IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION;PRETORIA

CASE NO:87643/2016

In the matter between :-

HELEN SUZMAN FOUNDATION	1st Applicant
FREEDOM UNDER LAW NPC	2nd Applicant

And

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
SHAUN ABRAHAMS	2nd Respondent
DR JP PRETORIUS SC	3rd Respondent
SIBONGILE MZINYATHI	4th Respondent
THE NATIONAL PROSECUTING AUTHORITY	5th Respondent

FILING NOTICE

DOCUMENT: **4TH RESPONDENT'S ANSWERING AFFIDAVIT**

ON ROLL: **24 NOVEMBER 2016**

FILED BY: 4TH RESPONDENT'S ATTORNEYS

THE STATE ATTORNEY PRETORIA
SALU BUILDING
316 THABO SEHUME (ANDRIES) STREETS
cnr FRANCIS BAARD (SCHOEMAN) AND
THABO SEHUME (ANDRIES) STREET
PRIVATE BAG X91
PRETORIA, 0001
Ref: 8081/2016/Z64
Tel: 012 309 1623
FAX: (012) 309 1649/50
FAX 2 EMAIL: 086 507 1910
E-mail: rsebelemetsa@justice.gov.za
Enq: MR. R J SEBELEMETSA

TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA

AND TO:

APPLICANTS' ATTORNEYS
WEBBER WENTZEL
90 RIVONIA ROAD
SANDTON, 2196
TEL: 011 530 5000
FAX: 011 530 5111
REF: V Movshovich / P Dela
D Cron / D Rafferty/
W Timm / T Dye
3012607
C/O: HILLS INCORPORTED ATTORNEYS
835 JAN SHOBA STREET
BROOKLYN
PRETORIA
0075
TEL: 087 230 7314
REF: L PIENAAR

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 87643 / 16

In the matter between:

HELEN SUZMAN FOUNDATION	**First Applicant**
FREEDOM UNDER LAW NPC	**Second Appellant**

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**

FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

SIBONGILE MZINYATHI

S.M

do hereby state under oath that:

1. I am the Director of Public Prosecutions for the Gauteng Division (Pretoria) of the High Court of South Africa.

2. The facts contained in this affidavit are to the best of my knowledge true and correct, and within my personal knowledge, unless stated or indicated otherwise by the context.

3. If I express a legal opinion, I do so on the advice of my legal representatives, even though I am a lawyer myself. Where I respond to any allegation by indicating that I note the contents of the paragraphs in which the allegations are made, I mean to be understood as essentially saying that I neither deny nor admit the allegations made.

4. In any event, as will be clear in the course of this affidavit, I have taken a particular view of the allegations that are made against me, which is to deny that I have done anything warranting the relief the Applicants seek against me. To the extent, therefore, that anything I note is inconsistent with the tenor of my defence against the allegations made against me, to that extent, I must be understood to deny them.

5. The prayers applicable to me in the Notice of Motion are paragraphs 1.5; 1.6; 4; 5 and 6. I note that paragraph 1.6 of the Notice of Motion refers to *"the sixth respondent"*, which I accept might be an error. There is no sixth respondent in

these proceedings and the paragraph's context indicates that it clearly refers to me.

6. I am opposing the application brought against me on a number of grounds which I set out below. It is my view that the application against me is founded on an incorrect factual analysis of available evidence, - largely because, by and large, the Applicants rely, unduly, on unsubstantiated media reports and fanciful allegations, as well as in- vogue catch phrases like "capture" of the National Treasury, and so on, - all intended to create agitational atmosphere. In the end, as will be shown, on a closer examination of the facts and the law, the Applicants' prayers have no basis in law and fact whatsoever.

7. Besides, the call by the Applicants upon the President to suspend me in circumstances where the President has not consulted me, and/or has not called upon me to make representations to him as to why, in light of allegations made by the Applicants against me, he should not suspend me, cannot be correct in law, due regard being had to rights that I solemnly declare I enjoy in terms of our constitutional order, one of which is the right to be heard before any decision which is detrimental to my interests, - like a suspension - is taken against me.

8. My suspension is a drastic step that would be taken by anyone, even by the President, considering that suspension, in and of itself has reputational connotations. Further, to be suspended from my current position would entail a drastic interference with my conditions of employment. A suspension without me having been given an opportunity to make representations would go against the grain of any tenets of our labour law regime.

S. M

9. Whist it is arguably so that when the President acts in terms of section 12 (6), he exercises executive power, and that his decision does not constitute administrative action, our constitutional order clearly militates against any decision, even by the President, that would adversely affect the interests of anyone against whom that decision is made, if that person has not been given an opportunity to be heard.

10. This was a basic tenet of our law of natural justice even in pre-Constitution days, and was founded on a very fair basis. I humbly aver that it is today, even more so a cornerstone of our law which is based on the values of fairness, freedom, equality and dignity, so foundational to our supreme law of the land, the Constitution, 108 of 1996, as amended.

11. I reiterate that at the time of deposing to this affidavit I have not received any correspondence from the President. I have not been asked to make any representations to him as to why the President should not suspend me in light of allegations made to him about me by the Applicants.

12. I do not believe that the President wants to deny me an opportunity to be heard. On the contrary, I believe the reason the President has not asked me to make representations is the unseemly haste with which this application is brought.

13. The application is an abuse of this Court's process, and this Honourable Court, respectfully submitted, should visit this ostentatious conduct of the Applicants, largely aimed at whipping up public opinion wrongly, with an appropriate order of costs.

J.M

14. For these reasons, I am unable to agree with the Applicants that the President has taken a decision not to suspend me, or must be deemed to have taken a decision not to suspend me. In my humble and considered opinion, the President is being stampeded, unreasonably, under immense pressure, and under threat of this ill-advised litigation, to take a decision without even affording me an opportunity to be heard. That cannot be right. .

15. Indeed, it would be unlawful for him to have taken a decision to suspend me without giving me an opportunity to be heard.

16. I therefore humbly plead with his Honourable Court not to be cajoled by the Applicants into earning for itself the dubious distinction of being the first court in our constitutional order, to grant Applicants like these, relief that compels the President, in these circumstances, to suspend me when I have not been given an opportunity to be heard. Legal argument in this regard will be advanced at the hearing of the application.

17. I also oppose the hearing of the matter on an urgent basis. In my view the founding affidavit does not set forth explicitly the circumstances which Applicants aver render the matter urgent. Most importantly, and which is a requirement for hearing of a matter on an urgent basis, the Applicants do not state whether they will not be afforded substantial redress at a hearing in due course. Legal arguments will be presented by my legal representatives on this aspect at the hearing.

18. Before I proceed, I wish to point out that paragraph 36 of the Founding Affidavit alleges that my place of business is Victoria and Griffiths Mxenge

S.M

Building, 123 Westlake Avenue, Weaving Park, Silverton, Pretoria. This is not true.

19. My place of business is at the Office of the Director of Public Prosecutions situated at 28 Church Square, Pretoria. I mention this in the context of the Applicants alleging that they will serve papers at Victoria Griffiths Mxenge Building, and electronically at the various e-mail addresses listed in par 36 of the Founding Affidavit. None of the listed e-mails addresses is mine or that of anybody in my office.

20. I only received the properly issued papers on 10 November 2016. Effectively, this gave me very little time for me to engage in the various internal administrative processes to have counsel appointed on my behalf. Consequently the State Attorney's Office was only advised to instruct counsel by e-mail shortly after 15h00 on the 11 November 2016.

21. I submit that the alleged urgency of the matter leaves me with very little time to engage in detail in all the factual allegations relating to me in the Founding Affidavit. I reserve the right to supplement this answering affidavit.

22. Par 126 of the Founding Affidavit alleges that the allegations in relation to Second Respondent, which constitute the bulk of the Founding Affidavit, apply ***"with equal force"*** to me. This is denied as factually incorrect, out of context, irrelevant and speculative.

23. It is also legally wrong to allege that all allegations against Second Respondent apply ***"with equal force"*** to me. This legally untenable allegation

S.M

would mean that I am vicariously liable for the Second Respondent's actions about which there are complaints by Applicants in the Founding Affidavit.

24. Against that backdrop, I now proceed to address the allegations in the founding affidavit ***seriatim***, and will use the same headings as that followed by the Applicants, to the extent necessary.

Ad Par 1

25. I have no knowledge of the contents of this paragraph.

Ad Par 2

26. I note that the deponent alleges that he is authorised to depose to this affidavit. However there is no copy of any document authorising him to depose on behalf of both the Applicants.

Ad Par 3

27. I dispute that the facts alleged by the deponent are within his personal knowledge. As it appears throughout the Founding Affidavit, the deponent, on behalf of the Applicants, relies on media stories / publications and various perceptions which he alludes to.

28. The contention that where facts are not within the personal knowledge of the deponent, reference is made to Mr WJ Timm is of no help at all. Mr WJ Timm's confirmatory affidavit confirms the contents of the Founding Affidavit

insofar as it relates to him and Webber Wentzel. There is no specific reference to Mr WJ Timm in the Founding Affidavit. Consequently I do not know what Mr WJ Timm confirms.

Ad Par 4

29. I take note of the contents of this paragraph.

INTRODUCTION

Ad Par 5

30. I take note of this paragraph's contents. In the press conference of the 11 October 2016 I said nothing. I fail to understand how what was said by Second Respondent in that Press Conference would apply "***with equal force"*** to me.

Ad Par 6

31. I have no knowledge of the prior correspondence referred to in this paragraph, and I deny the rest of the contents of this paragraph if any of the consequences are attributed to me.

Ad Par 7

J.M

32. In my view the charges were sustainable in law, as will be fully explained in the following paragraphs where I deal with the consultation process. I deny the rest of the contents of this paragraph in as far as they are alleged to apply, **with equal force,** to me.

Ad Par 8 – 10

33. I note the contents of this paragraph. I refer the above Honourable Court to paragraphs 3 and 4 above.

Ad Par 11 - 12

34. The contents of these paragraphs are denied. There is no decision that I took that leads to any conclusion that I am incompetent and not fit to hold office, and / or that I did not act independently or that I am beholden to others, and that I am acting contrary to the mandate of the NPA in order to promote and further my or others' ulterior purposes.

35. In line with the general sensationalist tone of the averments peppering the length and breadth of the Founding Affidavit, all of the emotive language used in these paragraphs is, as I indicated earlier, intended to create a certain atmosphere. It contributes nothing to what this Court is entitled to be given by way of appropriate evidence, in order for it to come to a just and equitable decision in making up its mind as to whether it should grant the relief sought

S.M

or not. The allegations, stated as hyperboles, are unhelpful, respectfully submitted.

Ad Par 13 - 15

36. The contents of this paragraph are denied to the extent of their inconsistency with my defence in this affidavit.

Ad Par 16 - 18

37. I deny that I acted recklessly. I deny that I acted with any ulterior motive. I deny that I acted with wanton disregard for the law. I deny that I am incompetent, unfit and improper for office. I also deny that I acted with any political interference.

Ad Par 19

38. I deny that I failed in my duties. I deny that I have to resign. I deny that there is ***incontrovertible*** evidence that illustrates that I misconducted myself. I have tried, with difficulty, and in vain, to find in what way a claim can be made that there is "incontrovertible evidence" that I have misconducted myself. I solemnly declare that there is no evidence, let alone "incontrovertible evidence" other than ill-advised innuendos, demonstrated in this paragraph that I have misconducted myself.

Ad Par 20

39. The contents of this paragraph are denied. Despite the flowery language of this paragraph (and the rest of the Founding Affidavit) the fact of the matter is that the Applicants are asking the court to speculate about a presumed risk allegedly posed.

40. The fact of the matter is that the accused were issued with summons to appear in court and subsequently the charges were withdrawn because of, ***inter alia***, representations made by some of the accused.

41. Such a process is usual in the NPA, and what happened in this case should not be regarded as a reckless process because of the personalities involved. That would fly in the face of the constitutional imperative that all persons are equal before the law.

42. Furthermore as will be demonstrated below, as Director of Public Prosecutions, the bulk of my work and my mandate (and that of the NPA) is not constituted by consultation with Special Directors. In terms of Section 20 of the National Prosecuting Authority Act 32 of 1998 the bulk of my work is to institute and conduct criminal prosecutions in the Gauteng Division (Pretoria) for which I am appointed as Director of Public Prosecutions.

Ad Par 21

S.M

43. I do not know of any new or threats of new charges against Minister Gordhan.

Ad Par 22 – 23

44. I deny that I misused power or that the Republic must be protected from me.

Ad Par 24

45. I confirm that as Director of Public Prosecutions I make dozens of prosecutorial decisions. I deny that I am a proven severe threat to the economy of the Republic. I repeat that I know of no further charges against Min Gordhan.

Ad Par 25

46. I deny that my office has been abused or unlawfully compromised. I deny that any of my actions indicate my unfitness to hold office, or that my actions contribute to the perception of the Applicants that the integrity of the NPA is compromised.

Ad Par 26

47. I note the contents of this paragraph.

S.M

Ad Par 27 – 28

48. I deny that there are jurisdictional facts or that there are appropriate circumstances for the First Respondent to suspend me and institute a disciplinary enquiry.

Ad Par 29 - 35

49. I note the contents of these paragraphs. However, I specifically deny that the NPA, in as far as my actions in relation to this application, has acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa.

Ad Par 36

50. I deny that the Applicants have justified that this matter must be heard as one of urgency. In fact, I have been told, and I verily believe it, that the Applicants, having set down the matter as one of urgency for hearing on the 22nd November, 2016, have, without even as much as contacting my Counsel, accosted the Deputy Judge President of this Honourable Court to reschedule

S.M

the hearing date to the, 23rd November, 2016, so much for their case that the matter is urgent. .

Ad Par 37

51. I note the contents of this paragraph.

Ad Par 38 – 39, 40 and 46

52. I take note of the contents of these paragraphs. However, I am unable to respond to the other allegations. I do not know the constitutional crisis referred to and the other independent institutions referred to and what relevance that is to the present application, if any.

53. In so far as I am concerned, and with reference to my involvement in this matter, I deny any abuse of the NPA, and I deny that my involvement is a result of any suggested capture, whatever this "in- vogue" term has come to mean to different people at different times. I deny the insulting suggestion that I have been carrying out my obligations in terms of the statute and the Constitution as a result of so-called undue influence by unnamed third parties.

S.M

54. I further deny that I acted irrationally or arbitrarily for ulterior motives and for the political gain or financial gain of others. I also deny that I lack the required competence or that I acted in a manner glaringly at odds with my mandate.

55. I deny that my actions immediately require my suspension. I invite the Applicants to bring proof that in as far as it relates to me, the NPA has been captured (whatever that means), and to name the third parties who allegedly influenced me.

Ad Par 41

56. I deny that the Applicants have shown any grounds for the relief sought against me.

Ad Par 42, 43, 44, 45, 47

57. The contents of these paragraphs are noted. However I deny that the jurisdictional facts exist in relation to me.

Ad Par 48 - 53

58. I take note of the contents of these paragraphs, which are irrelevant to me.

Ad Par 54 - 66

59. The contents of these paragraphs are noted.

Ad Par 67

60. The contents of this paragraph are noted. However I need to explain that the number '3000' is from an Internal Memorandum from Oupa Magashula to Min Gordhan dated 12 August 2010[1]. The relevant paragraph of the said memorandum reads, *"Over the past five years the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF(Appendix A)*

61. I and Third Respondent asked the prosecutors to go to SARS to find the Appendix A referred to in the memorandum as explained above. The investigators went to SARS and the said Appendix A was never found. Consequently it is not known whether the 3000 early retirement matters referred to were exactly on the same facts as that of Mr Pillay. Besides, the Applicants, as far as I know, have not annexed the so-called Appendix A. Unless that so called Annexure A is produced by way of credible and acceptable evidence, I do not admit these allegations.

62. In any event, even if the other 3000 matters were on the same facts as that of Mr Pillay, and there were no criminal prosecutions in relation thereto, this does not imply that when subsequent investigations are conducted which reveal a commission of an offence, charges should not have been considered, as was done in this particular matter.

[1] Page 100 – 103 of the paginated papers

Ad Par 68 - 73

63. The contents of these paragraphs are noted.

Ad Par 74

64. The contents of this paragraph are denied. The Applicants never saw the contents of the docket. I further dispute that the very fact that the NDPP instituted further investigations illustrates that there was obviously insufficient evidence to sustain the charges. It is normal practice to conduct further investigations even after an accused has been served with summons and actually appeared in court.

65. In many cases, the need to conduct further investigations sometimes justifies a legitimate denial, by a Court, of an Accused being admitted to bail. Consequently, these averments by the deponent are nonsensical, and are an abject revelation of how the deponent is out of touch with the workings of the criminal procedure system under our Constitution.

Ad Par 75

66. The contents of this paragraph are noted. However, I specifically deny that there was plainly no evidence that warrants the charges at the time.

Ad Par 76

67. The contents of this paragraph are noted.

Ad Par 77 – 78

68. I deny that there was insufficient evidence to formulate the charges. As pointed out above, it has not been established that the 3000 cases referred to are on the same facts as that of Mr Pillay.

69. It happens on a regular basis that accused persons are summoned whilst investigations are underway. Summons do not mean that investigations are finalised. Consequently it is denied that there was substantial irrationality in the decision to draft the charges. It is further denied that there was any ulterior motive. As far as I know, there is no principle of law that requires all facts with the potential to corroborate lawfulness must be sought before charges are drawn. Legal argument will be advanced in support of this averment when the matter is heard.

Ad Par 79 - 82

70. The contents of these paragraphs are noted.

Ad Par 83

71. I deny that the charges were unsupportable. In my view, and to the extent that I was consulted, there was basis to draft the charges.

Ad Par 84 – 85.2

72. The contents of these paragraphs are noted.

Ad Par 85.3 – 85.4

73. I deny that there was no evidence to support the charges.

74. Any suggestion that prosecutors should have looked at the allegations against the backdrop of a so-called battle to "capture" National Treasury and the removal of the Minister as a perceived impediment would be to ask prosecutors to consider irrelevant factors.

75. Any further suggestion that such factors alone, combined with political and economic sensitivities of a particular case under investigation, should be considered by prosecutors, slavishly, and be regarded as determinative of whether they should or should not prefer charges against anyone, rich or poor, weak or strong, high profile or not, would be a disastrous recipe for prosecutorial decision-making sliding onto a slippery road to chaos, and a consequent failure of the fair administration of justice under our constitutional dispensation..

76. I reiterate that the decision to draft charges was taken on the basis of sufficiency of the available evidence to make such a decision. Applicants are invited to explain what significant amount of evidence they are referring to, and which officials at SARS were still required to be consulted, before charges could be drafted.

77. At the time the charges were drafted, and at the time I was consulted, I was not aware that the Symington memorandum existed. I understand that at the time the Third Respondent consulted me, he also did not have the Symington memorandum.

78. The Applicants, with the greatest of respects, cannot make the quantum leap, permissibly, that ***because*** at the time the consultation between me and the Third Respondent took place we were not aware of the existence of the Symington Memorandum, ***that*** in and of itself translates into incompetence, ulterior motive, misconduct, or any of the hyperbolical epithets that the Applicants have resorted to, in their transparent effort to emotionalise the case in the way they attempt to portray me and the Third Respondent as deserving of being suspended, relief they are clearly not entitled to on any basis, in my humble and respectful submission,

Ad Par 85.5 – 85.6

79. The contents of these paragraphs are noted.

Ad Par 86 - 102

80. The contents of these paragraphs are noted.

Ad Par 103

81. The letter referred to in this paragraph was sent to the First Respondent. I never saw it until I received the papers in this application. Even if I had seen it, I would not have resigned on the basis of the allegations contained in it, which are largely what is contained in the Founding Affidavit.

Ad Par 104 - 123

82. The contents of these paragraphs are noted.

Ad Par 124 – 130

83. The contents of these paragraphs are denied in their entirety in as far as they relate to me. The paragraphs below clearly indicate the consultation process with me before the charges were drafted.

84. My primary functions are set in for in section 24 (1) and (2) of the NPA Act. The functions of Deputy Directors are also set out in this section. Over and above me being accountable for the Deputy Directors appointed in my area of jurisdiction, I am also accountable for prosecutors employed in my area of jurisdiction.

85. Powers, duties and functions of prosecutors are set in section 25 of the NPA Act.

86. As it is, in my area of jurisdiction, I have a staff establishment of about 500 staff members, consisting of Deputy Directors, prosecutors and an administrative component. The bulk of my responsibility is to deal with, and be accountable for, the prosecutorial decisions by these staff members.

87. In terms of section 24 (3) of the NPA Act, a Special Director shall exercise the powers, carry out and perform the functions conferred or imposed on, or assigned to him or her by the President subject to the directions of the National Director: provided that if such powers, duties and functions include any of the powers, duties or functions referred to in section 20 (1), such shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.

88. The powers referred to in section 20 (1) relate to the institution and conducting of criminal proceedings on behalf of the state; carrying out any necessary functions incidental to instituting and conducting of such criminal proceedings; and discontinuing of criminal proceedings.

89. A Special Director, like the Third Respondent in this matter, also has his or her own staff consisting of Deputy Directors, Prosecutors and administrative staff who account to him or her.

90. In the NPA, the normal practice of the interactions between Special Directors and Directors of Public Prosecutions is that when the Special Director is seized with an investigation, the management of such an investigation and the

engagements between the investigating authorities and the Deputy Directors and prosecutors under the control of the Special Director happen without the involvement of the Director of Public Prosecutions.

91. It is only when such a Special Director is contemplating making a decision that he or she initiates discussions with the Director of Prosecutions concerned. It is the culmination of these discussions that will determine if the decision of the Special Director was taken in consultation with the Director of Prosecutions or not, in other words, determining whether the Director of Prosecutions agrees with the decision or not.

92. Essentially, the agreement or otherwise of the Director of Public Prosecutions with the decision of the Special Director is on the basis of information provided by the Special Director.

93. In such instances, the Director of Public Prosecutions is not the original decision maker nor is s/he accountable for the decision as in instances when decisions are taken by staff in his/her area of jurisdiction for whom the Director of Public Prosecutions has the accountabilty.

94. It is not the function of the Director of Public Prosecutions to review or substitute the role of the Special Director in managing the activities falling under the auspices of the Special Director.

95. Ordinarily, the Special Director would summarise what the decision entails. This is normally done either through personal engagements, or through the submission of memorandums summarising the facts of the decision. If there are aspects that the Director of Public Prosecutions is not clear about, he or

she usually asks the relevant aspects to be clarified by the Special Director, and the Special Director would cause such clarifications to be made.

96. The Director of Public Prosecutions does not get involved in the normal day to day activities of the work of the Special Director. In the case of an investigation, for instance, he or she does not usually call for the dockets, or instruct which further investigations should be followed up, etc. This day to day running of the activities remains the responsibility of the Special Director.

97. To expect the Director of Public Prosecutions to be actively involved in the work and activities in the office of the Special Director would render the Special Director irrelevant, and the very purpose of the creation of the Special Directorate would be defeated.

98. The above exposition of the decision making process by Special Directors ordinarily followed in the NPA is the process that was followed in this matter.

99. In this regard, I confirm that the Third Respondent took the decision in this matter in consultation with me as more fully set out below.

My first involvement in this matter was when I was invited by the Third Respondent to a presentation at Head Office on the 6th September 2016. The presentation was made by two Deputy Directors of Third Respondent's office, hereinafter referred to as the prosecuting team.

100. This presentation outlined the history of the investigation that the prosecuting team were dealing with, and how the allegations against Min Gordhan and Messrs Magashula and Pillay were part of the investigation. They also explained why in their view the matter of the early retirement of Mr

Pillay had to be separated from the broader investigation of the so-called Rogue Unit investigation.

101. The explanation related to possible issues of misjoinder in that the three accused, Pillay, Magashula and Gordhan would be charged separately from the other suspects in the Rogue Unit investigation. I specifically recall the prosecuting team being asked about the 3000 cases referred to in the memorandum attributed to Mr Magashula. As already indicated, there was a later confirmation that in a follow up investigation and inquiry, the said addendum could not be obtained at SARS.

102. During the presentation, the prosecuting team members were asked certain questions about the charges, the available supporting evidence, the outstanding witness statements and the progress of investigations.

103. When I saw Mr Magashula' s memorandum, dated 12 August 2010, addressed to the Minister, I observed that there was space at which the Deputy Minister had to sign. The space was blank. In my observation, the Minister approved the memo on 18 October 2010, without the Deputy Minister having signed at the place at which he was designated to do so.

104. I suggested that an enquiry be made from the DPSA about the normal route of such memoranda, in particular, whether it is normal for the Minister to sign off an approval document, where it appeared it is a document that does require also the signature of his Deputy in order for it to have been validly executed, without the recommendations of the Deputy Minister. I was later informed that such was not unheard of.

J.M

105. In the evening of 13 September 2016, I met with the Third Respondent for a discusssion on the outstanding investigations. During this meeting we also talked about the public interest considerations of the matter and the implications the decision might have for the economic situation of the country.

106. On 15 September 2016, there was a briefing for the Second Respondent, and the Head of NPS (then Adv Jiba), by the prosecuting team in which the Third Respondent was also present. During this briefing, I recall that two specific further statements were deemed to be important and the prosecuting team undertook to obtain them.

107. I specifically suggested that Marco Granelli's statement was important, and should be obtained. This statement was later obtained.

108. Later, on 15 September 2016, a memorandum dated 7 September 2016 by the prosecuting team was endorsed by the Third Respondent and me in his office. Prior to signing this memorandum I and the Third Respondent discussed the outstanding investigations, and he informed me what was still outstanding in his view. Specifically because of the involvement of Min Gordhan in the matter, in our discussions we discussed public interest considerations, and the balancing thereof with considerations of the rule of law and equality of all before law.

109. The Third Respondent informed me that he supported the recommendations of the prosecuting team, but that before he could make his decision, he wanted further statements to be obtained. I endorsed the memorandum confirming my discussions with him.

J. M

110. It is my understanding that this memorandum was furnished to the Second respondent.

111. On 22 September 2016, the Third Respondent called me to inform me that there was another memorandum prepared by the prosecuting team which provides an update on the further investigations. I went to the office of the Third Respondent and it transpired that the two statements referred to above had been obtained. The Third Respondent gave me the memorandum dated 19 September 2016.

112. The recommendation by the prosecution team was as follows, *"We submit that there is enough evidence to warrant the prosecution of Messrs Oupa Magashula, Irvin Pillay and Pravin Gordhan as per the previous recommendation"*. The Third Respondent remarked as follows, *"I agree with the recommendation. I will conduct research into public interest"*.

113. In endorsing the memorandum I remarked as follows, *"I have discussed the matter with Dr Pretorius, and I have read all the statements referred to herein. I also agree with the recommendation. I also agree that research into public interest should be undertaken"*.

114. In this discussion, the Third Respondent indicated that he wished to conduct research on public interest jurisprudence, and the extent to which such may be applicable to the contemplated decision. The Third Respondent signed the memorandum, and I endorsed it, confirming the discussions with him. It is my understanding that this memorandum was also furnished to the Second Respondent.

115. On 30 September 2016, there was a briefing session by the prosecuting team attended by the Second respondent, the acting Head of NPS (Adv Majokweni) and the NPA Head of Administration (Dr Ramaite). Of particular importance, the role of the Auditor General in relation to this matter was discussed, and the prosecuting team undertook to follow up on this aspect.

116. On 4 October 2016, the Third Respondent called me again to inform me that there was an updated memorandum prepared by the prosecuting team which he wanted us to discuss. I met the Third Respondent in his office and we discussed the contents of the memorandum and the recommendations by the prosecuting team and his views thereon. He explained to me his rationale thereof.

117. He signed the memorandum, which is dated 3rd October 2016 and I endorsed it on the 4th October 2016, confirming our discussions as follows, *"Discussed the contents of the memo with Dr Pretorius and agree with the recommendation".* It is my understanding that this memorandum was furnished to the Second Respondent. The memoranda referred to were classified "Top Secret". For that reason, I request the permission of this Court to avail these memoranda to it, and to whomsoever the Court may direct. As things are, because they are TOP SECRET documents, and in my view, correctly so, I am rather wary of attaching them to these papers.

118. From my recollection, the meeting of the 4th October was the last meeting at which discussion with the Third Respondent prior to the

announcement of the decision to charge the accused took place. The announcement of the charges was made by the Second respondent in the press conference of 11 October 2016. Later the Second Respondent called a meeting and told us that he had received representations, and that, as a consequence thereof, as I understood him, he was persuaded that the charges should be withdrawn. I never saw the representations. The withdrawal of the charges was subsequently announced in the press conference of the 31st October, 2016.

119. The above exposition, in my most humble and respectful submission, demonstrates the lengths to which I and the Third Respondent in particular went to ensure that what was presented to us as a ***prima facie*** case was fully investigated, and that all possible loop-holes in the investigation were dealt with.

120. It is my submission that the above exposition indicates that there was no ulterior motive, on the part of any of the Respondents, in the way they conducted themselves in this investigation. I can speak for myself and I can categorically and humbly say that I never had any ulterior motive, nor should I have any, in the way I executed my duties as I understand them in terms of the relevant legislation. There was no breathtakingly reckless and incompetent fashion in which the matter was handled, as alleged by the Applicants.

121. I solemnly aver that my detailed account of what happened in the consultative process that I had with the Third Respondent clearly demonstrates that it is not correct for the Applicants to allege that there was

no proper legal analysis. It further disproves the Applicants' assertion that the prosecutors failed in their constitutional and statutory duty to ensure that the charges were properly grounded.

122. It also belies the largely unsubstantiated, and in any event, unsustainable allegation that there was a failure on our part to take an impartial, independent and objective view of all the facts that were presented before us as members of the prosecutorial authority, who, in one way or the other, were involved in the investigation and eventual decision making process that led to the prosecution of the Accused persons..

123. It also disproves the allegation that the prosecutors did not apply their minds to the facts and to the law, and accordingly I deny the allegations that there was no basis in law or in fact for the charges.

124. It would be inappropriate to expect that the prosecutors should take decisions based on untested media allegations, about the so called state capture, and or alleged attempts to capture National Treasury, and or alleged attempts at the removal of a National Minister. To expect the prosecutors, in the execution of their duties, to regard these speculative reports and speculations as fact and evidence on the basis of which the President is asked to take drastic steps as prayed for in the Notice of Motion, is most unfortunate.

125. It is a posture, on the part of the Applicants, that seriously undermines the integrity of the prosecutorial services, and the legitimacy of the NPA as a constitutionally ordered institution, charged, in the words of section 179 of the

Constitution, with the power (and indeed duty and responsibility) to institute criminal proceedings on behalf of the State.

126. The Constitution, and the National Prosecuting Authority Act, enjoin us to exercise our functions without fear, favour or prejudice, and I, for one, having pledged myself to uphold these solemn values and responsibilities that come with my position in the NPA, will not shirk performing my functions as enjoined by the Constitution and legislation, simply because there are self-appointed human rights organisations like the Applicants ---and I say this with the greatest of respects.

127. In their conduct in this litigation, the Applicants, ostensibly and allegedly acting in the public interest, have thrown their weight around, dictating what must be done, by whom, when and how. It is unacceptable behaviour, and one that must be condemned in the strongest terms possible.

128. It would not be in the best interests of the administration of justice that institutions like the Fifth Respondent should be disrupted on mere allegations of untested media reports. This is even more so when regard is had to what the Applicants themselves say about us, namely, that the *"second to fourth respondents wield enormous public power and occupy high level positions within the NPA"*[2].

Ad Par 131 - 140

129. The contents of this paragraph are noted.

[2] Par 17 of the Founding Affidavit.

Ad Par 141 - 144

130. The contents of these paragraphs are noted. However any suggestion that I acted in any manner that requires the First Respondent to suspend me or discipline me in any way is disputed as it is not supported by the "facts" alleged by the Applicants.

Ad Par 145 - 151

131. The contents of these paragraphs are noted. However, I submit that the Applicants have not furnished any compelling grounds for the relief sought.

URGENCY

Ad Par 152 – 156

132. The contents of these paragraphs are denied insofar as any suggestion of impropriety on my part is being implied by the terms thereof. To the extent that they are meant to demonstrate that this is a matter that must be heard as of urgency, I have more than articulated how even by their conduct of desiring to have the matter heard a day after that they had originally set I down for, they themselves do not regard it as urgent. As for the rest, I have already addressed all allegations against me in the Founding Affidavit.

CONCLUSION

133. I pray that the application be dismissed with costs. The costs should include the costs occasioned by the employment of two Counsel. I have had to employ two Counsel for a variety of reasons that will be addressed in argument.

134. I further make the point that this is not one of those **BioWatch Trust** types of cases where civil society organisations like the Applicants are often not ordered to pay costs because of a perception that they litigate in the public interest, and in pursuit of vindicating constitutional rights.

135. These Applicants have become notorious for litigating, at the drop of a hat, in many forums throughout the country. Their liberal use, in this case, of politically charged phrases, used by politicians nowadays, of "capture" of the National Treasury, and so on, would suggest, justifiably in my humble and respectful submission, that the Applicants are "playing politics", and, in the process, are abusing the Court process for what in the end amounts to a judicialisation of politics, or the politicisation of the judicial process. This is regrettable, and should not be encouraged by the Courts.

136. This Honourable Court, I pray, should refuse to allow an abuse of its process in such a way, and the way to express its displeasure at such abuse of its process is to mulct the Applicants in costs, and so I pray. Further articulation of this submission will be made by way of argument when the matter is heard.

J-M

DEPONENT

Thus signed and sworn to before me at PRETORIA on this 15 day of NOVEMBER 2016, the deponent having acknowledged that he knows and understands the contents of the affidavit, which are true and correct and that he has no objection in taking the prescribed oath, which considers to be binding on him.

COMMISSIONER OF OATH

STEPHEN MWIM
Commissioner of Oaths
Practising Attorney RSA
Suite 309 Van Erkom Building
217 Pretorius Street, Pretoria