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

CASE NO: 87643/2016

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

REPLYING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 2 Sherborne Road, Parktown, Johannesburg.

2. I am duly authorised to depose to this affidavit on behalf of the applicants. I also deposed to the founding affidavit in this matter on behalf of the applicants ("**the founding affidavit**").

3. The facts set forth in this affidavit fall within my personal knowledge unless the contrary is stated or appears from the context. They are, to the best of my knowledge and belief, both true and correct. Where I make any legal submissions, I do so on the advice of the applicant's legal representatives.

4. Words and phrases defined in the founding affidavit shall bear the same meaning in this affidavit, unless expressly indicated otherwise.

PURPOSE OF AFFIDAVIT

5. This Court has been mired in hundreds of pages of answering affidavits, which are largely irrelevant in relation to the crisp issues for determination before this Honourable Court.

6. The purpose of this affidavit is not to engage with each and every paragraph or allegation in the answering affidavits filed by the first to fifth respondents, but rather to focus on the case before Court. As such, a thematic approach is adopted in reply.

THE NARROW CASE BEFORE THIS COURT

7. Whether by design or error, the respondents mischaracterise the case before this Honourable Court.

8. Neither this Court nor the President is being asked to run the enquiry envisaged in section 12(6) of the NPA Act. The President must merely initiate the enquiry on the basis of the *prima facie* evidence of the unfitness

and impropriety of the second to fourth respondents for office. There is thus no need for this Court, or the President, to consider competing representations as to what conduct the second to fourth respondents ("**the NPA officers**") partook in (or failed to partake in), or whether the NPA officers are, in fact, fit to hold their positions, or should be suspended pending an inquiry.

9. Instead, the narrow issues which are before this Court are:

9.1 is there a duty on the President to exercise his powers under s 12(6) of the NPA Act where the facts of a matter indicate that an enquiry into the conduct or fitness for office of the relevant member of the NPA is warranted; and

9.2 is there a (separate) duty on the President to exercise his powers under s 12(6) of the NPA Act where the facts of a matter dictate that such member should be suspended pending the outcome of such enquiry;

9.3 if so, do the facts of this case warrant:

9.3.1 enquiries into the fitness and propriety for office of the NPA officers ("**the Enquiries**"),

9.3.2 the provisional suspension of these NPA officers pending the outcome of such Enquiries;

9.4 if so, do the President's actions fall short of the above steps required of him in our constitutional democracy?

10. The extensive representations of the NPA officers on the merits of their conduct are thus of little assistance - these representations will be mobilised

in the Enquiries. It is not for the President (or this Court) to run a quasi-enquiry, considering the merits and defensibility of the NPA officers' actions, based on their representations, before deciding that an enquiry, with or without a suspension, should proceed.

11. It is only in a case where there is patently no basis for any enquiry (or suspension) in the first place that the President may refuse to institute an enquiry. The present is plainly not such a case.

12. It is thus the President's actions, and affidavit, which are of primary importance, as read with the averments in the applicants' founding papers which show that at the very least the conduct complained of requires an Enquiry (and related suspension pending the outcome of the Enquiry).

13. As will be demonstrated, the President's affidavit puts up no substantive defences as to why the Enquiries should not proceed, or why these individuals should not be suspended pending the outcome of the Enquiries. To the extent relevant, neither do the NPA officers' affidavits.

14. The President's affidavit appears to conflate these two issues as being a single decision - instead, the correct approach is that there must be a decision whether or not to hold an enquiry; once this is taken, there is a concurrent (but separate) decision whether or not to suspend pending the outcome of the enquiry. This conflation has significant implications for any argument that *audi* must be afforded to the NPA officers in respect of both the issues of suspension and whether an enquiry is warranted.

RIPENESS

15. The President and the NPA officers allege that, as the President has now constructed a timeline whereby he will only be considering the representations of the NPA officers on 28 November 2016 (noticeably a date chosen after the hearing of this matter on 24 November), and has yet to take a decision whether to initiate the Enquiries, the matter is not ripe for hearing. It is alleged that there has been no failure or refusal to take a decision, but rather that the process which leads to the taking of a decision has been initiated, and thus the applicants, the administration of justice and the public, must wait for this process, however long it takes, to culminate in a decision before the applicants (or anyone else) may approach the Courts.

16. This is a regrettable line of reasoning designed to delay, and to avoid the President immediately discharging his duty by initiating an enquiry when the objective facts show that such an Enquiry is manifestly called for – and that the President has failed to institute such an Enquiry of his own accord, and also in response to the applicants' requests that he do so. By this construct the President is enabled to delay the making of his actual decision iand thereby to avoid judicial intervention and scrutiny of his conduct. By way of example, it would permit the President to call for further, or competing representations, in early December, so as to delay the actual decision-making further.

17. Of course, this is not what our law provides - if the President has failed to make a decision within a reasonable period of time, then there is a failure to decide, which is justiciable.

18. The timeline of events confirms that the President has failed, alternatively refused, to take a decision in a reasonable time.

19. By 1 November the President had not himself taken any steps to initiate an Enquiry, despite the public outcry over the events detailed in the founding papers which had occurred in the preceding month. Accordingly, on 1 November 2016, the applicants wrote to the President (annex "**FA11**"), putting the President on terms to initiate the Enquiries and suspend the NPA officers by no later than 7 November 2016. Significant information was provided in the letter which sufficed to ground both the urgency and the need for the Enquiries and suspension. Moreover, detailed court papers were provided, dealing with the bringing of the Charges, the utter incompetence and lack of conscientiousness of the NPA officers and / or the fact that their actions were motivated by ulterior purpose (or may be perceived as being motivated by ulterior purpose).

20. This letter was sent to the email addresses which:

20.1 the President concedes (at least one of which) were correct ("**FA12**");

20.2 appear from the Presidency's own website;

20.3 appear from the National Government Directory, dated 1 November 2016;

20.4 are addresses used previously, without objection, and have elicited a reply;

20.5 include an email address expressly identified in correspondence by the private office of the President in another matter.

21. In any event, there was no allegation that these email addresses did not receive the papers, but rather that the recipients were not authorised recipients and could not, for some reason, forward the information to the President or relevant officials. This is set out in annex "**FA13**".

22. Although the President thus had all the required information to make the decision to initiate the Enquiries ("**the enquiry decision**") and the decision provisionally to suspend the NPA officers ("**the suspension decision**") by 1 November 2016, he certainly had all this information by 7 November 2016.

23. Despite the urgency of the matter, the President did not take any decision immediately after 7 November 2016. Instead, he requested a further two weeks to take the decisions, requesting an extension until 21 November 2016. The applicants did not grant this extension, owing to the manifest urgency and public importance of the matter, but invited the President to make the enquiry and suspension decisions by 21 November 2016, which would have preceded the initial hearing date of this application (being 22 November 2016).

24. On 14 November 2016, the parties received directions from the Honourable Deputy Judge President, indicating that this matter would be heard on 24 November 2016. Serendipitously, on the very same day that the date of 24 November was identified, the President called for representations from the NPA officers.

25. There had been no call for representations in over a week since the President, at the latest, was aware of the applicants' complaints. When the President now did call for representations, these representations were to be received not prior to 24 November 2016, so as to allow the President to make

a decision timeously and possibly obviate the need for this hearing, but instead on to 28 November 2016. It is thus clear that, whether by cynical design or otherwise, the President is intent on pushing this decision well past 28 November 2016 - indeed, it is unlikely that any decision will be taken before December 2016, and this assumes that there are no calls for clarification, further or competing representations, or additional information.

26. As the applicants noted in their 1 November 2016 letter, should the President have failed to take the enquiry and suspension decisions by 7 November 2016, it would be assumed that the President had decided not to suspend the NPA officers or initiate the Enquiries. Moreover, in the founding affidavit, the President was invited to take the enquiry and suspension decisions before 22 November 2016, failing which his actions would constitute a further decision to refuse to initiate the Enquiries or suspend the NPA officers (paragraph 108 of the founding affidavit).

27. It is thus clear that the President has failed, alternatively refused, to take the enquiry and suspension decisions timeously. I am advised that the failure to take a decision within a reasonable period of time constitutes a reviewable decision. If this were not so, the President could simply initiate a "consultation" process, and then drag it out for weeks, if not months, all the while being immunised from review.

28. Moreover, to the extent that any *audi* was required, this *audi* was required to be exercised reasonably, in line with the exigencies of the case. The NPA officers have been afforded an opportunity to place whatever contentions they had as to the need for the Enquiries and suspensions before this Court (and the President) on oath. The President will thus have the benefit of these affidavits to make a decision before 24 November 2016, which is over twenty

days since this urgent matter of great national importance was first formally brought to his attention, to the extent that he did not otherwise – like all other South Africans who followed the events in October (including Parliament) – have knowledge of the crisis that has beset the NPA, its leadership, and the NPA officers involved.

URGENCY AND A REASONABLE TIME PERIOD TO TAKE THE DECISIONS

29. In deciding whether an Enquiry is called for (and a related suspension), the facts are to be assessed objectively as against a simple test: is an Enquiry called for on account of the allegations levelled against the NPA officers involved. The applicants need not prove either gross incompetence or ulterior purpose here - indeed, that is the purpose of the Enquiries. The relevant facts, which are not seriously disputed or capable of serious dispute, are as follows:

29.1 charges against the accused were announced to the world at a press conference, led by Mr Abrahams, on 11 October 2016. Mr Abrahams, as the NDPP and head of the NPA, lent his unequivocal support to the charges and the process followed in bringing them. He later confirmed that he had been briefed by the third and fourth respondents as to the charges, and, as his conduct in announcing the charges to the world evidences, where he lent his significant *imprimatur* as the NDPP, clearly was satisfied as to their legitimacy;

29.2 almost immediately, and as a result of this prosecution, over R50 billion was wiped off the Johannesburg Securities Exchange;

29.3 these charges came at a time where speculation was rife that at least Min. Gordhan was being targeted for prosecution as a means to remove

him as the Minister of Finance as a perceived obstacle to further ulterior purposes;

29.4 it later emerged that the night before the announcement of these charges, the NDPP attended a meeting behind closed doors at the political headquarters of the African National Congress, Luthuli House;

29.5 the NDPP, at the 11 October press conference, spent a significant amount of time informing the public that, as a matter of fact and law, the SARS rogue unit (as it was termed by the NDPP) was unlawful and unconstitutional, despite conceding that the investigation into such unit was ongoing and that no charges could or would be preferred at that stage. There is no conceivable basis on which the lengthy exposition of unconstitutionality of the "rogue unit" was warranted. It was later confirmed that this investigation remains ongoing, and speculation is rife that Min. Gordhan will be charged in relation to this unit (where the NDPP has now pre-judged its lawfulness);

29.6 the announcing of the charges led to an outpouring of support for Min. Gordhan, with numerous elements of society identifying the charges as being completely baseless and clearly punctuated by ulterior purpose;

29.7 the NDPP then performed a remarkable *volte face*, seeking to distance himself from the charges, by announcing that he had played no part in the bringing of the charges and would be reviewing them;

29.8 during this review process, it came to light that critical evidence had been overlooked by the NPA, including evidence which spoke to the lawfulness of the impugned payments forming the basis of some of the charges and to whether intention on the part of the accused could ever

be proven. In fact, it is clear that the NPA never had any evidence of a furtive or fraudulent intent. There was also no evidence of a fraudulent misrepresent of a *concretatio* on the part of Min. Gordhan at all;

29.9 it emerged that the NPA in fact did not (or chose not to) understand the legal framework for payments under the Government Employees Pension Fund, with explanatory affidavits being sought in this regard <u>after</u> the announcing of the charges;

29.10 it is further notorious that, as part of the post-charging investigative process, a Mr Symington of SARS, whose 2009 legal opinion to SARS was deemed, by the NPA, to be of pivotal import, was subjected to intimidation and harassment as elements of the State attempted to receive documentation from him. The so-called Symington "hostage drama" has been widely reported on - media reports are annexed marked "**RA1**";

29.11 at a press conference on 31 October 2016, the NDPP withdrew the charges, indicating that basic jurisdictional criteria, such as *animus*, could not be, and could never have been, established;

29.12 as such, the charges were clearly <u>never</u> good in law and the manner in which they were preferred against the accused was <u>impossible</u> to reconcile with professional, diligent, conscientious and independent conduct on the part of the NPA, more particularly its head;

29.13 in interviews and statements, including the two press conferences, a session before Parliament and an interview with Ms. M Weiner of EWN, the NDPP displayed not only a complete lack of remorse at the NPA's actions (going so far as to apportion blame to the accused for their own

botched prosecution), but also made a number of contradictory statements. At least one of his versions could not possibly be true.

30. Moreover, the background to Min. Gordhan's appointment cannot be overlooked, and neither can the well-publicised tension among Min. Gordhan, National Treasury and various individuals or factions within the State. It was clear that any prosecution of Min. Gordhan, in the politically charged environment, would attract international interest, have economic implications and create internal division. As such, there was a heightened duty that all aspects of such prosecution were required to be done responsibly and lawfully – and without any apprehension being raised that the independence of the NDPP (or his officers) was compromised. Instead of avoiding such an apprehension, the NDPP elected on the day before the charges were made public to meet with the President at Luthuli House. The NDPP to this day refuses to acknowledge that such a meeting (whatever the discussions thereat) could give rise to an apprehension that his independence and impartiality are undermined.

31. The preferring of charges, knowing the inevitable results, where a basic element, such as the intention to act unlawfully, was never capable of being established, smacks either of extreme recklessness and incompetence, or ulterior purpose, or both.

32. The NDPP, Dr Pretorius and Mr Mzinyathi are now perceived as being either incompetent or being activated by ulterior purpose.

33. Every day that they remain in office and are entitled to wield the powers of their office is a day that potentially irreparably prejudices the work of the NPA

and further detracts from the perception of independence and competence of the NPA.

34. In light of these facts, there can be no debate that an Enquiry is called for immediately, together with a suspension. The applicants need not prove either gross incompetence or ulterior purpose here - indeed, that is the purpose of the Enquiries. It suffices that a cloud of uncertainty taints the NPA officers; the perception of their incompetence and/or lack of independence is sufficient to warrant urgent Enquiries and suspension.

35. This is particularly so when one has regard to the especial powers the NDPP enjoys, as well as his status as the *de facto* leader of the NPA. This is a high office which yields enormous power and is charged, as its core mandate, to oversee the NPA and all prosecutions (or decisions not to prosecute) by the NPA, as well as to determine prosecution policy. The NPA is an institution of immense public import and central to the administration of justice. Incidental to this mandate is the concomitant requirement that any incumbent of such office not only be lawfully appointed and act lawfully (which is trite), but that the incumbent must also exhibit, and be seen to exhibit, the utmost independence, integrity and respect for the law. Any apprehension of the NDPP's compromised integrity or competence must immediately result in a temporary suspension, so as to preserve the integrity of the NPA for such period until such factual averments and apprehensions are disproved (or proved and a removal takes place).

36. Moreover, Dr Pretorius and Mr Mzinyathi, as Directors of Public Prosecutions, take decisions daily which affect the rights of numerous individuals, whether they be positive or negative decisions.

37. Every day that the NPA officers remain in office they may make, or fail to make, multiple decisions. These decisions include decisions to prosecute, or not to prosecute, and decisions as to the conduct of prosecutions on a daily basis. Given their performance in relation to the Charges, these officers are operating under a cloud of suspicion as to their motives, competence and independence. Every decision that they take, or fail to take, may now detract from at least the perception of the NPA's independence and competence. There is also a very real risk, and likely probability, that those decisions (of the highest order and remit) may be without any legal foundation.

38. The applicants, and the Republic, may be in a position to (try to) remedy those positive decisions taken by the NPA officers, but will never know of those decisions not taken by the NPA officers. It is not required of the applicants to identify each and every decision taken, or not taken, by the NPA officers, during the period whilst an enquiry into their fitness and propriety for office is live. It is enough that the NPA officers take and are ordinarily empowered to take such decisions, and that they now do so in circumstances where every action of theirs calls into question prosecutorial independence.

39. Public confidence in a critical constitutional institution is being eroded at an alarming rate - the only means to stop the rot is immediately to suspend the NPA officers and conduct the Enquiries.

40. The applicants, and the Republic, cannot be afforded redress, let alone substantial redress, in due course. It would be of scant comfort to learn, some weeks or months in the future, that indeed the NPA officers are incompetent, or lack independence, but have, despite these issues being raised as far back as 1 November 2016, been taking decisions daily for a

significant period of time. These decisions, as mentioned above, may not be capable of easy identification, much less reversal.

41. Accordingly, the matter is manifestly urgent. The President was required to take the Enquiry and suspension decisions within a reasonable time, given this urgency. He has failed to do so, and instead has indicated that no decision will be made before, realistically, December 2016.

42. This constitutes a failure, alternatively refusal, to make the Enquiry and suspension decisions; the matter is accordingly ripe for determination by this Honourable Court.

THE PRESIDENT'S ACTIONS

43. The President is given weighty and important powers under the NPA Act. The President is charged to exercise this power *mero motu*, timeously and responsibility. This application should never have been required to prompt the President to consider engaging his powers under s12(6) of the NPA Act. As a responsible President, he could hardly have failed to be aware of the facts that the charges were withdrawn by the NDPP, or of the effects the announcement of the charges had on the Republic. Indeed, both aspects dominated media attention at the relevant time. Despite this, the President, in his letter of 7 November 2016, alludes only to having some vague, peripheral notion of what has transpired, being "*obliquely aware of media reports*" pertaining to the matter. This is unacceptable. The President must surely have had knowledge of these events, or, at the very least, was required to have knowledge (or seek the knowledge) as a responsible leader of the Republic and the individual vested with the s12(6) powers. Parliament was well aware of the issues in this matter and quizzed the NDPP on them during the week of 31 October 2016. It was thus incumbent upon the President, at least after the 31 October 2016 press conference, to start the

s12(6) enquiry. The fact that this application was necessary, and that the President only called for representations from the NPA officers some 2 weeks later, simply compounds the perception that the President fails, completely, to grasp the urgency of this matter, the damage being done to the NPA and the Republic and the need for action. These unfortunate realities buttress the ripeness of this application, as well as strengthening for the need for judicial redress.

44. The President, on 14 November 2016, placed the NPA officers on terms, stating that "*I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016*" (see annex "SA2" to the second, third and fifth respondent's answering affidavit at page 333 - 338 of the bundle).

45. Facially, such letters are indicative of the following:

45.1 the President has taken a decision that an enquiry will be held into the fitness for office of each NPA officer ("*pending the outcome of the enquiry into your fitness to hold office*"); and

45.2 the President has not yet taken a decision as to whether the NPA officers will be suspended pending the outcome of this enquiry.

46. Yet the President in his answering papers denies having taken any decision at all. This lacks all logic, as the issue of suspension would never arise unless there was an enquiry to be instituted.

THE CORRECT INTERPRETATION OF S 12(6) OF THE NPA ACT

47. It appears common cause that section 12(6) affords the President the power to initiate enquiries into the fitness of members of the NPA to hold office, and

that the President may suspend such members pending the outcome of such enquiry.

48. The corollary to this power is a duty to exercise the power when the facts of a matter necessitate the power's invocation. It is not open to the President, who is expressly and specifically identified by legislation to be the upper guardian of the NPA, to do nothing or drag his heels where urgent action is clearly required. Instead, he is called upon properly, responsibly and timeously to wield his power to call for enquiries into the conduct of those potentially unfit for office, and to safeguard the public and the NPA for the duration of these enquiries.

49. In order to exercise this power, the President (and seemingly the NPA officers) contends that *audi* is an essential element, which forestalls his ability lawfully or rationally to suspend the NPA officers (or perhaps even order enquiries into their fitness to hold office).

50. Section 12(6) of the NPA Act does not, however, require any *audi* rights being afforded to the NPA officers before a decision is taken to institute enquiries with or without a provisional suspension of the officers who are subject to the enquiry. Instead, the President is called upon, based on the facts before him, to determine whether an enquiry, with or without a suspension, is necessary. In discharging this obligation, the President must act lawfully and rationally.

51. The nature of this power is clearly an executive where procedural fairness does not play a role, but even if procedural fairness is required, then the second to fourth respondents have been given more than ample opportunity to state their case in full in these proceedings.

52. The President adopts a schizophrenic approach to the characterisation of his s12(6) power - when dealing with *audi*, he asserts that *audi* is necessarily a precursor to the exercise of his s12(6) power as this power is administrative in nature (see paragraph 6.1.14 of the President's answering affidavit). In the same breath, however, the President asserts that "*I am advised that the Constitutional power to suspend an NDPP is a power in terms of section 84(2)(e) of the Constitution read with section 12(6) of the NPA Act. This power can only be exercised by the President. It is therefore an executive constitutional power...*" (para 6.3.1). Although the conclusion - that the section 12(6) power is executive in nature -is correct, the reference to section 84(2)(e) of the Constitution is inapposite. This section relates to power of the President, acting other than as head of the National Executive, to make appointments required by the Constitution or legislation. It is not clear how it relates to a duty to initiate enquiries into the conduct of NPA members, and suspend them during such enquiries. This power of appointment reflected in section 84(2)(e), in any event, has been held to be subject to the principle of legality, and is justiciable before the Courts by way of a rationality and lawfulness enquiry.

53. Of course, the definition of administrative action expressly does not include executive actions. Even if administrative action, however, the President's actions do not escape review. The precise characterisation is thus of little moment - whether executive or administrative, the impugned actions must be rational and lawful, whether under PAJA or the principle of legality, and this Court has jurisdiction to interrogate the impugned decisions and grant the relief sought.

54. In any event, section 12(6), properly interpreted, builds in no jurisdictional requirement of *audi* prior to the President exercising his powers under such section.

55. In the alternative to the above, if section 12(6) of the NPA Act is deemed to include an element of *audi* whether through the Promotion of Administrative Justice Act, 2000 ("**PAJA**") or otherwise, then this element is limited to the question of suspension, and not whether an enquiry must be initiated. That is because at the enquiry, the accused will be afforded full *audi* rights to defend his or her conduct - this defence cannot be required as a necessary precursor to initiating the enquiry. This would result in a Presidential enquiry on the merits preceding the section 12(6) enquiry on the merits, which is not what the NPA Act envisages.

56. If *audi* is at all part of section 12(6) (which is denied), then *audi* can only speak to the issue of whether or not an individual should be suspended pending the outcome of an enquiry. It is entirely irrelevant for purposes of considering whether an enquiry must be initiated.

57. In any event, by the time the matter is heard by this Court, the NPA officials will have been afforded every opportunity to provide their answers to the complaints contained in the applicants' founding affidavit. They have been provided that opportunity, and taken the opportunity, in filing their full answering affidavits. It is not clear what else they would say in their representations to the President – and obviously they would not be permitted to say anything different to the versions that they have now advanced before this Court.

58. In the circumstances, under the principle of legality, alternatively PAJA, the allegations about a lack of *audi* are unsustainable.

FAILURE TO INSTITUTE ENQUIRIES

59. If the President has decided to initiate the enquiries into the NPA officers' fitness to hold office, then there is no dispute on this score - a decision has been made, and the applicants agree that the enquiries must be held, forthwith and concluded as a matter of urgency.

60. If the President has not, however, made a decision in this regard (and he states on oath he has not, or has refused candidly to explain to the Court what his position is), then it is ripe for determination now.

61. The allegations levelled against the NPA officers are serious ones. They are accused of being – and on their own versions have been shown to be – either:

61.1 gross incompetent, failing to appreciate basic legal requirements and acting with reckless disregard to the interests of the accused and the Republic; or

61.2 motivated by ulterior purpose (assuming competence), and are accused of acting to advance their or other's unlawful interests.

62. It is, moreover, trite that the NPA officers' actions received global publicity (as they knew it would), resulted in calamitous financial consequences (as they accepted would be the result – witness the discussions between the third and fourth respondents about the potential impacts on the economy of the decision) and gave rise to speculation that the NPA officers had improperly

been influenced and were pursuing a vendetta against, at least, Min. Gordhan.

63. It is further trite that the decision to prefer charges was taken in an environment where suspicions are rife that Mon. Gordhan and the Treasury are at battle with various third parties, and that there is a concerted effort by various parties to undermine, intimidate or remove Min. Gordhan from his office. The cavalier attitude displayed by the second to fourth respondents is even more egregious is this context.

64. Finally, it cannot be disputed that the bulk of the press conference at which the Charges were announced was little more than a pronouncement, by the NDPP, as to the illegality of the SARS rogue unit and the unlawfulness of the actions by, *inter alios*, the accused. This was manifestly improper where, as the NDPP conceded, investigations were ongoing and no charges had been brought.

65. It cannot be ignored that the charges preferred by the NPA officers (or at least the third and fourth respondents) were then withdrawn, with it being made clear that these charges were never sustainable in law.

66. The sole enquiry for the President to make is whether, faced with all the above, and the facts identified in 29 above, any questions arise which warrant an enquiry into the NPA Officers' fitness and propriety to hold office.

67. The threshold to trigger such an enquiry is, it is submitted, a low one. It cannot be that this threshold is not crossed, given the allegations of recklessness and / or incompetence and / or ulterior purpose, and where the bringing of admittedly unsustainable charges has irreparably damaged not only the Republic's reputation and economy, but also (including through the

NDPP's reckless decision to meet at Luthuli House the day before the charges were made public) the perception of competence and / or independence of the NPA.

68. Moreover, given the contradictory versions mobilised by the NDPP, it cannot be that no further answers are required.

69. Accordingly, the only rational course of action is that which the Constitution and the NPA Act require: that an enquiry into the actions of the NPA officers in respect of the charges be instituted immediately, to determine whether they remain (or ever were) fit and proper to hold their offices in the NPA.

70. It is not necessary for the applicants to prove a case that the NPA officers are, in fact, not fit and proper to hold their offices in the NPA before this Court. Indeed, neither the President nor this Court need decide this issue - that is the preserve of the Enquiry to be constituted.

71. What the applicants must demonstrate is that there exist factors which necessitate the calling of an enquiry. The calling of an enquiry is not an infringement of any rights of the NPA officers - it will simply require them to defend their actions, in due course. Of course, an enquiry may be called without a suspension (although, as traversed below, this would be inappropriate in this case) - as such, there is no need for the affording of *audi* in this regard.

72. In any event, it is not for the NPA officers to exculpate themselves prior to the calling of an enquiry - this would render the enquiry process potentially nugatory, as the President would first be required to form a view on the merits (as opposed to a view on the need for an enquiry) before the enquiry then formed a view on the self-same merits. This double-tiered proceed is

not what s12(6) of the NPA Act envisages. In any event, it is precisely to ensure the independence of the NPA and its officials that the merits of any disciplinary action were not left to a member of the Executive, but are vested in an independent enquiry, uninfluenced by political considerations.

73. If the President has not taken a decision to initiate the Enquiries, then this Court is seized with all the relevant material to determine whether such Enquiries should be initiated. It even has before it the submissions on the merits by the NPA officers, defending their impugned conduct, should the Court believe *audi* to be relevant or these submissions to inform the need for an enquiry.

74. Accordingly, it is submitted that the only lawful course of action was for the President to institute the Enquiries; his failure to do so necessitates this Court ordering him to do so.

FAILURE TO SUSPEND

75. The power to suspend is a separate decision, where the President wields a different power.

76. The Enquiry will deal with the merits of the NPA officers' conduct. It will either confirm their unsuitability or ineligibility for office, or will vindicate their actions.

77. The aspect of suspension, however, deals with the interim regime - namely, what is to happen to the NPA officers pending the finalisation of the Enquiries.

78. The purpose of the power to suspend is to protect not only the Republic, but also the integrity of the NPA, and public confidence in law enforcement,

during the period in which an enquiry is live. The President must be, and is, empowered to exercise this power expeditiously, unilaterally and immediately where the facts of a matter warrant that this be done.

79. This is an important power, as it safeguards the NPA from being manned by individuals suspected of lacking the requisite competence, integrity or character. It also prevents such individuals doing further harm before their removal (or potentially being seen to do harm before their vindication), and protects against a host of unlawful decisions being made by such individuals before an enquiry is concluded.

80. It is, further, an important safeguard to protect the perception of independence of the NPA, where members, particularly those with immense decision-making power, are, or may appear to be, abusing said power for ulterior purpose or through incompetence.

81. In this matter, the President has clearly not taken any decision to suspend within a reasonable time; in fact, on his newly crafted time-line, this decision will only be taken in early December, at best.

82. This is clearly not a reasonable time for the taking of the decision, given, *inter alia*, the reasons identified in paragraphs 32 to 40 above, and the fact that the President is aware that this Court is dealing with this litigation and had convened the Full Court to hear the matter expeditiously on 24 November.

83. In addition, the President has been seized with all the relevant material to make a decision whether or not to suspend the NPA officers from 1 November 2016. To the extent necessary, he now has their further submissions, in affidavit form. There is thus no reason to push out his

decision until after the hearing date of 24 November 2016, and certainly not after 28 November 2016.

84. The President has thus failed to take a decision to suspend.

85. Moreover, in the circumstances of this case, based on the information before the President, it is clear that the only lawful decision is that the President must suspend the NPA officers pending the Enquiries.

86. This can be the only rational exercise of the President's suspension powers under section 12(6) of the NPA Act, given that the NPA officers are accused of such glaring incompetence or ulterior purpose that they cannot remain in office or be permitted to wield any power within the NPA without further tainting the operation of the NPA, public confidence in this important constitutional institution and / or the perception of the independence and competency of the NPA.

87. The test is not whether the NPA officers are in fact exercising their power unlawfully; instead, the test is whether the public may perceive the exercise of their power to be unlawful. This clearly is the case here - as such, in order to protect at least the perception of independence of the NPA, an immediate suspension of the NPA officers is warranted.

88. Even if, as the President and the NPA officers contend, some element of *audi* is required before the decision to suspend must be taken, then this *audi* opportunity must be exercised within a reasonable period of time. Here the NPA officers have been afforded the opportunity, on oath, to explain why they should not be suspended (in response to the applicants' submission that they must be). These affidavits now serve before this Court and the

President. There is no reason why the President requires further submissions, and certainly not submissions only by 28 November 2016.

89. The NPA officers' affidavits mobilise no reasons which militate against the Enquiry proceeding or which indicates that that should the Enquiry proceed but that they not be suspended in the interim.

89.1 Mr Mzinyathi, essentially, argues that he must be afforded further *audi* in relation to this point, and that any suspension would impact upon his reputation. His reputation as a Director of Public Prosecutions ("**DPP**"), of course, cannot be of greater significance than the reputation of the NPA as a constitutional institution, whose independence, and the need for the perception of independence, has been stressed by Courts throughout the land, including the Constitutional Court. Accordingly, the test proposed by Mr Mzinyathi, namely that the damage to his reputation must be weighed against the damage to the NPA and the Republic, can only have one winner. In the circumstances, where Mr Mzinyathi has taken a decision unsustainable in law which has caused severe harm to the reputation and economy of the Republic, the interests of justice dictate that the Republic be immunised from any further action by him as an NPA DPP. Mr Mzinyathi may well be suspended on full pay, and, should he be vindicated, his reputation will suffer no harm at all. Should Mr Mzinyathi not be suspended, however, the perception will remain that he may be grossly incompetent or motivated by ulterior purpose; public confidence in, and the perception of independence of, the NPA will be diminished and a hue of suspicion will colour each and every decision he takes as DPP.

89.2 Any argument that Mr Mzinyathi's conditions of employment place him beyond the NPA Act and beyond the constitutionally afforded powers of the President is simply unsustainable. As a DPP of the NPA, he clearly is subject to all legislation dealing with such position - to suggest that he has, somehow, contracted out of the law is baseless.

89.3 Similarly, Mr Abrahams and Dr Pretorius mobilise no reasons which warrant against their suspension. Much time is devoted to bald denials of misconduct, or explanations of their understanding of pension fund law, but these are, at best, aspects which fall to be addressed at the Enquiry, to explain whether they should remain in office. These factors do not speak to the issue of suspension at all.

89.4 The same reasons which motivated for a suspension in respect of Mr Mzinyathi apply with equal force here. The need for suspension is further heightened when one has regard to the especial powers the NDPP enjoys, as traversed above and in the founding affidavit.

90. The NPA officers also mobilise arguments that the conduct of one of them cannot be attributed to the others. The applicants do not seek to attribute conduct. It is clear that, on the most benevolent version to the NPA officers, Mr Mzinyathi and Dr Pretorius took the decision to prosecute. This decision was hopelessly bad in law and fact and, for the reasons traversed above and in the founding affidavit, demonstrates gross incompetence, an alarming lack of conscientiousness, the use of prosecutorial pwoewrs for purposes other than those set forth in legislation and/or lack of independence. It is remarkable that, between the voluminous justifications mobilised by the NPA officers, which include dozens of paragraphs of legal interpretation of pension fund law, not a single averment is made that there was evidence that the accused had

acted with the requisite animus; moreover, not a single piece of evidence is put up which proves that the NPA officers, prior to the preferring and announcing of the charges, had any evidence before them which spoke to or proved any unlawful intention on the part of the accused. Of course, this is a basic requirement of the charges, and was later admitted by the NDPP to have been absent. This evidence must therefore have been absent from the outset, yet the NPA officers still preferred and announced the charges. This smacks of either remarkable incompetence, or, more sinisterly, ulterior purpose by preferring charges bad in law not to achieve a prosecution, but ulterior outcomes. Quite apart from a lack of evidence of fraudulent intention, there was also no evidence of an unlawful and fraudulent misrepresentation or *concretatio* as required for fraud and theft.

91. The NDPP bears ultimate responsibility for the actions of the NPA. At the very least, he lent his *imprimatur* to the bringing of the Charges. He further improperly expounded upon the unlawfulness of the SARS rogue unit, and has presented multiple and contradictory versions to the Public and Parliament in explaining the saga of events which led to the bringing and dropping of the charges, and has acted in a manner that is reckless as to the vital constitutional duty to ensure that his office (and the NPA more broadly) is not tainted by any suspicion of bias or impartiality.

92. For the reasons traversed above and in the founding affidavit, the NDPP's conduct demonstrates gross incompetence and/or lack of independence.

93. All three were present at both press conferences and Dr Pretorius and Mr Mzinyathi said nothing to contradict the NDPP's assertion. In fact, the NDPP has indicated that the first press conference was called on 11 October 2016 on the back of the briefing he received from Dr Pretorius and Mr Mzinyathi.

94. The exact role of each of the NPA officers will, no doubt, be more fully revealed at the Enquiries - there is, however, a *prima facie* case against each of them for their actions that warrants immediate suspension and the institution forthwith of the Enquiries. The belated attempt now to apportion blame amongst themselves, or distance themselves from decisions jointly presented to the world, does not behove their case, and simply further illustrate their unfitness to take responsibility for the high offices they currently hold.

95. Accordingly, even if *audi* is required under s12(6) in relation to the question of suspension, this *audi* has been exercised through the affidavits filed by the NPA officers and does not disturb the conclusion that these officers fall immediately to be suspended. As the President has not made this decision, such failure is unlawful, and the Court, seized with all the relevant material, is called upon to order the President to suspend the NPA officers pending the outcome of the Enquiries.

COURT'S DISCRETION TO ORDER A SUBSEQUENT HEARING REGARDING SUSPENSION, IF NECESSARY

96. It is submitted that the Enquiries must be instituted forthwith, and the NPA officers immediately suspended.

97. If, however, this Court is minded to afford the NPA officers (more) *audi* in relation to the suspension issue, and this Court is further of the opinion that such *audi* has not yet properly been exercised, then the applicants contend that it is open to this Court to postpone any hearing on the narrow issue of suspension until after the representations have been received (by 28 November 2016).

98. It is submitted that, as just and equitable relief, the Court may order the President to make a decision in relation to suspension by no later than a specific date, such as 2 December 2016.

99. If the President does not institute the Enquiry and suspend the second to fourth respondents, the Court may reconvene on a date in the near future to finalise this application: such as 12 December 2016, with parties being afforded an opportunity to supplement their papers before the hearing, to the extent necessary.

100. The applicants stress that they do not believe the above regime to be necessary, as this Court is empowered to order the institution of the Enquiries now, with suspension of the NPA officers pending the outcome of the Enquiries. The above regime caters only for a scenario where the Court is minded that the President is entitled to consider the NPA officers' representations, pertaining only to the issue of suspension, on 28 November 2016 and thereafter to make a decision in regard to suspension.

THE TERMS OF THE SUSPENSION

101. The NDPP argues that the applicants' relief pertaining to suspension is incomplete, as it fails to set out the terms governing the suspension.

102. The applicants have always contended that the NPA officers must be suspended pending the outcome of their Enquiries. The applicants do not dictate to the President, or call upon the Court to inform the President, what other terms must apply to this suspension, inasmuch salary is concerned.

103. It remains for the President to exercise his s12(6)(e) powers to determine whether or not the suspended officers receive a salary, and, if so, what salary, for the duration of their suspension.

PRESIDENT'S INCORRECT UNDERSTANDING OF LEGAL REQUIREMENTS

104. It is telling, and worrying, that the President appears to fail to appreciate the factors which trigger the exercise of his s12(6) powers. In paragraph 7.4 of his affidavit, the President indicates that any enquiry into the NPA officers' being "fit and proper" is limited to an enquiry into their integrity and formal qualifications.

105. At the outset, this line of reasoning, quite apart from being incorrect, is irrelevant. It is not for the President to perform the Enquiry now - instead, he is simply called upon to determine whether objective factors warrant the initiation of an Enquiry, where fitness and propriety will properly be examined.

106. Moreover, the President seemingly omits critical factors such as competence; fitness for position; independence and misconduct.

107. In his affidavit, the President, even without receiving the NPA officers' representations, indicates that, on the facts before him, no challenge against the NPA officers' integrity is made out, and that no evidence of ulterior purpose exists. This assertion is, of course, untrue. More importantly, the President fails to appreciate that he is not called upon to run the Enquiry. He is called upon merely to assess the need for an Enquiry, where these assertions will be tested in the correct proceedings.

108. Quite apart from the President's failure to appreciate the s12(6) trigger, his affidavit in fact indicates that he has already determined that the applicants'

case and assertions are baseless; the ineluctable conclusion is thus that he will not be taking the Enquiry and suspension decisions.

109. Moreover, within the (incorrect) context where the President tests the merits of the Enquiry, the President has demonstrated that his call for representations is in fact a sham, as he has already indicated under oath that he does not believe the NPA officers' to have a case to answer. His call for representations is thus surprising, if not merely a dilatory tactic.

110. Even if there is a minimum substantive threshold, which echoes the grounds of the Enquiry, which must be overcome before the President should call for an Enquiry, then the test is not one merely of "*integrity*", as understood by the President.

111. It is worth emphasising that:

111.1 Section 9 of the NPA Act sets out the requirements for the appointment of the NDPP and any Director. These requirements include, under section 9(1)(b) that the NDPP and any Director "*be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.*"

111.2 Under section 12(6)(a)(iv) of the NPA Act, the NDPP and/or any Director may be suspended and an enquiry into their fitness to hold office initiated "*on account thereof that he or she is no longer a fit and proper person to hold the office concerned*".

111.3 The requirement to be "*fit and proper*" is not exhaustively defined or described in legislation and it is left to the subjective interpretation of,

and application by, seniors in the profession and ultimately the court.[1] The NPA Act does set out certain non-exhaustive list of factors which should be considered when deciding on fitness and propriety, including experience, conscientiousness and integrity to be entrusted with the high office in question. Not only are competence and independence an integral part of conscientiousness (and integrity), but they are also relevant factors in their own right.

112. The President, in his answering affidavit, seeks to limit the requirement of fitness and propriety to formal qualifications (which are not in issue) and integrity alone.

113. Though integrity is an important and multifaceted aspect of fitness and propriety, it does not stand alone, and it is clear there are a number of qualities that a lawyer, and indeed a prosecutor, should readily possess. I am advised that in *The General Council of the Bar v Nomcgobo Jiba*[2] it was stated that the minimum qualities that a lawyer should possess include, *inter alia*, impeccable honesty, dignity, respect of legal order and a sense of fairness. Furthermore, the Court noted that it was relevant to the "*fit and proper*" person requirement, in respect of prosecutors, to consider the directives of the Code of Conduct for Members of the National Prosecuting Authority ("**the Code of Conduct**"), which was published by the then NDPP.[3]

114. Relevant directives of the Code of Conduct include the following:

A Professional Conduct

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[1] *The General Council of the Bar v Nomcgobo Jiba* 4 All SA 443 (GP) (15 September 2016) ("**Jiba**").

[2] Ibid.

[3] Published in terms of section 22(6) of the NPA Act, *Government Gazette* 33907, notice number 1257, 29 December 2010.

Prosecutors must-

(c) <u>protect the public interest</u>;

(d) strive to be and to <u>be seen to be consistent, independent and impartial</u>;

(f) <u>strive to be well-informed and to keep abreast of relevant legal developments</u>…

B Independence

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be <u>free from political</u>, public and judicial <u>interference</u>.

C Impartiality

Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should-

(c) <u>take into consideration the public interest as distinct from media or partisan interests</u> and concerns, however vociferously these may be presented;

(d) avoid participation in political or <u>other activities</u> which may prejudice or be <u>perceived to prejudice their independence and impartiality;</u>

(g) take into account all relevant circumstances and ensure that <u>reasonable enquiries are made about evidence</u>, irrespective of whether

these enquiries are to the advantage or disadvantage of the alleged offender;

D Role in administration of justice

1. Prosecutors should perform their duties fairly, consistently and expeditiously and-

(d) in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence; and

(e) throughout the course of the proceedings the case should be firmly but fairly and objectively prosecuted.

2. Prosecutors should, furthermore-

(b) refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending or cases in which the time for appeal has not expired.

115. All of this must be borne in mind when the fitness and propriety of any member of the NPA to hold office is considered, and must particularly be borne in mind when having regard to the "*experience, conscientiousness and integrity*" of that office bearer.

116. Accordingly, if the President is obliged to consider the conduct of the NPA officers in order to determine whether an Enquiry is necessary, the "*integrity*" of those persons is not dispositive of whether they are "*fit and proper*" –

although on the facts as set out in the founding affidavit the integrity of the NPA officers is very much in question.

117. In any event, the Enquiry is not only held when fitness and propriety are at stake, but also where there has been a serious allegation of misconduct. The second to fourth respondents have plainly misconducted themselves in this matter, and have a serious case of misconduct to answer.

118. The competence of an individual to hold the office of prosecutor is clearly of great import and relevance. It is submitted that this standard is even more important for the NDPP as chief prosecutor, head of the NPA and overseer of all the prosecutors below him. Similarly, Directors of the NPA should have a commensurately higher standard to meet than their subordinates. The President's attempt, in his version, to simplify, narrow and lower the bar for the fitness of propriety, and to disregard the misconduct, of the NDPP and the Directors must be rejected.

119. Instead, it is submitted that the NDPP, the Special Director and the DPP must be held to the "*highest standards of the legal profession*" with respect to, *inter alia*, all of the above considerations and, in general, to conscientiousness, including competence, and integrity.

120. Ultimately, of course, the President need not engage in this exercise on the merits, which is the preserve of the Enquiries. Instead, he must merely be satisfied that the objective criteria warrant the initiation of the Enquiries - clearly, in this matter of immense national importance, where botched prosecutions have wreaked havoc on the Republic, the economy, the NPA and the Executive, the Enquiries are required.

COMPETENCE OF THE RELIEF SOUGHT

121. The President adopts a somewhat schizophrenic approach to the nature of his own actions / inaction, vacillating between his powers being administrative or executive in nature.

122. With respect, it matters little how the President characterises his actions; the fact is that the failure, alternatively refusal, to take the relevant decisions, is clearly justiciable, and falls to be reviewied either under the principle of legality or under PAJA.

123. Where objective criteria necessitate that the President must take a certain decision, even where he has failed to take any decision, the Court may order the taking of the necessary decision. Legal argument will be addressed on this score.

JIBA

124. Significant time is committed to vilifying the applicants due to their perceived reliance on the *Booysen* matter. The applicants, however, do not rely on that case.

125. In error, the applicants indeed cited an incorrect case, which they rectified, by way of a supplementary founding affidavit, well before any of the respondents had answered. As noted in the supplementary founding affidavit, the reference to the "*Booysen*" matter was in error, with the matter concerning Mr Richard Mdluli instead being the correct matter (being the case of *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP)).

126. The second and third respondents thus misconstrue the allegations made in the founding papers, by dealing with the *Booysen* matter, as opposed to the Mdluli matter.

CONDONATION

127. It is noted that all of the respondents filed their answering papers outside of the time periods set forth in the applicants' notice of motion, which had the effect of curtailing the applicants' time period to assimilate the answering material and prepare a reply.

128. In addition, the respondents cumulatively filed in excess of 300 pages of answering affidavits, which required substantial time to assimilate and answer. Counsel for the applicants were both abroad on work commitments, but availed themselves at short notice and after hours to expedite the finalisation of the replying affidavit.

129. The applicants have done everything possible to produce this affidavit within the time periods set forth in the notice of motion (and simultaneously draft heads of argument which were directed by the Honourable Deputy Judge President to be filed on Friday, 18 November 2016, a day after this replying affidavit was to be delivered). In light of the prolixity of the answering affidavits coupled with the importance of the issues raised in this matter, the applicants were required to engage substantively with the issues raised in the answering papers on an extremely truncated basis and did so as swiftly as possible.

130. In any event, the respondents are not prejudiced by the late filing of this replying affidavit as it was filed, effectively, hours after the deadline set forth

in the notice of motion, and the respondents are afforded sufficient time to consider this reply for the purposes of heads of argument (the respondents' sole remaining written contributions to the piece).

131. In light of the national importance of this matter, coupled with the minimal delay and lack of prejudice, the applicants humbly request this Honourable Court to condone the late filing of this replying affidavit for the reasons set forth above.

COSTS

132. It is unfortunate that the NPA officers seek to characterise the applicants' actions as falling outside of the prescripts of *Biowatch*, and instead being abusive and/or vexatious.

133. The applicants act in the public interest. It cannot be denied that the Republic is entitled to an NPA which is independent, is seen to be independent and is manned by independent officers who are characterised by integrity, and conscientiousness (including competence) and proper conduct. Approaching Court to ensure that this is the case can hardly be said to be a matter where public interest organisations are acting for financial benefit, or seeking to abuse Court processes. Indeed, a costs order against litigants in the position of the applicants may well stifle approaches to Court, which appears to be the desire of the NPA officers.

134. The actions by the NPA officers have impacted upon the rights and interests of every person in the Republic. The relief sought by the applicants goes some way to vindicate these rights.

135. Accordingly, even if unsuccessful, the applicants contend that the constitutional principles outlined in *Biowatch* should apply.

136. It is regrettable that the Mr Mzinyathi impugns not only the conduct of the applicants, but also that of the Honourable Deputy Judge President, by suggesting that the Honourable Deputy Judge President somehow colluded with the applicants to secure the hearing date of 24 November. Such a scurrilous suggestion is entirely without merit is based on no evidence, is unbefitting of an individual in the position of the Mr Mzinyathi and is abusive in the extreme. It simply reaffirms his lack of fitness for his high office. The applicants reserve their rights to apply for the striking out of this statement and to bring it to the attention of the necessary authorities. It is submitted that the Court ought to express its displeasure at Mr Mzinyathi's irresponsible allegations through a punitive costs award, *de bonis propriis*.

PRESIDENT HAS DISABLED HIMSELF FROM MAKING A LAWFUL DECISION IN FUTURE AND CONCLUSIONS

137. The President has failed to take the Enquiry and suspension decisions. This is in spite of the facts before him, the national importance of the matter and the manifest urgency punctuating the matter.

138. Instead, the President has crafted a timetable which, by design or otherwise, will push out any taking of an actual decision until after the hearing of this matter. Based largely on this fact, ripeness has become the lynchpin of the first to fourth respondents' arguments.

139. The failure to take a decision in a reasonable period of time, however, is reviewable. Moreover, the material before the Court warrants the Court

ordering the President to institute the Enquiries forthwith, and suspend the NPA officers pending the outcome of such Enquiries.

140. It is, moreover, concerning to note that the President has misconstrued the jurisdictional factors which trigger the obligation to exercise his s12(6) powers; he has, moreover, indicated a failure to appreciate what factors are considered when one considers the fitness and integrity of the NPA officers, and has apparently already decided (even before seeing their representations) that they do not have a case to meet. Based on the President's assertions he has adopted an unlawfully rigid stance and has effectively disable himself from making a lawful and rational decision. This speaks both to the reviewability of his failure or refusal to make a decision and whether this Court should substitute its decision for that of the President.

141. Ultimately neither the President nor the Court is called upon to decide whether the NPA officers are fit and proper and should remain in office. This is the terrain of the Enquiries.

142. The issue before this court is a crisp one - does the second to fourth respondents' conduct the facts of a botched prosecution, which damaged numerous facets of the Republic, in a politically charged environment where ulterior purpose and/or recklessness appears manifest, warrant at least an official enquiry to determine whether the NPA officers acted properly and are fit to remain in their positions of significant power and responsibility? Moreover, for the duration of such enquiry, should the Republic and the NPA be shielded from those who played a pivotal, and disastrous, role in the botched prosecution?

143. The answers to both questions, it is submitted, should be a resounding yes.

WHEREFORE, the applicants pray for the relief set forth in the notice of motion to which the founding 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 Sandton on 18 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
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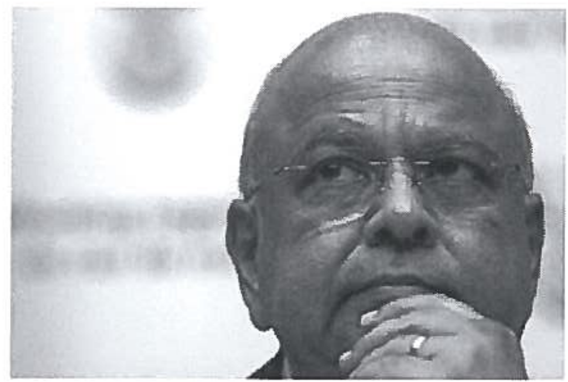
SARS deputy director Vlok Symington has opened a case of kidnapping, Ipid confirms

Oct 27, 2016 | Nomahlubi Jordaan

The Independent Police Investigative Directorate (Ipid) has confirmed that South African Revenue Service (SARS) deputy director of law Vlok Symington has opened a case of kidnapping with it.



Pravin Gordhan. File photo.

Photograph by: REUTERS

"

The Independent Police Investigative Directorate (Ipid) has confirmed that South African Revenue Service (SARS) deputy director of law Vlok Symington has opened a case of kidnapping with it.

"

This follows a video clip and media reports on Thursday indicating that Symington had been locked in a boardroom in the SARS head office while the Hawks, and SARS boss Tom Moyane's bodyguards attempted to get him to make an affidavit in the fraud case against Finance Minister Pravin Gordhan.

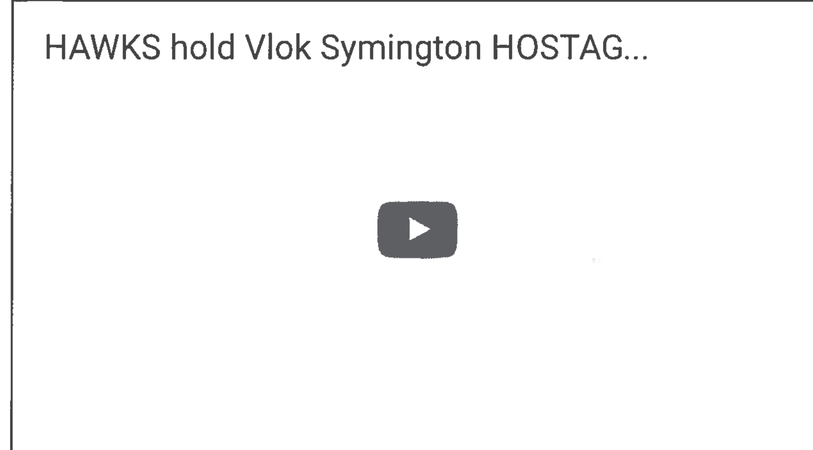
- Save South Africa campaign calls for sacking of Abrahams, Moyane (http://www.timeslive.co.za/politics/2016/10/27/Save-South-Africa-campaign-calls-for-sacking-of-Abrahams,-Moyane)

"I can confirm that we've opened a case of kidnapping. It was registered late yesterday [Wednesday]. It has been assigned to an investigator," said Ipid spokesperson Moses Dlamini.

"It's still the beginning of the investigation. It's difficult to say more."

- Gordhan on SARS hostage drama report: 'totally unacceptable behaviour' (http://www.timeslive.co.za/politics/2016/10/27/Gordhan-on-SARS-hostage-drama-report-totally-unacceptable-behaviour)

Dlamini said Ipid was in possession of the video footage and other evidence.



Video posted to YouTube by Sebastien Bogart (https://www.youtube.com/channel/UCcE4X7kIGWKMCXIGKpCSIOw).

Symington was the author of the 2009 legal opinion which the Helen Suzman Foundation and Freedom Under Law used to file an application to the Pretoria High Court requesting that the fraud charges against Gordhan be set aside. In that opinion, he states that there was "no technicality" stopping SARS from reappointing former deputy commissioner Ivan Pillay on a contract basis after an early retirement payout.

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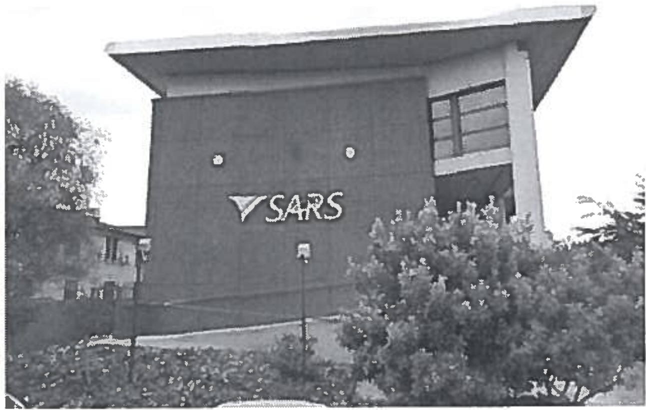
(/)

(http://adserver.adtech.de/?adlink|567|4450267|0|225|AdId=7463200;BnId=9;itime=417746828;key=key1%2Bkey2%2Bkey3%2Bkey4;)

QUESTIONS OVER PRESENCE OF MOYANE'S BODYGUARD IN SARS 'HOSTAGE' DRAMA

Video footage Vlok Symington recorded shows him being blocked from leaving Sars officer over a document.



Picture: Sars.

SARS (http://ewn.co.za/Topic/SARS) Tom Moyane (http://ewn.co.za/Topic/Tom-Moyane) Hostage (http://ewn.co.za/Topic/Hostage)

Barry Bateman (http://ewn.co.za/Contributors/barry-bateman) | 21 days ago (21 days ago)

PRETORIA - Questions have emerged as to why Sars (http://ewn.co.za/Topic/SARS)commissioner Tom Moyane's personal bodyguard was helping the Hawks take a statement from a revenue service employee and eventually played a part in holding him hostage (http://ewn.co.za/2016/10/27/dramatic-recording-reveals-details-of-the-sars-hostage-situation).

Senior Hawks officials, including the head of the crimes against the state unit Brigadier Nyameka Xaba, wanted a statement from the staff member who gave former deputy commissioner Ivan Pillay advice on his request for early retirement in 2009.

EWN Reporter
@ewnreporter
Follow

#SARShostage SARS commissioner Tom Moyane's bodyguard, Thabo Titi. He blocked the door. BB

5:50 PM - 27 Oct 2016

25 6

Finance Minister Pravin Gordhan has been charged together with Pillay with fraud for approving Pillay's early retirement and subsequent re-appointment on a contract.

Vlok Symington recorded shows him trying to leave a boardroom while Moyane's bodyguard who was on the phone and seemingly receiving instructions blocks his path.

"Can I open the door? Why not? Why can't I open the door?"

EWN Reporter
@ewnreporter
Follow

#SARShostage two other Hawks officials were in the office. BB
5:47 PM - 27 Oct 2016

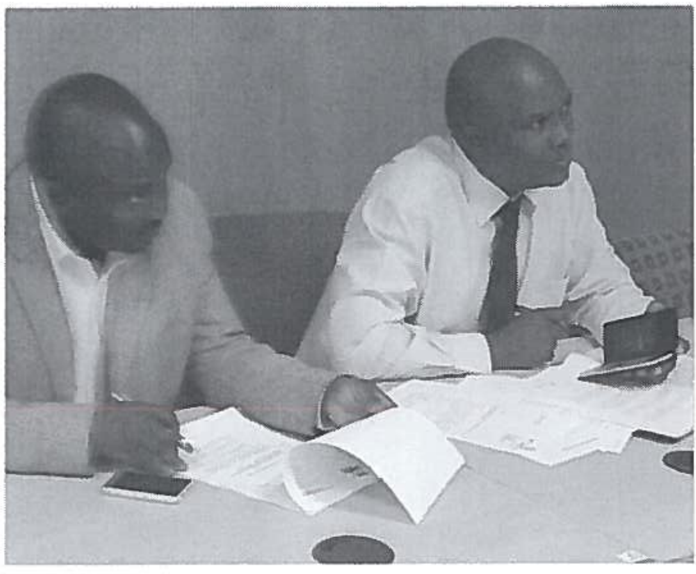
38 12

It's understood the drama started when Xaba mistakenly gave Symington copies of an email exchange which revealed that Sars' own attorney disagreed with the prosecution of Gordhan.

Xaba wanted it back.

"We want that document. We are saying that one doesn't belong to you."

The Independent Police Investigative Directorate has confirmed that a case of kidnapping has been opened.



EWN Reporter
@ewnreporter
Follow

#SARShostage among the alleged hostage takers was CATS boss Brig Nyameka Xaba (left). BB
5:47 PM - 27 Oct 2016

16 5

Sars has not commented on the incident.

(Edited by Winnie Theletsane)

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Violent showdown in Sars office exposes plot against Gordhan

Pauli van Wyk (http://mg.co.za/author/pauli-van-wyk) 28 Oct 2016 00:00

Visual evidence: A video screen grab of Tom Moyane's bodyguard, Thabo Titi, (left) and Hawks lead investigator Nyameka Xaba (right).

(http://mg.co.za/article/2016-10-28-00-violent-showdown-in-sars-office-exposes-plot-against-gordhan)

The prosecution of Minister of Finance Pravin Gordhan is ethically dubious, a South African Revenue Service lawyer said in an email exchange that set off an explosive series of events in the past 10 days, including an alleged hostage drama at a Sars office in Pretoria.

Four Hawks officials are accused of using physical force and "apartheid-style tactics" to retrieve a printout of the damning email from a senior Sars employee, Vlok Symington.

Among them was Brigadier Nyameka Xaba, the Hawks's lead investigator in the case against Gordhan. Symington was allegedly left with bruises on his forearms and hands from the altercation.

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Dramatic video and audio recordings suggest that Sars commissioner Tom Moyane might have been consulted and updated during the alleged hostage drama.

The recordings were made by Symington and handed over, with other evidence, to the Independent Police Investigative Directorate (Ipid), which is now investigating the matter.

The *Mail & Guardian* was still waiting for comment from all parties at the time of going to press.

This bizarre twist in the Gordhan saga was triggered by an email Moyane seemingly erroneously shared last week.

The chain of events began with Torie Pretorius, the lead prosecutor targeting Gordhan, emailing Xaba, asking him to obtain a statement from Symington. That happened just before 5pm on October 17. Pretorius attached a list of questions for Symington to answer.

They relate to a legal opinion Symington wrote in 2009 about whether Sars was permitted to pay out former Sars deputy commissioner Ivan Pillay's pension fund and rehire Pillay on a contract basis.

Symington's legal opinion stated that there was "no technicality" that prevented Sars from reappointing Pillay and that he was "entitled" to request Gordhan [minister of finance at the time, during his first stint] to waive the early retirement penalty.

Charges of fraud recently brought against Gordhan, Pillay and former Sars commissioner Oupa Magashula relate to this pension payout.

A few minutes after receiving the email from Pretorius, at 5.07pm, Xaba asked Sars's lawyer, David Maphakela from law firm Mashiane, Moodley and Monama, to deal with the NPA's request as a "matter of urgency".

Maphakela then emailed Moyane the following damning message: "Kindly find this for your urgent attention. On ethical reasons, I cannot be involved in this one, as I hold a different view to the one pursued by the NPA and the Hawks."

This essentially says Sars's own lawyer did not agree with the prosecution of Gordhan and his co-accused.

It set off the chain of events that led to the alleged hostage incident.

By Moyane's own doing, this message has now found its way into the public domain.

It seems that at some point after the email exchange, Moyane handed a hard copy of Pretorius's questions, along with the entire

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email trail, to senior Sars employee Rosie Louw, to whom Symington reports. Louw asked Symington to answer Pretorius's questions.

At about 10am on Tuesday October 18, Moyane's bodyguard, Thabo Titi, and the Hawks, including Xaba, met Symington.

The meeting seems to have been congenial, with the Hawks explaining what they would need from him. Why Titi accompanied the investigators is not clear.

They then left Symington and walked across the road to Lehae la Sars, the main building and location of Moyane's office.

But when Xaba, Titi and the Hawks returned at 1pm, matters no longer appeared to be so pleasant. From a recording of the events, Titi appeared to be blocking Symington from leaving the boardroom, as well as preventing Sars security officials and Symington's personal assistant from entering.

In one recording, Titi can be heard telephonically consulting a person whom he addressed as "commissioner" and "sir", while ordering Sars security to stay outside.

Insiders said Titi was speaking to Moyane.

The Hawks can be heard demanding that Symington hand over the printout of the email and questions.

At some point, a clearly agitated and intimidated Symington pushed the record button on his phone. He can be heard repeatedly shouting that he was "being held against my will" and "I'm being held hostage".

The recording seemed to have been done in secret – until Symington is heard warning Titi that he was filming them preventing him from leaving the boardroom.

Symington made at least three phone calls – two to his personal assistant and one to 10111. He is heard asking his PA to call the building's security guards because he was being held hostage and "against my will". The second time he called his PA it was to ask what was delaying the guards from responding.

Symington seemingly got no joy from 10111. The operator asked whether Symington knew the people holding him hostage and why they were allowing him to phone. She also struggled to grasp where Symington was – in Sars's Khanyisa building in Brooklyn, Pretoria.

From the recordings, it is clear that between 10am and 1pm on Tuesday October 18 the Hawks's attention suddenly shifted from getting Symington to answer the NPA's questions urgently to their panicked attempts to get him to return the email printout.

Symington can be heard expressing his surprise by the change in the Hawks's tone.

Sars insiders say this was after the Hawks left Symington for the building where Moyane's office is.

Xaba appeared determined about retrieving the document that contained the email trail and, crucially, the Sars lawyer's comment sent to Moyane.

He can be heard saying the document had been given to Symington "by mistake".

It appears from the recordings that Xaba wanted to trade the document for another copy of the NPA's questions – without the message from the Sars lawyer.

Symington bluntly refused.

During the recorded conversation, it is clear that he had caught on to why Titi and the Hawks so desperately wanted the document back.

"It must be about the attachments," he is heard saying to Xaba, a reference to the email with its damning message from the lawyer.

At one stage, Louw and Symington's colleagues, Eric Smith and Mark Kingon, joined the unravelling meeting.

Louw asked the Hawks to leave the room and give Symington's colleagues "five minutes" alone with him. They're heard trying to placate him and apparently to coax him into giving the document to the Hawks.

Symington did not budge.

It is at this time – about an hour after he first mentioned being held "against my will" – that Symington lost his patience.

"The commissioner's bodyguard is holding me hostage," Symington is heard shouting.

The bodyguard then seems to have retreated but, when Symington left the room, all hell broke loose.

In the recording shouts can clearly be heard. An insider said it was the moment "the Hawks pounced on him and roughed him up a bit, while taking the document by force at the moment Symington exited the room".

Symington's repeated shouts of "he stole the document" intermingle with the soothing voices of his colleagues, saying: "Vlok, kalmeer nou" [Vlok, calm down now].

The desperation displayed by the Hawks, with the seemingly tacit consent of Moyane, is the clearest show yet of the lengths some powerful organs of state are willing to go to prosecute Gordhan and his co-accused.

It further confirms, from within the prosecutorial camp, what legal experts have said – that the case against the finance minister is fatally flawed.

It also displays the increasingly desperate lengths they are willing to go to execute their plan.

Violence and intimidation – tactics reminiscent of the apartheid-era state of emergency – seem to be back in vogue.

'It's unacceptable if it's true'

In Parliament on Wednesday, Finance Minister Pravin Gordhan was quizzed about whether he had knowledge of the alleged South African Revenue Service "hostage drama", before the *Mail & Guardian* broke the story.

"The incident at Sars, I heard whispers about it, to be frank. I have no formal report yet. I believe there's something on the wires this morning, but I haven't had a chance to look at it," Gordhan said. "I will ask Mr [Tom] Moyane for an explanation as soon as I get a chance. If this it true, it's unacceptable behaviour. But let's get the facts first and we will take it from there."

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Sars and the Hawks did not reply to questions from the *M&G*. They were asked if Moyane had ordered the Hawks to retrieve the document from Vlok Symington and, if so, under what authority.

The National Prosecuting Authority said its head, Shaun Abrahams, had considered representations from Oupa Magashula and Ivan Pillay, and had "directed that further investigations be conducted to clarify some issues. The review process is underway; please give the NDPP [national director of public prosecutions] space to apply his mind to the matter in a judicious manner."

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