STATE ATTORNEY
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78

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 60970/17

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 SHEET

DOCUMENT: OPPOSING AFFIDAVIT ON BEHALF OF 4TH RESPONDENT

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TO: THE REGISTRAR OF THE HIGH COURT
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AND
TO: **3RD RESPONDENT'S ATTORNEY**
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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 60970 / 17

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

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 and the Fourth Respondent in these proceedings.

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

3. The applicants seek an order to review, alternatively declare unlawful and set aside a decision by the First Respondent made on or about 3 March 2017. The said decision relates to the First Respondent's decision not to hold an enquiry, under section 12 (6) (a) of the National Prosecuting Authority Act No. 32 of 1998 ("the NPA Act") into my fitness to hold the office of Director of Public Prosecutions, and his decision not to suspend me from office provisionally, pending the finalisation of such an enquiry under section 12 (6) (a) of the NPA Act.

4. The Applicants also seek an order directing the First Respondent to institute an enquiry and to suspend me provisionally, pending the finalisation of such an enquiry. They call this the Mzinyathi enquiry.

5. A similar order is sought in relation to the Second and Third Respondents.

6. The prayers applicable to me in the Notice of Motion are therefore paragraphs 1.5; 1.6; and 4. 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 in clearly refers to me.

7. The Applicants have confirmed in writing that they are not seeking a record of decision from me. I therefore do not need to provide one. In any event, I am not the one who made the decision which is now sought to be reviewed.

8. I am cited as a Respondent in these proceedings, and the Applicants are effectively asking the First Respondent to hold an enquiry into my fitness to hold office and to suspend me pending the finalisation of such an enquiry. I therefore have the right to participate fully in these proceedings in so far as they relate to me.

9. I need to mention that on the 9th November, 2016, under Case Number 87643/16, the Applicants filed and brought an urgent Application seeking virtually the self-same orders they are still seeking in these proceedings, still relying, on the same facts which are before the court now. That Application was dismissed, for lack of urgency. In the said urgent application, I fully addressed the merits of the application, and I repeat them herein.

10. The gist of the Applicant's reasons for bringing this application is that it is not for the NPA officers to prove, on a balance of probabilities, that they are fit and

proper for office prior to the calling of an enquiry. Taking this argument to its logical conclusion, it would arguably mean that any complaint against a prosecutor of similar status to us, without more, must necessarily lead to an enquiry and a suspension pending such an enquiry. I humbly submit that that would lead to an untenable situation.

11. It would, in my humble submission, actually, mean that the President's decision has already been taken for him; that he must not consider the facts of the complaint, and the response thereto, but must simply initiate an enquiry, and, pending the outcome thereof, suspend an incumbent, whenever, or as soon as a complaint is made. I respectfully submit that this could never have been the intention of the NPA Act.

12. Whilst full legal argument in relation to what the Legislature intended will be advanced when the application is heard, I am advised that one of the submissions to be made will be that the provisions of section 12(6) (a) of the NPA Act, must be read together with the provisions of the preceding section 12 (5).

13. The submission will be that section 12(5) is a prohibition against, *inter alia*, my suspension and that of the other Respondents. It will be argued that the prohibition is stated in peremptory terms, and that the Legislature, therefore, clearly intended that our suspension should be justified only if Applicants seeking that relief were able to prove the existence of jurisdictional facts that

bear out the criteria contemplated in section 12, subsection (6) (a) (i) to (iv) , of the Act.

14. In what would appear to be an impermissible disregard of this stated peremptory prohibition against my suspension, the Applicants are asking for the institution of an enquiry - and my suspension pending the finalisation of that inquiry - *simply because they say so*. This, I submit, is notwithstanding the fact that I [and the other respondents] have provided full facts and explanations for the decisions taken which they seek to impugn and set aside.

15. Further, I submit that these are application proceedings to which the normal rules apply. The applicants have to satisfy the court that they have met the test set out in the *Plascon Evans* case. My legal representatives will make further legal argument on this aspect at the hearing. For now, on the advice that I have received, I point out that it is for the Applicants to make out a proper case in the founding affidavit.

16. I am opposing the present application brought against me on a number of grounds which I set out below. I still hold the view that the application against me is founded on an incorrect analysis of available evidence, and has no basis in law whatsoever.

17. Before the First Respondent took the decision under review, he called on me, the Second and Third Respondents to provide him with reasons

(representations) why such enquiries should not be held, and why we should not be suspended, pending such inquiry. He cannot be faulted for doing so.

18. The reasons were given to him. Whilst I cannot speak on his behalf, I am confident that he considered them. In so doing, he also must have sought legal advice, for which he also cannot be faulted. It is my view that having considered the complaint, the facts on which it is based, the representations made and legal advice, his decision was not irrational in the circumstances and was thus not subject to review, regardless of how much the Applicants dislike it, or disagree therewith.

19. That the Applicants or the courts could have come to a different decision becomes irrelevant where the Applicants have failed to show where the irrationality they allege is, as they have in this Application.

20. Par 126 of the Founding Affidavit alleges that the allegations in relation to the 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.

21. It is also legally and factually wrong to allege that all allegations against Second Respondent apply with equal force to me. This legally untenable allegation would mean that I am *vicariously liable* for actions that are complained about in the Founding Affidavit.

22. The Applicants have divided the founding affidavit to address the various issues and the different Respondents. Out of an affidavit comprising of 176 paragraphs, only paragraphs 124 – 130 are directly relevant to me and the Third Respondent. I will deal with these paragraphs subsequently.

23. I proceed to address the founding affidavit *seriatim*, and will use, to the extent necessary, the same headings as that followed by the Applicants. In so doing I will use the same headings adopted by the Applicants.

24. **Ad Paragraphs 1 - 4**

I have no knowledge of the contents of these paragraphs.

INTRODUCTION

25. **Ad Paragraph 5**

This paragraph relates to the press conference. I did not call the press conference. I said nothing at the press conference. I am not responsible for what the Second Respondent said at the press conference. Consequently nothing said at the press conference, as alleged in the founding affidavit should be attributed to me and be used to support the relief sought against me.

26. **Ad Paragraph 6**

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.

27. **Ad Paragraph 7**

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.

28. **Ad Paragraphs 8 – 9**

I note the contents of this paragraph. I refer the above Honourable Court to par 10 and 11 above. Furthermore, I have no knowledge of the rogue unit investigations that are referred to.

29. **Ad Par 10 - 12**

29.1. The contents of these paragraphs are denied. There is no decision that I took that by any stretch of the imagination, 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 constitutional mandate of the NPA in a manner which amounts to a gross abuse of public power. I actually take exception to this baseless characterisation of me, by a deponent who obviously makes conclusions about me, when it is manifest that he does not know who I am from a bar of soap.

29.2. There is no proof offered that I am beholden to others. Those *others* are also not mentioned. How the Applicants come to this *ineluctable conclusion* escapes me. In the circumstances I submit that the facts that purport to support what applicants call the *core of the matter* submission are baseless.

29.3. Applicants state that the *"core of the matter is a display of incompetence and / or gross abuse of public power"* causing:

29.3.1. national uproar;

29.3.2. urgent summoning of the second respondent to Parliament to explain himself;

29.3.3. Public power exercised in a manner so reckless that it did not only severely impact on the rights of charged individuals and on the public's trust in the integrity of the NPA, but sent the economy into a nose dive;

29.3.4. wiping R50 billion off the Johannesburg Stock exchange almost immediately;

29.3.5. second respondent admitted (without taking responsibility) that an elementary mistake had been made in bringing the charges; and

29.3.6. that the charges were (and had always been) baseless.

29.4. In dealing with this alleged *core of the matter*, I submit, firstly, that the individuals were never charged. They never appeared in any court. It is therefore incorrect and misleading to allege - and perpetuate the allegations - that they were charged. As part of the reasons for the *core of the matter*, this reason is faulty.

29.5. Secondly, the reaction of the markets, that may have led to the wiping off of R50 billion is a combination of many factors that are not under the control of prosecutors when they make decisions. The Applicants have not even attempted to articulate, for the above Honourable Court, how this link is made to the exact amount alleged. The applicants are calling upon the court to speculate.

29.6. Without a doubt, some of the factors that affect decisions in relation to the markets and the Johannesburg Stock Exchange are based on newspaper reports and other forms of media over which the prosecutors have no control. These would be the same, or some of the newspaper reports on which the Applicants bases their application in Annexure "**FA 1**".

29.7. When prosecutors make decisions, they cannot be expected to predict the reactions of the markets to their decisions, and to make decisions based on that.

29.8. Decision makers at the stock exchange make their own decisions on information and advice from sources that the prosecutors have no knowledge of. Ultimately the R50 billion alleged to have been wiped off the stock exchange is based on many other variables about which the court cannot be called upon to speculate, let alone adjudicate on the basis thereof.

29.9. The amount of R50 billion itself is, at best, anecdotal. I respectfully submit that to use this amount as a basis for the *core of the matter*, is also misguided.

29.10. Annexure "**FA 1**", referred to in support of the allegations of riots in the streets (as part of the core of the matter), mentions ***planned marches*** which were to happen after the charges were already withdrawn. Some of the marches mentioned were by political parties. It can hardly be a reason that threatened marches by political parties should now influence the courts to make orders of one sort or the other. These marches (Annexure FA 1 does not reflect riots in the streets), cannot be used to support the *core of the matter* argument.

29.11. Parliament has a particular oversight on the NPA. It is separate from the judiciary and acts differently. Whilst obviously the Second Respondent will depose for himself, I can only venture my considered opinion that when Parliament called the Second Respondent to account, it was exercising its oversight function as required by law. The mere fact that the Second Respondent was called to account by Parliament cannot be used, in my humble and respectful opinion, as a *core of the matter* reason as Appellants seek to suggest. Parliament has not made any recommendations that the Second Respondent or I or the Third Respondent must be sanctioned in any way.

29.12. There is no law to support a contention that the reaction of certain sections of the public, and/or certain political parties, and/or Parliament, and/or the markets can or must be used to gauge the competence or incompetence of prosecutorial decisions.

29.13. Lastly, on this *core of the matter* issue, I deny that the charges were baseless at the time they were drafted. The Second Respondent has explained the decision making process, the applicable facts and the law in the representations made to the First Respondent. In this regard I also refer to my own representations to the First Respondent, which are all part of the record.

29.14. Consequently I deny that at the very least there is a *prima facie* case against me that I lack the requisite fitness and propriety to continue to

hold office, and that the First Respondent is constitutionally required to institute an enquiry into my fitness to hold office and to suspend me.

30. **Ad Paragraphs 13 – 14**

30.1. The contents of this paragraph are noted. In my view the First Respondent was correct in holding as he did.

30.2. The alleged wealth of *prima facie* evidence warranting enquiries is no more than a reaction to newspaper reports, political pressure and politics playing out - all aimed at discrediting genuinely considered prosecutorial decisions.

RELIEF SOUGHT

31. **Ad Paragraphs 15 - 17**

31.1. The Applicants seek that the enquiries and the suspensions be ordered based on the conduct of each of the prosecutors in respect of the charges that were brought and then withdrawn.

31.2. This seems to contradict the Applicant's assertion in par 126 of the founding affidavit that the actions of the Second Respondent are equally applicable to me and the Third Respondent. These two positions cannot be reconciled.

31.3. I deny that there was no lawful basis for the President's decisions.

31.4. I deny that I acted recklessly. I deny that I acted with any ulterior motive. I note with interest, that the allegation that I acted with ulterior motive, other than merely being stated, is not substantiated in any way.

31.5. 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.

THE PARTIES

32. **Ad Paragraphs 18 - 27**

The contents of these paragraphs are noted, save to specifically deny that the NPA acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa when a decision was made to draft the charges.

STANDING

33. **Ad Paragraph 28**

33.1. The contents of this paragraph are denied in as far as they seem to suggest that there is a constitutional crisis. No evidence has been presented in the founding affidavit to support the contention that the NPA is being abused, has been unduly influenced by third parties, or is acting irrationally, arbitrarily, in a manner which constitutes a gross abuse of public power.

33.2. No evidence has been set out in the founding affidavit that the NPA is manned [populated] or led by individuals who lack the requisite competence and / or are acting in a manner strikingly at odds with their mandates.

34. **As Paragraphs 29 – 37**

34.1. The contents of these paragraphs in respect of the standing of the Applicants are noted.

34.2. However I categorically deny that the President's decision undermines our constitutional democracy, and must be rectified without delay.

34.3. I deny that there are jurisdictional facts for the President to suspend me or to hold an enquiry against me. Consequently I deny that the President has failed in his constitutional duty.

RELEVANT FACTUAL BACKGROUND

The Charges

35. **Ad Paragraph 38**

The contents of this paragraph are admitted.

36. **Ad Paragraph 39**

I admit that none of the charges were put to the accused. However, in as far as my involvement is concerned, the charges were based on the payment by SARS, of Mr Pillay's retirement pension deduction, to the Government Employee's Pension Fund. I was not involved in an investigation of other charges, or publication thereof. Those charges were distinct from those that were attached to the summons.

37. **Ad Paragraph 40**

I have no knowledge of the contents of this paragraph. There is no allegation that I was a member of the alleged group of people referred to in the paragraph.

Consequently this paragraph is irrelevant to me, and cannot be used to support the relief sought against me.

The 11 October press conference

38. **Ad Paragraphs 41 - 55**

38.1. The Applicants allege that at the press conference the Second Respondent made certain announcements in his capacity as NDPP and head of the NPA.

38.2. Even if any wrongdoing is alleged, I am not vicariously liable for the actions of the Second Respondent. Any alleged wrongdoing by him at the press conference cannot be used to support a contention that I must be suspended and an enquiry be held against me.

38.3. I wish to point out though, that it is not a fact that at the time we made the decision there were 3000 other instances of *similar conduct*. The background to the charges is explained fully by the Second Respondent in his answering affidavit in the urgent application and in his representations to the President, which form part of the record. (I refer the above Honourable Court to paragraphs 120 – 188 of the Second Respondent's answering affidavit in the urgent application, at page 329 – 365 of the Record, and paragraphs 15 – 69 of his representations, at page 17 – 23 of the Record)

38.4. I reiterate what I said in my answering affidavit in the urgent application. I refer the above Honourable Court to paragraphs 60 – 62 of my answering affidavit in the urgent application – at page 568 of the Record). The number '3000' is from an Internal Memorandum from Oupa Magashula to Minister 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)".*

38.5. 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 - or comparatively similar facts as those in Mr Pillay's case.

38.6. Besides, the Applicants, as far as I know, have not annexed the so-called Appendix A, neither to the urgent application they launched in November, 2016, nor to this application. There was never any credible confirmation of the facts of the other alleged 3000 requests or the number 3000. I humbly state that this Honourable Court should draw

[1] Page 100 – 103 of the paginated papers

from this inability by the Applicants to provide the alleged Appendix A, such inferences as to it may seem fit.

38.7. 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 which reveal the commission of an offence are conducted, charges should not have been considered, as was done in this particular matter.

38.8. There is no principle of law that requires all facts with the potential to corroborate unlawfulness must be sought before charges are drawn.

38.9. This allegation about the 3000 other early retirement matters cannot be used to support a contention that I should be suspended, and that an enquiry should be initiated against me.

The Applicants challenge the decision

39. **Ad Paragraphs 56 - 58**

The contents of these paragraphs are noted.

40. **Ad Paragraphs 59 – 61**

40.1. I dispute that the fact that the NDPP sought to institute further investigations illustrates that there was insufficient evidence to sustain the charges in the first place. It is normal practice to conduct further investigations even after an accused has been served with summons and actually appeared in court.

40.2. 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 and relevant legislation.

40.3. I refer the above Honourable Court again to paragraphs 164 – 168 of the Second Respondent's answering affidavit in the urgent application (at page 358 – 359 of the Record), where he explained the facts leading to the charges. Having explained the backdrop to the charges, he states at paragraph 168, *"In light of the above, the prosecutors were quite correct in bringing the charges against the three individuals"*.

40.4. Furthermore the Second Respondent explains as follows in paragraphs 21 and 53 of his representations to the First Respondent (at page 18 and 19 of the Record):

> *"21 At the time when the prosecutors decided to charge GP & M, they did not have the Symington memorandum in their possession (as noted in paragraph 131 of the answering affidavit). It was received by me only when the applicants wrote to me on 14 October 2016, and attached it as an annexure (File 1: pg 98 – 99). Perusal of the memorandum led me to believe that it was unlikely that a conviction could be obtained – not because the other elements of the offences alleged could not be proven – but specifically because the element of intent would be very difficult to prove beyond reasonable doubt (File 1: pg 89 – 116)*
>
> *53 Fundamentally, the basis for the charges was that, upon consideration of the available evidence, it became clear that the manner in which Pillay was able to obtain an unlawful benefit at the expense of SARS was through a series of transactions that were* in ***fraudem legis.*** *This is discussed in the answering affidavit at paragraphs 182 – 184 (File 1: pg 275)"*

40.5. 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.

40.6. 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 are equal before the law.

40.7. As an illustration that the calling for, and the submission of representations are a common feature in the NPA, the following statistics of representations received by its head office component are informative:

2013-2014	-	507 received
2014-2015	-	396 received
2015-2016	-	473 received
2016 / 2017	-	571 received
2017 / 2018	-	402 received

40.8. Other representations, which are not included in the statistics above, are received by the various DPP offices around the country.

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

41. **Ad Paragraphs 62 – 64**

41.1. The contents of this paragraph are denied in as far as they suggest that the NPA never had sufficient evidence to take the decision to prefer charges against the accused.

41.2. Applicants further allege that:

"Any evidence which spoke to the practices and lawfulness of early retirement of public servants with full pension had to be fully investigated and considered before *charging the accused".*

41.3. The deponent's superficial knowledge of how our criminal justice procedure works is breathtakingly exasperating. In criminal matters it is only after the accused has pleaded to the charge, that the *lis* is established between the accused and the prosecution. In any event, in this case, I categorically state that the accused were not charged.

41.4. There is nothing untoward in calling for further investigations after a decision to prosecute has been made, and even after an accused has appeared in court. Many cases are postponed, at the instance of the prosecuting authorities, for further evidence to be gathered by the police, even after the accused has appeared in court, informed of the charges and, in some cases, actually denied bail.

41.5. There is nothing inherently unlawful in deciding to charge someone and thereafter withdrawing the charges after representations have been made. Even where representations have not been made, the Second Respondent is within his lawful rights to withdraw the charges. He has explained his reasons for withdrawing charges in this case, The President evidently considered them and decided not suspend us and institute the enquiries prayed for.

The decision to withdraw and press conference

42. **Ad Paragraphs 65 – 69**

The contents of these paragraphs are noted. Again I reiterate that I am not vicariously liable for the actions of the Second Respondent. What he said at the press conference of the 31 October cannot be used to support a contention that I must be suspended and an enquiry instituted against me.

43. **Ad Paragraph 70**

43.1. The contents of these paragraphs are denied. The Applicants seek to argue, via an affidavit, the merits of a criminal case that never occurred. This is pure speculation. Their view that there is no evidence of a fraudulent intent or a fraudulent misrepresentation on the part of Mr Gordhan is theirs only, and has not been tested anywhere. It is a disputed fact which cannot be resolved on affidavit in application proceedings. If the dispute of fact is of that kind, I am advised that if it has to be resolved at all by a Court in motion proceedings, the ruling of the Court as to which version must be accepted by it, is usually in favour of a version proffered by a respondent, in this case by me. A more precise legal argument on this averment will be proffered at the hearing of the case.

43.2. The contention that there was nothing unlawful about the accused's conduct is also in dispute. In this regard reference is again made to the Second Respondent's answering affidavit in the urgent application.

43.3. The Applicants are also arguing the merits of the Symington memorandum out of context. In my view the Symington memorandum does not change the previous actions of the accused as appears from their written documents and the applicable pension law and rules which we considered when we made the decision.

43.4. In any event there was nothing untoward in the Second Respondent asking for, and considering the Symington memorandum. Furthermore, further investigations of all criminal cases are conducted to bolster already available evidence and are not grounds to suspend prosecutors. It is important to remind the deponent that in the urgent application, I did say that, for my part, I had never seen the so called Symington Memorandum during my engagement with the process leading up to the taking of the decision to draft the charges.

44. **Ad Paragraph 71**

The contents of this paragraph are noted.

45. **Ad Paragraphs 72 - 80**

45.1. The contents of this paragraph are noted. They relate to what the Applicants contend were not explained by the Second Respondent and are irrelevant to me, and cannot be used to support a contention that I must be suspended and an enquiry held against me.

45.2. However I maintain that the charges were not *preferred* against anyone in the legal sense as accepted in criminal law practice.

45.3. However, any suggestion that prosecutors should have looked at the allegations against the backdrop of a battle to "capture" National

Treasury, and the removal of the Minister as a perceived impediment, would be to ask prosecutors to consider irrelevant factors.

45.4. I reiterate that the decision to draft charges was taken on the sufficiency of the available evidence, enough for us to make such a decision. Applicants are invited to explain what significant amount of evidence they are referring to, and which officials at SARS still needed to be interviewed before charges could be drafted.

45.5. 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.

Aftermath and further comments and explanations by Mr Abrahams

46. **Ad Paragraphs 81 – 97**

The contents of these paragraphs are noted. They are irrelevant to me and cannot be used to support a contention that I should be suspended and an enquiry held into my fitness to hold office.

47. **Ad Paragraphs 98 – 99**

The contents of these paragraphs are noted. I contend that there is no reason for me to resign or for the President to suspend me and institute an enquiry into my fitness to hold office on the basis of the allegations made by the Applicants.

48. **Ad Paragraphs 100 - 112**

48.1. The contents of these paragraphs are noted, and they are largely irrelevant to me. However, I specifically deny that any alleged cloud of impropriety, which is denied, was created by my conduct in the bringing of the charges.

48.2. I further deny that the respondents focussed their arguments on urgency. In my view, all the respondents in the urgent application also fully addressed, to some relative degree of completeness, the merits raised in the founding affidavit, albeit mainly to demonstrate the baseless grounds upon which relief was being sought by way of urgency,

48.3. Besides, the deponent will have been advised by his legal team that the Judges had canvassed the approach to the proceedings on the day, in Chambers, with all the legal representatives, and the agreement was that the question of whether or not the application was urgent would be argued first. In the event, it was argued first, and the Applicants lost that battle.

49. **Ad Paragraph 113**

The contents of this paragraph are noted. However, I deny that the Abrahams Representations traverse irrelevant material. I also deny that such representations confirm the facts alleged by the Applicants that there is *prima facie* evidence justifying the institution of enquiries and suspensions against me.

50. **Ad Paragraph 113.1**

I have nothing to do with the rogue unit.

51. **Ad Paragraph 113.2**

51.1. In his representations at par 16, the Second Respondent did not claim,

"that it was only after representations from the accuseds (sic) that the Prosecutors were of the view that 'it would be difficult to prove intent beyond a reasonable doubt".

51.2. In par 16 of his representations the Second Respondent states that,

"...It was only on production of the oral representations and documents, furnished for the first time upon review, that I was able to conclude that it would be difficult to prove intent beyond a reasonable doubt".

51.3. It is clear from the above that the Second Respondent was referring to himself in par 16 of his representations, as a reviewer. He is clearly saying it was him and not "the Prosecutors", as alleged by the Applicants, who was able to arrive at the conclusion that it would be difficult to prove intent beyond a reasonable doubt.

52. **Ad Paragraph 113.3**

52.1. The proper context of the Maema briefing as explained by the Second Respondent should be set out. It is that the alleged unlawful manner in which Pillay's retirement was handled came to light when Maema was briefing NPA management about the "Rogue unit", so called.

52.2. The briefing, *inter alia,* (amongst other things) was the basis of the charges. I note that nowhere do the Applicants address all the other available facts and the law that was taken into account in the decision making process to draft the charges. All they seem to be interested in is to marry the Rogue Unit issue to the charges that were brought arising from the Pillay pension matter.

52.3. 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.

52.4. This presentation outlined the history of the investigation that the prosecuting team were dealing with and how the allegations against Minister 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 Rogue Unit investigation.

52.5. The explanation related to possible issues of misjoinder in that the three accused, Pillay, Magashule and Minister 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 of Mr Magashula, and them later confirming that aspect was followed up and the said addendum— Annexure A so called-- could not be found at SARS.

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

52.7. When I saw the memorandum of Mr Magashula dated 12 August 2010, addressed to the minister, I observed that there was space for the Deputy Minister to have signed at, and this was blank, and instead, the Minister apparently had approved the memo on 18 October 2010 without the Deputy Minister's signature.

52.8. I suggested that an enquiry be made from the DPSA about the protocol about such memoranda, essentially about whether it is normal for a Minister to sign without a co-signature of the Deputy Minister where provision for such a signature had been made on the form. I was later informed that such was not unheard of.

52.9. In the evening of 13 September 2016, I met with the Third Respondent, to follow up on the outstanding investigations. During this meeting we also talked about the public interest considerations of the matter and the impact the decision might have on the economic situation of the country.

52.10. 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.

52.11. I specifically suggested that the statement of Marco Granelli was important and should be obtained. This statement was later obtained.

52.12. 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 Minister 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 the law.

52.13. 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.

52.14. It is my understanding that this memorandum was furnished to the Second Respondent.

52.15. On 22 September 2016, the Third Respondent called me to inform me that there was another memorandum prepared by the prosecuting team which provided 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.

52.16. 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".*

52.17. 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".*

52.18. In this discussion, the Third Respondent indicated that he wished to conduct research on public interest case-law, and the extent to which that such may or may not be impactful on 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.

52.19. 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.

52.20. 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 he explained his rationale thereof.

52.21. 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". I am wary of attaching them to these papers, but will avail them to the above Honourable Court if ordered to do so.

52.22. From my recollection, this meeting was my last one at which discussion with the Third Respondent prior to the announcement of the decision to charge the accused took place. It is clear from the above, I humbly aver that I was not reckless. This matter was carefully considered. Later, the Second Respondent called a meeting and told us that he had received representations [from some of the Accused persons], and that he was persuaded that the charges should be withdrawn. I personally never saw the representations. The withdrawal of the charges was subsequently announced in the press conference of the 31 October 2016.

52.23. I humbly aver that the above exposition 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.

52.24. It is my submission that the above exposition indicates that there was no ulterior motive to this investigation. There was no breathtakingly reckless and incompetent fashion in which the matter was handled, as alleged by the applicants.

52.25. It also demonstrates that it is not correct 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, and to take an impartial independent and objective view of all the facts that were presented before them.

52.26. 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.

53. **Ad Paragraph 113.4**

53.1. Applicants allege that in par 21 of his representations, Second Respondent claimed that the Symington memorandum was first brought to the Prosecutor's attention in the applicants' 14 October 2016 letter. This is not true.

53.2. In Par 21 of his representations, the Second Respondent states that the memorandum was received by him, only when the applicants wrote to him on 14 October 2016. (The above Honourable Court is referred to paragraph 21 of the Second Respondent's representations at page 18 of the Record).

54. **Ad Paragraph 113.5**

The Second Respondent explained what evidence was there in his answering affidavit in the urgent application. This clearly appears in par 53 of his representations. (The above Honourable Court is referred to page 19 of the Record).

55. **Ad Paragraph 113.6**

It happens on a regular basis that accused persons are summoned whilst investigations are underway. Summonses do not mean that investigations are finalised. Even if the charges at issue here were not a model of clarity at the time - which is not admitted - the accused were not asked to plead to them. Furthermore, the accused themselves could have asked for clarity at the appropriate time as provided for in the Criminal Procedure Act 51 of 1977.

56. **Ad Paragraph 113.7**

I deny that there is any implicit admission in par 34 of the Second Respondent's representations that the prosecutors did not apply their mind to the charges of theft.

57. **Ad Paragraph 113.8**

The contents of this paragraph are noted.

58. **Ad Paragraph 113.9**

The contents of this paragraph are noted. However, I wish to state that further investigations do not necessarily mean a defective docket on which initial charges cannot be drawn.

59. **Ad Paragraph 113.10**

This paragraph is irrelevant to me.

60. **Ad Paragraphs 113.11 – 113. 13**

The contents of these paragraphs are noted. However the alleged incompetence is denied.

61. **Ad Paragraph 114**

The contents of this paragraph are denied in as far as they seek to impute any incompetence on my part.

62. **Ad Paragraph 115**

I deny that my representations add nothing of relevance or substance. The Applicants have not pointed which part of my representations is irrelevant.

63. **Ad Paragraph 116**

63.1. The Applicants seem to allege that the reasons they are approaching court is because the President's position is that there was no evidence on the basis of which he could form a *prima facie* view of misconduct despite (a) the patently bad charges preferred by the Prosecutors, and (b) the inappropriate and unlawful approach of Mr Abrahams to the 11 and 31 October press conferences.

63.2. If that is the reason for approaching the court I wish to point out that reason (b) is not applicable to me.

63.3. In as far as reason (a) is concerned, I reiterate that the charges were not preferred against, or put to, anyone. No one appeared in court. No one was asked to plead. The charges were withdrawn before they were put

to the Accused for them to plead thereto. The charges are therefore of no legal consequence.

63.4. The Applicants are therefore bringing this application because of what they call the *aftermath* of the charges. The aftermath is the reaction of the JSE, the reaction of political parties, the reaction of journalists, and the reaction of persons with partisan interests. I contend that I am supposed to perform my duties without fear or favour or prejudice, regardless of media and partisan interests, however vociferously these maybe presented.

63.5. Accordingly, no reason has therefore been brought before court by the Applicants as to why I should be suspended or an enquiry held against me, or both.

THE UNFITNESS AND IMPROPRIETY FOR OFFICE OF THE PROSECUTORS

Mr Abrahams

64. **Ad Paragraphs 117 - 123**

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

JP Pretorius SC and S Mzinyathi

65. **Ad Paragraph 124**

65.1. I deny that the charges were prosecuted.

65.2. I deny that the charges were pursued.

65.3. I deny that there was recklessness and incompetence. Notably, the Applicants have not addressed the facts and the law pertaining to the charges on the basis of which they claim that there was recklessness and incompetence in the drawing of the charges. Their own analysis is conspicuously absent.

65.4. That the Second Respondent is considered to have shifted the blame onto me and Dr Pretorius does not turn on anything. The issue is whether the Applicants have made out a case against me for the relief sought.

66. **Ad Paragraph 125**

The contents of this paragraph are denied. That Applicants themselves would have done something different does not necessarily mean that the charges were not properly grounded or that the decision was not made impartially, independently or objectively in view of all the available facts.

67. **Ad Paragraph 126**

I deny that the allegations against the Second Respondent apply with equal force to me. In my view there was basis in law and in fact for the charges.

68. **Ad Paragraph 127**

The contents of this paragraph are denied. The Second Respondent never said we failed to take into account, *inter alia,* the most basic requirements for a successful prosecution of fraud or theft, the fraudulent furtive intention, as alleged by the Applicants. The basis of his conclusions for the withdrawal of the charges has been fully canvassed by him in his Answering Affidavit, and elsewhere.

69. **Ad Paragraph 128**

The contents of this paragraph are noted. I contend that we discharged our constitutional mandate as required by law.

70. **Ad Paragraph 129**

70.1. The contents of this paragraph are denied. The views of the Applicants are not the views of the public. There is nothing to support the contention that the public confidence in the NPA has been severely undermined by my actions.

70.2. I deny that I must be suspended and that an enquiry should be held into my fitness to hold office without delay.

THE PRESIDENT'S DECISION

The legal framework

71. **Ad Paragraphs 131 - 134**

The contents of these paragraphs are noted.

72. **Ad Paragraph 135**

The contents of this paragraph are denied. Section 12 (6) of the NPA Act does not require the President to initiate the enquiry on the mere basis of *prima facie* evidence. The President exercises a discretion to suspend pending an enquiry.

73. **Ad Paragraph 136**

Even if the above Honourable Court agrees with the issues for determination as proposed by the Applicants I submit as follows:

74. **Ad Paragraph 136.1**

The facts herein do not indicate that an enquiry into the conduct or fitness for office is warranted in my case.

75. **Ad Paragraph 136.2**

In my view the President has a duty to exercise his discretionary powers only where the facts dictate the particular member should be suspended. Any suggestion that the President can determine whether there is a *prima facie* case without exercising his own mind is irrational. There is no other way to determine whether there is a *prima facie* case except by considering the facts presented to him.

76. **Ad Paragraph 136.3.1**

The facts in this case do not warrant an enquiry into my fitness and propriety to hold office.

77. **Ad Paragraph 136.3.2**

The facts in this case do not warrant my provisional suspension pending the outcome of such an enquiry.

78. **Ad Paragraph 137**

The contents of this paragraph are denied.

79. **Ad Paragraph 138**

79.1. The test in the present matter is whether the Applicants have succeeded in showing on a balance of probabilities whether the relief sought is justified. I contend that they have dismally failed in doing so.

79.2. There is no proof that the suspensions sought will prevent the alleged eroded public trust in the NPA except perhaps to satisfy only the Applicants' wishes.

80. **Ad Paragraph 139**

80.1. I submit that the representations show unequivocally that there is no *prima facie* evidence of my unfitness to hold office.

80.2. The Applicants do not advance any legal basis for arguing that balance of probabilities would be more appropriately made at the enquiry stage. The logical conclusion of this submission would be that it would be sufficient for a mere allegation to be made against the NDPP or a DPP for a suspension and an enquiry to follow. The person who must suspend the official and initiate the enquiry thus has no exercise of discretion at

all and is not allowed to consider the views of the person against whom the allegations are made. In our country's constitutional dispensation, such an argument has no place.

80.3. Section 12 (6) of the NPA Act cannot be read to mean that an enquiry must be held simply because bodies like the Applicants call for it, or when they make allegations of impropriety, with no basis at all.

81. **Ad Paragraph 140**

81.1. The contents of this paragraph are denied.

81.2. The allegations of unfitness to hold office are made in application proceedings, and have to be answered there. If the NPA officers are expected to respond only at an enquiry, such would be tantamount to their admission of the alleged "facts" in this application. It also would be an unwarranted and unjustifiable violation of the Respondents' right of access to the Courts as enshrined in section 34 of our Constitution, 108 of 1966.

81.3. The Applicants elected this Honourable Court as an arena to which we have been dragged to defend ourselves against the allegations levelled by the Applicants at us. We are here at their instance. I sincerely submit that it can now hardly lie in their mouths that having been brought here at their instance, we now need to go to another forum in order for us to

be heard in order to dispute their allegations. With all due respect to them, respectfully submitted, that appears to be a nonsensical argument.

81.4. If this is a *lacuna* in the law, it should be corrected elsewhere and not by prejudicing the present respondents, where the court is called upon to effectively ignore their responses (because the enquiry is allegedly the only forum where the respondents must be heard).

81.5. If that were the case, the court would be abdicating its duty to adjudicate a dispute that has been brought before it.

81.6. In any event, it is not for the respondents to prove, on balance, that they are fit and proper for office. That would have the effect of putting the onus on the respondents to prove their fitness for office, instead of on the accuser, the Applicants.

81.7. It would be irrational for the President simply to call for an enquiry in the present circumstances.

82. **Ad Paragraphs 141 - 142**

82.1. The contents of these paragraphs are noted.

82.2. It should also be noted that it is the ***courts*** that have made the findings of unfitness and which have stated the minimum qualities a lawyer should possess that are referred to.

83. **Ad Par 143 - 1444**

The contents of these paragraphs are noted. I contend that there is no proof that I contravened any of the directives of the Code of Conduct.

GROUNDS OF UNLAWFULNESS AND/OR REVIEW

The President's Decisions not to institute disciplinary proceedings are unlawful and are, in any event, irrational

84. **Ad Paragraphs 145 - 146**

The contents of these paragraphs are noted.

85. **Ad Paragraph 147**

I deny that there is *prima facie* evidence presented before the President, and that he is obliged to institute the enquiries.

86. **Ad Paragraph 148**

The contents of this paragraph are denied. Other rational decision makers can come to a different conclusion.

87. **Ad Paragraphs 149 - 151**

The contents of these paragraphs are noted.

88. **Ad Paragraph 152**

It is denied that there is evidence of incompetence, impropriety, gross abuse of power and a patent lack of integrity on my part, or that I pose a threat to the rights of the public and the administration of justice. I contend that the President's decision is not plainly unconstitutional.

89. **Ad Paragraph 153**

It is denied that the President acted unlawfully.

90. **Ad Paragraph 153.1**

It is denied that the President acted without due regard to the Applicant's representations. It is denied that there is a plethora of publicly available *prima facie* evidence of misconduct and lack of fitness and propriety on my part. The

information presented by the Applicant does not support the contentions they make.

91. **Ad Paragraph 153.2**

91.1. It is denied that the President acted with undue deference and adherence to the content of the Representations. In my view the President is supposed to properly consider the Representations made by the Second to Fourth Respondents, and on any analysis of the available evidence in the record of decision, he did so.

91.2. I deny that the Representations do not adequately answer the complaints against us. I deny that there is any *prima facie* evidence. *The glaring omission by the Applicants is that they do not engage at all the contents of the Representations which set out the evidence that was available to the prosecutors when the decision was made.*

91.3. Were Applicants to do that, they would immediately realise that the complaints they make are answered. Instead they argue that complaints they make before the court, on certain factual allegations, must not be determined by the Court to which they are made, but must be left for an enquiry.

92. **Ad Paragraph 153.3**

It is denied that the President makes / made his decision in a manner that was not rationally connected to the evidence before the President.

93. **Ad Paragraph 153.4**

It is denied that the decision of the President was so unreasonable in the circumstances that no reasonable person would have come to that decision. On the contrary, any reasonable person, asked to make certain adverse decisions against another, acts reasonably by hearing the other side, and considering the complaint and the answer to it - which is what happened here.

94. **Ad Paragraph 154**

It is denied that the President's decision not to institute the disciplinary proceedings was unlawful and falls to be set aside.

THE DECISION NOT TO SUSPEND THE PROSECUTORS IN THE CIRCUMSTANCES IS UNLAWFUL AND IS, IN ANY CASE, IRRATIONAL

95. **Ad Paragraph 155**

I deny that I have very publicly grossly abused, alternatively used my power with recklessness and incompetence, and with shattering effects on the economy.

96. **Ad Paragraph 156**

The contents of this paragraph are admitted.

97. **Ad Paragraph 157**

The contents of this paragraph are denied. I deny that there is incontrovertible evidence illustrating that I have misconducted myself. On the contrary, the evidence appearing in the Representations of the applicable facts and the law on the pension issue has not been addressed at all by the Applicants. How they determine that there is incontrovertible evidence against me is beyond me.

98. **Ad Paragraph 158**

The contents of this paragraph are denied. I particularly deny that my conduct in relation to the charges, (which were not recklessly preferred), which were withdrawn against Minister Gordhan and Messrs Pillay and Magashule confirms any risk to the public perception of confidence in the NPA

99. **Ad Paragraph 159**

The contents of this paragraph are denied. I have not threatened any new charges against Mr Gordhan.

100. **Ad Paragraph 160**

100.1. The contents of this paragraph are denied. The above Honourable Court can make a determination of the issues raised in the founding affidavit, having regard to the answering affidavits and the replying affidavit, if any. In any event it is denied that the sanctity of the NPA would be preserved only by granting the relief sought against me in the Notice of Motion. The sanctity of the NPA is intact precisely because, in these proceedings, I have shown, in detail, how I and the Third Respondent went about our duty in directing the investigation of the case, in considering the facts and the law, before coming to the conclusion that certain charges were competent against the three Accused persons.

100.2. Our considerations were discussed with, and supported by the Second Respondent, who only decided to withdraw the charges after he had received representations from some of the Accused. I never saw, and have no knowledge of what was in the representations that the Second Respondent considered.

101. **Ad Paragraph 161**

The contents of this paragraph are denied.

102. **Ad Paragraph 162**

I deny that I am a proven threat to the economy of the Republic.

103. **Ad Paragraph 163**

This paragraph is irrelevant to me.

104. **Ad Paragraph 164**

I deny that my fitness to hold office has been placed in doubt, in particular by the type of allegations, and the basis thereof, made against me by the Applicants. I deny that I abused, or unlawfully compromised or impeded my office.

105. **Ad Paragraph 165**

The contents of this paragraph are noted.

106. **Ad Paragraph 166**

106.1. The grounds set out in par 153 of the founding affidavit have been addressed above. I deny that the President was under an obligation to suspend me or that he acted unlawfully in failing to suspend me.

106.2. I deny that the President acted irrationally or unlawfully.

REMEDY

107. **Ad Paragraph 167**

I deny that the President's decision should be substituted.

108. **Ad Paragraph 168**

I deny that there are any exceptional circumstances or that the certain factors referred to have been met or clearly satisfied in the present case.

109. **Ad Paragraph 169**

The contents of this paragraph are noted.

110. **Ad Paragraph 170**

I deny that the Applicants have made out a case for the President's decision to be substituted.

111. **Ad Paragraph 171**

I deny that there is only one lawful decision that can be made, being the one sought by the Applicants. I further deny that there is no other rational decision that could be made except the one prayed for by the Applicants.

112. **Ad Paragraph 172**

112.1. I deny that the President's decision reflects that he does not appreciate the alleged misconduct. I contend that there is no misconduct.

112.2. There is no need to refer the matter to the President. He has made his decision. The matter simply falls to be dismissed on the normal rules applicable to applications.

113. **Ad Paragraph 73**

113.1. In my view, the President did not prejudge the matter. He was responding according to what was in front of him at the time, when the Applicants were calling for suspensions and enquires without the Second and Third Respondents being given an opportunity to give the President their side of the story. I submit that there was nothing in front of the President which warranted suspensions and enquiries.

113.2. I do not understand why the Applicants contend that it is unclear what the purpose of requesting Representations was in the first place. In a constitutional democracy the *audi alteram partem* principle cannot be emphasised enough.

113.3. For Applicants, who profess to be fighting for the upholding of the Constitution, not to understand the right to be heard, is simply flabbergasting.

113.4. I deny that it is clear that even before he received the Representations the President had formed a view that I was to be exonerated. The facts do not support that contention.

113.5. The rest of the contents of this paragraph are denied.

114. **Ad Paragraph 174**

114.1. The Applicants admit that the President, correctly, need only consider whether there are allegations which warrant enquiry.

114.2. I contend that the President has correctly determined that there is no *prima face* evidence that enquiries are warranted. It would be irrational for the First Respondent to hold enquiries on the present facts.

114.3. Consequently the President was correct in his decision.

115. **Ad Paragraph 175**

I deny that there are compelling grounds for the above Honourable Court to grant the substituted relief prayed for in the Notice of Motion. Since this matter raises a constitutional matter/s, which I have indicated in the course of this Answering affidavit, in the exercise of its powers in terms of section 172 of the Constitution, the only order that would be just and equitable for this Honourable Court to order is a dismissal of the application with costs.

CONCLUSION

116. **Ad Paragraph 176**

I deny that it is clear that the President has acted irrationally and unlawfully in failing to institute the enquiry against me and to suspend me.

WHEREFORE I pray that the Application be dismissed with costs.

DEPONENT

Thus signed and sworn to before me at Pretoria on this 15 day of December ~~November~~ 2017, 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.

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