IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23199/2016

In the matter between:

HELEN SUZMAN FOUNDATION & ANOTHER **APPLICANTS**

and

THE MINISTER OF POLICE AND OTHERS **RESPONDENTS**

FILING SHEET

DOCUMENTS FILED	:	**PRACTICE NOTES,**
	:	**HEADS OF ARGUMENTS AND,**
	:	**LIST OF AUTHORITIES**
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AND TO: APPLICANTS ATTORNEYS

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TIME: 10:34
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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION – PRETORIA)

CASE NO: 23199/16

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

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FIRST RESPONDENT'S PRACTICE NOTE
06 & 07 DECEMBER 2016

1.	Date	:	6 and 7 December 2016
2.	Number on the roll:		Special Allocation
3.	Counsel for the applicants:		Adv D N Unterhalter SC Adv C A Steinberg
	Tel:		011 263 9000
4.	Counsel for the first respondent:		Adv W R Mokhari SC Adv T B Hutamo
	Tel:		082 440 3944

5.	Counsel for second respondent:	Adv P Seleka SC
6.	Nature of the application:	A judicial review in terms of Rule 53
7.	Issues for determination: heads	The issues are as set out in the of argument attached hereto.
8.	Relief sought:	Dismissal of the application
9.	Duration:	2 Days
10.	Must the papers be read:	Yes

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION – PRETORIA)

CASE NO: 23199/16

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

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FIRST RESPONDENT'S HEADS OF ARGUMENT FOR PART B OF THE APPLICATION

INTRODUCTION

1. The applicants, which describe themselves in the founding affidavit as non-governmental organisations responsible for the upholding of the rule of law filed on an urgent basis an application on 17 March 2016 with the above Honourable Court seeking in Part A an interdict against the second respondent ("the National Head of the Directorate for Priority Crime

investigations ("DPCI")), preventing him from discharging any function or duty as the DPCI Head pending the review in Part B.

2. Part A of the application was dismissed by Tuchten J on 18 April 2016. The applicants sough direct access to the Constitutional Court, and their application was also dismissed by the Constitutional Court on grounds that it was not in the interest of justice for the Constitutional Court to hear the matter at this stage. The applicants then asked Tuchten J to hear the conditional leave to appeal which they had filed simultaneously with their application for direct access to the Constitutional Court. The applicants' leave to appeal was dismissed by Tuchten J on 19 October 2016.

3. In the meantime, the Judge-President and the Deputy-Judge President had in consultation with the parties respective legal representatives, set the review application ("Part B") as a special allocation to be heard on 06 and 07 December 2016. All the papers including the record have been filed and the review application is ripe for hearing. It is common cause that the review application in Part B is a matter of public interest because it involves the appointment of the DPCI Head, an institution that the Constitutional Court has already found in ***Helen Suzman Foundation v The President of the Republic of South Africa and others*** to be structurally and operationally independent and that it should be insulated from undue political influence.

4. The review application is brought in terms of Rule 53 of the Uniform Rules of Court. In Part B, the applicants seek the following relief:

"1. *The decision taken in or about September 2014 by the first respondent, with, alternatively without, the concurrence of the third respondent, to appoint the second respondent as the National Head of the Directorate for Priority Crime Investigation is reviewed and set aside.*

2. *Ordering any of the respondents who oppose this application to pay the applicants' costs, including the costs of two counsel, on a joint and several basis along with any other respondent who opposes the relief sought by the applicants.*

3. *Granting the applicants further and/or alternative relief."*

CONCURRENCE OF CABINET

5. Whilst the applicants were of the view that the decision taken by the first respondent to appoint the second respondent did not have the concurrence of Cabinet, this point as it seems from the reading of the applicants supplementary founding affidavit and the applicants heads of argument has been abandoned. The current stance of the applicants could have been influenced by what the Minister stated in the answering affidavit and the dispatch of the record which conspicuously demonstrate that the decision to appoint the second respondent was taken with the concurrence of Cabinet.

OTHER GROUNDS OF REVIEW

6. The ground of review that the decision to appoint the second respondent was not taken with the concurrence of Cabinet thus falls away. What remains are the other grounds of review which we deal with in these heads of argument. Those grounds of review relate to the criticism of the second respondent by

Matojane J in his judgment refusing leave to appeal and granting an order of execution pending the leave to appeal to the Supreme Court of Appeal ("SCA"). Matojane J's remarks will be dealt with in these heads later. The other grounds of review relate to the allegation that the Minister failed to take all relevant factors including the Matojane judgment's remarks into account. Whilst it appears that when filing the urgent application on 17 March 2016, the applicants were under the impression that no information pertaining to the criticism of Matojane J was placed before the Minister and the interview panel, this point seems to have been abandoned once the applicants received the Minister's answering affidavit and the record which contain a brief memorandum which was attached to the second respondent's application for the post. What the applicants now contend is that the second respondent's memo was inadequate and did not deal with the earlier judgment of Matojane J when he reviewed and set aside the suspension of Major-General Sibiya and also that the Minister did not take the Matojane J's criticism into account.

7. The other allegation which formed the basis of the grounds of review on rationality such as the criticism of the second respondent by Van Zyl J in the KwaZulu Natal High Court judgment were abandoned by the applicants when Part A of the application was argued. But the applicants made it clear that they were not relying on those criticisms for purposes of the review because that judgment came way after the second respondent was appointed and could not have been taken into account when the first respondent took the decision to appoint the second respondent with the concurrence of Cabinet.

8. Other allegations which related to the second respondent ignoring Court orders have since been abandoned by the applicants when Part A was argued and they also do not form the basis of the grounds relied upon for purposes of Part B of the application. In these heads we focus on the grounds of review which are relevant to the decision to appoint the second respondent as the DPCI Head. In doing so, we start with brief historical background, the applicable legal regime, and case law and conclusion.

BRIEF HISTORICAL BACKGROUND

9. The second respondent was appointed DPCI Head in September 2015. The second respondent is a career policeman with experience spanning over 30 years. Prior to his appointment to the post, he was appointed by the Minister as acting National Head of DPCI in December 2014, when Lieutenant-General Dramat was placed on suspension by the Minister. During his term as acting Head of DPCI, he placed Major General Sibiya on suspension. Sibiya challenged his suspension in the High Court. His suspension was set aside by the Court. The second respondent applied for leave to appeal which prompted Sibiya to file an application for execution of the order pending the appeal. Matojane J, delivered his judgment in the leave to appeal and the execution application. He dismissed the leave to appeal and granted an execution application with costs. In the course of his judgment, Matojane J was very critical of the second respondent and labelled him as dishonest person. No finding of dishonesty was made against the second respondent except for the obiter remarks which the judge made about his honesty and integrity.

10. In the meantime, the Minister advertised the post of the National Head of DPCI. The second respondent applied and he was interviewed together with other candidates. To his application form, the second respondent attached his memorandum in which he disclosed that Matojane J had made adverse remarks about him in his judgment. When he was interviewed, he informed the interview panel about the memo attached to his application form and the adverse remarks made by Matojane J. The minutes of the interview reveal that the panel noted what the second respondent had told them. No further discussion on the topic is recorded in the minutes. The panel had recommended that the second respondent, who had obtained the highest score be appointed to the post.

11. The Minister approved the appointment and referred it to the Cabinet for concurrence as required by section 17CA(1) of Chapter 6A of the South African Police Service Act. Cabinet concurred and the second respondent was appointed as the National Head of DPCI. The second respondent was appointed for a non-renewable period of seven years. Six months after the second respondent had been appointed, the applicants brought this application to review and set aside his appointment as irrational and unlawful.

LEGISLATIVE FRAMEWORK

12. As we have pointed out above, the second respondent was appointed in terms of Section 17CA (1) of the SAPS Act. It reads as follows:

"17CA Appointment, remuneration and conditions of service

(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is-

(a) a South African citizen; and
(b) 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, as the National Head of the Directorate for a non-renewable fixed term of not shorter than 7 years and not exceeding 10 years.

(2) The period referred to in subsection (1) is to be determined at the time of appointment.

(3) The Minister shall report to Parliament on the appointment of the National Head of the Directorate within 14 days of the appointment if Parliament then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session."

13. Although the SAPS Act does not require the post of the national Head of DPCI to be advertised, the Minister deemed it prudent for him to advertise the post in order to attract a wider pool of candidates. There was no obligation on the Minister to advertise the post, shortlist and interview including constituting a panel which would assist him with the selection of the best candidate. The panel selected the second respondent as the best candidate which it recommended to the Minister for appointment.

14. The Minister, who was also present during the interview and chaired the interview panel was also satisfied with the pedigree of the second respondent and that he meets the requirements set out in section 17CA (1) of the SAPS

Act the various requirements stated in section 17CA (1) which are (a) that the candidate must be a South African citizen; and (b) a fit and proper person. This include the candidate's experience, conscientiousness and integrity. If the candidate meet these requirements there is no bar in the candidate being appointed if the Minister and Cabinet approve his appointment. If that happens, which is that both the Minister and Cabinet are satisfied that the candidate has met all the requirements, and they both approve the appointment, then on that occasion, both the procedural and substantive requirements would have been met and the appointment will be unassailable in law.

15. Having regard to the exposition above, we now turn to considering each of the requirements in section 17CA (1), both procedurally and substantively in order to determine whether all of these requirements have been met. We concede upfront that if one of the requirements is not complied with, the appointment is in law assailable and falls to be set aside.

PROCEDURAL REQUIREMENT

16. The reading of section 17CA (1) reveals that the following procedure is contemplated in the appointment of the National Head of DPCI. The Minister identifies the person who meets the substantive requirements set out in the section and appoints him/her with the concurrence of Cabinet. Concurrence as a legal concept means that prior consent of Cabinet is a prerequisite for a valid appointment. Once this occurs, the procedural requirement has been

complied with. As we understand the current status of the matter and the applicants' heads of argument no serious challenge is mounted against any procedural irregularities. In fact on the facts of this matter none whatsoever is apparent from the papers. Thus, it is submitted that the procedural requirements have been complied with.

SUBSTANTIVE REQUIREMENTS

17. Substantive requirements relate to "fit and proper" with due regard to the following attributes: experience, conscientiousness and integrity.

18. We deal with each of the above attributes with regard to the second respondent.

Experience

19. The second respondent is a career policeman with over 30 years experience. In addition to this experience, he has academic qualifications. His Curriculum Vitae shows that he has the following academic qualifications: Matriculation certificate; B.A. in Police Science and B. Juris. He is currently studying for an LLB degree at the University of South Africa. There can be no doubt that the second respondent possesses both the requisite experience and qualifications to be appointed as the National Head of DPCI.

Conscientiousness

20. The Oxford dictionary, 6th Edition defines conscientiousness as "the state of being able to use your senses and mental powers to understand what is happening". There is nothing in the papers suggesting that the second respondent lacks conscientiousness. In fact there is no such allegation made in the papers about the second respondent's conscientiousness.

Integrity

21. Integrity is defined in the Oxford dictionary, 6th Edition, as "the quality of being honest and having strong moral principles". The applicants have alleged in their founding and supplementary papers that the second respondent lacks integrity. To this end, they rely on the two judgments by Matojane J. One in the review of the suspension of Sibiya and the other in the judgment refusing leave to appeal and granting an execution order. In the main judgment in which the suspension of Sibiya was reviewed and set aside, there is nothing in the judgment which says that the second respondent lacks integrity or that he is a dishonest person. Nothing really turns on that judgment which disqualified the second respondent from being considered for appointment and being ultimately appointed to the post.

22. However, much of an issue is made about the judgment refusing leave to appeal and granting an execution order. In that judgment the remarks made by Matojane J were obiter and did not form the ratio *decidendi* of the order granted. No order of dishonesty was made against the second respondent nor

was there any finding of dishonesty made against the second respondent. The remarks made by Matojane J in his judgment did not disqualify the second respondent from being considered for the post and being appointed to the post. The second respondent was not afforded an opportunity to defend himself prior to these adverse remarks being made by Matojane J.

23. It would have been unfair if the second respondent were to be excluded from being considered for the post purely on remarks made by the judge in the course of delivering a judgment especially when the matter did not centre on the fitness, integrity and honesty of the second respondent.

24. The only issue that remains, given that the adverse remarks of Matojane J did not debar the second respondent from being appointed to the post, is whether the Minister ought to have taken into account these adverse remarks when they were brought to his attention by the second respondent both in his application for the post, and orally when he was interviewed. In our respectful submission it was incumbent upon the Minister to take those adverse remarks into account and determine whether they militate against the appointment of the second respondent.

25. In our respectful submission, having regard to the minutes of the interview of the second respondent and the answering affidavit of the Minister in response to Part B of the application, the Minister did take into account the adverse remarks made by Matojane J in his judgment and concluded that they were not an obstacle to the second respondent's appointment to the post. His

decision in the effect is not irrational. Taking into account the totality of the facts and the fact that the second respondent was not afforded an opportunity to defend himself, the Minister's decision in not accepting the criticism as a fact is not irrational. It is a decision that any decision maker confronted with the situation that had confronted the Minister during the interview would have made. In this regard we align ourselves with the remarks by Tuchten J in his judgment when dismissing the interdict application when he stated that:

"66. *I do not think that in Sibiya, in relation to the application for leave to appeal and to put the order into operation pending the appeal, I would have judged the second respondent as severely as did Matojane J. I think one must make some allowance for an aggrieved litigant. In addition, the preposterous conclusion to which the second respondent came regarding the probity of the learned judge was probably 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, provoke lack of integrity.*

67. *There were other allegations in the applicants' papers designed to demonstrate that the second respondent lacked integrity. As, properly so, no reliance was placed on them, I have not dealt with them at all. I would only express the hope that when and if this dispute goes further, the applicant will either back up their assertions with fact or withdraw them from the record or contention."*

26. We also refer to the following paragraphs of the judgment:

"54. *This is not to say that the decision maker is bound to agree with the tribunal or court which made the adverse finding. But in principle, a decision maker who is aware of such an adverse finding is obliged to take it seriously and consider the grounds on which the finding was made as part of the decision making process. I need not consider whether any finding of any tribunal or any court would trigger this obligation. Nor need I consider what the position would be if a relevant finding existed but was not known to the decision maker at the time the*

my judgment a necessary step in the decision making process that where a decision makers knows that a judge of the High Court has during the course of a reasoned judgment (as opposed, eg, to remarks made during the course of the proceedings or during argument) pronounced adversely on the integrity of a candidate for a position in which integrity is a prerequisite, the decision maker must investigate the circumstances under which the pronouncement was made sufficiently to enable the decision maker to assess whether the candidate is a person with the integrity to discharge the responsibilities of the position. The more important the position, ie the more public power that the position will vest in the candidate, the more stringently must the decision maker scrutinise the conduct of the candidate which led to the adverse finding.

56. *Finally on this aspect, I would add that the facts that the proceedings before Matojane J were not directed at the question whether the second respondent was fit to be the National Head of the DPCI or that the question of the second respondent's fitness was not "fully ventilated" in those proceedings are of no significance in the present context. I have said that the Minister was not entitled to ignore the finding of the court. A decision maker confronted with such an adverse finding must himself ventilate the question, if ventilation is necessary."*

27. The applicants rely on what the Minister said in his answering affidavit opposing Part A of the application, that he did not take the Matojane J's remarks into account. This statement has been explained by the Minister in his answering affidavit filed to oppose Part B, that he did take into account those remarks and his allegation in the answering affidavit opposing Part B is supported by the minutes of the interview panel.

THE CORNERSTONE OF THE APPLICANT'S CASE

28. According to the applicants, the first respondent, in making the decision to appoint the second respondent, failed to take into account all relevant factors,

which are the judicial pronouncements in the Sibiya judgments that cast serious doubt on the fitness and propriety of the second respondent to hold any public office.[1] First, we do not agree that those were judicial pronouncements. They were obiter remarks made in the course of the judgment and do not constitute findings.

29. The applicants argue that despite the requirements of the SAPS Act and his mandate under the Constitution, the first respondent, in considering the appointment of the second respondent to the post of National Head of DPCI and eventually making the decision, did not take into account the Sibiya judgments where specific findings were made referring to the second respondent's character and integrity; and that the second respondent does not satisfy the criteria required to hold the important office of the National Head of DPCI. And according to the applicants the first respondent's decision to appoint the second respondent is irrational.[2]

THE SECOND RESPONDENT'S SUITABILITY AND FITNESS TO HOLD THE POSITION OF NATIONAL HEAD DPCI

30. Contrary to the applicants assertion that the first respondent's version in the answering affidavit in respect of Part A of the application differs from the answering affidavit in relation to Part B of the application, it is submitted that the first respondent's answering affidavit in relation to Part A of the application was prepared in haste given the limited time periods which were set by the

[1] FA page 21, para 58
[2] FA page 23, para 63

applicants in the notice of motion. Due to the [illegible] the first respondent did not elaborate on some of the issues raised in the answering affidavit. The first respondent elaborated his answers in his answering affidavit in respect of part B of the application. There has never been any changes or volte face.

31. The second respondent satisfies the criteria set out in section 17CA of the SAPS Act for his appointment to the position of National Head DPCI.

32. As an illustration that the second respondent is a person of character and integrity, out of his volition, and voluntarily disclosed to the interview committee the adverse remarks made by Matojane J in the Sibiya judgments. The second respondent's explanation thereof was as follows:

> *"1. I raise an issue which I believe 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. During January 2015 I initiated a process to suspend Major General Sibiya; the Provincial Head of DPCI. He challenged his suspension in the North Gauteng High Court successfully. I applied for leave to appeal and General Sibiya applied to have an order of execution of the judgment pending appeal. The lawyers of Sibiya set the execution application down without prior arrangement with my lawyers, and they addressed a letter to my lawyers that they have arranged the date with Judge Matojane. My lawyers addressed a letter to Sibiya's lawyers objecting to Sibiya's lawyers conduct. In my affidavit opposing the execution application, I raised the same issue and I attached the letter from my lawyers.*
>
> *3. To my surprise, when Judge Matojane delivered his judgment on the leave to appeal and 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 I am dishonest and did not inform the Court about the report which exonerated Sibiya.

4. *I have since been vindicated because, the Minister appointed Werksmans Attorneys to investigated the conflicting reports. Werksmans concluded that there is only one legitimate IPID report of January 2014. Werksmans also concluded that Sibiya and Let. General Dramat and other officers should be criminally charged and that disciplinary proceedings be brought against them. Werksmans also found that Mr Robert McBride tempered with the report in order to protect Dramat and Sibiya.*

5. *Sibiya has since gone through the disciplinary enquiry and he is awaiting the outcome from the chairperson. The above-mentioned developments are a vindication to me and have shown that I had no personal vendetta against Sibiya that I was doing my work as I am required do so in terms of the SAPS Act.*

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. *I can confirm to the panel that I am a fit and proper person to be appointed to the position of National Head of the DPCI. 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 finalized and it will be made available should the panel wish to have it."*[3]

33. In considering the second respondent's application to the post, and the explanation given in the memorandum pertaining to the remarks made by Matojane J, the interview committee was unanimous in recommending the

[3] Record page 18

second respondent to the post. The first respondent approved the second respondent's appointment to the post after he has been satisfied about his fitness to hold office by virtue of his qualifications, experience, integrity and conscientiousness and that he was the best candidate for the post.[4]

34. The basis of the applicants' assertion that the first respondent's decision is unlawful because he failed to take into account relevant factors i.e. the Sibiya judgments when appointing the second respondent is speculative and not supported by facts. The first respondent read the judgment of Matojane J after it was delivered as he was duty bound as the Executive Authority to read the judgment given that it was widely reported in the media that the judge had accused the second respondent of dishonesty. The first respondent had an opportunity to respond to media briefings whenever asked about the remarks made by Matojane J. The second respondent was not afforded an opportunity to deal with the remarks made by Matojane J.[5]

35. It is therefore not correct that the first respondent did not take into account the remarks by Matojane J in the Sibiya judgments.

36. The second respondent is a person of character and suitable for the post of National Head DPCI. Apart from reference to the remarks made by Matojane J, there is no factual basis to support the applicants' contention that the second respondent is not fit and proper to hold the official of the National Head of DPCI. What is clear is that the applicants have been content with the

[4] First respondent's answering affidavit to Part B, para 7
[5] First respondent's answering affidavit to Part B, para 11

second respondent as the National Head of DPCI and their position has changed and started to see him as a threat to democracy and the rule of law when he started to investigate certain influential and political figures aligned to the applicants.

37. From the time he was at the helm of the DPCI as its National Head, the second respondent has proved himself to be fearless, independent and has demonstrated integrity and honesty. He has never been accused of corruption or fraud and the applicants are also not accusing him of corruption or fraud, the two heinous crimes that have been identified as a problem to the nation. He is a fervent investigator, highly experienced in complex priority crimes investigations. His only sin was when he started to touch the most powerful and the influential.[6]

38. The first respondent support a fearless, independent and highly experienced National Head who is not prone to undue influence, corruption or improper motive. The second respondent's record on his achievements speaks volume. He has stabilised the DPCI, he filled more than 80% of the vacant posts in the DPCI and assisted in the appointment of Provincial Heads of DPCI in all the provinces in terms of section 17CA subsection (6) of Chapter 6A of the SAPS Act.

39. The record of the second respondent is impeccable. The second respondent has investigated priority crimes regardless of who the suspects were. The applicants' unhappiness of the second respondent's performance only

[6] First respondent's answering affidavit to Part A, para 27

emerges when certain individuals (their favourites) were investigated. In this regard, the applicants' attitude goes against the decision of the Constitutional Court in the matter of ***Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others***[7] where it held that:

> *"[2] We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate."*

40. The applicants' attitude is tantamount to interference with the DPCI's operations and their complaint is[8] :

> *"44. Maj-Gen Ntlemeza has, since his appointment, been particularly active in restructuring of the DPCI and effecting fundamental change of personnel within the DPCI, ... He has also been involved in high-profile investigations and interrogatories of current Ministers."*

41. The applicants' attitude described above is a clear indication that the applicants seek to direct the operations of the DPCI and who must be investigated.

COMPARISONS BETWEEN THE INSTANT CASE AND THE CASE OF THE DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS[9] ("Simelane case")

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[7] 2015 (2) SA 1 (CC) at para 2
[8] FA page 16 para 44
[9] 2013 (1) 248 (CC) ("Simelane")

42. The constitutional court dealt with a case which required a decision on whether the appointment of Mr Menzi Simelane ("Simelane") as the National Director of Public Prosecution of the country by the President was within the bounds of the Constitution.

43. The issues that the court traversed were defined as follows[10]:

> *"(a) The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.*
> *(b) The requirements of rationality concerned in particular with -*
>
> *(i) The distinction between reasonableness and rationality and the relationship between the means and the ends;*
> *(ii) Whether the process as well as the ultimate decision must be rational;*
> *(iii) The consequences for rationality if relevant factors are ignored; and*
> *(iv) Rationality and the separation of powers.*
>
> *(c) An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala commission was rationally related to the purpose for which the power to appoint was conferred."*

44. The Constitutional Court agreed with the Supreme Court of Appeal that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment[11].

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[10] DA v The President of SA, para 12(a)
[11] DA v The President of SA, paras 14 & 20

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 failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and 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[12].

46. The Democratic Alliance relied on four aspects of the evidence of Mr Simelane in the Ginwala commission[13]:

45.1 Mr Simelane's failure to disclose a letter that had been drafted by him and sent by the Minister consequent upon a letter received by the Minister from the President together with Mr Simelane's evidence relating to the contents of the letter he had drafted;

45.2 Mr Simelane's failure to disclose the former President's letter to Mr Pikoli's attorneys in response to the request for certain documents;

[12] DA v The President of SA, para 39
[13] DA v The President of SA, para 53

45.3 Mr Simelane's failure to disclose a legal opinion that had been obtained by him and which was adverse to his opinion concerning the relationship between the National Director and the Director General ;

45.4 Mr Simelane's evidence accusing Mr Pikoli of dishonesty.

47. The extracts from the report of the Ginwala Commission ought to have been of great concern.

48. The constitutional Court held[14]:

"[Mr Simelane, having conceded that the letter was both relevant and important, found himself driven to the irrelevancies in the attempt to explain the failure to disclose it. These extracts reflect on Mr Simelane's credibility and conscientiousness. They are material. Any decision by any person aware of this evidence to ignore it in the decision making process involving Mr Simelane's credibility would have been, on the face of it and in the absence of any explanation from that person, irrational. In other words, not taking evidence into account was not, on the face of it, rationally related to the purpose of appointing a National Director, sufficiently conscientious and credible to resist interference with his office.]"

49. What is apparent from the Simelane case is that the question of Mr Simelane's fitness to hold office was made in relation to the evidence which he presented to the Ginwala commission. Mr Simelane was subjected to cross examination and issues of his credibility emanated from his evidence.

[14] DA v The President of SA, para 62

50. In the present case, the second respondent's credibility was put into question when Matojane J made remarks about the second respondent during the delivery of the Sibiya judgments.

51. The Simelane case and the present case are distinguishable. Simelane was subjected to cross examination in respect of his testimony, whereas the second respondent was not cross examined nor given an opportunity to explain himself in respect of the remarks made against him, which then necessitated the need to prepare the memorandum as he did to explain himself.

52. The Ginwala commission found that Mr Simelane failed to disclose information. In the present case, the second respondent disclosed information which he considered to be adverse against him, i.e. remarks by Matojane J in the Sibiya judgments. The second respondent, during his application for the post, gave an explanation of the circumstances under with the remarks were made. The first respondent accordingly considered the Sibiya judgments and the explanation proffered by the second respondent in respect of the adverse remarks.

53. The second respondent's disclosure of adverse remarks and his explanation was an illustration that the second respondent is a person of integrity and credibility.

54. The interview committee considered all of the above to come to the conclusion that the second respondent is suitable and fit and proper to hold the position of national head of DPCI.

55. The applicants have also belatedly raised what they call the Ramahlaha compliant. There can be nothing as frivolous as the Ramahlaha complaint which had since been rejected by the Director of Public Prosecutions, Limpopo.

JUST AND EQUITABLE REMEDY

56. This application is not brought in terms of Promotion of Administrative Justice Act ("PAJA"). The decision that is challenged on review is an executive decision taken by the Minister and Cabinet. PAJA does not apply. As such, the decision can only be challenged under the principle of rationality and legality.

57. When the Court set aside the decision, it is called upon to consider a remedy that is just and equitable. If this Court finds that the appointment should be set aside, it should preserve all the past decisions that were made by the second respondent since his appointment because if they are not preserved, this will lead to chaos within the DPCI and the administration of the justice system.[15]

[15] DA v The President of SA supra; see also: Minister of Defence and Military Veterans v Motau and others 2014 (5) SA 69 (CC)

58. This however does not mean that the decisions taken by the second respondent cannot be challenged on a case by case basis on merits other than that the second respondent's appointment had been declared invalid.[16]

59. The matter must then be referred back to the Minister and the Cabinet to properly consider on the facts whether the second respondent is fit and proper if the Court finds that the adverse remarks by Matojane J were not properly considered. This will also be a just and equitable order to make considering the separation of powers between the judiciary and the executive.[17]

CONCLUSION

60. It has been fully demonstrated that the second respondent has been appointed in accordance with the law. The first respondent's conduct was therefore not irrational in the appointment of the second respondent to the position of National Head of DPCI.

61. The applicants have failed to make out a case for the relief sought in the notice of motion. Consequently, the application should be dismissed with costs, and such costs to include costs for the employment of two counsel.

W R Mokhari SC
T B Hutamo
Counsel for the First Respondent
Duma Nokwe Group of Advocates

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[16] DA v The President of SA, supra.
[17] Allpay Consolidated Investment Holdings Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 (CC); See also Doctors for Life International v Speaker of the National Assembly and others 2006 (6) SA 416 (CC); See also: S v Van Rooyen and others 202 (5) SA 246 (CC)

Sandton

27 October 2016

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION – PRETORIA)

CASE NO: 23199/16

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

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FIRST RESPONDENT'S LIST OF AUTHORITIES

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1. Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para 2

2. Democratic Alliance v President of the Republic of South Africa and others 2013 (1) 248 (cc)

3. Minister of Defence and Military Veterans v Motau and others 2014 (5) SA 69 (CC)

4. Allpay Consolidated Investment Holdings Pty, Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 (CC);

5. Doctors for Life International v Speaker of the National Assembly and others 2006 (6) SA 416 (CC);

6. Sate v Van Rooyen and others 2002 (5) SA 246 (CC)