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

CASE NO:

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

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

FOUNDING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

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

2. I am duly authorised to depose to this affidavit on behalf of the applicants.

3. The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context, and are both true and correct.

4. All legal submissions are made on the advice of the applicants' legal representatives.

INTRODUCTION

5. On 11 October 2016, the second respondent, in a press conference lasting over an hour ("**the 11 October press conference**"), announced to the world, in the most vivid detail and with unequivocal force that the National Prosecuting Authority ("**NPA**"), after the conclusion of a full investigation, had decided to prefer serious fraud and theft charges against the then sitting Minister of Finance, the former Commissioner of the South African Revenue Service ("**SARS**") and the former Acting Commissioner of SARS.

6. This news, as the NPA was warned in prior correspondence, and, in the circumstances, inevitably, resulted: in the South African market going into a tailspin; serious questions being posed as to the independence of the NPA and the NDPP, the workings of the Executive being affected; and the country being rocked by political uncertainty.

7. By 31 October 2016, however, the charges (which were clearly never sustainable in law) had been withdrawn, with the NDPP performing a remarkable *volte face* and seeking now to blame the accused for the bringing of the spurious charges (as well as laying all responsibility for the actual initial bringing of the charges at the feet of the third and fourth respondents).

8. This represented a remarkable about-turn from the NDPP's own attitude at the 11 October media spectacle, where, as the responsible head of the NPA

under section 179 of the Constitution, the NDPP lent his *imprimatur* to the legitimacy of the initial charges. At this press conference the NDPP announced to the world, after smearing the names of the accused for well over 30 minutes (through innuendo on a completely unrelated matter, which has not even been investigated, being the co-called SARS rogue unit), that the NPA was prosecuting the accused.

9. The NDPP, attempting to distance himself from the charges and his initial pronouncements, then claimed that he should bear no responsibility for this debacle, instead placing the blame at the feet of, of all people, the charged individuals, the direct victims. His insistence that he is blameless and his unwillingness to shoulder responsibility confirms that he is not fit and proper for the high office of the NDPP, which office is endowed with immense power and is the head of a critical component of our constitutional project. The NPA cannot learn from its most dramatic calamity, correct its egregious violation of rights, or repair the destruction of its integrity and reputation, while it is headed by somebody of the second respondent's character and competence.

10. At the core of the matter is a display of incompetence and/or gross abuse of public power, causing a national uproar, riots in the streets (see news report annexed "**FA1**") and the urgent summoning of the second respondent to Parliament to explain himself. This immense public power was 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, wiping R50 billion off the Johannesburg Securities Exchange almost immediately. Yet, only 20 days later, and after all the damage was already done, the second respondent admitted (but without taking responsibility therefor) that an elementary mistake had been

made in bringing the charges and that the charges were (and had always been) utterly baseless.

11. In the circumstances of the matter, as developed below, the ineluctable conclusions are that the second to fourth respondents ("**the Prosecutors**"):

11.1 are incompetent and not fit to hold positions within the NPA; and/or

11.2 are not acting independently, are beholden to others, and are acting contrary to the constitutional mandate of the NPA and in a manner which amounts to a gross abuse of public power.

12. In the circumstances, it is submitted that, at the very least, there is a *prima facie* case that the Prosecutors lack the requisite fitness and propriety to continue to hold the offices they currently hold. In circumstances such as these, the first respondent is not only empowered, but constitutionally required to institute enquiries into the fitness and propriety of the Prosecutors ("**the enquiries**") and to suspend them pending these inquires ("**the suspensions**") under section 12(6) of the National Prosecuting Authority Act, 1998 ("**NPA Act**").

13. Despite requests to him to do so, however, the first respondent decided on or before 3 March 2017 neither to hold enquiries into the fitness and propriety to hold office of the Prosecutors nor to suspend them from their offices pending these enquiries. In declining to institute the enquiries and suspensions, the President stated that "*there is no prima facie evidence pointing to... misconduct or lack of fitness and propriety*" and, accordingly the Prosecutors' conduct was not even worthy of further investigation, let alone censure.

14. It is respectfully submitted that this conclusion is plainly incorrect. The President has been presented with a wealth of *prima facie* evidence warranting the enquiries and suspensions of the Prosecutors and, in light of this *prima facie* evidence, it is submitted that there is no lawful alternative for the President other than to institute the enquiries and suspensions. In any event, the President's failure to institute the enquiries and suspensions is irrational in the circumstances, is unlawful and falls to be set aside.

RELIEF SOUGHT

15. This is an application for judicial review under Rule 53 of the Uniform Rules of Court, *inter alia*, seeking to review, set aside and declare unlawful the "**President's Decisions**" not:

15.1 to institute an enquiry, under section 12(6)(a) of the NPA Act, into the Prosecutors' fitness to hold the offices of National Director of Public Prosecutions, of Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, and of Director of Public Prosecutions respectively based on the conduct of each of the Prosecutors in respect of charges ("**the Charges**") which were brought and then withdrawn against the then Minister of Finance, Mr Pravin Gordhan, MP ("**Mr Gordhan**"), Mr Visvanathan "Ivan" Pillay ("**Mr Pillay**") and Mr George "Oupa" Magashula ("**Mr Magashula**"; together with Mr Gordhan and Mr Pillay, "**the charged persons**") by the NPA; and

15.2 provisionally to suspend the Prosecutors from office, under section 12(6)(a) of the NPA Act pending the enquiries.

16. The applicants furthermore seek to direct the first respondent to institute the enquiries and provisionally to suspend the Prosecutors from office pending the enquiries.

17. As I shall demonstrate, there is no lawful basis for the President's Decisions.

PARTIES

18. The first applicant in this application is the HSF. The HSF was established in 1993, and is a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".

19. The second applicant is Freedom Under Law NPC ("**FUL**"). FUL is an organisation that is primarily concerned with upholding the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), constitutionalism and the rule of law, particularly in the context of law enforcement agencies.

20. The applicants approach this Honourable Court, firstly, in their own interest. They are both organisations that are primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. The applicants contend that the NPA has acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa. The applicants thus have an interest in ensuring that the unlawful decisions of the NPA are set aside and that the NPA be prevented from taking further unlawful decisions which will prejudice the Republic as a whole and do irreparable violence to our democracy.

21. The applicants also approach this Honourable Court in the public interest. All South Africans have an interest in the rule of law, the requirements for a

properly functioning constitutional democracy, and, in particular, that bodies charged with law enforcement and the prosecution of crimes act lawfully, in good faith, in accordance with their mandates, independently and in the best interests of the Republic. The far-reaching powers and functions of the NPA mean that it is essential that they act responsibly and in good faith in their interactions with members of the public and all other public officials.

22. The first respondent is the President of the Republic of South Africa ("**the President**"). It is the President's Decisions which are the subject matter of this application.

23. The second respondent is the incumbent of the office of the National Director of Public Prosecutions ("**NDPP**"), Mr Shaun Abrahams ("**Mr Abrahams**"). Mr Abrahams'/the NDPP's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. The President's Decisions relate directly to Mr Abrahams and his misconduct.

24. The third respondent is Dr JP Pretorius SC ("**Dr Pretorius**"), the acting special director of the Priority Crimes Litigation Unit, cited in his personal and official capacities, whose place of business is at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Dr Pretorius is ostensibly the prosecutor who, in consultation with Mr Sibongile Mzinyathi ("**Mr Mzinyathi**"), elected to proceed with the charges against Minister Gordhan. The President's Decisions relate directly to Dr Pretorius and his misconduct.

25. The fourth respondent is Mr Mzinyathi, the Director of Public Prosecutions, North Gauteng, whose place of business is at Victoria and Griffiths Mxenge

Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. The President's Decisions relate directly to Mr Mzinyathi and his misconduct.

26. The fifth respondent is the NPA. The NPA's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

27. This application will be served on the respondents c/o the State Attorney.

STANDING

28. The applicants approach this court to guard against a constitutional crisis, where it appears that independent institutions, such as the NPA, are being abused; have been unduly influenced by third parties; are acting irrationally, arbitrarily; in a manner which constitutes a gross abuse of public power; are being led or manned by individuals who lack the requisite competence and/or are acting in a manner strikingly at odds with their mandates; and where the President remains unmoved by these actions of the NPA as manifested in his failure to discharge his duties properly in response to the complaints against the officials.

29. These principle of legality concerns, coupled with the national importance of the matter, the implications for the functioning of the Executive, perceptions of NPA independence and the devastating economic and other effects of the abuse of these powers, make it uniquely in the public interest for the second to fourth respondents to be suspended from office and subjected to the enquiries.

30. The applicants clearly have standing to pursue this matter, and rely on clear rights (of their own and of the public's) to ground the relief sought.

31. In addition to what has been stated above pertaining to the applicants acting in their own and the public interest, it is clear that the President's Decisions undermine the values of our constitutional democracy and must, in the public interest, be rectified without further delay. This is thus pre-eminently a case where the applicants should, and do, act in the public interest.

32. As the Constitutional Court has recently held:

> "*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.*"[1]

33. It is further trite that the NPA is enjoined to act lawfully, and to fight, *inter alia*, corruption and organised crime relentlessly, independently and effectively.

34. As I demonstrate later in this affidavit, on 15 December 2016, in a letter dated 13 December 2016 the President acknowledged, through the State Attorney, that there were "*serious allegations*" levelled against the Prosecutors, and that "*the matter is both urgent and of public importance*".

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[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para [1].

35. The applicants, and, indeed, all people in the Republic, have a clear constitutional right to an independent and functioning criminal justice system, where public power will be mobilised rationally and lawfully. They further enjoy the rights that the institutions tasked with implementing such system, such as the NPA, act responsibly, independently and in the best interests of the administration of justice. Furthermore, the applicants, and the public at large, are entitled to expect the President to act on his constitutional and statutory duty to exercise his powers where the necessary jurisdictional facts exist. In the present case, these jurisdictional facts are undeniable, yet the President considers that there is no evidence to which the Prosecutors must answer. He fails in his constitutional duty.

36. The applicants, as well as the public, have a right to expect public office bearers and state institutions to act lawfully and rationally, and that the NPA's powers are exercised in the best interests of the Republic.

37. Ultimately, this matter implicates a number of clear rights enjoyed by the applicants and the public (on whose behalf the applicants also litigate). The applicants have a clear right (grounded in at least the principle of legality and the rule of law) to review the decisions, have them set aside and have the necessary processes under section 12(6) of the NPA Act set in motion without further delay.

RELEVANT FACTUAL BACKGROUND

The Charges

38. On 11 October 2016, summons no. 574/16 was served on, *inter alios,* Mr Gordhan (a copy of which is annexed marked "**FA2**"). The charges included

allegations of theft and fraud in relation to the alleged payment by SARS to the Government Employees' Pension Fund of Mr Pillay's early retirement pension deduction, and allegations of fraud in relation to the rehiring of Mr Pillay by SARS in or around April 2014.

39. At no time were allegations of fraud or theft ever put to the accused; indeed, these charges were distinct from those which had been investigated and publicised up until this point.

40. The applicants understand that Mr Abrahams was, at all relevant times and in particular prior to 11 October 2016, a member of a group which included government officials and/or intelligence officials and/or police officials and/or other law enforcement personnel who would regularly and secretly discuss *inter alia* various law enforcement issues including criminal investigations and the bringing of criminal charges against the accused and/or issues related to these charges. The applicants understand that these meetings were held *inter alia* at the offices of the NPA. The applicants invite Mr Abrahams to confirm whether he is aware of this group, explain these interactions and/or his involvement with the aforesaid group and any discussions he may have with any of the aforesaid individuals in relation to the Charges.

The 11 October press conference

41. The 11 October press conference at which Mr Abrahams, in his capacity as NDPP and head of the NPA, announced these new charges, was an unlawful abuse of power in its own right.

42. The relevant excerpts of a transcript of the 11 October press conference are attached as "**FA3**". The full transcript will be made available on request).

43. Before addressing the Charges, Mr Abrahams spent the first 30 minutes of his press conference expounding on the unlawfulness of a so-called SARS rogue unit, which unit was entirely unrelated to the charges and related to a separate case which was still under investigation. Mr Abrahams asserted that the SARS rogue unit was *"unlawful"* in that it was covert in nature and that the creation of the unit was a violation of legislation and the Constitution. He further asserted that those who operated the unit, those who authorised its establishment and those who maintained its existence violated the SARS Act, the National Strategic Intelligence Act, 1994 and the Constitution. Mr Abrahams and the NPA thus asserted, as a proposition of fact and law, that each of Mr Pillay, Mr Magashula and Mr Gordhan acted unlawfully and unconstitutionally.

44. These statements had nothing to do with the charges actually preferred against the accused, and were in relation to an investigation which the NDPP himself conceded was *"incomplete and ongoing"*, and which had, to this day, resulted in no charges. These statements were thus of no relevance at all to the Charges, and served only, publicly and indeed globally, to smear the names and reputations of those involved with the so-called SARS rogue unit. This can, regretfully, only speak to a gross abuse of public power, and a desire to harass and intimidate the accused on a global platform.

45. This public prejudging of a live matter before an investigation has been concluded falls far short of the actions required of an NDPP, particularly where charges have not even been made (and, as can be seen in respect of the Charges, Mr Abrahams' standards for sufficient evidence to lay charges are impermissibly low in any case). Either Mr Abrahams did not realise that his lengthy commentary and prejudgment in the SARS rogue unit matter

were manifestly improper, or if he did, he acted with an intention to malign those accused by means of these inappropriate public statements. He has also now clearly rendered himself incapable of performing his powers in relation to the charged persons in an objective manner, and at least the perception of the independence of the NPA has suffered further damage. These considerations emphasise his unsuitability to hold the high office of NDPP.

46. In any event, if Mr Abrahams, as stated, believed that there was a difference between unlawfulness and criminality of conduct, and the latter was still under investigation, on what basis does the NPA, which is tasked with prosecuting criminal, and not simply unlawful conduct, make lengthy comments about the lawfulness of conduct especially where no decision on a prosecution has been made? There can be no proper purpose for such statements. This reveals an inappropriate lack of propriety and requisite judgment on the part of Mr Abrahams, as well as a lack of integrity. The applicants submit that the conduct also reveals an implicit intention to malign the accused.

47. In revealing his motive and prejudice, Mr Abrahams violated the rights of the accused and abused his position. Mr Abrahams accordingly intentionally and maliciously or recklessly misused his office to smear the SARS unit and, by association, the accused, since none of these statements bore any relation to the new Charges he then announced. I am advised that the NPA is not permitted to use the media in an attempt to influence public opinion against an accused or suspect, not least of all on charges that are not even being preferred against him. Yet that is precisely what Mr Abrahams did, whether

intentionally or incompetently, having admitted at the 11 October press conference that the SARS rogue unit had nothing to do with the Charges.

48. I am advised that the Supreme Court of Appeal has confirmed that such conduct by the NPA is not only improper, it is unlawful.

49. Mr Abrahams then spent less time explaining the new charges than he did defaming the accused by association with his inappropriate statements regarding the SARS rogue unit. When he did eventually turn to the Charges, Mr Abrahams did not explain how the Charges in question were supported in evidence. On the contrary, he mentioned that the early retirement of Mr Pillay (which was the object of the Charges relating to fraud and alleged theft) was preceded by at least 3 000 other cases of early retirement in the 5 years prior to Mr Pillay's retirement. Mr Abrahams referred to an affidavit from the Director General of the Department of Public Administration which described the circumstances under which early retirement is usually given, and explained that it was ordinarily granted for the purposes of transformation within state entities.

50. Despite the very obvious lack of substance to the Charges, Mr Abrahams stridently defended and justified them in the press conference, including stressing that any suggestion (as was made by Mr Gordhan) that the Charges are groundless and constitute "*no more than* a *bitter political mischief*" is, "as *you will come to learn, ... nothing further from the truth*".

51. Either the NDPP was thus fully apprised of the facts, and was incompetent in believing the Charges to be sustainable, or the NDPP was not fully apprised with the relevant facts, and thus acted grossly negligently and recklessly, in stressing the credibility of the Charges to the world.

52. There are also a number of revealing statements made by Mr Abrahams in response to questions from the media at the conference. When asked whether, in light of the 3 000 other instances of early retirement, there had been any prosecutions for fraud on the basis of early retirement before, Mr Abrahams said that he could not say off the cuff. The admission is revealing. It shows that, despite the fact that the Charges against Mr Gordhan had been preceded by 3 000 other instances of similar conduct, Mr Abrahams and the prosecutors did not bother to check if any of these 3 000 had been criminally prosecuted, nor did he direct investigations into the ubiquitous and accepted practice in relation to early retirement in state institutions. This indicates both: (a) incompetence, in that Mr Abrahams did not, despite knowing of the 3 000 precedents, consider this evidence which indicated that crucial elements of the charge, namely lawfulness, or at the very least, intention was absent; and (b) a gross abuse of power, in that, despite being aware of 3 000 other instances of the conduct in question, only the conduct concerning the accused was singled out for prosecution.

53. Mr Gordhan's attorneys, on 11 October 2016, published a statement on behalf of Mr Gordhan (annexed marked "**FA4**"). Its content speaks for itself; I pray that it is incorporated by reference. It is notable that it was stressed that the NPA had reneged on its undertaking first to interact with Mr Gordhan before any decision to prosecute was taken, and that Mr Gordhan had not even been informed he was an accused in this matter on the new charges.

54. Finally, during the press conference, Mr Abrahams made a jocular, but not inaccurate, remark that he is accountable for everything that happens within the NPA. Later Mr Abrahams then declared that the days of disrespecting the decisions of the NPA were over and, further, that the days of not holding

government officials to account were over. Mr Abrahams, who had declared his responsibility for all that occurred within the NPA, and declared that government officials would be held to account, would later attempt to distance himself completely from the Charges, placing the blame on Mr Gordhan, the other accused persons, and Dr Pretorius and Mr Mzinyathi.

55. This back pedalling began (in the face of scathing public criticism) on or about 13 October 2016, when Mr Abrahams issued a public statement, seemingly distancing himself from any decision to prosecute Mr Gordhan and indicating that he believed himself endowed with the power to review the decision to prosecute and to withdraw the Charges, and was indeed open to reconsidering the Charges. A copy of media reports recording this statement are annexed marked **"FA5".**

The applicants challenge the decision

56. Between 14 and 18 October 2016, there was a flurry of correspondence between the applicants and the NPA / NDPP (the relevant correspondence is annexed marked "**FA6**"). The contents of this correspondence speak for itself, and I pray it be incorporated by reference.

57. Ultimately, the applicants placed the NDPP on terms to withdraw the charges, alternatively to provide information and reasons related to the decisions to prefer the Charges. These demands were not complied with, causing the applicants to launch urgent court proceedings to set aside the Charges as being unlawful.

58. During this exchange of correspondence, and as new facts came to light after the launch of the proceedings, it emerged that the NDPP and NPA were still

desperately trying to procure information in relation to the charges, which information was necessary to allow for a proper consideration thereof.

59. I am advised that the Charges are either supportable or insupportable on the basis of the docket, and the sustainability of the decision to prosecute must be decided on that basis. The fact that the NDPP sought to institute further investigations after the announcement of the Charges illustrates that there was insufficient evidence to sustain the Charges in the first place.

60. Where there was plainly no evidence which warrants the continuation of any prosecution based on the Charges and overwhelming reasons for withdrawal, the NDPP's failure timeously to withdraw the Charges serves on its own to confirm that he is not capable of acting in a manner that is independent, impartial and conscientious. At the time, in response to an invitation to make representations to the NDPP in relation to the review of the Charges, it was reported that Mr Gordhan *"does not have any confidence in the National Director of Public Prosecutions' ability or willingness to afford him a fair hearing",* as appears from the article annexed marked **"FA7".**

61. After launching urgent proceedings, the applicants became aware of a subpoena issued to the CEO of the Government Pensions Administration Agency (photographs of which I annex marked "**FA8**"). The subpoena on its face was issued on 20 October 2016 under section 205 of the Criminal Procedure Act, 1977. It called on the CEO to submit:

61.1 appendices A and B to the 18 October 2010 memorandum, on which charge 1 and the alternative to charge 1 are based ("**the Memorandum**"). Those appendices are: (a) the statistics showing that, over the five years prior to August 2010, the GEPF has approved over

3000 requests from various government departments for staff members to retire before the age of 60 with full benefits; and (b) evidence that the former and current Ministers of Finance have approved five such requests over the two years prior to August 2010;

61.2 an affidavit:

61.2.1 explaining the approval of the 3000 requests from various government departments for early retirement on full benefits between 12 August 2005 and 12 August 2010; and

61.2.2 giving an explanation as to whether the GEPF approves requests from government departments for early retirement.

62. The *subpoena* is an indictment of the prosecutorial process leading to the Charges. It is also clear that the NPA never had sufficient evidence to take the momentous decision to prefer charges against the accused. 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. This is particularly so where this evidence is referenced in the document on which the prosecution is based - ie, the Memorandum. The Memorandum is specifically referenced in charge 1 of the Charges. The prosecuting authorities were thus expressly directed to, and must have been aware of, the existence of such potentially exculpatory evidence.

63. This evidence was not sought, much less considered. The decision to prosecute thus failed to consider the actual evidence pertinent to the charge - indeed, it appears as if the Prosecutors elected to ignore any facts which had the potential to corroborate the lawfulness of the conduct in question. This

confirms the substantive irrationality of the decision to prosecute, and also reinforces the submission that the Charges were a gross abuse of public power, in breach of the constitutional mandate of the NPA.

64. That the prosecuting authorities were only then, days after the announcement of the Charges, calling for the evidence and considering the applicable laws, reinforces the unlawfulness of the Charges and the abusive and precipitous manner in which they were pressed.

The decision to withdraw and press conference

65. On the morning of 31 October 2016 at approximately 10:25 am, Mr Abrahams informed the applicants' attorneys that he was withdrawing the Charges. It is understood by the applicants that the accused also received such notification.

66. Minutes later, at approximately 10.30am, Mr Abrahams held a press conference where he would announce to the public that the Charges had been withdrawn ("**the 31 October press conference**"). The relevant excerpts of a transcript of the 31 October press conference are attached as "**FA9**". The full transcript will be made available on request).

67. Before announcing the actual withdrawal of the Charges, however, Mr Abrahams spent a great deal of time attempting to distance himself from the decision to prosecute: He alleged that there had been general public misconception of the NDPP's role, that he did not institute the decision to prosecute in this matter, that he had acted only as a spokesperson at the 11 October press conference, that he had not reviewed the evidence himself before announcing the decision to prosecute on 11 October 2016 and that he only become involved in the decision after the conference when called on to

review the Charges. He also attempted to paint the process as one which happens on a regular basis.

68. Mr Abrahams engaged in another long legal exposé with respect to the interpretation of various provisions and continued to suggest that Mr Pillay's early retirement had been suspicious and that the early retirement *"did not advance SARS' business interests".* These assertions, however, had nothing to do with the criminality of the conduct of the charged individuals with respect to the Charges. The assertions made by Mr Abrahams at this stage were thus irrelevant and seemingly made simply in an attempt to preserve (or manufacture) a cloud of suspicion over the accused, despite the dropping of the Charges. As he had done at the 11 October press conference, Mr Abrahams continued to abuse his position as NDPP to malign and cast aspersions on the accused, despite the fact that the press conference had been called by him to withdraw the Charges.

69. Mr Abrahams then turned to the relevant information. Mr Abrahams alleged that the NPA had not seen a memorandum to the then Commissioner of SARS, Mr Magashula, from SARS Legal & Policy Division's Mr Vlok Symington dated 17 March 2009 (a document which was attached to the applicant's 14 October 2016 letter, which is in bundle "**FA6**") ("**the Symington memorandum**"). This document was alleged by Mr Abrahams to be the key document which Mr Abrahams relied on to withdraw the Charges.

70. But the Symington memorandum was not the only reason why the Charges were unsustainable. They were unsupportable from the outset. Mr Abrahams and the NPA at no stage had any evidence of fraudulent or furtive intention by any of the accused. There was also no evidence of a fraudulent misrepresentation or a *concretatio* on the part of Mr Gordhan at all.

Moreover, there was nothing unlawful about any of the accuseds' conduct in this matter, as set forth in the 14 October 2016 letter. The Symington memorandum thus stated what would already have been evident to any rational, conscientious prosecutor, with integrity. Indeed, if the Symington memorandum was so pivotal, there would clearly have been no need to issue the subpoena. What Mr Abrahams' conduct after 14 October 2016 reveals is that he was actively seeking to bolster the feeble case against the accused through his further enquiries. Moreover, it is not clear why the Symington memorandum would have been of any consequence in relation to the Charges pertaining to the renewal of Mr Pillay's employment agreement in 2014.

71. Mr Abrahams announced the withdrawal of the Charges at the 31 October press conference. He accordingly withdrew the Charges.

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

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

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

72.3 how the NPA made as fundamental an error as issuing charges where critical elements, such as *animus* (and in the case of Mr Gordhan, a

fraudulent misrepresentation or a *concretatio*) clearly could never be established. This is particularly so where charges are preferred against the then sitting Minister of Finance, against a backdrop where allegations of a battle to "capture" National Treasury and remove the Minister as a perceived impediment are rife. These factors, combined with the political and economic sensitivities of the matter, necessitated that great care was taken to ensure the Charges were sustainable and credible;

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

72.5 on what basis Mr Abrahams can allege that the matter could easily have been clarified, without the need for charges, had there been *"proper engagement and co-operation"* between the DPCI and the accused (particularly where the NPA, and not the DPCI, makes the decision to prosecute). This is also belied by the fact that the NPA reneged on an undertaking to consult the accused before the charges were announced at the 11 October press conference; and

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

73. After the official statement, a question and answer session was held with the media. During this session, and when asked why he had not reviewed the Charges before he decided to announce them, Mr Abrahams claimed

(misunderstanding, alternatively misrepresenting the law) that he could not, *mero motu,* intervene in a decision to prosecute taken by Dr Pretorius and Mr Mzinyathi unless he was called on to review. He alleged that he had called the 11 October press conference, not because he had taken the decision on the Charges but because he was mindful that the decision was of great public interest, and, as the head of NPA, it was incumbent upon the NDPP to take the public into his confidence and address "*why*" such a decision to prosecute had been made.

74. Mr Abrahams' justification for apparently not applying his mind to the Charges before the press conference is, however, self-contradictory. If his intention was to address "*why*", this implies that Mr Abrahams intended to convey a substantive understanding of the basis of the Charges to the public.

75. To do so, he first had to understand these charges himself. If, as head of the NPA, he wishes to present these charges as being good in law to the public, and taking account of the intense public interest, he must have satisfied himself as to their credibility and evidential basis. If he in fact did this, then it is clear that he is incompetent. On the other hand, had he failed to do this, it is clear that he was grossly reckless.

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

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

78. Finally, it appeared that Mr Abrahams had little or no appreciation of the magnitude of the questions posed as to the NPA's independence, ability and conscientiousness arising out of this matter, and refused to offer any apology.

79. At the 11 October press conference, Mr Abrahams, as NDPP, stated that the decision to prefer the Charges was "*made within the confines of the rule of law and the Constitution*". There can be no doubt that he adopted the decision to prosecute, represented it as being lawful, and conveyed to the world that it was a credible prosecution, supported by evidence. This was not communicated as the view of another, but as his own view. Mr Abrahams is not a mere spokesperson for his juniors; he is the most senior prosecutor in the Republic and his statements necessarily bear his *imprimatur.*

80. Just days after the 11 October press conference, he reversed this position, attempting to distance himself from the Charges, which he then ultimately

announced were not credible, were not supported by evidence and never had been. It does not credit the NDPP first to align himself, publicly and unequivocally, with the legitimacy of the Charges, only then to try remain aloof from the decision to prosecute, representing that, in fact, he had nothing to do with this decision and his role was limited to an *ex post facto* review role.

Aftermath and further comments and explanations by Mr Abrahams

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

82. The mere fact that the NDPP would see no issue in attending at the headquarters of a political party, the day before preferring charges against a perceived thorn in said party's leader's side, is remarkable. Of course, the NDPP must be seen to be wholly independent - it is thus never open to him or her to attend at the headquarters of any political party, behind closed doors, for clandestine meetings (quite apart from the unique facts of this matter, where there was a heightened duty to avoid such a meeting).

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

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

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

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

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

84.4 explained that, in his view, the Priority Crimes Litigation Unit ("**PCLU**") was the correct unit to refer the Charges to as the PCLU dealt with "*Foreign bribery matters, corruption, fraud, financial irregularities*" (it is disturbing, and speaks to incompetence, that Mr Abrahams is not aware that the PCLU does not deal with any of these matters, but is in fact mandated to deal with the crime of genocide, crimes against humanity, war crimes, high treason, sedition, terrorism, sabotage and crimes relating to foreign military assistance; see the mandate of the PCLU annexed hereto marked "**FA10**") He referred to the SARS 'rogue' unit in particular as it "*impacts on the security of the country*" (despite the fact the SARS 'rogue' unit no longer exists and thus could not possibly pose a threat to the Republic);

84.5 admits that he informed the Minister of Justice prior to the laying of charges against Mr Gordhan that the Charges would be laid, and that this information was communicated to the President. Mr Abrahams denies, however, that the Charges were discussed at the Luthuli House

meeting. Instead, Mr Abrahams claims that the meeting was of the Justice, Crime Prevention and Security Cluster; that the Minister of State Security was serving as the Acting Minister of Police; and that the Minister of Social Development was serving as the Acting Minister of Defence. I note that there appears to be no gazetted record of these acting appointments, and I invite the respondents to provide any evidence that such acting appointments were in fact made in writing in answer. The meeting, according to Mr Abrahams, only concerned the recent violence on the campuses of South African universities. Despite their centrality to the issue in question, it is noteworthy that the Minister of Higher Education and indeed Mr Gordhan, who was the Minister of Finance at the time, were not invited to the meeting;

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

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

84.8 in response to a question whether he is incompetent, states simply that *"my career speaks for itself there is nobody out there that can call me incompetent. I would not have the long list of successes had I been incompetent. Certainly, nobody that is incompetent can achieve what I have achieved in my career."* What that answer reveals is a failure to appreciate is that mere elevation to a position does not render a person fit and proper for that position. This is why provisions such as section

12(6) of the NPA Act exist, so that unsuitable individuals like Mr Abrahams may be removed from their offices. Mr Abrahams cannot rely on his historic appointments to justify his continued tenure as NDPP. He must explain why, in response to this affidavit in the face of overwhelming evidence to the contrary indicated herein, he is in fact fit and proper for the position. In any event, if Mr Abrahams is not incompetent, then he must be consciously reckless or dishonest: both disqualify him from his office;

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

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

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

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

87. It is also worth noting that the Chairperson noted that, at the last meeting of the committee, Mr Abrahams had objected to the presence of opposition Member of Parliament Ms Glynnis Breytenbach, MP as Ms Breytenbach had

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

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

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

88.2 he indicated that he thought (he seemed unclear on this aspect) that Mr Mzinyathi had given his concurrence in writing, and he offered to make that document available in a court of law (he is invited to do so in this application);

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

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

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

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

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

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

Mr Abrahams' impropriety with respect to Ms Jiba

89. There is a further ground for an enquiry into Mr Abrahams' fitness for office which is factually unrelated to the Charges, but which further shows that Mr Abrahams is not fit and proper for the office of NDPP, particularly in that he is prone to partiality. I refer, in this respect, to his recent handling of another high profile matter.

90. The matter in question concerns the now suspended Deputy National Director of Public Prosecution Nomgcobo Jiba ("**Ms Jiba**"). Ms Jiba was accused, in a summons delivered to her on 24 March 2015, of two counts of fraud and one of perjury. These charges arose from her involvement in a case against former KwaZulu-Natal provincial head of the DPCI, Maj-Gen Johan Booysen. In a Durban High Court ruling penned by the Honourable Mr Justice Gorven *(Booysen v Acting National Director of Public Prosecutions and Others* [2014] 2 All SA 391 (KZD), "**the *Booysen* case**"), the charges brought against Booysen were set aside. Importantly, the court in the *Booysen* case strongly implied that Ms Jiba had misled the Court (see para [34]). These findings were made in judgment of a High Court and are an undeniable basis for, at the very least, a *prima facie* case against Ms Jiba in respect of fraud and perjury.

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

92. Subsequently, this Court, in the matter of *the General Council of the Bar South Africa v Jiba and Others* [2016] ZAGPPHC 833 (15 September 2016), struck Ms Jiba off the roll of advocates on the basis of, *inter alia*, her dishonesty and other unlawful conduct in the case of, *inter alia*, *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP). Following that judgment, on 19 September 2016, the applicants wrote to Mr Abrahams to request the immediate reinstatement of the charges against Ms Jiba (the letter is annexed marked "**FA11**"). Mr Abrahams has, to date, failed to act in this respect.

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

94. The Jiba matter furthers the perception that Mr Abrahams is incompetent or prone to partiality. Any perception of independence is diluted when he chooses to prefer charges which lack any substance, and cannot meet even basic jurisdictional criteria, over charges against his deputy, which were supported by judicial findings. At best for him, he appears entirely incapable of assessing whether a charge is good in law and must be proceeded with.

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

Urgent application by the applicants and prelude to this application

96. In light of the conduct of the Prosecutors in respect of the Charges, and the overwhelming evidence such conduct provides of their unfitness and impropriety, the applicants wrote to the President on 1 November 2016 (this letter is attached, without enclosures, but with the covering emails, marked annex "**FA12**"). In this letter, the applicants called on the President to exercise his powers under section 12(6)(a) to suspend the Prosecutors from their offices and to hold enquiries into their fitness and propriety for those offices. To avoid prolixity, I do not attach the enclosures to the letter. These will, however, be made available should this be required.

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

98. The letter also called on the Prosecutors to resign so as not to further harm the Republic's law enforcement institutions.

99. Finally, the letter called on the President to suspend the Prosecutors and institute enquiries into their fitness and propriety.

100. On 7 November 2016, the President indicated that he would not be making a decision as requested at any point in the near future (letter annexed marked "**FA13**"), and instead sought an extension until 21 November 2016 to make the decision whether to suspend the Prosecutors and institute the enquiries.

101. It was the applicants' view that, in light of the public importance of the matter, and the cloud of impropriety and unfitness for office created by the conduct of

the Prosecutors in the bringing of the charges, that the President's delay was inappropriate in the circumstances. Accordingly, the applicants launched an urgent application in this Honourable Court to review and set aside the President's failures, at that time, to make the President's Decisions on 9 November 2016 ("**the Urgent Application**").

102. On 14 November 2016, almost a week after the launch of the Urgent Application, and two weeks after the applicant' first letter requesting that he take action against the Prosecutors, the President sent letters to the Prosecutors (letters attached marked "**FA14**") requesting reasons as to why they should not be suspended from their respective offices at the NPA pending enquiries into their respective fitness for office ("**the Representations**"). The President gave the Prosecutors until 28 November 2016 to respond. It was accordingly clear that the President would not, as promised, deliver his decision on 21 November 2016.

103. The application was heard on 22 November 2016, but was dismissed for lack of urgency. I will not now go into all that was said by the Respondents in that application (largely as the Respondents focused their arguments on urgency, which will not be relevant going forward), but I note that, in his answering affidavit, the President made it clear that he considered, on the facts before him even at that stage, that there was insufficient evidence to justify an enquiry under section 12(6) of the NPA Act (see paragraphs 7 to 8 of the President's answering affidavit in case number 87643/2016; excerpt attached as annex "**FA15**"). This statement was made even before the President received the Representations.

104. On 7 December 2016, in a letter to the President (letter attached marked "**FA16**"), the applicants requested that the President:

104.1 confirm that the Representations had been received;

104.2 make the Representations available to the applicant; and

104.3 indicate when the President's Decisions would be made.

105. On 15 December 2016, in a letter dated 13 December 2016 (attached marked "**FA17**") the State Attorney replied to this letter on behalf of the President, confirming that the Representations had been received. The President acknowledged, through the State Attorney, that there were "*serious allegations*" levelled against the Prosecutors, that "*the matter is both urgent and of public importance*". The President did not, however, make the Representations available to the applicant, nor did he indicate when the President's Decisions would be made.

106. The applicants followed up with the President on 3 January 2017 (letter attached marked "**FA18**") repeating the enquiries at 104.2 and 104.3 above. When no response was received by 21 February 2017, another follow up letter was sent to the President (letter attached marked "**FA19**").

107. On 3 March 2017, the President responded to the applicants' 21 February 2017 letter with his Decisions (letter attached marked "**FA20**"). In this letter, the President communicated that it was not his task to determine whether the Prosecutors are guilty of misconduct or are not fit and proper to hold office, but "*to establish whether, prima facie, there is evidence of misconduct or lack of fitness and propriety to hold office on the part of [the Prosecutors]*". He then communicated the President's Decisions and gave the following reasons therefor:

107.1 "*the President could not find substantiation for the claim that their conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that any one of them is no longer fit and proper to hold office*";

107.2 "*The President has also considered the career records of [the Prosecutors] both qualifications and experience have to date of their decision to charge and review the charges against Minister Gordhan, Mr Pillay and Mr Magashula, stood above reproach*"; and

107.3 "*The President is of the view that there is no prima facie evidence pointing to the conduct of [the Prosecutors] constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) of the National Prosecuting Authority Act.*"

108. The President, yet again, failed to address the applicants' request that the President make the Representations available.

109. On 8 March 2017, the applicants dispatched a final letter to the President (attached marked "**FA21**"). In that letter, the applicants sought confirmation that the reasons at 107.1 to 107.3 above were the full reasons for the President's Decisions and requested that any further reasons be made available by 20 March 2017. The applicants, once again, also requested that the Representations be made available, together with all other information and documentation relied on to make the President's Decisions.

110. On 6 April 2017, the applicants received a letter from the state attorney on behalf of the President dated 3 April 2017. In this letter, the President indicated that his reasons for the decision were those quoted from the 3 March 2017 letter at 107.3 above. In purported amplification of this reason,

the President addressed, in *ad paragraph* style, the concerns raised by the applicants in their 1 November 2016 letter. In respect of each such concern, however, the President merely stated, repetitively, that there was "*no factual evidence*", no "*facts*", "*no specifics*", "*no particularity*", no "*information*", no "*evidence*" to support any of the concerns raised by the applicant and thus the President could not form a *prima facie* view of misconduct on the part of the Prosecutors (or some variation of justification). The President did not deal substantively with any of the bases for misconduct and lack of fitness and propriety made by the applicants. The President also alleged that suspending the Prosecutors would "*under[mine] the constitutional independence of the NPA and its officials*".

111. Attached to this letter were the Representations made by the Prosecutors. The Representations consist of two documents:

111.1 a letter drafted by Mr Abrahams, purportedly on behalf of all three Prosecutors ("**the Abrahams Representations**"); and

111.2 a letter drafted by Mr Mzinyathi, seemingly drafted to amplifiy the Abrahams Representations ("**the Mzinyathi Representations**").

112. Dr Pretorius did not submit a separate representation as far as the applicants are aware.

113. The Abrahams Representations are lengthy and traverse extensive tracts of irrelevant material. Be that as it may, I submit that they do not in any way go to exculpate the Prosecutors and indeed mostly goes to confirm that the key facts canvassed above, and which constitute much of the *prima facie* evidence justifying the institution of the enquiries and suspensions, are common cause. I note that Mr Abrahams, on behalf of the Prosecutors:

113.1 admits that "*the Rogue Unit*" investigations are still pending, and while Mr Abrahams has directed the investigation into the matter be expedited, no decision has been made as to charges (para 7);

113.2 claims that "*it was proper to infer from the facts intent to act unlawfully*" and that it was only after representations from the accuseds that the Prosecutors were of the view that "*it would be difficult to prove intent beyond a reasonable doubt*" (para 16);

113.3 claims that a Mr Sello Maema, a Deputy Director of Public Prosecutions in the NPA, is responsible for "*providing guidance*" for the investigation concerning "*the Rogue Unit*" briefed Dr Pretorius and Mr Mzinyathi, and it was on the basis of this briefing, *inter alia*, that the Charges were preferred (para 17);

113.4 claims that the Symington memorandum was first brought to the Prosecutor's attention in the applicants' 14 October 2016 letter. It was on the basis of this memorandum that Mr Abrahams felt that it would be difficult to prove intent. He implies that, despite the Symington memorandum, he remained confident that all other elements of the crime could have been proven (para 21). He does not indicate how the misrepresentations and unlawfulness elements were present with respect to Mr Gordhan;

113.5 maintains that, at the time the Charges were preferred, it was "*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" (para 22). He does not indicate what evidence the NPA had for a fraudulent intention at the time the Charges were preferred.

113.6 admits that the "*charges were not a model of clarity*" (para 34). With respect, it is not acceptable for the Prosecutors to bring such serious charges against the accused without clarity with respect to the bases of these charges;

113.7 suggests that the charges of theft were brought only because "*it is common practice that the charge of theft is always preferred as an alternative to a charge of fraud*" (para 34). It is submitted that Mr Abrahams thus implicitly admits that the Prosecutors did not apply their mind to the charges of theft but simply applied them as it was "*common practice*" to do so;

113.8 indicates that it was Dr Pretorius, in consultation with Mr Mzinyathi, who preferred the Charges and that Mr Abrahams "*agreed with the decision*" (para 36);

113.9 claims that it would be "*perverse*" not to engage in further investigations during his review of the Charges (para 53). It is not clear on what basis, and for what reason (other than to supplement a defective docket), Mr Abrahams could lawfully investigate when he is made aware that the docket has insufficient evidence to sustain the Charges brought against the accuseds;

113.10 claims that the *General Council of the Bar of South Africa v Nomcgobo Jiba & Others* 2016 (2) SA 122 ("***GCB***") "*exonerated*" Ms Jiba. The *GCB* judgment did anything but exonerate Ms Jiba: it found that she had "*ceased to be a fit and proper person to remain on the roll of advocates*" (para [138] of *GCB*] and it was ordered that she be struck from the roll of advocates accordingly (para 69);

113.11 attempts to rely on prosecution verdict statistics to prove that he was not incompetent for, on his version, agreeing with Dr Pretorius and Mr Mzinyathi when they preferred the Charges (paras 81 - 84). These statistics are irrelevant. They have nothing to do with the incompetence shown by the Prosecutors in preferring insupportable charges, or the lack of integrity shown by Mr Abrahams by defaming the accuseds with respect to, among other things, the "*Rogue unit*" charges, which charges are even now, yet to be brought;

113.12 claims that the effect of preferring charges against a sitting Minister of Finance would be "*entirely speculative*" (para 86). It is obvious that the preferring of charges against a sitting Minister of Finance would send markets into a tail spin. In any case, speculation was not required: this is precisely what happened after the 11 October 2016 press conference;

113.13 claims that the applicants' interest in seeking an enquiry in respect of the Prosecutors is purely to prevent the future preferment of charges against Mr Gordhan as Minister of Finance (para 88). Mr Gordhan is no longer the sitting Minister of Finance.

114. It is also noteworthy as to what the Abrahams Representations does not cover:

114.1 it does not provide answers to the central questions posed at paragraph 72 above; and

114.2 it does not justify the unlawful and inappropriate remarks made by Mr Abrahams with respect to the "*Rogue Unit*" charges, which charges have still not been brought against the accuseds, despite Mr Abrahams

spending a good portion of the 11 October press conference, and even portions of the 31 October press conference, on discussing the apparent unlawfulness of the conduct of Messrs Gordhan, Pillay and Magashula.

115. The Mzinyathi Representations add nothing of relevance or substance to the Abrahams Representations. The Mzinyathi Representations are particularly short and serve, in relevant part, only to confirm aspects of the version of Mr Abrahams.

116. The President's position is thus that there was "*no evidence*" to form even a *prima facie* view of misconduct or a lack of fitness and propriety. This is despite the patently bad charges preferred by the Prosecutors, and the inappropriate and unlawful approach of Mr Abrahams to the 11 and 31 October press conferences. Accordingly, the applicants have no choice but to approach this court to compel the President, in light of the wealth of *prima facie* evidence against the Prosecutors, to institute enquiries under section 12(6) of the NPA Act and suspend them pending those enquires.

THE UNFITNESS AND IMPROPRIETY FOR OFFICE OF THE PROSECUTORS

Mr Abrahams

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

118. Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct, as set out above. He has, *inter alia,* improperly violated the rights of individuals not even accused of crimes, by pronouncing to the world of their unlawful conduct; acted recklessly and in a manner which amounted to gross abuse of public power in permitting the Charges to have been preferred; delivered contradictory narratives and versions to Parliament, the Republic and the public; acted in a manner which casts serious aspersions on his independence; displayed a lack of understanding of the law and appears more interested in self-preservation than serving the interests of the Republic.

119. It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a *bona fide* blunder, has brought the NPA into disrepute, continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' present ability and his future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm should he not be suspended. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.

120. Moreover, there can be no suggestion of any harm to the State or the NPA were Mr Abrahams to be suspended pending a disciplinary enquiry. It cannot be suggested that no other individual in the Republic has the skillset and appetite to discharge the functions of the NDPP in the interim.

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

122. The fact of the contradictions in his multiple versions should be sufficient to warrant a suspension on its own, and an enquiry into his propriety for office is necessitated thereby. The failings highlighted above, moreover, far exceed mere contradictions in public statements.

123. Mr Abrahams is not a fit and proper person to continue to occupy the position of NDPP and should be suspended and disciplined.

JP Pretorius SC and S Mzinyathi

124. It is plain that the prosecution of the Charges was pursued either as gross abuse of public power or in a reckless and incompetent fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the Charges came to be publically criticised, and despite electing to announce the Charges personally at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr Pretorius and Mr Mzinyathi (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).

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

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

127. According to the 31 October press conference, Dr Pretorius and Mr Mzinyathi failed to take account, *inter alia,* of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable, particularly in a matter with such drastic national consequences. Dr Pretorius and Mr Mzinyathi's failures, at best, show an

unacceptable lack of competence; and at worst, betray a gross abuse of power and a lack of integrity. The seniority of the Prosecutors augments the case for a gross abuse of public power.

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

129. Similarly to Mr Abrahams, as explained above, Dr Pretorius and Mr Mzinyathi's handling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in the institution that they be suspended and an enquiry into their continued fitness to hold office as prosecutors be commenced without further delay.

130. It is thus plain that Dr Pretorius and Mr Mzinyathi misconducted themselves and lack the conscientiousness (and/or competence) and integrity to continue to serve their official functions.

THE PRESIDENT'S DECISIONS

The legal framework

131. Section 179 of the Constitution provides for a single prosecuting authority that has the power to institute criminal proceedings and to carry out all incidental functions necessary thereto on behalf of the State. Section 179 further provides that Directors of Public Prosecutions will be appointed in

terms of an Act of Parliament. The NPA Act was enacted in order to give effect to the provisions of the Constitution.

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

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

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

134. Section 14(3) of the NPA Act (which applies to persons in the position of Mr Mzinyathi and Dr Pretorius) makes the provisions of section 12(6) applicable to a Director, including a Special or Acting Director of Public Prosecutions.

135. It must be recalled that neither this Court nor the President is being asked to run the enquiry envisaged in section 12(6) of the NPA Act. The President must merely initiate the enquiry on the basis of the *prima facie* evidence of

the unfitness and impropriety of the Prosecutors for office. There is thus no need for this Court, or the President, to consider whether the Prosecutors are, in fact, fit to hold their positions. This is the role of the enquiry instituted under section 12(6) of the NPA Act.

136. Accordingly, the narrow issues before this Court are:

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

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

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

136.3.1 enquiries into the fitness and propriety for office of the NPA officers,

136.3.2 the provisional suspension of these NPA officers pending the outcome of such enquiries;

137. If the answers to the above questions are in the affirmative, then the President's Decisions not to institute the enquiries are unlawful and fall to be set aside.

138. It is important to recall that this is not a conclusive and final test into the fitness and propriety of the Prosecutors. Such a process of enquiry and

suspension is a disciplinary process with interim measures to prevent, among other things, the public's trust in the NPA from being eroded further. Such a decision is not, in itself, punitive nor final in respect of any of the Prosecutors' rights.

139. Accordingly, in this context, the applicants submit that the Representations will only justify a decision not to institute the enquiries or the suspensions where they show unequivocally that there is no *prima facie* evidence of their unfitness and impropriety for office. Where the Representations fail to do this, then *prima facie* evidence of misconduct or a lack of fitness and propriety remains, and there is a duty on the President to initiate inquiries under section 12(6) of the NPA Act, regardless of whether the President may consider it more likely than not that the Prosecutors are fit and proper for the offices they hold. The balance of probabilities test should more appropriately have been made at the enquiry stage; and the fact that they were made prior thereto does not absolve the President of the duty to initiate inquiries where the requirements of section 12(6) are met, as they clearly are in this matter. In any event, a decision that the Prosecutors are fit and proper cannot be made on the basis of the Representations alone.

140. It is not for the NPA officers to prove on balance that they are fit and proper for office <u>prior</u> to the calling of an enquiry - this would render the enquiry process potentially nugatory, as the President would first be required to form a view on the merits (as opposed to a view on the need for an enquiry) before the enquiry then formed a view on the self-same merits. This double-tiered process is not what section 12(6) of the NPA Act envisages. In any event, it is precisely to ensure the independence of the NPA and its officials that the merits of any disciplinary action were not left to a member of the

Executive, but are vested in an independent enquiry, uninfluenced by political considerations.

141. In this regard, it is worth emphasising that:

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

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

141.3 The requirement to be "*fit and proper*" is not exhaustively defined or described in legislation and it is left to the subjective interpretation of, and application by, seniors in the profession and ultimately the court.[2] The NPA Act does set out a certain non-exhaustive list of factors which should be considered when deciding on fitness and propriety, including experience, conscientiousness and integrity to be entrusted with the high office in question. Not only are competence and independence an integral part of conscientiousness (and integrity), but they are also relevant factors in their own right.

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

142. Though integrity is an important and multifaceted aspect of fitness and propriety, it does not stand alone, and it is clear there are a number of qualities that a lawyer, and indeed a prosecutor, should readily possess. I am advised that in *The General Council of the Bar v Nomgcobo Jiba*[3] it was stated that the minimum qualities that a lawyer should possess include, *inter alia*, impeccable honesty, dignity, respect for legal order and a sense of fairness. Furthermore, the Court noted that it was relevant to the "*fit and proper*" person requirement, in respect of prosecutors, to consider the directives of the Code of Conduct for Members of the National Prosecuting Authority ("**the Code of Conduct**"), which was published by the then NDPP.[4]

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

> ***A Professional Conduct***
>
> *Prosecutors must-*
>
> *(c) protect the public interest;*
>
> *(d) strive to be and to be seen to be consistent, independent and impartial;*
>
> *(f) strive to be well-informed and to keep abreast of relevant legal developments…*
>
> ***B Independence***

[3] Ibid.

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

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

C Impartiality

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

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

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

(g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;

D Role in administration of justice

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

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

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

2. Prosecutors should, furthermore-

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

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

Grounds of unlawfulness and/or review

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

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

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

147. I submit that in the face of the *prima facie* evidence presented to him, the President is in fact obliged to institute the enquiries. No other lawful options are open to the President in these circumstances.

148. I submit in any case, however, that the even if any substantive discretion is afforded to the President, no rational decision maker can come to a conclusion in the circumstances, other than the conclusion to institute the enquiries and suspensions.

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

150. The purpose of the conferral of the power on the President to discipline persons in the position of the second to fourth respondents was to ensure that the office of the NDPP, DPPs and Special Directors of Public Prosecutions remain inviolable and the persons appointed to such office are sufficiently conscientious and possess the integrity required to be entrusted with the responsibilities of the office. Yet, despite all of this, the President has stated unequivocally that he believes there is "*no evidence*" whatsoever of misconduct, fitness or impropriety whatsoever and that the Prosecutors were "*beyond reproach*".

151. Furthermore, the reasons given at paragraphs 155 to 165 below, in the context of suspension of the Prosecutors, apply equally to the decisions not

to institute the enquiries: if a prosecutor is *prima facie* a threat to the integrity of the NPA and rights of the public that he warrants suspension, he will obviously also have a *prima facie* case to answer at an enquiry.

152. In light of the evidence of incompetence, impropriety, gross abuse of power and a patent lack integrity on the part of the Prosecutors, and the threat that these Prosecutors pose to the rights of the public and administration of justice, the President's Decisions not even to refer the matter to further enquiry, is plainly unconstitutional.

153. It is indeed clear that the President acted unlawfully in that he made the decision:

153.1 without due regard to the applicants' representations and the plethora of publically available *prima facie* evidence of misconduct and lack of fitness and propriety on the part of the Prosecutors, which he alleges does not exist;

153.2 with undue deference and adherence to the content of the Representations and in any case do not adequately answer the complaints against the Prosecutors, nor do they refute the *prima facie* evidence against the Prosecutors, and in some instances do not answer the complaints at all;

153.3 in a manner which was not rationally connected to the evidence before the President; and

153.4 which was so unreasonable in the circumstances, that no reasonable person would have likewise come to that decision.

154. In light of the power granted to the President as set forth above, and in the face of the conduct of the Prosecutors in respect of the Charges, there is a duty on the President to exercise such power to appoint enquiries in respect of the Prosecutors and forthwith to institute disciplinary proceedings against them. This, the President has singularly failed to do. Accordingly it is submitted that the President's decisions not to institute the disciplinary proceedings were unlawful and fall to be set aside.

The decision not to suspend the Prosecutors in the circumstances is unlawful and is, in any case, irrational

155. The Prosecutors wield enormous public power and occupy high level positions within the NPA. Such offices cannot be entrusted to individuals who have very publically grossly abused, alternatively used their power with recklessness and incompetence, and with shattering effects on the economy. There can be no clearer case for the unfitness and impropriety of individuals for their offices.

156. The NPA is a constitutionally mandated organ which is indispensable to the protection of our constitutional democracy. The need to insulate the NPA from political and other interference, and to ensure its officers (particularly its most senior officer) are at least adequately competent, is attributable in part to the fact that at the core of its mandate is the requirement to investigate and prosecute all crimes, including high-level and high-profile corruption and other crimes, which often implicate important political figures. The converse of this duty is, likewise, to ensure that this immense power, from which significant consequences may flow for both the public and the individuals involved, is exercised properly, lawfully, and with respect to the rights of individuals involved.

157. In view of their conduct, and the fact that the test for being fit and proper is an objective one, the Prosecutors ought to have recognised the enormity of their failures and ought to have resigned of their own accord. They were given that opportunity, but have chosen to remain in office. Given their refusal to do their duty, there is a clear call for enquiries to be instituted into the conduct of the Prosecutors. Moreover, they should be suspended pending such enquiries. The incontrovertible evidence illustrates that they have misconducted themselves and lack the fitness and propriety required of their offices. The President has, however, in declining to suspend the Prosecutors pending an enquiry, simply turned a blind eye to widespread public outcry and the damage the Prosecutors have done to the perceived integrity (and potentially to the actual integrity) of the NPA.

158. Each day that the Prosecutors are allowed to occupy their respective offices under this cloud of uncertainty and impropriety potentially irreparably prejudices the work of the NPA and does damage to the public perception of and confidence in this constitutionally mandated institution. There is no need to speculate about the risk that these officials pose. That risk has already been confirmed by their conduct in relation to the charges recklessly preferred and then withdrawn against Mr Gordhan and Messrs Pillay and Mageshula (which resulted in inestimable damage to our economy, our country's reputation and the rights of those accused), and their steadfast refusal - through the NDPP - to acknowledge any wrong or accept any responsibility.

159. It also poses an unacceptable risk to the work of the NPA. This is particularly so when the second respondent, unrepentant with respect to his conduct to

date, has threatened that new charges may yet be around the corner for Mr Gordhan.

160. Given the President's decision not to suspend the Prosecutors, the only recourse available to preserve the sanctity of the office occupied by the Prosecutors (and the institution as a whole), and to protect the Republic from the devastating impact of the misuse of their power, is to approach this Honourable Court for the relief set forth in the notice of motion to which this affidavit is attached.

161. The first respondent has failed his constitutional duty to protect the integrity and independence of and public confidence in one of South Africa's most important corruption and crime fighting institutions and to uphold the rule of law.

162. It is clear the Prosecutors occupy positions at the very heart of the NPA's ability to function effectively to fulfil its constitutional mandate. Indeed, the second respondent has wide and sweeping powers under the NPA Act which can affect almost every aspect of the functioning of that organisation. The Prosecutors make dozens of critical, operational, institutional and financial decisions which may have a substantial bearing on on-going sensitive and high profile investigations and pending cases, the rights and expectations of members of the public, and the very structure and operational integrity of the NPA, which would be difficult or impossible to reverse. They are also a proven severe threat to the economy of the Republic.

163. This is particularly so where it is reported that charges against, *inter alios,* Mr Gordhan, in relation to the SARS rogue unit, are to be brought in the future (see, for example, the media report quoting Mr Abrahams annexed as

"**FA22**"). For the NDPP to oversee the bringing of these charges where he has already preferred, or permitted the preferring, of unsustainable charges against Mr Gordhan, smacks of political partisanship, and further undermines any perception of the independence of the NDPP (and the NPA).

164. It is thus imperative that the offices occupied by the Prosecutors are not again abused, nor unlawfully compromised or impeded. The NPA, the office of the NDPP as well as other high level offices within the NPA must be, and must be perceived to be, independent of executive and political interference and competent to perform their duties. If the fitness and propriety of any office bearers are placed in doubt (in this case there can be no doubt about their unfitness for office), then the integrity of the institution as a whole is compromised and a perception among the public and members of the NPA is created that the NPA is not independent, is not competent and is vulnerable to executive interference or political influence.

165. The importance of an impeccable prosecutorial service which has the capacity, willingness and fortitude to pursue the interests of the Republic above narrow political interests, and the effective prosecution of all crimes, including high level corruption and organised crime, cannot be gainsaid. As our courts have held previously, it is imperative that any threat to the efficacy and operation of a constitutionally mandated institution and any opportunity for political interference in the functioning of such institution must be addressed as a matter of urgency.

166. Accordingly, it is submitted that, on the same grounds as set out at 153 above, the President was under an obligation to suspend the Prosecutors in the circumstances and that he acted unlawfully in failing to suspend them. In any case, the President's decisions not to suspend the Prosecutors pending

enquiries into their fitness and propriety was irrational and unlawful and falls to be set aside.

REMEDY

167. The applicants submit that it would be appropriate for this Honourable Court to substitute the President's Decisions not to institute disciplinary proceedings against the Prosecutors and not to suspend the Prosecutors with an order that enquiries as contemplated under section 12(6) of the NPA Act are instituted against the Prosecutors and that the Prosecutors are suspended pending the outcome of such enquiries.

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

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

170. The applicants contend that this Honourable Court is in as good a position as the President to make a decision to institute disciplinary proceedings against