Instead, Mr Abrahams engaged in victim blaming, stating that these issues could have been properly clarified if there had been proper engagement and co-operation by the accused.

85. For the most part, it is not remarkable what was said, but what was not said. There is no explanation as to:

85.1 why Mr Abrahams did not himself consider the credibility of the Charges before the much-publicised decision to charge the accused, especially given the political and economic significance of the Charges, and the devastating effect their publication had;

85.2 on what basis Mr Abrahams aligned himself with the Charges, and their credibility, when announcing the fact of these charges to the world on 11 October 2016, particularly given that he stressed he had not reviewed the evidence (or, more accurately, lack thereof) at such time;

85.3 how the NPA made as fundamental an error as issuing charges where critical elements, such as *animus*, clearly could never be established. This is particularly so where charges are preferred against the Minister of Finance, against a backdrop where allegations of a battle to "capture" National Treasury and remove the Minister as a perceived impediment are rife. These factors, combined with the political and economic sensitivities of the matter, necessitated that great care was taken to ensure the Charges were sustainable and credible;

85.4 why charges were preferred when clearly a significant amount of evidence and consultation with various officials was still required, including internal SARS documents such as the Symington memorandum and the documents which were annexed to the Memorandum;

85.5 on what basis Mr Abrahams can allege that the matter could easily have been clarified, without the need for charges, had there been "*proper engagement and co-operation*" between the DPCI and the accused (particularly where the NPA, and not the DPCI, makes the decision to prosecute); and

85.6 what steps will be taken to hold those who made this disastrous "error" accountable.

86. After the official statement, a question and answer session was held with the media. During this session, and when asked why he had not reviewed the Charges before he decided to announce them, Mr Abrahams alleged that he could not, *mero motu*, intervene in a decision to prosecute taken by Dr Pretorius and Mr Mzinyathi unless he was called on to review. He alleged that he had called the 11 October press conference, not because he had taken the decision on the Charges but because he was mindful that the decision was of great public interest, and, as the head of NPA, it was incumbent upon the NDPP to take the public into his confidence and address "*why*" such a decision to prosecute had been made.

87. Mr Abrahams' tortured excuse for apparently not applying his mind to the Charges before the press conference is, however, self-contradictory. If his intention was to address "why", this implies that Mr Abrahams intended to convey a substantive understanding of the basis of the Charges to the public. To do so, he first had to understand these charges himself. If, as head of the NPA, he wishes to present these charges as being good in law to the public, and taking account of the intense public interest, he must have satisfied himself as to their credibility and evidential basis. If he in fact did this, then it is clear that he is incompetent. On the other hand, had he failed to do this, it is clear that he was grossly reckless.

88. Mr Abrahams emphasised that he had been briefed on the facts of matter and believed there was a case to prosecute and that he was "*satisfied that there was a case to answer by all three of the accused... when I applied my mind to the matter*". This begs the question of Mr Abrahams' competence, bearing in mind the glaring deficiency of any proof of unlawfulness or intention.

89. Despite admitting that he had in fact applied his mind to the matter, Mr Abrahams still attempted to distance himself from the Charges, implying that he had simply gone on the say-so of his inferiors. He stated that he had primarily relied on the briefing by the relevant prosecutors, in whom he had full confidence. It was for this reason, Mr Abrahams alleged, that he did not ask for further information at the time the Charges were announced. This is despite the fact that he admitted that he did ask for further information in some cases. He could not explain why he did not do so in a case of such public significance and with such glaring deficiencies. Of course, Mr Abrahams is, in any event, wrong (in law) in both the assertion that he could not review the Charges before they were brought and that he could not review the Charges *mero motu*.

90. Finally, it appeared that Mr Abrahams had absolutely no appreciation of the magnitude of the questions posed as to the NPA's independence, ability and conscientiousness arising out of this matter, and refused to offer any apology. Mr Abrahams stated, ironically, but which irony was apparently lost on him, that he believed the press conference goes to show the independence and integrity of the NPA.

91. At the 11 October press conference, Mr Abrahams, as NDPP, stated that the decision to prefer the Charges was "made within the confines of the rule of law and the Constitution". He thus clearly adopted the decision to prosecute,

represented it as being lawful, and conveyed to the world that it was a credible prosecution, supported by evidence. Of course, days later, he reversed this position, attempting to distance himself from the Charges, which he then ultimately announced were not credible, were not supported by evidence and never had been. It does not credit the NDPP first to align himself, publicly and unequivocally, with the legitimacy of the Charges, only then to try remain aloof from the decision to prosecute, representing that, in fact, he had nothing to do with this decision and his role was limited to an ex post facto review role.

Aftermath and further comments and explanations by Mr Abrahams

92. Mr Abrahams' naivety in assuming the 31 October press conference would speak to the independence and integrity of his office shows how divorced from the reality and demands of his high office Mr Abrahams is. Indeed, the 31 October press conference ignited a nationwide uproar over the Charges.

93. It also came to light that, on 10 October 2016, the day before the Charges were announced, Mr Abrahams attended a meeting at the headquarters of the African National Congress at Luthuli House in Johannesburg. This meeting was apparently attended by, among others, the President, the Minister of Justice, Michael Masutha, MP, the Minister of Social Development, Bathabile Dlamini MP and the Minister of State Security David Mahlobo, MP ("**the Luthuli House meeting**").

94. The mere fact that the NDPP would see no issue in attending at the headquarters of a political party, the day before preferring charges against a perceived thorn in said party's leader's side, is remarkable. Of course, the NDPP must be seen to be wholly independent - it is thus never open to him or her to attend at the headquarters of any political party, behind closed

doors, for clandestine meetings (quite apart from the unique facts of this matter, where there was a heightened duty to avoid such a meeting).

95. On 1 November 2016, Mr Abrahams gave an interview of more than forty minutes with Eye Witness News's Mandy Weiner.

96. Some of Mr Abrahams' statements in the interview are revealing. Mr Abrahams:

96.1 reemphasised that he believed there was a "*strong*" and "*winnable*" case on the papers;

96.2 emphasised that the NPA does not have investigative power but relies on the DPCI;

96.3 explained that the Charges had been a leg of the SARS rogue unit investigation (despite the fact that he had admitted in the 11 October press conference that the Charges had nothing to do with the SARS rogue unit. Indeed the facts bear out that the only commonalities between the two investigations are the individuals they target);

96.4 explained that, in his view, the Priority Crimes Litigation Unit ("**PCLU**") was the correct unit to refer the Charges to as the PCLU dealt with "*Foreign bribery matters, corruption, fraud, financial irregularities*" (it is disturbing, and speaks to incompetence, that Mr Abrahams is not aware that the PCLU does not deal with any of these matters, but is in fact mandated to deal with the crimes of genocide, crimes against humanity, war crimes, high treason, sedition, terrorism, sabotage and crimes relating to foreign military assistance; see the mandate of the PCLU annexed hereto marked "**FA10**"). He referred to the SARS rogue unit in particular as it "*impacts on the security of the country*" (despite the fact

that the SARS rogue unit no longer exists and thus could not possibly pose a threat to the Republic);

96.5 admits that he informed the Minister of Justice prior to the laying of charges against Min. Gordhan that the Charges would be laid, and that this information was communicated to the President. Mr Abrahams denies, however, that the Charges were discussed at the Luthuli House meeting. Instead, Mr Abrahams weaved a bizarre story that the meeting was of the Justice, Crime Prevention and Security Cluster: that the Minister of State Security was serving as the Acting Minister of Police, and that the Minister of Social Development was serving as the Acting Minister of Defence. The meeting, according to Mr Abrahams, only concerned the recent violence on the campuses of South African universities. Despite their centrality to the issue in question, it is noteworthy that the Minister of Higher Education and indeed Min. Gordhan, who is the Minister of Finance, were not invited to the meeting;

96.6 laughed, when asked to acknowledge that he had done something illegal when he named a suspect before the suspect had appeared in Court, and stated only that he did not think it was illegal;

96.7 confirmed that he "had a handle" on the Charges before the press conference, or else he would never have called it. He also claimed, however, that he largely relied on the people who made the initial decision;

96.8 also displays his hallmark arrogance when, in response to a question whether he is incompetent, states simply that "*my career speaks for itself. There is nobody out there that can call me incompetent. I would*

not have the long list of successes had I been incompetent. Certainly, nobody that is incompetent can achieve what I have achieved in my career." What Mr Abrahams fails to understand is that mere elevation to a position does not render a person fit and proper for that position. This is why provisions such as section 16(2) of the NPA Act exist, so that unsuitable individuals like Mr Abrahams may be removed from their offices. Unfortunately, Mr Abrahams cannot rely on his historic appointments to justify his continued tenure as NDPP. He must explain why, in response to this affidavit in the face of overwhelming evidence to the contrary alluded to herein, he is in fact fit and proper for the position. In any event, if Mr Abrahams is not incompetent, then he must be consciously reckless or dishonest: both disqualify him from his office;

96.9 claims that the public outcry regarding the Charges did not impact his decision to withdraw; and

96.10 admits that he was mindful of the effects of his decisions with respect to the Charges on South Africa's economy.

97. If there is any doubt as to the public importance of this matter, it must be put to rest by the fact that Mr Abrahams was summoned to attend at Parliament on 4 November 2016 to explain the Charges.

98. During these proceedings, the chairperson of the Committee on Justice and Correctional Services stated, correctly, that the NDPP was a crucially important office which "*lies at the heart of our criminal justice system*". The Chairperson noted explicitly the national uproar and concerns that the NDPP's office had been "*captured*" and was being used "*to fight political battles within the ruling party*". The chairperson is a member of the African National Congress (the so-called "*ruling party*").

99. It is also worth noting that the Chairperson noted that, at the last meeting of the committee, Mr Abrahams had objected to the presence of opposition Member of Parliament Ms Glynnis Breytenbach, MP as Ms Breytenbach had pending charges against her (though no convictions). The Chairperson stated that legal advice had since been taken by the committee and it had been (rightly) determined that Ms Breytenbach had every right to participate. It is quite astounding that Mr Abrahams, as the head of the NPA, does not understand simple constitutional principles, such as the right to be presumed innocent until proven guilty, and that he thought it was somehow within his competence to raise an objection against a sitting member of Parliament's presence in a committee meeting to which he had been invited. This simply demonstrates further the disturbing lack of competence on the part of Mr Abrahams, as well as a seeming vendetta Mr Abrahams has with the perceived political rivals of President Zuma and his allies. It is noteworthy that Mr Abrahams had no compunctions about attending the clandestine Luthuli House meeting with President Zuma, in respect of whom the High Court had ordered the reinstatement of 783 serious charges in *Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] 3 All SA 78 (GP).

100. Mr Abrahams largely repeats the explanations for his conduct which were given in the 31 October press conference, as well as during the interview with Ms Mandy Weiner:

100.1 he alleged that he had been satisfied, on the merits, that the Charges could be sustain, after a briefing by Mr Mzinyathi and Dr Pretorius. He later reiterated that he was "*satisfied that there was a case*";

100.2 he indicated that he thought (he seemed unclear on this aspect) that Mr Mzinyathi had given his concurrence in writing, and he offered to make

that document available in a court of law – and he is accordingly called on to produce it as part of his answering affidavit in this application;

100.3 he also claimed that he had considered the political ramifications of the Charges, just as he had done in other cases, but that he did not allow them to influence his decision;

100.4 he repeated his bizarre account of the Luthuli House meeting and asserted that the NDPP should be able to meet with anyone regarding any issues relating to prosecutions or state security;

100.5 asserted that he had to do further investigations following the submission of the representations and the Symington memorandum, stating that he could not simply accept the documents at face value, but needed to investigate further (contrary to his assertion in the Mandy Weiner interview that the NPA could not investigate and relied on the DPCI);

100.6 asserts that there was "*not an iota of proof*" of a political motive and that the media had "*self-created*" this narrative;

100.7 confirms that, he had previously told the media that he would personally take charge of any prosecutions in relation to the SARS rogue unit and Min. Gordhan. Mr Abrahams then went on to say that when the docket in respect of the Charges was handed to him, that he spoke instead to Dr Pretorius, handing him the docket. Mr Abrahams alleged that he considered it inappropriate for him (Mr Abrahams) to handle the matter himself. It is not clear why; and

100.8 confirmed that he had received calls to resign, including from the applicants, but that he would not do so.

Latest correspondence by the applicants

101. In light of the conduct of the second to fourth respondents in respect of the Charges, and the overwhelming evidence such conduct provides of their unfitness and impropriety, the applicants wrote to the President on 1 November 2016 (this letter is attached, without enclosures, but with the covering emails, marked annex "**FA11**"). In this letter, the applicants call on the President to exercise his powers under section 12(6)(a) to suspend the second to fourth respondents from their offices and to hold enquiries into their fitness and propriety for those offices. To avoid prolixity, I do not attach the enclosures to the letter. These will, however, be made available should this be required.

102. The letter set out in detail the grounds on which the President should exercise his discretion in this respect. To avoid prolixity, I do not traverse each of the grounds set forth in the letter, but pray that these be incorporated by reference.

103. The letter also called on the second to fourth respondents to resign so as not to further harm the Republic's law enforcement institutions any further.

104. Finally, the letter called on the President to suspend the second to fourth respondents and institute enquiries into their fitness and propriety by 16:00 on Monday, 7 November 2016, failing which the applicants would exercise their rights in law on an urgent basis without further notice.

105. In response, at 16:08 on 7 November 2016, a most peculiar letter was received from the office of the Presidency (annexed marked "**FA12**"), which requested an extension, seemingly on the basis that the applicants' 1 November 2016 letter had only come to the attention of the President on 7 November 2016. The President's office does not allege that it (ie, the

Presidency) did not receive the letter. Indeed, the letter was in fact sent on 1 November 2016 to each of the email addresses stated in that letter, and all of these email addresses are addresses stated on the websites of the Presidency and the Government Communication and Information Services (the relevant extract is annex "**A**" and "**B**" respectively to the letter referred to as annex "**FA13**" below). No error messages were received after the email was sent.

106. Rather, the Presidency's response is seemingly premised on the basis that the half dozen people within the Presidency who did receive the applicants' 1 November 2016 letter (and were for all intents the interface of the Presidency with the public) were all not "authorised" to deal with this specific issue (or presumably bring the matter to the President's attention). This (astoundingly) includes the President's private secretary. One of the addressees was, however, "correct" even on the President's version and the letter was thus (on any basis) timeously received.

107. The applicants replied to the President on 7 November 2016 (which letter is annexed marked "**FA13**"), pointing out various of the incongruences in the President's response and precognising the respondents of this application, including that it may be launched electronically after hours. No additional emails were received for service purposes. I pray that the contents of the applicants' letter, including all the evidence which establishes that the 1 November letter was correctly sent, be incorporated by reference.

108. In the President's letter of 7 November 2016, the President sought an extension until 21 November 2016 to make the decision whether to suspend the second to fourth respondents and institute the enquiries. Having regard to the public importance of the matter, the urgency and all the circumstances, it is plain that any further delay was inappropriate. The President is,

however, invited to decide to suspend and institute enquiries against the second to fourth respondents prior to the hearing of this matter on 22 November 2016, which may obviate a hearing on the urgent roll. If, however, the President, following further consideration, refuses by the date of the hearing hereof, to suspend and institute enquiries as aforesaid, this application and these founding papers are also directed against that decision.

109. On 8 November 2016, the applicants received a response from Mr Michael Louw at the President's office, annexed marked "**FA14**", which states that the 7 November letter will be brought to the attention of the President. Interestingly, Mr Louw is Director: Support Services, and the Presidency website printout attached to the applicants' letter of 7 November 2016 shows that one of the email addresses for Mr Louw is presidentrsa@presidency.gov.za, which is one of the addresses to which the 1 November letter was dispatched.

Other relevant conduct

110. Mr Abrahams' self-proclaimed commitment to the rule of law and to equality is belied, not only by the facts set out above in relation to the Charges, but by his recent handling of another high profile matter.

111. The matter in question concerns the now suspended Deputy National Director of Public Prosecution Nomgcobo Jiba ("**Ms Jiba**"). Ms Jiba was accused, in a summons delivered to her on 24 March 2015, of two counts of fraud and one of perjury. These charges arose from her involvement in a case against former KwaZulu-Natal provincial head of the DPCI, Maj-Gen Johan Booysen. In a Durban High Court ruling penned by the Honourable Mr Justice Gorven (*Booysen v Acting National Director of Public Prosecutions and Others* [2014] 2 All SA 391 (KZD), "**the *Booysen* case**"), the charges

brought against Booysen were set aside. Importantly, the court in the *Booysen* case strongly implied that Ms Jiba had misled the Court (see para [34]). These findings were made in judgment of a High Court and are an undeniable basis for, at the very least, a *prima facie* case against Ms Jiba in respect of fraud and perjury.

112. After the unceremonious exit of the then NDPP, Mr Mxolisi Nxasana, Mr Abrahams was appointed as the NDPP on 18 June 2015. On 18 August 2015, the day before she was meant to appear in court on the charges, Mr Abrahams announced that the charges against Ms Jiba would be dropped, claiming that Ms Jiba had acted in good faith and that she was thus absolved from criminal responsibility.

113. Subsequently, this Court, in the matter of *the General Council of the Bar South Africa v Jiba and Others* [2016] ZAGPPHC 833 (15 September 2016), struck Ms Jiba off the roll of advocates on the basis of, *inter alia*, her dishonesty in the *Booysen* case. Following that judgment, on 19 September 2016, the applicants wrote to Mr Abrahams to request the immediate reinstatement of the charges against Mr Jiba (the letter is annexed marked "**FA15**"). Mr Abrahams has, to date, failed to act in this respect.

114. The contrast between the Charges against the accused and the charges against Ms Jiba is remarkable: the Charges were preferred against the accused despite a dearth of evidence in respect of criminality; while the charges preferred against Ms Jiba were withdrawn despite a court judgment and an array of demonstrably false representations.

115. The Jiba matter furthers the perception that Mr Abrahams is incompetent or prone to partiality. Any perception of independence is diluted when he chooses to prefer charges which lack any substance, and cannot meet even

basic jurisdictional criteria, over charges against his now suspended deputy, which were supported by judicial findings. At best for him, he appears entirely incapable of assessing whether a charge is good in law and must be proceeded with.

116. It is submitted that Mr Abrahams' conduct in the case of Ms Jiba is further evidence that Mr Abrahams cannot be entrusted with the office of NDPP, particularly when viewed in contrast to his markedly different treatment of the Charges.

THE UNFITNESS AND IMPROPRIETY FOR OFFICE OF THE SECOND TO FOURTH RESPONDENTS

Mr Abrahams

117. In light of the circumstances surrounding the preferring and withdrawal of the Charges, Mr Abrahams has misconducted himself and is not a fit and proper person to hold the office of the NDPP, in that he lacks the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP. He has also brought the administration of justice and his high office into disrepute.

Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct, as set out above. He has, *inter alia*, improperly violated the rights of individuals not even accused of crimes, by pronouncing to the world of their unlawful conduct; acted grossly recklessly or with ulterior purpose in permitting the Charges to have been preferred; delivered contradictory narratives and versions to Parliament, the Republic and the public; acted in a manner which casts serious aspersions on his independence; displayed a lack of understanding of the law and

appears more interested in self-preservation than serving the interests of the Republic.

118. It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a *bona fide* blunder (which the applicants deny), has brought the NPA into disrepute, continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' present ability and his future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.

119. Furthermore, in a botched prosecution, which was clearly unsustainable from inception, but resulted in the loss of billions of Rand, the besmirching of the reputations of loyal servants of State and greatly affected the standing of the Republic in the eyes of the world, it is astounding that there is not a trace of humility or accountability from the NDPP. He has failed even to offer an apology to the accused, much less take any steps to protect the integrity of the NPA, which steps must, it is submitted, include his resignation (or, at the very least, suspension during a full enquiry).

120. Moreover, there can be no suggestion of any harm to the State or the NPA were Mr Abrahams to be suspended pending a disciplinary enquiry. It cannot be suggested that no other individual in the Republic has the skillset and appetite to discharge the functions of the NDPP in the interim - simply by way of example, the previous NDPP, Mr Nxasana, has publicly indicated a willingness to resume his role (see the newspaper report attached hereto marked "**FA16**").

121. It is furthermore important to note that Mr Abrahams repeatedly contradicted himself when giving his explanation of the events surrounding the Charges during the various press conferences, the Mandy Weiner interview and the portfolio committee meeting. The ineluctable conclusion flowing from the contradictory versions presented by the NDPP is this: quite simply, he cannot be trusted to take the public, the Republic or Parliament into his confidence. Either he is, sadly, completely incapable of remembering what he has and has not done in the last month in relation to one of the most controversial prosecutions in recent time (which version beggars belief and falls summarily to be rejected), or, fully aware of his deeds, he is presenting another, false narrative to the world at large. This conduct does not behove the high office of the NDPP, and further erodes any perception of the independence or conscientiousness of the NPA or the NDPP, and destroys any faith in the ability or integrity of Mr Abrahams to lead the NPA and hold the high office of the NDPP.

122. The sheer fact of the contradictions in his multiple versions should be sufficient to warrant an immediate suspension and inquiry into his propriety for office; of course, however, the failings, regretfully, far exceed mere contradictions in public statements.

123. Mr Abrahams is not a fit and proper person to continue to occupy his high office and should be suspended and disciplined urgently.

JP Pretorius SC and S Mzinyathi

124. It is plain that the prosecution of the Charges was pursued either for ulterior purposes or in a breathtakingly reckless and incompetent fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the Charges came to be publically criticised, and despite seeking the limelight for himself in announcing the Charges at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr JP Pretorius, SC and Sibongile Mzinyathi (collectively, "**the Prosecutors**") (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).

125. The Prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all the facts, including considering all the evidence which was required to be considered in the matter.

126. In addition to what is stated above in relation to Mr Abrahams (which applies with equal force here), had the Prosecutors applied their minds to the facts and law relevant to the Charges, as a rational and conscientious prosecutor of integrity would have done before the decision to prefer the Charges was taken, they would have realised that there was no basis, in law or in fact, for the Charges and would never have taken the decision to prefer charges.

127. According to the 31 October press conference, the Prosecutors failed to take account, *inter alia*, of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable, particularly in a matter with such drastic national consequences.

The Prosecutors' failures, at best, show a startling lack of competence; and at worst, betray ulterior motive and a lack of integrity. The seniority of the Prosecutors augments the case for ulterior purposes.

128. The Prosecutors were obliged to discharge their constitutional mandate lawfully and properly. In the circumstances of this case, that included a duty, not only to the accused but to the Republic and the NPA, only to prefer charges which were supported by evidence and met the requirements of the alleged crimes.

129. Similarly to Mr Abrahams, as explained above, the Prosecutors' unacceptable handling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in institution that they be suspended and an enquiry into their continued fitness to hold office as prosecutors commenced as a matter of utmost urgency.

130. It is thus plain that the third and fourth respondents misconducted themselves and lack the conscientiousness (and/or competence) and integrity to continue to serve their official functions.

THE PRESIDENT'S FAILURES

The legal framework

131. Section 179 of the Constitution provides for a single prosecuting authority that has the power to institute criminal proceedings and to carry out all incidental functions necessary thereto on behalf of the State. Section 179 further provides that Directors of Public Prosecutions will be appointed in terms of an Act of Parliament. The NPA Act was enacted in order to give effect to the provisions of the Constitution.

132. At all relevant times, Mr Abrahams held the position of NDPP and is currently the NDPP. Both the Acting NDPP and Deputy NDPP are governed by section 11 (read with section 12) of the NPA Act.

133. At all relevant times, Dr Pretorius has occupied the position of Acting Special Director of Public Prosecutions ("**Acting Special Director**") and Head of the PCLU, as contemplated under section 14 of the NPA Act.

134. At all relevant times, Mr Mzinyathi has occupied the position of DPP Director of Public Prosecutions ("**DPP**"), as contemplated under section 14 of the NPA Act.

135. Section 12 of the NPA Act, read with section 14, governs the term of office of the NDPP, DPP and Acting Special Director. Section 12(6)(a) provides that the NDPP, Director and Special Directors may provisionally be suspended by the President, pending an enquiry into the fitness of such NDPP or Deputy NDPP to hold that office and may be removed by the President from such 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.

136. Section 14(3) of the NPA Act (which applies to persons in the position of the Mr Mzinyathi and Dr Pretorius) makes the provisions of section 12(6)

applicable to a Director, including a Special or Acting Special Director of Public Prosecutions.

Grounds of review

The failures to institute disciplinary proceedings and to suspend are irrational and unlawful

137. Persons occupying the office of a NDPP, a DDPP and an Acting Special Director of Public Prosecutions wield tremendous public power. Such persons are required to be fit and proper to hold such office; this requirement must be closely scrutinised and applied, to ensure confidence in the institution.

138. The requirement that the NDPP, Deputy NDPP and Special Directors of Public Prosecutions must be fit and proper with due regard to his / her misconduct, conscientiousness and integrity is not a matter to be determined subjectively. Rather, it must be determined objectively.

139. Furthermore, the test for rationality in decision making obliges a court to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand, and the purpose for which the power to make the decision was conferred and the information available to the decision maker, on the other. Each and every step in the process must be rationally related to the outcome. A failure to take into account relevant material or properly to apply one's mind to the facts and law renders the decision reviewable.

140. The purpose of the conferral of the power on the President to discipline persons in the position of the second to fourth respondents was to ensure that the office of the NDPP, DPPs and Special Directors of Public

Prosecutions remain inviolable and the persons appointed to such office are sufficiently conscientious and possess the integrity required to be entrusted with the responsibilities of the office.

141. In light of the evidence of incompetence, impropriety, ulterior motive and a patent lack integrity on the part of the second to fourth respondents the fifth respondent's conduct and failure to take any decision in relation to the second to fourth respondents, let alone discipline and suspend them, is plainly unconstitutional.

142. In light of the power granted to the President as set forth above, and in the face of the conduct of the second to fourth respondents in respect of the Charges, there is a duty on the President to exercise such power to suspend the second to fourth respondents and forthwith to institute disciplinary proceedings against them. This, the President has singularly failed to do.

143. The applicants submit that it would be appropriate for this Honourable Court to substitute the President's failure to institute disciplinary proceedings against the second to fourth respondents with an order that disciplinary proceedings as contemplated under section 12(6) of the NPA Act are instituted against the second to fourth respondents and further, that the second to third respondents are suspended pending the outcome of such disciplinary proceedings.

144. Courts are generally unwilling to usurp the powers of decision makers by granting an order for substituted relief except under exceptional circumstances and if certain factors are met. Those factors are clearly satisfied in the present case.

145. The first factor to be considered is whether a court is in as good a position as the original decision maker to make the decision. The second is whether the

decision is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court may still consider other relevant factors. These include delay, bias or the incompetence of the decision maker. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

146. The applicant submits that this Honourable Court is in as good a position as the President to make a decision to institute disciplinary proceedings against the second to fourth respondents and to suspend them pending the outcome of such disciplinary proceedings. These decisions are largely of a legal nature, which are well suited to the Court's institutional competence. Moreover, the applicant placed before this Honourable Court all material information which information was largely publically available and broadly known in any case. The respondents may provide the balance of any relevant information in their answering affidavits.

147. The Court will thus be in as good a position as the fifth respondent to make the relevant decisions. As the decisions are of a legal nature, the President has very little discretion in the exercise of his powers and, based on the available evidence was required, objectively as a matter of constitutional law, to suspend the second to fourth respondents and to institute disciplinary proceedings without delay.

148. When these findings of impropriety are viewed through the lens of the power conferred on the President and the fact that the offices occupied by the second to fourth respondents are of paramount constitutional and public

importance, there is no other conclusion that a rational decision maker could reach.

149. Furthermore, the fact that the President has refused alternatively failed to take a decision to institute disciplinary proceedings against the second to fourth respondents, despite being called upon by various different public interest organisations may be symptomatic of a closed mind on the part of the decision maker. Moreover, the unreasonable delay in the exercise of the President's powers has been highly prejudicial to the integrity of the NPA and the offices occupied by the second to fourth respondents. Further delay would visit considerable further violence on the NPA, public confidence and the rule of law.

150. This is particularly so where it is reported that charges against, *inter alios*, Min. Gordhan, in relation to the SARS rogue unit, are to be brought in the near future (see, for example, the media report annexed as "**FA17**"). For the NDPP to oversee the bringing of these charges where he has already preferred, or permitted the preferring, of unsustainable charges against Min. Gordhan (but has not acted on credible charges against either the President or Adv. Jiba), smacks of political partisanship, and further undermines any perception of the independence of the NDPP (and the NPA).

151. For these reasons, the applicant submits that there are compelling grounds for this Honourable Court to grant the substituted relief prayed for in the notice of motion to which this affidavit is attached.

URGENCY

152. The applicant approaches this Honourable Court on an urgent basis.

153. There is a strong case that the second to fourth respondents are not fit to hold the high offices which they currently occupy and their continued performance of their official duties jeopardises dozens of critical prosecutions and investigations daily – and brings the law into disrepute and makes a mockery of those offices.

154. The NPA has the mandate and duty to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings (this includes investigation); and to discontinue criminal proceedings. Dozens of critical decisions which affect the criminal justice system as a whole are taken on a daily basis by the NDPP, the DPPs and Special Directors of Public Prosecutions.

155. Mr Abrahams, as the NDPP in particular may exercise far reaching powers including the power to review a decision to prosecute or not to prosecute and the power to conduct any investigation he deems necessary in respect of a prosecution. This is particularly concerning in light of the threat, at the 31 October press conference, that investigations regarding the SARS rogue unit were ongoing. It appears that Mr Abrahams expects to undermine the integrity of the NPA even further and perhaps wipe another R50 billion of the stock exchange soon.

156. Under section 20(4) of the NPA Act a DPP may exercise or perform any of the powers, duties and functions of the NDPP which he or she has been authorised by the NDPP to exercise or perform in the area of jurisdiction for which he has been appointed. Effectively, a DPP is able to play a central role in prosecutorial decisions in the area of his jurisdiction, subject to the "supervision" of the NDPP whose integrity and fitness and propriety is also seriously in question.

157. Such an insidious position cannot be allowed to endure as it has the real potential to cause irreparable harm to the functioning of the NPA, actual and perceived.

158. Acting Special Directors of Public Prosecutions are also vested with far reaching powers which powers are conferred or assigned to them by the President, subject to the direction and control of the NDPP. The NPA's website refers to the Proclamation published in 2003, which sets out the powers of the PCLU and its head: then Mr A Ackerman (see the proclamation, attached above marked "**FA10**"), now Dr Pretorius. These are plainly positions of enormous responsibility and public trust, which cannot be entrusted to a person of potentially redoubtable character and competence.

159. The failures by the President to institute an enquiry into the fitness and propriety of, and to suspend, the second to fourth respondents (despite being called on to do so must be addressed without delay).

160. It is evident that substantial redress cannot be obtained in due course and as such the matter is patently urgent. This conclusion is fortified by the fact that the issues raised in this matter strike at the heart of our constitutional democracy; and the ramifications for our constitutional democracy of allowing the second to fourth respondents to maintain power, unchecked, unaccountable and under a cloud of justified suspicion.

161. If a hearing were only to take place in the ordinary course, there is a real risk that this will result in continuing irreparable harm to the reputation of the NPA and the rule of law.

162. Furthermore, if the second to fourth respondents were to remain in their current offices, they will inevitably take hundreds of decisions that will have an impact on members of the public, the NPA as well as parties that are

subject to prosecution and the victims and the families of victims of criminal acts. Undeterred and apparently impervious to self-reflection, it also seems that Mr Abrahams is already contemplating his next move against Min. Gordhan and, indeed, the economy and the already-shattered reputation of the NPA.

163. These decisions may be irreversible or will only be reversible with a great amount of difficulty following review proceedings. In any event, the decisions will have numerous irreversible consequences.

164. This application has been launched a day after 7 November 2016, the date set forth in the 1 November letter for the President to act. The timetable set out in the notice of motion is commensurate with the exigency of the matter and has been designed to allow the respondents almost a week to respond to this application, by Tuesday, 15 November 2016, which will permit the applicants a short period to formulate a reply, to the extent necessary, as required under the Rules.

CONCLUSIONS

165. In light of the above, it is clear that the President has acted irrationally and unlawfully by failing to institute disciplinary proceedings against the second to fourth respondents and to suspend them pending the outcome of such disciplinary proceedings.

WHEREFORE, the applicants pray for the relief set forth in the notice of motion to which this affidavit is attached.

FRANCIS ANTONIE

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Rosebank on 08 November 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names: Mabokela Malose
Address: 15 Sturdee Ave Rosebank
Capacity: Cst

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