65] Ibid at para 58.

[66] Ibid at para 102.

will be that Mr Nxasana will have to return the R17.3 million. That is not just and equitable relief.

CONCLUSION

86. CASAC respectfully submits that the High Court's declaration that sections 12(4) and 12(6) of the NPA Act are constitutionally invalid should be confirmed.

87. This Court should also confirm the High Court's orders with regard to the Settlement Agreement.

88. Finally, CASAC submits that, having regard to the judgment of the High Court and the fact that the hearing of this application is imminent, it would not be in the interests of justice for Mr Abrahams to make a decision about whether Mr Zuma should be prosecuted, before the Court has decided this application. CASAC invites Mr Abrahams to give the Court an undertaking to that effect.

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