IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23199/2016

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant
and	
THE MINISTER OF POLICE	First Respondent
MTHANDAZO BERNING NTLEMEZA	Second Respondent
DIRECTORATE OF PRIORITY CRIME INVESTIGATIONS	Third Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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FILING SHEET

DOCUMENT: Second Respondent's Practice Note & Heads of Argument: Part B (Review Application)

Presented for filing by
Hogan Lovells (South Africa) Inc.

Dated at SANDTON on this the 1st day of November 2016.

(sgd): J.P MATABANE

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TO:

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For: Applicants' Attorney

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DIRECTORATE FOR PRIORTY CRIME INVESTIGATION	Third Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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SECOND RESPONDENT'S PRACTICE NOTE (Part B)
Hearing Date: 6 & 7 December 2016

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1. Number on the roll: Special Allocation

2. Counsel:

2.1	For Applicants:	**DN Unterhalter SC** (011 263 9000) **CA Steinberg** (011 217 5000)
2.2	For First Respondent:	**W Mokhari SC** (011 282 3800) **T Hutamo** (011 282 3700)
2.3	For Second Respondent:	**PG Seleka SC** (011 282 3700) **R Tulk** (011 282 3800)

3. Nature of application: Review

4. Issues for determination:

Whether the First Respondent's decision to appoint the Second Respondent as the National Head of the DPCI was rational in relation to the provisions of section 17CA(1) of the SAPS Act 68 of 1995

5. Relief sought:

Second Respondent seeks dismissal of the application with costs;

6. Probable duration: Set down for 2 days

7. Urgency: No

8. Need to read papers: Yes

PG Seleka SC & R Tulk

Counsel for Second Respondent
Duma Nokwe Group
Sandton
1 November 2016

List of Authorities

Case law

1. **Democratic Alliance v President of RSA** (***Simelane***) 2013 (1) SA 248 (CC)

2. ***Albutt v Centre for the Study of Violence and Reconciliation & others*** 2010 (3) SA 293 (CC)

3. ***Helen Suzman Foundation & another v Minister of Police & others***, Case No: 23199/16 (18 April 2016)

4. ***Sibiya v Minister of Police & others [2015]***, Case No: 5203/2015 (20 February 2015), main judgment

5. ***Sibiya v Minister of Police & others [2015]***, Case No: 5203/2015 (23 March 2015), leave to appeal judgment

Legislation

6. Section 6(2) of the **Promotion of Administrative Justice Act 3 of 2000 ("PAJA")**

7. **South African Police Services Act** 68 of 1995

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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THE MINISTER OF POLICE	First Respondent
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SECOND RESPONDENT'S HEADS OF ARGUMENT (Part B)

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Introduction

1. The First Respondent (*"the Minister"*) is empowered in terms of Section 17CA(1) of the South African Police Service Act, 68 of 1995 (*"the Act"*) to appoint, with the concurrence of cabinet, the National Head of the Directorate for Priority Crime Investigation (*"the Directorate"*).

2. The Act provides the criteria for appointment, namely a person who is a South African Citizen, and fit and proper, with due regard to his/her experience, conscientiousness and integrity.

3. Acting in terms of Section 17CA(1) of the Act, the Minister took a decision appointing the Second Respondent (*"Ntlemeza"*) as the National Head of the Directorate with effect from 10 September 2015. It is this decision that the Applicants, in the present application, seek to have reviewed and set aside on the ground that the decision is irrational and unlawful, as the Minister and cabinet failed to have regard to certain relevant factors when making the decision.

4. The alleged factors said to have been ignored by the Minister are:-

    4.1. certain pronouncements made by Matojane J in the ***Sibiya*** judgments (i.e. the ***main judgment*** and the ***leave to appeal judgment***), and

4.2. the Ramahlaha complaint.

5. The specific pronouncements that underpin the Applicants' attack on the Minister's decision are the following:-

5.1. in the *main judgment* para 31:

> *"In my view, there exists no basis in law or fact for the Third Respondent* [Ntlemeza] *to take the drastic measure of placing Applicant on precautionary suspension. I agree with the Applicant that the decision by Third Respondent was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates Applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair."*

5.2. in the *leave to appeal judgment*, the remarks:-

5.2.1. that Ntlemeza had failed to take the Court into his confidence, and thereby misleading the Court by not mentioning that there were apparently conflicting reports on Sibiya's involvement in the illegal rendition of the Zimbabweans [Judgment p7];

5.2.2. that Ntlemeza is biased, dishonest, lacks integrity and honour, he made false statements under oath [Judgment p8];

5.2.3. that Ntlemeza has a contemptuous attitude towards the rule of law, the principle of legality and transparency [Judgment p11].

6. The Ramahlaha complaint, in which wide ranging allegations were made against Ntlemeza,[1] is invoked by the Applicants ostensibly to show that some disciplinary matter was pending against Ntlemeza which Ntlemeza failed to disclose when being interviewed for the appointment.

7. Relying on the above pronouncements and the Ramahlaha complaint, the Applicants conclude that Ntlemeza is not a fit and proper person to be appointed the National Head of the Directorate,[2] and the Minister's decision to the contrary is irrational and unlawful.

8. The concerned pronouncements and the Ramahlaha complaint are dealt with in turn below, followed by submissions on the distinction between the present case and the ***Simelane*** case, including why the Applicants' reliance on the ***Glenister*** judgment is of no assistance in the present case. However, we first make submissions on the correct test for rationality.

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[1] Essentially relating to an alleged failure by Ntlemeza to take appropriate action against a former police captain, Thomas Rallele, who was found to have falsified vehicle log entries, and that Ntlemeza was targeting the complainant and certain named police officers. Record, **"SFA5"** (p773) and **"SFA6"** (p776).

[2] Applicants' HoA p26/71.

9. It is important to emphasise that only the Minister can defend the legality of his decision. However, the matter directly implicates Ntlemeza who is alleged, in so many words, not to be a fit and proper person for the position of the National Head. It is also alleged that he failed to make certain disclosures to the Minister when interviewed for the position.[3] Ntlemeza is opposing the application not in order to defend the impugned decision *per se*, but to refute these allegations, and also show the deficiencies in the Applicants' grounds for review.

Test for rationality

10. It is now trite that the test for rationality is conceptually distinct from the test for reasonableness and that the two should be kept separate. Reasonableness is generally concerned with the decision itself,[4] and on this ground a decision would be reviewable if it is underpinned by reasons that are bad in law, making the decision unreasonable.

11. The test for rationality, on the other hand, is, as was stated by Yacoob ADCJ (as he then was) in ***Simelane***, one concerned with the *nexus* between the means and ends (or purpose). This is what the learned Judge said:[5]

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[3] Applicants' HoA p16/42-43.

[4] **DA v President of RSA** (***Simelane***) 2013 (1) SA 248 (CC) at paras 29, 30 & 36.

[5] Id at para 32.

"Rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

12. This observation was based on the Learned Judge's assessment of the earlier judgment of the Constitutional Court in ***Albutt v Centre for the Study of Violence and Reconciliation & others***,[6] where the following was said:

"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally

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[6] 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

> *related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*[7]

13. It is also trite that the rationality standard is the lowest possible threshold for the validity of executive decisions. It is the minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.[8] The rationale for this is to avoid infringement of the separation of powers principle.[9]

14. On the application of the rationality test where it is alleged that certain factors were ignored, the Constitutional Court, *per* Yacoob ADCJ, has laid down the legal position as follows:[10]

> *"[39] If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the*

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7 Id at para 51.

8 ***Simelane*** at para 42.

9 Id paras 41 & 42.

10 ***Simelane*** paras 39 & 40.

> *failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.* (own emphasis)

15. It is significant that were certain factors are said to have been ignored, that such factors be shown to be relevant to the purpose for which decision was made. The mere failure to take a factor into account is not decisive, and an ignored factor that has no bearing on the rationality of the decision is itself of no consequence. That much was made clear by Yacoob ADCJ as follows:

> *"[40] I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose."*[11]

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[11] ***Simelane*** at para 40.

16. On the strength of these principles, it is submitted that the Ramahlala complaint was an irrelevant factor. However, if relevant, the failure to take it into account did not impact on the rationality of the decision, due to the mootness of the complaint and the ulterior motive by which it was driven.

17. The submissions below demonstrate why it cannot be said that the procedure leading to Ntlemeza's appointment and the decision of the Minister to appoint him can be impugned for want of rationality.

Pronouncements

18. The Applicants' contend that Ntlemeza failed to disclose the full extent of the pronouncements to the Minister.[12] However, it is not clear what is meant by *"full extent"* of the pronouncements, and same is not explained.

19. Firstly, the findings in para 31 of the *main judgment* relate to ordinary grounds of judicial review of administrative action.[13] They bear no reference to Ntlemeza's fitness or probity to occupy the office of the National Head or a public office. Otherwise, every administrative official successfully reviewed under PAJA would be unfit to hold a public office.

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[12] Applicants' HoA p27/74.

[13] cf: Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**).

20. Secondly, the remarks made in the *judgment for leave to appeal* should be considered in context. The leave to appeal application was not a case in which the fitness or probity of Ntlemeza to hold office arose for determination. It was an application for leave to appeal against the Court's decision uplifting the suspension of General Sibiya. The indictment on Ntlemeza's character was therefore irrelevant to the question before the Court and made without affording the parties the opportunity to make submissions on the question of Ntlemeza's integrity or fitness to hold office.[14]

21. It is significant that the remarks made in the *leave to appeal judgment* were made in respect of a side issue relating to the manner in which the hearing date for that application was apparently secured by the Applicant's attorneys directly with the Judge's office, without the prior knowledge of the Respondents' attorneys. The facts in relation to that side issue are fully set out in Ntlemeza's affidavit in part A of the application.[15]

22. As appears from the judgment, the learned Judge apparently felt compelled to deal with what he said was a *"contemptuous and false allegation of impropriety"* made against him by Ntlemeza.[16] His reasoning, it would appear, would, with respect, have been coloured by an allegation he considered

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[14] Ntlemeza **AA166/30**.

[15] Ntlemeza AA p165 – 177/paras 29 to 67.

[16] Leave to appeal judgment, p3.

offensive to him. However, neither party was invited to make submissions on the matter.

Disclosure by Ntlemeza

23. It is significant that when Ntlemeza was asked at the interview whether there was anything he wished to declare that might impact negatively on him being considered for the post, he responded by specifically disclosing the comments made by Matojane J that Ntlemeza was dishonest and lacked integrity, and offered to provide more documentation if required.[17] The relevant portion of the minutes of the interview read as follows:

> *"13. After all the questions were asked to the candidate [Major General Ntlemeza] the Chairperson asked him whether he had any matter/issue he would like to declare that may impact negatively on him being considered for the post. Major General Ntlemeza responded by informing the panel that he has attached in his application a brief memorandum which seeks to clarify the comments made by Judge Matojane in an application that was brought by Major General Shadrack Sibiya in the Pretoria High Court. He informed the panel that in dismissing his application for leave to appeal, Judge Matojane commented that he was dishonest and lacks integrity.*
>
> *14. He referred the panel members to his brief memorandum which was attached to his application and he indicated that if there are any documents required by the selection committee, he will make them available. The panel engaged General Ntlemeza*

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[17] Ntlemeza **AA794/31** (Part B). Record p27.

on his memorandum and the Chairperson confirmed that he has seen the judgment before.

15. The Chairperson thanked Major General Ntlemeza for the information and further acknowledged that the panel has taken note of the memorandum."[18]

24. The Minister was a party to proceedings where the pronouncements were made, and when Ntlemeza referred to the judgment, the Minister confirmed that he had seen it before. The review record shows that Ntlemeza's submissions regarding the pronouncements were deliberated upon by the selection committee, and Ntlemeza engaged on those submissions. Ntlemeza's submissions were also included in the Minister's memorandum to cabinet.[19]

25. Insofar as Ntlemeza stands accused of having failed to disclose the "full extent" of the pronouncements, it is apposite to reproduce the following excerpts from his submissions:

"1. I raise an issue which I belief I should bring to the attention of the panel, because the requirement for the appointment of the National Head of the DPCI among others is that the incumbent must be a fit and proper person. I am currently acting in the position of National Head of DPCI since December 2014.

2. ...

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[18] Minutes of the Interview held on 19-8-2015.

[19] Review record, p52–53.

3. *To my surprise, when Judge Matojane delivered his judgment on the leave to appeal in the execution application, he attacked me saying that I have accused him of colluding with Sibiya's attorneys, and that I am dishonest and cannot be trusted. All these accusations were unfounded and baseless. Judge Matojane did not even give me an opportunity to deal with the accusations nor did he give my legal representatives an opportunity to address him on the accusations. Judge Matojane made certain factual findings that Sibiya was innocent or that he had been exonerated by IPID from the Zimbabwean rendition when he was not called upon to decide the merits. It was on that basis that he said that I am dishonest and I did not inform the Court about the report which exonerated Sibiya.*

4. *...*

5. *Sibiya has since gone through the disciplinary enquiry and he is awaiting the outcome from the chairperson. ...*

6. *During the disciplinary enquiry of Sibiya, I am told by my legal team that Sibiya did not make any single allegation against me in his evidence, and he never suggested to witnesses that I was acting with ulterior motive in disciplining him.*

7. *... The judgment of Matojane and my affidavit are available upon request should the panel wish to peruse them. The transcript of the disciplinary enquiry of Sibiya is not yet finalised and it will be made available should the panel wish to have it.*

Yours faithfully"

26. From these excerpts it is plain that Ntlemeza was quite frank and open with the Committee in regard to the pronouncements. He addressed the matter

forthrightly and comprehensively, specifically pointing out that the learned Judge had said that Ntlemeza was dishonest and lacked integrity. This was the information that Ntlemeza had taken the initiative to place before the decision-maker.

27. Therefore, on the facts, it is apparent that the adverse remarks made against Ntlemeza were disclosed to the decision-maker who was, in any event, already aware of them prior to the interview, and took them into account when making the decision.

Minister's Consideration of the Disclosure

28. That much was said by the Minister in his answering affidavit (under part A) at paras 23 and 25 as follows:

> *"23. The Second Respondent was one of the candidates who were shortlisted and interviewed. He submitted his application form which was completed and signed by him. Attached to his application form were his curriculum vitae ("CV"); his formal qualifications documents; documents signed by him dealing with his disclosure about the judgment of Matojane and the criticism by the Judge in which he corrected the factual issues which informed the Judge's criticism. In considering his application and the submissions he made in his documents, including his explanation on the Matojane's judgment, the interview committee was unanimous in recommending the Second Respondent to the post. I also approved his appointment after being satisfied about his fitness to hold office, his explanation thereof, his qualifications and experience that he was the best candidate for the job. Cabinet also*

concurred on my decision upon its consideration of the same material."

"25. The basis of the Applicants' assertion that my decision is unlawful because I failed to take into account relevant factors, i.e. the Matojane judgment when appointing the Second Respondent, is speculation and false."[20]

29. In the same affidavit, the Minister explained his view on the concerned pronouncements along the lines that the **Sibiya** matter did not involve issues pertaining to Ntlemeza's fitness and propriety to hold the office of the National Head of the Directorate, and that it would be irrational of him to take a decision on a matter which had not yet been properly ventilated.[21] This position is consistent with the Minister's affidavit under Part B of the application. Therefore, there is no reliance on new reasons, as allegedly by the Applicants.

Urgent Court's Position

30. It is significant how the urgent Court dealt with this issue, and the question whether or not it was bound by the pronouncements. The urgent Court expressed grave reservations in regard to the manner in which the learned Matojane J dealt with Ntlemeza in what was a judgment in an application for leave to appeal, and particularly where the aspects on which adverse remarks

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[20] Minister's **AA135/23 & 25** (Part A).

[21] Minister's **AA147/63.3** (Part A).

were made had not been tested in oral evidence. We can do no better than repeat what the urgent Court said at para 66 of its judgment:

> *"I do not think that in Sibiya, in relation to the application for leave to appeal and to put the order in operation and in the appeal, I would have judged the Second Respondent [Ntlemeza] as severely as Matojane J. I think one must make some allowance for an aggrieved litigant. In additional, the preposterous conclusion to which the Second Respondent came regarding the probity of the learned Judge, was properly fuelled by absurd legal advice. The Second Respondent, and probably one or more of his lawyers, jumped to a wholly unjustified conclusion. But that, as I see it, does not necessarily, or even probably, prove lack of integrity."*

31. We respectfully agree with the urgent Court's observation.

Ramahlaha Complaint

32. It is now conceded in the Applicants' heads of argument that the Ramahlaha complaint did not constitute a disciplinary matter pending against Ntlemeza.[22] That being so, there is no basis for the allegation that Ntlemeza should have disclosed the Ramallah's complaint as a pending disciplinary matter.

33. The said complaint was made during December 2014, but relates to matters dating back to 2012/2013, a period of about two years or more before Ntlemeza's appointment on 10 September 2015. However, the allegations in the complaint and Ramahlala's subsequent sworn statement were never

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[22] Applicants' HOA, p 31/82.

tested and established. Quite to the contrary, the National Prosecuting Authority decided not to pursue any investigation against Ntlemeza, as it considered the complaint to have no merits.[23]

34. The Applicants' reliance on this complaint is further negated by other factors set out in Ntlemeza's answering affidavit.[24] In this regard, Ntlemeza makes the point that Ramahlala's complaint to the Minister was inconsistent with the facts and had no shred of truth in it. He considered it to be no more than a malicious campaign admittedly intended to bring about his downfall by an indignant officer. The complaint was wholly moot by the time it was raised, as Rallele had been held to account and dismissed from the Police Service in December 2014, following his conviction on 25 May 2014 and sentence on 26 September 2014. The matter was not in Ntlemeza's mind at the time of the interview and would not have occurred to him to be relevant to his fitness to be appointed to the office of the National Head.

35. In the result, it is submitted that the concerned complaint motivated, as it was, by ulterior motives and false information, would not have served to impugn Ntlemeza's probity or fitness to hold the office of the National Head of the Directorate. The inadvertent failure to consider that this complaint does not impact on the rationality of the decision.

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[23] Ntlemeza **AA788/12.7** (Part B).

[24] Part B; **AA786-788/12.1 to 12.6**.

Simelane materially distinguishable

36. The Applicants' reliance on the decision of the Constitutional Court in ***Simalene*** is,[25] with respect, misplaced. Mr Simelane, in his capacity as the Acting Director-General of the Department of Justice was involved in a dispute concerning the proper role of the then National Director, Vusi Pikoli who had been suspended by the President. Shortly after Mr Pikoli's suspension, then President Mbeki appointed a commission of enquiry ("the Commission") into his fitness to hold office, headed by former speaker of Parliament, Dr Frene Ginwala.

37. Mr Simelane had prepared the government's submissions to the Commission and gave evidence under oath there, and was cross-examined. Both his submissions and evidence were severely criticised by the Commission and his credibility questioned. The Minister of Justice then requested that the Public Service Commission ("PSC") investigate Mr Simelane's conduct at the Commission. The PSC in a report recommended disciplinary proceedings against Mr Simelane arising out of his evidence at the Commission.

38. However, the Minister expressly advised the President not to take into account both the PSC report and the Commission's adverse findings against Mr Simelane. In short, it was found at the Commission that Simelane was untruthful and the President was advised by the relevant Minister to disregard

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[25] 2013 (1) SA 248 (CC).

that finding in appointing Simelane as the National Director of Public Prosecutions ("NDPP").[26]

39. The Constitutional Court set aside the President's appointment of Mr Simelane as the NDPP. The Court held that the President's failure to take into account Mr Simelane's evidence at the Commission, when regard was had to the purpose of the power of appointing a National Director of Public Prosecutions, rendered the appointment process irrational, vitiating the President's appointment of Mr Simelane. The Court said at para 86:

> *"The difficulties concerning Mr Simelane's evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to Mr Simelane's credibility, honesty, integrity and conscientiousness. The Minister's advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational."*

40. ***Simelane*** is markedly distinguishable from the facts of this case. Here, there was no failure to take into account relevant material. In fact the record demonstrates the following:

40.1. the adverse remarks made by Matojane J were brought to the Minister's attention.

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[26] ***Simelane*** para 47.

40.2. at the time that the remarks were brought to his attention the Minister was already aware of the remarks. Thus, he knew of them before and during the interview process.

40.3. the remarks were addressed in the Minister's submissions to Cabinet recommending the appointment of the second respondent.

41. In any event, aspects on which the remarks were made were not tested in oral evidence.

42. ***Simelane*** thus finds no application to the facts of this case. Unlike the President in ***Simelane***, the decision-maker in the present case was aware of and applied his mind to the remarks of Matojane J in his decision to appoint Ntlemeza.

43. The independence of the Directorate was never an issue in this case. Therefore, reference to the ***Glenister*** judgment is of no assistance.

Conclusion

44. For the reasons above, it is submitted that the Applicants' review application falls to be dismissed with costs, including costs for two counsel.

P G SELEKA SC

R TULK

Counsel for Second Respondent
Duma Nokwe Chambers
Sandton
1 November 2016