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

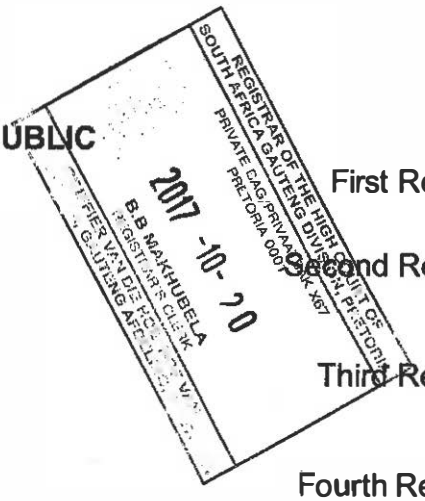
CASE NO: 60970/2017

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



FILING NOTICE

TAKE NOTICE THAT the applicants present the following for service and filing:

1. applicants' amended notice of motion; and

2. applicants' supplementary founding affidavit.

Dated at **PRETORIA** on **19 OCTOBER 2017**

WEBBER WENTZEL
Applicants' Attorneys
90 Rivonia Road
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Ref: V Movshovich / P Dela /
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3012607

C/O HILLS INCORPORATED ATTORNEYS
835 Jan Shoba Street
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0075
Tel: 087 230 7314
Ref: A Engelbrecht

THE REGISTRAR
High Court
PRETORIA

TO: **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
First Respondent
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria
Enq: Mr RJ Sebelemetsa
Ref: 6580/2017/Z64/JB

STATE ATTORNEY
PRIVATE BAG/PRIVAATSAK X91
2017 -10- 19
PRETORIA 0001
STAATSPROKUREUR

SERVICE BY SHERIFF

TO: **SHAUN ABRAHAMS**
Second Respondent
Victoria and Griffiths Mxenge Building
123 Westlake Avenue
Weavind Park
Silverton
Pretoria

SERVICE BY SHERIFF

TO: **THE STATE ATTORNEY**
Third respondent's attorneys
SALU Building
316 Thabo Sehume Street
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Ref: 8530/2016/Z49
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SERVICE BY SHERIFF

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SERVICE BY SHERIFF

TO: **THE NATIONAL PROSECUTING AUTHORITY**
Fifth Respondent
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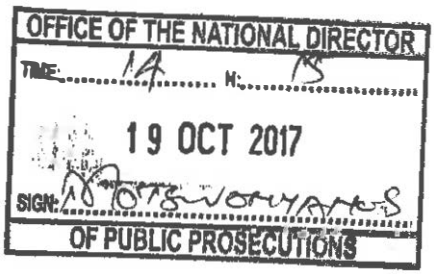

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DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

SUPPLEMENTARY NOTICE OF MOTION

TAKE NOTICE THAT the applicants intend to make application to the above Honorable Court on a date to be determined, for an order in the following terms:

1. the decisions on or about 3 March 2017 by the first respondent not to:

1.1 institute an enquiry, under section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("**NPA Act**"), into the second respondent's fitness to hold the office of the National Director of Public Prosecutions ("**the Abrahams enquiry**");

1.2 provisionally to suspend the second respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Abrahams enquiry,

1.3 to institute an enquiry, under section 12(6)(a) of the NPA Act, into the third respondent's fitness to hold the office of Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit ("**the Pretorius enquiry**");

1.4 provisionally to suspend the third respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Pretorius enquiry,

1.5 to institute an enquiry, under section 12(6)(a) of the NPA Act, into the fourth respondent's fitness to hold the office of Director of Public Prosecutions ("**the Mzinyathi enquiry**");

1.6 provisionally to suspend the sixth respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Mzinyathi enquiry,

are reviewed, alternatively, declared unlawful and set aside;

2. the first respondent is directed to institute the Abrahams enquiry and provisionally to suspend the second respondent from his office pending the finalisation of such enquiry ("**the Abrahams suspension**");

3. *Alternatively* to 2:

3.1 it is declared that the President is unable to make the decision with respect to the Abrahams enquiry and suspension due to a conflict of interest; *alternatively*, a reasonable apprehension of bias;

3.2 the decision on whether to institute the Abrahams enquiry and suspension is referred to the Acting President as contemplated under section 90 of the Constitution;

4. the first respondent is directed to institute the Pretorius enquiry and provisionally to suspend the third respondent from his office pending the finalisation of such enquiry;

5. the first respondent is directed to institute the Mzinyathi enquiry and provisionally to suspend the fourth respondent from his office pending the finalisation of such enquiry;

6. ordering the first respondent to pay the applicants' costs, including the costs of two counsel, jointly and severally, the one paying the others to be absolved, together with any other respondent who opposes the relief sought in this application;

7. granting the applicants further and / or alternative relief.

TAKE NOTICE FURTHER THAT the founding affidavit of **FRANCIS ANTONIE**, together with the annexes thereto will be used in support hereof.

TAKE NOTICE FURTHER that the applicants have appointed Webber Wentzel as their attorneys of record and the address at which they will accept service of notices and other process in these proceedings is care of Hills Incorporated Attorneys at 835 Jan Shoba Street (Duncan), Brooklyn, Pretoria; *alternatively*: dylan.cron@webberwentzel.com.

TAKE NOTICE FURTHER THAT:

1. Under Rule 53(1)(a) of the Uniform Rules of Court, the respondents are called upon to show cause why the aforementioned decisions should not be reviewed and corrected or set aside.

2. Under Rule 53(1)(b) of the Uniform Rules of Court, the first to fourth respondents are required, within 15 days after receipt hereof, to dispatch to the Registrar of this Honourable Court the record of the proceedings sought to be reviewed and set aside (including all plans, correspondence, reports, memoranda, documents, evidence and other information which were before the respondents at the time when the decisions in question were made), together with such reasons as they are by law required to give or desire to make, and to notify the applicants that they have done so.

3. Within 10 days of receipt of the record from the Registrar, the applicants may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement their founding affidavit in terms of Rule 53(4) of the Uniform Rules of Court;

4. If any of the respondents intend to oppose the application, they are required, under Rule 53(5):

   (a) within 15 days after the receipt of this notice of motion or any amendment thereof, to deliver notice to the applicants that they intend to oppose and in such notice to appoint an address within fifteen kilometres of the office of the Registrar at which they will accept notice and service of all process in these proceedings; and

   (b) within 30 days after the expiry of the time referred to in Rule 53(4), to deliver any affidavit they may desire in answer to allegations made by the applicants.

5. If no such notice of intention to oppose is given, application will be made to this Honourable Court for an order in terms of the notice of motion on _____ at 10h00 or so soon thereafter as counsel may be heard.

TAKE NOTICE FURTHER THAT the relevant respondent is required to appoint in the notice of opposition an address referred to in rule 6(5)(b) at

which such respondent will accept notice and service of all documents in these proceedings.

DATED AT ON OCTOBER 2017

_____

WEBBER WENTZEL
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Ref: V Movshovich / P Dela /
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3012607

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THE REGISTRAR
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TO: **THE PRESIDENT OF THE**

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SALU Building
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Enq: Mr RJ Sebelemetsa

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Ref: 8530/2016/Z49
E-mail: eturner@justice.gov.za
Tel: 012 309 1563
Enq: J Meier

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Fourth Respondent
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TO: **THE NATIONAL PROSECUTING AUTHORITY**
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THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

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

2. I was the deponent in the applicants' founding affidavit, dated 31 August 2017 ("**the Founding Affidavit**"). 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. For the purposes of this affidavit, I adopt the definitions used in the Founding Affidavit.

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

INTRODUCTION

6. This supplementary founding affidavit is filed in terms of rule 53(4) of the Uniform Rules of Court. Supplementation is necessary as the applicants had not, until delivery of the record on 28 September 2017 ("**the Record**"), had sight of five documents contained in the Record. It is submitted, as will be shown below, that two of these five documents in particular bolster the applicants' case for review, as well as provide further grounds of review in respect of the President's Decisions.

7. The record contains mostly correspondence between the President and the applicants, as well as the President and the Prosecutors. This correspondence, other than the President's 1 March 2017 letters to the Prosecutors informing them of the President's Decisions ("**the 1 March letters**"), are attached to the Founding Papers.

8. The 1 March letters contain no additional pertinent information and simply confirm to the Prosecutors that it was the President's position that the applicants had not substantiated their complaint against the Prosecutors, that there was no *prima facie* evidence that the Prosecutors had misconducted themselves or were unfit or improper for office, and that accordingly the President would not institute the Suspensions or the Enquiries.

9. The applicants have also seen the Abrahams and Mzinyathi Representations. The applicants requested the Representations of all the Prosecutors in their letter of 14 November 2016, but were only finally provided with the Abrahams and Mzinyathi Representations on 6 April 2017 after numerous letters following up with the President in this respect (see paragraphs 102 - 111 of the Founding Affidavit). The Abrahams and Mzinyathi Representations were discussed at paragraphs 113 to 115 of the Founding Affidavit. These representations appear at pages 7 - 37 and 57 - 78 of the Record respectively and should be taken as attached to the applicants' founding papers for purposes of the relief sought.

10. The President's 6 April 2017 letter, despite purporting to attach all of the representations, did not, however, attach the Representations of Dr Pretorius (**"the Pretorius Representations"**). The applicants assume this was an oversight. The Pretorius Representations were first received by the applicants as part of the Record. The Pretorius Representations, however, contain remarkable admissions on the part of Dr Pretorius which, the applicants' view, confirm not only that there was insufficient evidence to bring the Charges, but also that the Charges had been brought in bad faith. This will be discussed in more detail below.

11. Finally, the applicants had also not seen the undated opinion authored by the President's counsel ("**the Opinion**") until its delivery as part of the Record. It appears to the applicants that the President's reasons for his Decisions, communicated to the applicants on 6 April 2017 ("**the President's Reasons**"; which are summarised at paragraph 110 of the Founding Affidavit), were distilled from the Opinion. The President's reasons echo the Opinion as, at their core, both documents:

11.1 emphasise that instituting the suspensions and enquiries in the circumstances would unconstitutionally undermine the independence of the NPA; and

11.2 repetitively contend that there are no "*facts*", "*evidence*", "*substantiation*" or some variation of this assertion, to show *prima facie* that the Prosecutors misconducted themselves or lack the fitness and propriety for office.

12. As the apparent core basis for the President's Decision, it is thus important to analyse the Opinion. With respect, it is the applicants' submission that the President's counsel erred in a number of crucial respects in the Opinion and the President's reliance on the Opinion fatally taints the President's Decisions. This will be dealt with in more detail below.

13. Supplementation is further necessary in light of certain developments in a highly relevant related matter. This matter in question is that of *Zuma v DA*; *Acting NDPP v DA* (SCA) ("***Zuma v DA***").[1] Judgment in this matter was delivered after the filing of the founding affidavit but its implications are directly relevant

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[1] ZASCA 146 (13 October 2017).

to the present matter. In particular, the judgment in *Zuma v DA* (a) provides further *prima facie* evidence that Mr Abrahams is not fit and proper for the office of the NDPP and has misconducted himself; and (b) indicates that it would be inappropriate and unlawful for President Zuma to make the decision concerning the Abrahams' enquiry and suspension as he is conflicted in this regard. This will be discussed in more detail below.

14. Accordingly, in this supplementary founding affidavit, I analyse (i) the Pretorius Representations; (ii) the Opinion, and make submissions that each of these documents either reinforce the grounds of review set out in the Founding Affidavit or raise new grounds of review; and (iii) discuss the implications for the present matter of the judgment in *Zuma v DA*.

THE PRETORIUS REPRESENTATIONS

15. There are a number of significant admissions made in the Pretorius Representations which bear scrutiny. In this section of the affidavit I focus primarily on these admissions which, I submit, confirm that the Charges were brought without sufficient evidence and in bad faith. I shall then also deal briefly with a number of ancillary issues raised in the Pretorius Representations.

The admissions regarding insufficient evidence regarding Mr Gordhan

16. At paragraph 27 of the Pretorius Representations, the following admissions are made:

> "*Despite the evidence the prosecutors presented, I did question Gordhan's criminal intent. Since the Annexures annexed to of (sic) the Second Retirement Memorandum were not provided, I questioned*

whether Gordhan was not 'duped' by Magashula and Pillay. Deputy Director Sello Maema assured me that Gordhan was the SARS Commissioner for 10 years and that he was approached about the matter before the "final" memorandum was submitted to him. I did see a memorandum that was addressed to Gordhan before he approved the final application. The prosecutor was confident that he could prove the intent, and thus guilt, of Gordhan. I also questioned Deputy Director Jabulani Mlotswa separately and he assured me that he had the firm believe (sic) that there was an unlawful scheme that could not be achieved without Gordhan's participation."

17. It is therefore clear that Dr Pretorius was not, himself, satisfied that there was evidence with respect to Gordhan's supposed fraudulent or furtive intent. Instead, he relied on the assurances and "*firm belie[f]*" of his juniors, Messrs Maema and Mlotswa to justify his "*belie[f], in good faith, that the prosecutors had sufficient evidence regarding the retirement matter*".

18. Dr Pretorius notes that, in his view, Gordhan may have been "*duped*" by Magashula and Pillay and appears to have been concerned that he had not seen the annexes to the "*Second Retirement Memorandum*". Instead of calling for further evidence in this regard (at the very least the annexes to the said memorandum), Dr Pretorius went on the say-so of Messrs Maema and Mlotswa, who gave him no additional evidence, but simply their assurances.

19. It is very concerning that a prosecutor as senior as Dr Pretorius, and in a matter as high profile, and with such massive ramifications for the public, as those charged, and the reputation of the NPA, would decide to lay charges with no evidence of Mr Gordhan's criminal intent and with self-expressed doubts that Mr Gordhan in fact had this intent. The unsubstantiated

assurances of juniors are, it is submitted, insufficient for the bringing of the Charges against Mr Gordhan in the absence of any other evidence.

20. It seems that Dr Pretorius had only one piece of "evidence", in his mind, which potentially "*prove[d]*" that Mr Gordhan had a motive and thus presumably criminal intent. This piece of "evidence" is set out at paragraph 26 of the Pretorius Representations:

> "*From the evidence presented to management that day, I came to the prima facie conclusion that a case could probably be made out that Pillay and Magashula were warned by the experts in the HR department and they had the requisite intent to act unlawfully. Furthermore, Gordhan and Pillay's involvement in the wiretapping matter was sufficient to create a suspicion and prove a possible motive to provide Pillay with an unlawful retirement package. The investigation into the wiretapping is still ongoing, but I believed, in good faith, that the prosecutors had sufficient evidence regarding the retirement matter.*"

21. Similarly at paragraph 33.4 of the Pretorius Representations:

> "*[I]n light of the evidence of the rogue unit under [Mr Gordhan's] watch as commissioner for 10 years I was inter alia satisfied that he had a case to answer.*"

22. It appears, therefore, that Dr Pretorius's only evidence for Mr Gordhan's criminal intent, aside from unsubstantiated assurances from his juniors, was the "*suspicion*" he had of Mr Gordhan arising from the "*wiretapping matter*", that being the so-called SARS rogue unit matter. No charges have ever

been brought against Mr Gordhan in respect of this matter, let alone a conviction.[2]

23. But indeed, even if Mr Gordhan had been convicted of a crime in that matter, this would be completely and utterly irrelevant to the Charges in the present matter. The matters are entirely unrelated but for an identity of some individuals. It is trite law that even previous convictions are generally inadmissible as evidence against an individual (indeed, even when they are this is usually only with respect to sentencing issues), and certainly are not proof of criminal intent in another matter - the fact that an individual committed one crime, does not then automatically render his intent unlawful in all future conduct. Yet this is precisely the approach Dr Pretorius had in this matter, and then armed not with a conviction in another matter, but only with a suspicion (which suspicion has since been confirmed to be based on a flimsy KPMG report which KPMG has itself withdrawn).

24. This evidences Dr Pretorius's incompetence (in that he was, and apparently remains, of the view that suspicion in an unrelated set of facts "*prove[s]*" motive in a second set of facts): in that in the absence of any evidence of Mr Gordhan's criminal intent, Dr Pretorius inferred this intent on the basis of his suspicion of Mr Gordhan in an unrelated matter.

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[2] It is worth noting that the SARS rogue unit matter arose primarily from the findings of a report authored by KPMG South Africa. KPMG has since issued a statement noting that "*it is possible to read [certain] sections… of the 'Executive findings and conclusions' contained in the report in a way which suggests that Pravin Gordhan knew, or ought to have known of the establishment by SARS of an intelligence unit in contravention of the rule of law that was 'rogue' in nature.*

"This was not the intended interpretation of the report. To be clear, the evidence in the documentation provided to KPMG South Africa does not support the interpretation that Mr Gordhan knew, or ought to have known, of the rogue nature of this unit." This statement is annexed marked "**SFA1**".

Accordingly, it is clear that any suspicion of Mr Gordhan with respect to the so-called SARS rogue unit matter is without basis in any evidence.

25. Indeed, it appears that the SARS rogue unit matter (the foundations of which case have now fallen away completely) were, and remain, at the forefront of Dr Pretorius's mind in his approach to this matter. This can be seen in the extensive discussion of this matter in the Pretorius Representations at paragraphs 20 and 21 in particular (in addition to paragraph 26). It is clear that Dr Pretorius, on his own version, considered his suspicions in the ill-fated SARS rogue unit matter as decisive to his decision to institute the Charges.

26. The incompetence evidenced by this approach is concerning in someone as senior and experienced as Dr Pretorius. More importantly, however, it is submitted that it is obvious and unavoidable *prima facie* evidence that Dr Pretorius does not have the requisite competence and integrity for the senior office he holds.

27. The President's Decisions not to institute the Pretorius enquiry and suspension in particular is thus further unlawful in that he either failed to consider this relevant fact, *alternatively*, his Decisions not to institute the Pretorius enquiry and suspension were not rational in the face of what is tantamount to an admission of conscious recklessness, incompetence and improper fettering of the mind.

28. It is further submitted that these admissions are not only relevant to Dr Pretorius. On the Prosecutors' version, Dr Pretorius made the decision to prefer the Charges against the charged persons in consultation with Mr Mzinyathi (I refer to page 50 of the founding affidavit in the Urgent Application in this regard). Likewise, Mr Abrahams has claimed that he was "*satisfied*" prior to the 11 October press conference that there was sufficient evidence to prefer the Charges (I refer to page 36 of the founding affidavit in the Urgent

Application in this regard), which means that he was likewise satisfied that there was also criminal intent.

29. Dr Pretorius has confirmed, as the applicants have always suspected, that there was simply no evidence, beyond suspicion, that Mr Gordhan had any criminal intent. Messrs Abrahams and Mzinyathi have not provided any evidence in this respect either. Accordingly, Messrs Abrahams and Mzinyathi equally showed incompetence by preferring the charges against Mr Gordhan without any evidence of his intent and, while they have not explicitly admitted, like Dr Pretorius has, to an improper closing of the mind in respect of the Charges against Mr Gordhan. This was seemingly based on their suspicions in the SARS rogue unit matter. This is particularly so with respect to Mr Abrahams in light of his extensive commentary on the SARS rogue unit matter when announcing the Charges at the 11 October press conference.

Lack of evidence generally

30. While the case is most stark with respect to Mr Gordhan's criminal intent (or clear lack thereof), in light of Dr Pretorius's unequivocal admissions above, the Pretorius Representations also clearly show that there was altogether insufficient evidence to bring the Charges against any of the charged persons.

31. Among the requirements for fraud is that a fraudulent misrepresentation be made. The Prosecutors framed the Charges such that the fraudulent misrepresentation was made to SARS, Treasury or its staff. Yet it is clear from the record that no such misrepresentation was ever made to officials at SARS, to SARS itself or the Treasury.

32. As is clear from paragraphs 22 and 23, both Mr Magashula and Mr Pillay were entirely open about Mr Pillay's reasons for retirement, which were "*personal*" and included "*to provide for Pillay's children's education*". It is therefore clear that no misrepresentation was made. Mr Gordhan did not misrepresent these facts either.

33. Furthermore, Dr Pretorius relies primarily on the objections of one Ms Visser and one Mr Coetzee (described at paragraphs 23 and 24 of the Pretorius Representations), to show that the charged persons were aware of the unlawfulness of the payment of the penalty by SARS to the GEPF on Mr Pillay's behalf. And yet neither Ms Visser nor Mr Coetzee ever stated that they considered the payment to be unlawful. These individuals stated only that they advised against it, primarily as it would "*set a bad precedent*". This is a matter of policy, not lawfulness – let alone criminality – and the charged persons were never advised that the payment would be unlawful. On the contrary, had Dr Pretorius requested the attachments to the so-called "Second Retirement Memorandum", he would have seen that the charged persons were in fact presented with evidence that such payments were common practice. Had Dr Pretorius investigated the matter conscientiously, as he is required to do, and not relied on the unsubstantiated "*firm belie[f]*" of his juniors, he may also have considered the Symington Memorandum and its advice that the transaction was entirely lawful.

34. But even in the absence of this exculpatory evidence, Dr Pretorius has not referenced a single item of evidence which indicates or even implies the criminal intent of the charged persons. Dr Pretorius instead states that "*At this stage, I was not aware of any financial or legal advice that was obtained*

by Magashula, Pillay or Gordhan which could indicate the lack of knowledge of unlawfulness".

35. This reveals that Dr Pretorius was of the view that it was not for him, as a prosecutor, to establish a *prima facie* case that the accused had the necessary knowledge and criminal intent, but that he should instead be provided with evidence that the charged persons did not have the requisite knowledge and intent. This approach is, obviously, anathema to the constitutional right to the presumption of innocence. It is not for a prosecutor to prefer charges in the absence of exculpatory evidence, but only to prefer charges when there is *prima facie* proof that the accused is guilty thereof.

36. Importantly, none of the Prosecutors has provided any evidence whatsoever that the charged persons had the requisite knowledge of unlawfulness and criminal intent.

37. Finally, it is obvious that neither Magashula nor Gordhan in fact appropriated any funds for themselves. Accordingly, not only did they not have a furtive intention, the requirement of *concretatio* was also absent from the charges of theft against them.

38. Accordingly, the Pretorius Representations make it clear that, even without the exculpatory evidence, particularly the Symington Memorandum, the Prosecutors had no evidence whatsoever that the charged persons had committed the crimes of fraud or theft. Indeed:

38.1 there was no evidence of the requisite criminal intent;

38.2 no fraudulent misrepresentations were ever made;

38.3 the evidence against Messrs Magashula and Gordhan clearly did not establish the requirement of *concretatio* in respect of the theft charges; and

38.4 the Prosecutors instead proceeded with the charges, not on the basis of evidence but on the basis of an absence of exculpatory evidence.

39. The Prosecutors' decision to prefer the Charges despite the absence of these fundamental principles evidences recklessness, particularly for Prosecutors of their seniority and experience. It is also *prima facie* evidence that the Prosecutors are not fit and proper for the senior offices they hold.

40. The President's Decisions not to institute the enquiries and suspensions in particular is unlawful in that he either failed to consider the above relevant fact, *alternatively*, his Decisions not to institute the enquiries and suspensions were not rational in view of the *prima facie* evidence of the Prosecutors' incompetence with respect to fundamental issues of criminal law.

Public Perception

41. At paragraph 7 and 8 of the Pretorius Representations, Dr Pretorius states that "*it appears from the above that [the applicants'] approach is that the true and/or objective facts should be disregarded in these very important decisions, to order an enquiry and suspend senior officials of the NPA - Once a negative perception is created by the media it is enough to justify the infringement of basic fundamental rights of these officials and have them suspended.*"

42. With respect, Dr Pretorius mischaracterises the applicants' arguments with respect to the impact of public perception on the present matter. At no point

have the applicants ever contended that the objective facts are irrelevant. Indeed, it is objective facts which form the *prima facie* case against him and the excerpt quoted by Dr Pretorius at paragraph 7 of the Pretorius Representations pertains only to suspensions. I am advised that it is settled law that, where there are objective facts grounding the public perception that certain officials have misconducted themselves, as there are in the present case, then this public perception is a ground for suspension to protect the integrity of the institution in question pending the finalisation of the enquiry. Obviously, a decision maker cannot be made to wait until there is a final finding with respect to the enquiry before a suspension may be brought as, at that stage, the official will either be exonerated or removed. A suspension, necessarily, will occur without final and conclusive proof of wrongdoing and has in the past legally been instituted in light of the damage to the public faith in the institution until that official has either been exonerated and removed.

43. The relevance of public perception is not only written into settled administrative law, but into the NPA's own Code of Conduct. Among other things, the Code of Conduct requires prosecutors to: "*avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality*" (paragraph C(d) of the Code of Conduct); and "*strive to be and to be seen to be consistent, independent and impartial*" (paragraph A(f) of the Code of Conduct). To the extent a prosecutor, including a director of the NPA, has, by his or her conduct, allowed a perception that he is not independent or impartial to form, this may in itself, constitute *prima facie* grounds for misconduct. Dr Pretorius's objection to the consideration of the impact of his actions on the public perception of the NPA must thus be considered in this context: the public

perception is certainly not irrelevant, and his insistence that it is compounds the unlawfulness of his decision.

44. It remains the applicants' submission that every day that the Prosecutors remain in office, with the allegations against them pertaining to the Charges unanswered, is another blow to the public faith in the integrity and competence of the NPA. This threat to the public faith in this key institution will only be removed should the Prosecutors be suspended, and then ultimately exonerated or removed after enquiries into their conduct.

Dr Pretorius's issues with the Urgent Application

45. Dr Pretorius raises several issues pertaining to the Urgent Application which, in his view, exonerate him in the present case.

46. First, Dr Pretorius bemoans "*personal attacks that mar the founding affidavit*" in the Urgent Application. The applicants assume that Dr Pretorius refers to language used by the applicants in the Urgent Application, and indeed in this application, which suggests that he and the other Prosecutors' lack conscientiousness, integrity and competence.

47. These allegations are not gratuitous attacks on the Prosecutors, but are supported by facts and directly relevant to their fitness and propriety to hold office. If the officials are innocent of any wrongdoing, then that will be shown by them in the inquiry – which serves as a basis by which their rights to a hearing are protected and their reputations may be exonerated.

48. Second, Dr Pretorius refers to the judgment in the Urgent Application of 24 November 2016 ("**the 24 November Judgment**"), stating at paragraph 13 of the Pretorius Representations that "*indeed [the High Court] found that there*

was no factual basis for the application apart from media perceptions relied upon by the Applicants".

49. Dr Pretorius appears to rely on this characterisation of the judgment to suggest that the applicants have not presented any facts to the President to substantiate their claims and justify either the enquiries or suspensions. This Honourable Court was not satisfied, in the Urgent Application, that sufficient grounds had been made out for urgency.

50. This is not to say, as is also suggested in the Opinion (as discussed below) that there are insufficient facts, in the ordinary course, to ground the suspensions and enquiries. Indeed, this Honourable Court stated, in its 24 November Judgment (attached as "**FA2**") that "*it is in our view not the type of matter[,] particularly the facts and the issues it raised[,] that can be properly dealt with within the exigencies of the urgent court where there is no adequate opportunity for judges to reflect on the issues raised and to reach sound conclusions and judgments*". Indeed, the urgent court considered the legal and factual issues too complex to deal with in urgent court. The 24 November Judgment is thus irrelevant to the President's Decisions as the statements therein were made in the ordinary course by the decision maker and not by an urgent court. The 24 November Judgment may also certainly not be used, as Dr Pretorius implies, as authority for the allegations that there are insufficient facts to ground the enquiries and suspensions in the ordinary course.

THE OPINION

51. It is submitted that the President's reliance on the Opinion, which was prepared by the advocates who represented him in the Urgent Application

and reads more like an answering affidavit than an opinion, with respect, was fatal to the lawfulness of the President's Decisions in that, *inter alia*, the Opinion:

51.1 fails to deal with key undisputed facts;

51.2 fails to deal with the NPA Code of Conduct altogether;

51.3 contains numerous material errors of law;

51.4 fails to appreciate the threat to the independence of the NPA that is inherent in the failure to discipline officials who have misconducted themselves or lack the fitness and propriety for office; and

51.5 merely adopts, without critical analysis, the factual and legal position presented by the Prosecutors in their representations.

52. I deal with each of these issues in turn below.

Discussion on independence

53. The Opinion opens with a discussion of the principle of prosecutorial independence. The discussion focuses largely on the fact that the independence of the NPA is constitutionally entrenched and that suspension and removal of directors of the NPA may only be done by way of section 12(6) of the NPA Act. Indeed, removal by any other means is unlawful and a threat to the independence of the NPA.

54. While the importance of the independence of the NPA cannot be overstated, the Opinion undermines that importance by overstating the thresholds of misconduct or lack of fitness and impropriety that are required to trigger an enquiry into conduct that threatens that independence and integrity of the

NPA. The discussion begins with a conclusion which is not substantiated at all elsewhere in the Opinion (at paragraph 4), that:

> "*Were an NDPP to be provisionally suspended purely on the grounds of having made a decision which proves to be wrong, however spectacular the error, would threaten the independence of the institution.*"

55. The statement, which has no basis in law, is, with respect, clearly wrong, and the implications of such a principle, if accepted, are disturbing. It suggests explicitly that no matter how spectacular an error, even if that error reveals an utter lack of competence to do the job, indeed even if that error is made repeatedly, that it would unconstitutionally infringe the independence of the NPA to seek to discipline directors of the NPA.

56. There is no legal basis for this and it is, with respect, palpably wrong to suggest that a director of the NPA may never be removed for incompetence.

57. The argument appears to be developed somewhat at paragraphs 15 to 16 of the Opinion where the authors refer to the case of *Pikoli v the President of the Republic of South Africa*[3] ("***Pikoli***") claiming that "*This is sufficient authority that accepting that the decision to prosecute the [charged persons] is found to be wrong, that in itself cannot be a ground to subject the implicated officials to a removal process contemplated in section 12(6) of the NPA Act*" (this argument is repeated again at paragraph 19.1). Yet there is nothing in the *Pikoli* case that is authority for this proposition.

58. Further legal argument will be directed in this regard at the hearing. For now I simply stress that the quoted excerpt from the case at paragraph 15

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[3] 2010 (1) SA 400 (GNP).

pertains generally to the independence of the NPA, and the *Pikoli* case itself merely interdicted President Zuma from appointing a new NDPP, prior to a review of then-President Mothlante's decision to remove Mr Pikoli from the position of NDPP under section 12(6) of the NPA Act despite an enquiry under that section recommending that Mr Pikoli not be removed. The case is, by no stretch of the imagination, "*sufficient authority*" for the proposition that a spectacular error on the part of the NDPP revealing incompetence cannot be grounds for initiating a process of enquiry under section 12(6) of the NPA Act. Yet this is precisely the advice given to the President in this regard by way of the Opinion. To the extent that the President relied on this advice, which he indeed appears to have done, he made a material and fundamental mistake of law which vitiates the President's Decisions.

59. The Opinion, in its discussion of the principle of prosecutorial independence, also does not deal at all with the threat posed by a failing to discipline and remove a director of the NPA who has misconducted himself in such a way that it reveals he does not have the requisite integrity to hold the office of a director of the NPA. The continued tenure of such a director is in itself a threat to this independence, and the failure of the President in these circumstances to remove such a threat to the independence of the NPA would be unconstitutional. Yet the Opinion does not discuss this issue whatsoever. To the extent that the President was under the impression that the law did not require him to take action against a compromised director of the NPA to protect the independence of the NPA, the President was operating under a material mistake of law which, again, vitiates the President's Decisions.

60. Indeed, the Opinion is entirely one-sided. It sets out all of the potential reasons **not** to initiate enquiries under section 12(6) of the NPA (including by mischaracterising the import of the *Pikoli* decision), without informing the President as to the circumstances in which he should decide to institute enquiries. To be clear, the applicants are not here complaining that the Opinion does not recommend that enquiries be instituted, but that the Opinion gives the impression that the threshold required to trigger section 12(6) of the NPA Act is so high that it may never be triggered in circumstances of incompetence, no matter how spectacular.

61. It is submitted that this threshold is clearly overstated and, indeed, undermines the very purpose of section 12(6) of the NPA Act and the constitutional principle of prosecutorial independence itself. Indeed, as is stated elsewhere in the Opinion, the standard to trigger an enquiry is *prima facie* evidence of misconduct or that a person is no longer fit or proper for the office they hold. To suggest that a "*spectacular*" error which amounts to misconduct or which reveals a lack of fitness and propriety does not meet that standard, is wrong.

62. This also flies in the face of several provisions of the Code of Conduct which requires, *inter alia*, the following:

62.1 "*strive to be well-informed and to keep abreast of relevant legal developments*" (paragraph A(f) of the Code of Conduct);

62.2 "*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*" (paragraph C(g) of the Code of Conduct);

62.3 "*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*" (paragraph D1(d) of the Code of Conduct).

63. Each of these provisions of the Code of Conduct speak precisely to a prosecutor's duty not to take all reasonable precautions to avoid mistakes in wrongly charging an accused. Failure to make reasonable enquiries, keep informed of the relevant law, and not proceed with charges in the absence of evidence are mistakes, but they are, according to the Code of Conduct, unequivocally misconduct. The Code of Conduct applies to all members of the NPA, and it is submitted that the standard in this regard is greater with respect to senior members of NPA, such as directors. In any case, the Opinion's failure to consider misconduct in light of the Code of Conduct, particularly insofar as the Code of Conduct makes it clear that a mistake, even one that is not spectacular, may amount to misconduct, is a further material and substantial error of law.

64. It should also be recalled that the President's power to institute an enquiry under section 12(6) of the NPA Act does not finally remove a director of the NPA. The director must first face an enquiry, which will give the director full *audi* rights and decide, not on a *prima facie* basis, but on a balance of probabilities, whether the director has in fact misconducted himself or is no longer fit and proper for office. Even then, the President again applies his mind and, if he removes the director, Parliament must confirm this removal for it to be effective. The Opinion argues that this indicates a higher threshold for the triggering of a section 12(6) enquiry. The reality is clearly to the contrary: the numerous checks and balances which follow the President's

decision to institute an enquiry under section 12(6), and the fact that the director in question will in due course receive full *audi* rights, necessitates that the standard is a *prima facie* one, and not that requires "*utmost circumspection and caution*".

65. It is submitted that where the President has *prima facie* evidence of misconduct or a lack of fitness and impropriety, he is under an obligation to institute an enquiry under section 12(6) of the NPA Act. To the extent that the Opinion advises him that he may never, in these circumstances, institute such an enquiry, he has been wrongly advised, and the President's Decisions on the basis of this advice are thereby vitiated by error of law.

Failure to deal with key undisputed facts and the Code of Conduct

66. The constant refrain of the Opinion is that the applicants' complaint against the Prosecutors suffer from a "*lack of specificity*" (paragraph 38.3), that there is "*no prima facie evidence*" to demonstrate the improper conduct in question (paragraph 39.4, 40.4, 41.6, 42.5, 43.5, 44.4, 45.9, 46.4, 47.4, 48.4, 49.3), that "*What is lacking is any evidence pointing to these conclusions*" (paragraph 43.3), that the applicants "*have not provided any objective evidence*" (paragraph 44.3), that the allegations of the applicants are "*unsubstantiated*" (paragraph 45.9), and that "*there is no supporting information to warrant the establishment of an enquiry or a provisional suspension*" (paragraph 53).

67. It is clear that the drafters of the Opinion have not engaged with the facts as they appear from the Record. Instead, the Opinion repeatedly simply accepts, without any analysis, the position of the Prosecutors set out in their representations. It is not clear what value, if any, the Opinion has in this

respect as it simply parrots the Prosecutors' Representations. This can be seen, *inter alia*, at paragraphs 42, 44, 48, 49 and 50 of the Opinion where the Representations are simply paraphrased.

68. More importantly, the Opinion does not engage at all with certain key objective facts, including, but not limited to, the following:

68.1 At the 11 October press conference, Abrahams engaged in a long and inappropriate monologue regarding the now utterly debunked SARS rogue unit matter. The SARS rogue unit matter is unrelated entirely in fact, other than an identity of purported suspects, to the Charges (this was set out at pages 10 and 23 to 25 of the founding affidavit in the Urgent Application). These utterances are undisputed and clearly violate paragraph D2(b) of the Code of Conduct which states that Prosecutors should "*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*". It is common cause that the SARS rogue unit case was at the time, and to this day remains, a pending case. Yet there is no engagement with the opinion on this conduct or the Code of Conduct in this regard. The Opinion simply sidesteps this issue at paragraphs 37 and 38 claiming simply that "*the public interest is plain*" and that impropriety in this regard is "*made without any substantiation*". The Opinion simply avoids dealing with the Prosecutors' misconduct in this regard. To the extent that the President relied on this advice to exonerate the Prosecutors in respect of this specific instance of misconduct, he has acted irrationally and unlawfully.

68.2 The Opinion fails entirely to deal with the Mr Abrahams' visit to the Luthuli House on the eve of the announcement of the Charges (this was set out at pages 37 to 39 and 41 of the founding affidavit in the Urgent Application). The Opinion fails to engage, entirely, with the accusation made by the applicants that this visit fell foul of several paragraphs of the Code of Conduct, including the obligation to "*strive to be and to be seen to be consistent, independent and impartial*" (paragraph A(d) of the Code of Conduct) and "*avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality*" (paragraph C(d) of the Code of Conduct). The Opinion does not consider this factual issue, or the Code of Conduct whatsoever.

68.3 The Opinion fails to deal with the utter dearth of evidence of criminal intent. The Opinion's approach is encapsulated at paragraph 49.1, where it states "*the complainants have not provided any facts that show that there were other facts that could have shown the lack of intent*". This is not the test, however, and as discussed in paragraphs 34 to 36 above with respect to the Pretorius Representations, it is up to the prosecutor to provide *prima facie* evidence of criminal intent. A prosecutor may not simply go ahead, as Dr Pretorius has made clear was presently the case, without evidence that a fraudulent intention may at least be inferred. Accordingly, just as Dr Pretorius has admitted there was no evidence to proceed against the charged persons, the Opinion has placed the burden on the charged individuals to exonerate themselves, violating the constitutional right to a presumption of innocence.

68.4 The Opinion does not deal with the Symington Memorandum. The writers of the Opinion say that they have not seen the Symington Memorandum at all (paragraph 45.5 of the Opinion). It is not clear how this is possible, as the writers of the Opinion were counsel for the President in the Urgent Application: the Symington Memorandum is discussed at length in the papers of the Urgent Application, and a copy of the Memorandum appears as annex "**FA7**" to the founding affidavit in the Urgent Application (which is page 99 of the Record). Despite claiming to have not seen the Symington Memorandum, the authors of the Opinion express their doubt that it was correct. It is not clear on what basis this doubt is asserted. Elsewhere in the Opinion, it is stated that, despite Abrahams' review and withdrawal of the Charges, the Opinion writers are of the view that "*the initial decision was [not] necessarily wrong*" (see paragraph 40.3). It accordingly appears that the Opinion writers, having never considered the Symington Memorandum, and when the common cause fact is that the Symington Memorandum showed clearly a lack of intent on the part of the charged persons, are of the view that the Charges may in fact have originally been preferred correctly. This undermines the credibility of the Opinion as it clearly does not properly consider all relevant information and jumps to conclusions which are not supported by the Record.

68.5 The Opinion fails to deal altogether with Mr Abrahams' management of the Jiba saga as described at pages 111 to 116 of the founding affidavit, read with the supplementary founding affidavit, in the Urgent Application.

69. The above list is not a definitive list. Wherever the Opinion alleges that there is "*no evidence*" at all of the allegations made against the Prosecutors, it is clear that the Opinion writers have not engaged sufficiently, or have only selectively engaged, with the Record. The applicants' papers in the Urgent Application is replete with evidence, most of which arising from undisputed transcripts of Mr Abrahams' own statements. To be clear, the applicants are not concerned, in this respect, that the Opinion has considered the evidence and, despite the evidence, given a view that an enquiry is not justified; the applicants are concerned that the Opinion has simply not engaged with the evidence, beyond merely adopting the Prosecutor's Representations. This means that the Opinion does not consider many relevant facts.

70. Accordingly the Opinion does not deal with all of the material facts relevant to the complaints against the Prosecutors. Its cogency is fundamentally undermined by the fact that it omitted any discussion of common cause facts and the manner in which they fall foul of the Code of Conduct. To the extent that the President has relied on the Opinion to exonerate the Prosecutors on all bases, including the above mentioned key factual issues which were omitted in the Opinion, the President has failed to take into account all relevant information, and/or has acted irrationally, and in any case unlawfully.

IMPLICATIONS OF THE JUDGMENT IN *ZUMA V DA*

71. The recent unanimous judgment by the Supreme Court of Appeal in *Zuma v DA* emphasised the crisis facing the NPA's credibility and integrity. The appeal was against a decision of the Full Court of the Gauteng High Court to set aside the Decision of the then NDPP communicated on 6 April 2009 to discontinue the prosecution of a case of *inter alia* charges of corruption against President Zuma ("**the decision *a quo***").

72. After many years and numerous court cases concerning the prosecution of President Zuma in respect of charges of corruption and money laundering, and only minutes into argument before the SCA, counsel for both President Zuma and the NPA conceded that the decision to discontinue the prosecution ("**the decision to discontinue**") was flawed (paragraph 3 of *Zuma v DA*). The appeal was dismissed and the decision *a quo* upheld. As a result, the original decision to prosecute President Zuma was revived.

73. The judgment is remarkable in a number of ways, but for present purposes, it is particularly remarkable with respect to its characterisation of the conduct of the case by the present NDPP, Mr Abrahams, in making common cause with the President and defending the decision to withdraw the charges against President Zuma, which decision counsel for the NDPP was forced to concede was unsustainable.

74. The bench was scathing of Mr Abrahams' conduct of his case in *Zuma v DA*. As held by Navsa ADP:

> "*[91] The submissions by the NPA set out in para 48 above, that when the prosecution itself believes that there has been an abuse of process, it could not be expected of them to prepare for a case on the basis that a court should later decide whether a stay of prosecution is justified. It was contended that, in those circumstances, it ought to be left to the discretion of the prosecuting authority to decide whether to continue with the prosecution. I disagree. It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with constitutional values and the provisions of the NPA Act. It is in the interest of the NPA, accused persons and the public's confidence in the administration of justice, that decisions concerning allegations of abuse of process be made by a trial court.*

[92] In the light of what is set out in the preceding paragraphs, it beggars belief that the present regime at the NPA, on its own version of events, saw fit to defend Mr Mpshe's decision as being rational. For all these reasons I can find no fault with the reasoning and conclusions of the court below that the decision to discontinue the prosecution was irrational and liable to be set aside. A question one might rightly ask is why it took so long to come to the realisation at the eleventh hour that the case for both the NPA and President Zuma had no merit.

...

[94]... *it is difficult to understand why the present regime at the NPA considered that the decision to terminate the prosecution could be defended.*" (own emphasis)

75. It is clear from the above that the SCA considered Mr Abrahams' defence of the decision to discontinue to be flawed to the extent that it was inconsistent "*with constitutional values and the provisions of the NPA Act*". As in the present case, Mr Abrahams showed that he had no understanding of what was required of him by the Constitution or the NPA Act, and was seemingly unaware of basic legal principles associated with the doctrine of legality and discontinuation of prosecutions.

76. The applicants submit that it is implicit in that finding by the SCA, and clear from the conduct of Mr Abrahams in *Zuma v DA*, that Mr Abrahams is not fit and proper to occupy the highest prosecutorial office or has misconducted himself, either: (i) because of his failure to appreciate his role, his duties to the court and/or the fundamental legal principles and has pursued very serious litigation in a reckless manner, causing enormous damage to the Republic and bringing his office into disrepute; or (ii) because of a material impairment of his independence and/or integrity whereby he is beholden to the President.

77. Furthermore, Mr Abrahams remains the head of the institution now tasked with running the prosecution's case against President Zuma in respect of the reinstated charges against President Zuma. Not only does this show the importance of suspending Mr Abrahams, but also that President Zuma is irreparably compromised and conflicted when it comes to assessing any aspect of Mr Abrahams' conduct or fitness for office. President Zuma has a direct and personal interest in the identity of the individual running the NPA and Mr Abrahams has made common cause with President Zuma in litigation which should the Supreme Court of Appeal has confirmed was completely without foundation. That litigation is widely seen by the public as an attempt to delay President Zuma facing justice and to protect the President from prosecution. It is submitted that these facts result in a reasonable apprehension of bias and a material conflict of interest which precludes President Zuma from taking any decisions under section 12(6) in respect of Mr Abrahams's future.

78. As such, it is submitted that this severe conflict of interest substantially augments the applicants' contention that the appropriate remedy in the present case is for the court to substitute the President's Decisions with the decisions to institute the enquiries and the suspensions. At the very least, should the matter be referred back to the office of the President, it should instead be referred to an Acting President, as provided under the Constitution.

CONDONATION

79. This affidavit was due on 12 October 2017 but will be filed on 19 October 2017. Accordingly, the affidavit will be filed five court days late. This delay was unfortunately unavoidable for the following reasons:

79.1 supplementation was more complex than anticipated. The Opinion, which was first delivered with the Record, is not only factually but legally complex and is lengthy at 48 pages;

79.2 judgment in the *Zuma v DA* matter was expected on 13 October 2017. The applicants were aware that judgment in this matter would be handed down on this day and anticipated that it would be factually relevant to the present case. It then took several days to analyse the judgment in *Zuma v DA*.

80. Accordingly, it is submitted that a negligible delay of five court days was warranted in the circumstances. In any case, the respondents have recorded no prejudice and, it is submitted, no party is prejudiced by this short delay.

81. Accordingly, the applicants respectfully pray that the late filing of this affidavit is, to the extent necessary, condoned by the Honourable Court.

CONCLUSIONS

82. In light of the above, it is submitted that the President, in relying on the Opinion as a basis for the President's Decisions, and the reasons therefor, has made numerous material and substantial errors of law and has failed to consider highly pertinent facts.

83. Furthermore, the Pretorius Representations include admissions which, in essence, show that the Prosecutors had insufficient evidence from the outset to bring the Charges, and that Dr Pretorius, and seemingly the other Prosecutors, had fettered their minds when preferring the Charges having in fact been decisively influenced by, suspicions arising from an entirely unrelated investigation which, to this date, has never resulted in the bringing of charges, let alone any conviction.

84. Finally, the findings of the SCA in *Zuma v DA* confirm Mr Abrahams' unfitness for office. Furthermore, it is also clear that President Zuma is

conflicted in taking any decision pertaining to Mr Abrahams in terms of section 12(6) of the NPA Act. Accordingly, it is appropriate for, *inter alia*, these reasons in the present case for this Honourable Court to step into the shoes of the President and order the institution of the enquiries and suspensions, or at least direct that President Zuma cannot take the decision under section 12(6), and this should be done by an Acting President.

85. In these circumstances, and in the circumstances set out in the Founding Affidavit, the President has acted irrationally and unlawfully by failing to institute enquiries against the Prosecutors and to suspend them pending the outcome of such enquiries.

WHEREFORE, the applicants pray for the relief set forth in the amended notice of motion.

FRANCIS ANTONIE

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Rosebank on 19th October 2017, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

7166457

COMMISSIONER OF OATHS
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KPMG International media statement

15 September 2017

*Please note editorial change from previous version

KPMG South Africa leadership changes and key findings arising from KPMG International's Investigation

As has been widely reported, various allegations have been raised with respect to KPMG South Africa's work on behalf of the Gupta family and work performed in 2014-2015 on the 'Report on Allegations of Irregularities and Misconduct' which KPMG South Africa produced for the South African Revenue Service (SARS report).

As a result, KPMG International has conducted a comprehensive investigation. While the investigation did not identify any evidence of illegal behaviour or corruption by KPMG partners or staff, this investigation did find work that fell considerably short of KPMG's standards.

Based on the results of this investigation, significant actions have been taken and are being announced today with respect to KPMG South Africa. These actions include a series of leadership changes, changes in the governance of KPMG South Africa, and enhanced quality control procedures in certain areas.

LEADERSHIPNhlamu Dlomu has been appointed to succeed Trevor Hoole as CEO. Mike Oddy, Head of Audit and

Nhlamu was previously KPMG South Africa's Head for People and Change. She is a highly experienced partner with extensive client experience leading significant transformation in the Financial Services and other industry sectors in South Africa and overseas.

She has over 17 years' experience in management consulting, and management roles gained mainly in organizational development and human resources across various industry sectors.

As a former HR Executive for one of the largest banks in South Africa, Nhlamu's experience spans culture transformation, change management and other people management practices.

"I am very proud to have been named the new CEO of KPMG in South Africa," Nhlamu said. "KPMG has a long and distinguished record of service in South Africa. Ethics and integrity are fundamental values of KPMG and these will be the guiding principles of my leadership."

"To this end, my first order of business will be to build a management team committed to these principles." Nhlamu added, "That team will be announced in the coming days. The skill, experience and energy of KPMG's new management team will ensure stability and high quality service to our clients. Included on that team will be Andrew Cranston, a senior partner from the KPMG International network, as interim Chief Operating Officer. Andrew is a former CEO of KPMG in Russia and Commonwealth of Independent States, and a former KPMG International COO.

I will also appoint another partner from the KPMG International network to serve as the interim Risk Management Partner, to bring international expertise and best practice to improve risk management and quality control for KPMG South Africa."

The findings of the investigation have reinforced the criticality of a leadership and governance model that sets the right tone from the top, and ensures appropriate accountability and responsibility at every level of leadership within the firm.

The South African Board, working with KPMG International, has taken a series of actions to address both those responsible for specific failures and those who, by virtue of their knowledge and leadership role, should have acted to ensure that those failures ended and appropriate actions were taken.

Trevor Hoole has tendered his resignation to the Board of KPMG South Africa and stepped down as CEO, and Steven Louw has resigned as Chief Operating Officer and Country Risk Management Partner.

"Steven and I have taken the decision to step down, in the best interests of the firm as it rebuilds and moves forward. I absolutely understand that ultimate responsibility lies with me. KPMG South Africa is a firm of hugely talented people and I believe it is the right thing for me to stand down and allow a new CEO to restore public trust and build a firm that once again sets the standard for quality and ethics," said Trevor Hoole.

In addition, Ahmed Jaffer has resigned from the firm and stepped down as Chairman of the Board. Board member

The following partners will be leaving the firm:

- Muhammad Saloojee, Head of Tax and

Board member

- Herman de Beer, Former Head of Forensic and Board member
- John Geel, Head of Deal Advisory
- Mickey Bove, Risk Management Partner for Deal Advisory.

KPMG South Africa has decided to take disciplinary action seeking dismissal in relation to Jacques Wessels, the Lead Partner on the audits of the non-listed Gupta entities.

INVESTIGATION OUTCOMESGovernance Reforms

In addition to the leadership changes set out above, KPMG South Africa will enhance its corporate governance processes. These may include adopting additional recommendations set out in the King IV Report on Corporate Governance for South Africa and the appointment of a senior, independent, non-executive director to complement the current Board members. This will assist the KPMG South Africa Board and leadership team to deliver the actions necessary to restore public trust in the firm.

At present, the role of Risk Management Partner is combined with that of Chief Operating Officer for KPMG South Africa. Going forward, the two roles will be separated to ensure that the Risk Management Partner has sufficient time to focus on this crucial role.

KPMG South Africa is committed to overhaul the firm's public reporting, including a commitment to publish an annual Transparency Report detailing the firm's quality processes and controls.

SARS Report

In December 2014, KPMG South Africa was engaged by the South African Revenue Service to perform an extensive document investigative review which resulted in the 'Report on Allegations of Irregularities and Misconduct'. A version of the report dated 3 September 2015 was leaked and made public on 4 October 2015. The report was accepted as final on 26 January 2016.

This mandate involved an extensive document investigative review and a collation of the documentation. At a later stage, this mandate was extended to the provision of a report which included conclusions, recommendations and legal opinions. As a result, during the course of the engagement, the scope of the work changed. KPMG International has concluded that KPMG South Africa did not properly grasp the new risks associated with this change and consequently the appropriate consultation with risk management did not take place.

Importantly, quality controls associated with the version of the report dated 3 September 2015 were not performed to the standard we expect. Specifically, in this instance, our standards require a second partner to review the work done; however, the final deliverable of this work was not subjected to second partner review.

The SARS Report refers to legal opinions and legal conclusions as if they are opinions of KPMG South Africa. However, providing legal advice and expressing legal opinions was outside the mandate of KPMG South Africa and outside the professional expertise of those working on the engagement. KPMG South Africa acknowledges that such opinions should have been caveated as recommendations of legal advisors and not formulated in the manner contained in the report.

Furthermore, the language used in sections of the report is unclear and results in certain findings being open to more than one interpretation.
As a result, it is possible to read sections 12.1.1, 12.1.2 and 12.1.3 of the "Executive findings and conclusions" contained in the report in a way which suggests that Pravin Gordhan knew, or ought to have known, of the establishment by SARS of an intelligence unit in contravention of the rule of law that was "rogue" in nature.

This was not the intended interpretation of the report. To be clear, the evidence in the documentation provided to KPMG South Africa does not support the interpretation that Mr Gordhan knew, or ought to have known, of the "rogue" nature of this unit.

We recognise and regret the impact this has had. KPMG South Africa had no political motivation or intent to mislead. The partner responsible for the report is no longer with the firm.

Given the failure to appropriately apply our own risk management and quality controls, that part of the report which refers to conclusions, recommendations and legal opinions should no longer be relied upon.
KPMG South Africa has contacted SARS and offered to repay the R23 million fee received for the extensive work performed, or to make a donation for the same amount to charity.

The Forensic practice has since made changes to certain of its controls and methodologies. For example, before accepting contentious engagements, discussion with, and approval by, the firm's Executive Committee is required. In addition, prior to finalising an investigation report, engagement teams are required to provide anyone who is the subject of the report an opportunity to respond to relevant findings.

Audit
With respect to the audits of the Gupta entities, it is evident from the investigation that the audit work in certain instances, including Linkway Trading Pty Ltd, fell well short of the quality expected, and that the audit teams failed to apply sufficient professional scepticism and to comply fully with auditing standards.

Despite the deficiencies in the audit work, KPMG International found no evidence of dishonesty or unethical behaviour on the part of the audit partners and audit teams working on the audits for the Gupta group of companies. However, the investigation established that management of many Gupta entities responded misleadingly and inadequately to audit teams' enquiries about the nature of related party relationships and the commercial substance of significant unusual transactions.

While the firm's last audit opinions for the Gupta group of companies were for the year ended 28 February 2015, KPMG South Africa should have resigned as auditors earlier than March 2016. KPMG South Africa regrets that its association with the Guptas and their business entities went on for far too long.

KPMG International will be working actively with KPMG South Africa to improve audit quality and risk management processes. There are a number of processes in place which give us assurance as to the general level of audit quality in the South African firm. The firm has an annual Quality Performance Review program that assesses audit quality.

The firm is also subject to inspection on a regular basis by both local and other national regulators. As a result of the KPMG International investigation, KPMG South Africa will supplement these processes with additional audit controls to ensure that KPMG's standards are met consistently.

KPMG South Africa will fully co-operate with IRBA (Independent Regulatory Board for Auditors) to assist in its investigation.

Wedding attendance
KPMG fully understands the criticism of the attendance of four KPMG partners at the Gupta family wedding in 2013. While the investigation concluded that their attendance was not a breach of auditor independence rules, we accept that the partners should not have attended this wedding.

Tax
One of the main allegations levelled at KPMG is that it was involved, or complicit, in facilitating tax evasion and corruption by the Guptas and their entities. In particular, it has been alleged that tax advice given to Gupta entities involving offshore structures was illegal or improper.

KPMG South Africa sought independent advice from Peter Solomon SC, a respected tax silk, as to whether it had acted unlawfully or improperly in giving the advice on offshore structures. Peter Solomon says; "In my opinion it is clear KPMG did not act unlawfully or improperly in giving the advice....I have not seen anything....which constituted KPMG advising its clients to partake in any form of tax evasion, or which even hinted at this possibility."

The KPMG International investigation identified, based on subsequent information that is now in the public domain, a series of misrepresentations from the client over the period that KPMG South Africa provided tax advice.

The majority of the tax services provided by KPMG South Africa to the Guptas and their entities was routine tax compliance work. These tax compliance activities were reviewed to confirm they were of a professional quality and consistent with the tax advice given, where applicable.

The tax advisory services provided to the Guptas since the start of the tax advisory engagement in 2014 were also reviewed, including the technical quality of the services, the facts upon which the advice was based, and whether the tax advice was consistent with KPMG's Global Principles for a Responsible Tax Practice.

The investigation concluded there was nothing to indicate that in the delivery of these tax services, KPMG South Africa, its partners or staff, were involved in any activities of the Gupta family involving potential money laundering, tax evasion, corruption or any other illegal activity.

The Oakbay listing
A further allegation made against KPMG is that the firm was involved in the valuation of Oakbay Resources and Energy Limited (ORE) at the time of listing in November 2014, where it has been alleged that the share price was fixed.

The investigation confirmed that KPMG's responsibility at the time of listing was limited to issuing audit opinions in respect of the historical financial information of ORE for the three years ended 28 February 2014 contained in the Pre Listing Statement (PLS), and for issuing a reporting accountant's report on the pro forma financial information of the group. KPMG was not engaged to provide a valuation.

KPMG South Africa's report on the pro forma financial information entailed confirming that the pro forma financial information was properly compiled in accordance with the JSE Listings Requirements. As part of KPMG's responsibilities, the firm also provided advice to ORE on the application of these requirements.

In a mineral company listing the Competent Person's Report, prepared by Mineral Corporation Consultancy (Proprietary) Limited and included in the PLS, includes the value of the mineral assets of R6.1 billion and was prepared in accordance with Section 12: Mineral Companies of the JSE Listings Requirements.

Advice on the Optimum deal
KPMG South Africa provided limited transaction support services to the Guptas in connection with their interest in acquiring the Optimum Coal Mine (OCM) from Glencore. These services included approaching Glencore to express interest in acquiring OCM, and subsequently assisting with early negotiations with the Business Rescue Practitioners appointed by Glencore. The firm also built a financial model reflecting assumptions to assist in the development of a purchase price offer.

Limited financial and tax due diligence services were performed, as well as assistance in reviewing the share purchase agreement drafted by Glencore's legal advisers. KPMG South Africa did not provide any advice in connection with the raising of funds to pay for the transaction.

As the transaction progressed, representatives of the Gupta group were increasingly undertaking commercial discussions with the seller's representatives in the absence of KPMG. KPMG South Africa was not always made aware of the details of these discussions.

During the course of the engagement KPMG South Africa became aware of information which called into question the integrity of the Guptas. This information was not adequately dealt with by a number of senior leaders in the firm and was not taken into account when assessing whether to continue to perform work for the Gupta group.

The KPMG Investigation did not, however, find any evidence of participation by KPMG South Africa, partners or staff in illegal activity or corruption as a result of work performed on the engagement, or as a result of the information which became available to them.

Quality Controls
The firm has a requirement to re-assess its clients annually, and more frequently than that if significant events or matters come to the firm's attention. In relation to the Guptas, over a number of years this process lacked the necessary rigour which prevented KPMG South Africa from ceasing work for the Guptas at an earlier date.

The investigation found that there were certain red flags that came to KPMG South Africa's attention regarding the integrity and ethics of the Guptas that were not appropriately considered and addressed at that time. Had one or more of those red flags been heeded, KPMG South Africa would have stopped working for the Guptas earlier.

KPMG South Africa's client acceptance and continuance process will be centralised into a specialised team led by an experienced KPMG South Africa partner with the appropriate skills to evaluate the information provided on new and existing clients. Whenever integrity issues are identified, either the firm risk management partner or an ad hoc panel of senior partners will be consulted and decide upon the acceptance decision.

Reporting
KPMG South Africa has, and will, comply with all its reporting obligations as required by applicable law, regulation and professional standards.

Donation
In addition to the R23 million fee for the SARS report referred to above, KPMG South Africa will also make a donation of R40 million into education and anti-corruption not for profit organisations. The R40 million figure is based on the total fees earned from Gupta related entities to which KPMG South Africa provided services from 2002.

Conclusion
Nhlamu Dlomu said: "This has been a painful period and the firm has fallen short of the standards we set for ourselves, and that the public rightly expects from us. I want to apologise to the public, our people and clients for the failings that have been identified by the investigation.

It is important to emphasise that these events do not represent KPMG, our people or the values we have adhered to over decades of committed client service. My pledge and promise to the country is that we can and will regain the public's confidence."