ENQUIRY IN TERMS OF SECTION 12(6) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998

UNABRIDGED VERSION

1 APRIL 2019

TABLE OF CONTENTS

LIST OF WITNESSES

Johan Wessel Booysen ("Booysen") is a retired Police Officer who held a rank of Major General. He retired in 2016. He received training in racketeering investigations. His evidence was on affidavit and he testified at the Enquiry.

Glynnis Breytenbach ("Breytenbach") is a Member of Parliament and has been since 2014 when she left the NPA. She was one of the founding members of the SCCU, which she joined when it started in 1999. She became a DDP in the SCCU in 2001 and was appointed as Senior DDPP and Regional Head of SCCU in 2007. Breytenbach submitted an affidavit and gave evidence at the Enquiry.

Theunis Jacobus de Klerk ("de Klerk") is a Lieutenant Colonel in SAPS stationed at the Serious Corruption Offences Unit. His evidence was in affidavit form. Given the nature of his evidence he was not requested to give oral evidence.

General Anwa Dramat ("Dramat") is retired. Prior to retirement, he was Lieutenant General and the Deputy National Commissioner in the South African Police Services ("SAPS"). He was also the Head of the Directorate for Priority Crime Investigations ("DPCI" or "the Hawks"). He submitted an affidavit and testified at the Enquiry.

Adv Jan Maatjan Ferreira ("Ferreira") was admitted as an advocate in December 1993. He worked as a State Advocate, then as Senior State Advocate until he was appointed as DDP at the SCCU in 2003. He then became a Senior DDP at the SCCU in 2007. Ferreira deposed to an affidavit for the Enquiry on 14 January 2019 and gave evidence at the Enquiry.

Kersananthan Govender ("Govender") is a Deputy Director General: Governance and Public Administration in the Department of Public Service Administration. His evidence was in affidavit form confirming the affidavit of Chris MacAdam insofar as it related to him. Given the nature of his evidence he was not requested to give oral evidence.

George Frederick Hardaker was employed by the NPA as Senior Special Investigator in the Directorate of Special Operations ("DSO"). He was attached to the Asset Forfeiture Unit ("AFU"). Prior to that, he was a Captain in the SAPS. His evidence was on affidavit and he was prepared to testify before the Enquiry. Given the nature of the evidence the Evidence Leaders deemed it not necessary.

Willie Hofmeyr ("Hofmeyr") is an admitted attorney and a DNDPP. He is currently the head of the Legal Affairs Division ("LAD"). He was the head of Special Investigations Unit ("SIU") from 2001 to 2011. He established the Asset Forfeiture Unit ("AFU") in 1999 and headed it until 2015. He had three affidavits to the Enquiry. Two of these formed part of court records and one was deposed to in January 2019 for the Enquiry. He also gave oral evidence.

Salomon Cornelius Johannes Hoogenraad-Vermaak ("Vermaak") is the Director: Ethics and Code of Conduct Management in the Department of Public Service Administration. He is also the South African Coordinator for the OECD. He provided the Enquiry with an affidavit and he was prepared to testify before the Enquiry. The Evidence Leaders deemed it not necessary.

Adv Stephanus Christiaan Jordaan ("Jordaan") was a Special Director in the SCCU. He began his career 1980 as a prosecutor in the Magistrate Court and specialised in commercial crimes from 1982. He went on to become State Advocate, Senior State Advocate, Deputy Attorney General, Deputy DPP Investigating Directorate Serious Economic Offences: Head of SCCU. He was conferred a status of Senior Counsel in 2002. His evidence was on affidavit and he gave oral evidence.

Adv Chris Macadam ("Macadam") is a Senior DDPP in the Priority Crimes Litigation Unit ("PCLU") in the Office of the NDPP. Macadam's evidence was affidavit which had been prepared for and submitted to the State Capture Commission. He gave oral evidence.

Adv Elijah Rathabeng Mamabolo ("Mamabolo") is a Senior State Advocate. He was part of Special Projects Division dealing with organised crime and responsible for processing applications for authorisation of prosecutions in racketeering charges for the NDPP. His evidence was on affidavit. He was requested to testify before the Enquiry but refused to do so.

Adv Cyril Simphiwe Mlotshwa ("Mlotshwa") is a practising advocate at the Pietermaritzburg Bar. He was appointed as a prosecutor in 1998 and went on to regional court prosecutor, state advocate and then senior state advocate. He was appointed as DDPP in 2008 and from May 2010 he acted as DPP in KwaZulu Natal, until 9 July 2012. He gave oral evidence relating to an affidavit dated 30 March 2015.

Adv Nomvula Mokhatla ("Mokhatla") is a DNDPP and is currently in charge of the AFU. During much of the period when Jiba was the Acting NDPP, Mokhatla was both the Head of the SIU and the Head of LAD of the NPA. She provided an affidavit and gave oral evidence.

Adv Simphiwe Mzinyathi ("Mzinyathi") is the DPP North Gauteng, where he was appointed in 2008. From 2003 to 2008 he was the DPP for the Northern Cape from 2000 to 2003 he was a DPP in the DSO. Prior to that (1999-2000) he was as senior state advocate at the DSO. From 1996 – 1999 he was a magistrate in Umtata. He commenced his career as a prosecutor in 1990. He gave oral evidence relating to his oral evidence in the Glynnis Breytenbach disciplinary proceedings as well affidavits he deposed to in both the FUL and GCB matters.

Gerhard Nel ("Nel") is retired. He was employed by the Department of Justice, from 1969, in various capacities, as a prosecutor in district court, regional court and a control prosecutor. In 1984, he was transferred to the Chief Directorate: Parliamentary Legislation where he held positions of Deputy Director, Director and Chief Director. He drafted, reviewed and commented on legislation and provided legal advice to the Minister of Justice. From 1999 until December 2015, he was legal adviser to the NDPP. He was the first person to head the Legal Services Division, later renamed LAD when it was established in 2009. On 7 January 2019, Gerhard Nel attested to an affidavit for the Enquiry and he gave oral evidence.

Mzukisi Lubabalo Ndara ("Ndara") is a complainant in a case that was investigated by the SCCU, headed by Mrwebi. He submitted an affidavit dated 30 January 2019, after the oral hearings had already commenced. At that juncture the Evidence Leaders were not able to verify any of the allegations. Mr Ndara was informed that his oral evidence would not be required.

Humbulani Netangaheni ("Netangaheni") is a Deputy Director Employee Relations at the NPA. He submitted an affidavit and though willing to testify the Evidence Leaders deemed it unnecessary.

Mxolisi Nxasana ("Nxasana") is an admitted attorney and was appointed as the NDPP on 1 October 2013, effectively substituting women. His evidence was in the form of affidavits from various court applications. He was requested to give oral evidence before the Enquiry and indicated that for personal and family related reasons he was not able to do so.

Colonel Padayachee ("Padayachee") is a section commander at the Intelligence section of SAPS. He submitted an affidavit dated 4 February 2019 and though willing to testify the Evidence Leaders deemed it unnecessary.

Dr Mashau Silas Ramaite ("Ramaite") started as a prosecutor but was appointed as a DPP at the NPA. He is currently a DNDPP. He acted as NDPP in 2004, 2015 and at the time of testifying he had been acting NDPP since August 2018. He gave oral evidence and, by agreement among the parties, he did not provide an affidavit as his evidence was limited to the structure of the NPA.

Col Kobus Roelofse ("Roelofse") is a Colonel in the SAPS attached to the DPCI), currently placed with the Anti-Corruption Task Team at the DPCI ("ACTT") and the investigating officer in the Mdluli matter. He gave oral evidence and provided the enquiry with:

(1) An unsigned affidavit dated 2013, the signed version of which he had used to lodge a criminal complaint against Mrwebi.

(2) Affidavits signed on 8 January 2019 Roelofse and 14 January 2019.

Adv Karen Van Rensburg ("Van Rensburg") is a DDPP based in the Office of the DPP North Gauteng. She deposed to an affidavit for the Enquiry on 14 January 2019 and gave oral evidence. She was the Acting CEO and then CEO at the NPA during the relevant period.

Statements were also received from counsel who worked on some of the relevant litigation: Adv Paul Kennedy SC and Adv Leon Halgryn SC, Adv Johan Uys and Adv Ms Eulanda Mahlangu. The relevant counsel obtained consent from their Bar Council to make these statements. It was agreed that it would not need to be under oath and that they would not be called to give oral evidence.

LIST OF ABBREVIATIONS

"ACTT"	Anti-Corruption Task Team
"AFU"	Asset Forfeiture Unit
"AG"	Auditor General
"The BF report"	The report prepared by Breytenbach and Ferreira dated 13 April 2011
"CASAC"	Council for the Advancement of the South African Constitution
"The Code"	Code of Conduct for Members of The National Prosecuting Authority Under section 22(6) of the National Prosecuting Authority Act, 1998 – R. 1257 29 December 2010
"CCC"	Complex Commercial Crime
"C-funds"	DSO's confidential funds, used to pay informants
"CI"	Crime Intelligence Unit
"the CPA"	Criminal Procedure Act 51 of 1977
"DG"	Director General in the Department of Justice and Correctional Services (and predecesssors-in-title)
"Directives"	Prosecution Policy Directives
"DDPP"	Deputy Director of Public Prosecutions
"DNDPP"	Deputy National Director of Public Prosecutions
"DOJCD"	Director General, Accounting Officer of the NPA
"DPCI"	Directorate for Priority Crimes Investigations
"DPP"	Director of Public Prosecutions
"DPSA"	Department of Public Service and Administration
"DSO"	Directorate for Special Operations
"ELs"	Evidence Leaders
"FUL"	Freedom under the Law
"GCB"	General Council of the Bar of South Africa
"IAP"	The International Association of Prosecutors
"IGI"	Inspector General of Intelligence
"I/O"	Investigating officer
"IPID"	Independent Police Investigative Directorate
"the ISO Act"	Intelligence Services Oversight Act 40 of 1994
"Jiba CV"	The curriculum vitae submitted by Jiba to the Enquiry
"JSCI"	Joint Standing Committee of Intelligence
"LAD"	Legal Affairs Division

"the LPA"	Legal Practice Act 28 of 2014
"the Minister"	Minister of Justice and Correctional Services (and his predecessors-in-title)
"MISS"	Minimum Information Security Standard
"Mrwebi CV"	The curriculum vitae submitted by Mrwebi to the Enquiry
"the NSC"	National Security Council
"NDPP"	National Director of Public Prosecutions
"NEEC"	National Efficiency Effective Committee
"NPA"	National Prosecuting Authority
"the NPA Act"	National Prosecuting Authority Act 32 of 1998
"NPS"	National Prosecuting Services
"NSI Act"	National Strategic Intelligence Act 39 of 1994
"OECD"	Organisation for Economic Co-operation and Development
"the OECD Convention	Convention on Combating Bribery of Foreign Public Officials and International Business Transactions
"PDA"	Protected Disclosure Act 26 o 2000
"PCLU"	Priority Crimes Litigation Unit
"PGI"	Prosecutor Guided Investigations
"POCA"	Prevention of Organised Crime Act 121 of 1998
"SAPS"	South African Police Services
"SCA"	Supreme Court of Appeal
"SCC"	State Capture Commission
"SCCU"	Specialised Commercial Crime Unit
"SD"	A DPP appointed under section 13(1)(c) of the NPA Act ("Special Director")
"SIU"	Specialised Investigating Unit
"SMS Handbook"	Senior Management Service Handbook
"SPD"	Special Projects Division
"SSA"	Secret Service Account
"the Standards"	The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors
"The Yacoob Committee"	Yacoob Fact Finding Commission report
"ToR"	Terms of reference
"the UN Guidelines"	United Nations Guidelines on the Role of Prosecutors

1. INTRODUCTION

1. The effective prosecution of crime is instrumental to any state that has the rule of law underpinning its social contract. It being a fundamental value which undergirds our Constitution, duly enforced it could ensure that every individual regardless of social or political standing is treated equally.

2. The Constitution provides for a single prosecuting authority, the National Prosecuting Authority (NPA) and the only institution vested with the power and responsibility to institute charges and prosecute crime on behalf of the state. The Constitution makes it imperative that the NPA performs that critical role and function independently without fear, favour or prejudice - anything less would weaken the rule of law and stymie the nation's constitutional aspirations.

3. To fortify the NPA in fulfilling its constitutional mandate and insulating it from undue pressure and influence the Constitution makes provision for enabling legislation like the National Prosecuting Authority Act 32 of 1998 (the NPA Act) the main instrument in terms of which it executes its constitutional mandate.

4. Moreover, the NPA has over the years created and adopted a Prosecuting Policy, Policy Directives and a Code of Conduct (the code) guiding its members as they execute their mandate and safeguard the independence of the institution. It is thus, as an example, in terms of the NPA Act that only the President may in terms of section 12(6) provisionally suspend a sitting National Director of Public Prosecutions, a Special Director of Public Prosecutions and DNDPP's.

1.1. Establishment of the Enquiry

5. Advocate Nomgcobo Jiba (Jiba) one of four DNDPPs and Advocate Lawrence Sithembiso Mrwebi (Mrwebi) the SDDP who heads the SCCU are both senior officials within the NPA. They had been provisionally suspended by the President on 26 October 2018 in

terms of section 12(6) of the NPA Act, following serious criticisms made against them in the courts during the course of litigation and in other fora. The Enquiry was, as a result, established to look into the fitness and propriety of both Jiba and Mrwebi to hold office.

6. On 26 October 2018, the President provisionally suspended Jiba and Mrwebi from their respective positions pending the completion of this Enquiry. Inferred from the Enquiry's Terms of Reference the action was in all likelihood prompted by particular criticisms and serious allegations levelled against both of them in various fora, including Courts of law, which raised critical questions regarding their fitness and propriety to hold office.

7. The Enquiry and this report are but intermediate steps in the process triggered by the President's suspension of the two officials under section 12(6) of the NPA Act. Once this report is submitted, the President is required to make a decision regarding the future of both Advs Jiba and Mrwebi in their respective positions within the NPA. Moreover, the decision must be made within a time limit of 6 months from the date of suspension of the officials, a prescription read-in recently by the Constitutional Court, which had found aspects of section 12(6) constitutionally wanting. This aspect is covered in greater detail in the concluding remarks of this report.

8. The ToR establishing this Enquiry were published on 9 November 2018 with the President designating me as chairperson assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi. Together we comprise the Panel.

9. Led by N Bawa SC, the evidence team included N Sikhakhane, N Rajab-Budlender and Z Gumede on the instruction of the State Attorney. Jiba was represented by N Arendse SC, T Masuku SC and S Fergus as instructed by Majavu Inc. Mrwebi was represented by M Rip SC and R Ramawele SC instructed by Vilakazi Tau Inc.

10. As soon as the Enquiry was established the evidence team actively engrossed themselves in the arduous task of evidence gathering and the Panel focused on putting

in place the Secretariat, the appropriate structure, the rules and format to follow enabling it to execute its mandate with utmost efficiency.

1.2. The Terms of Reference

11. The Enquiry's ToR were published on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette No 42029). According to the ToR, the Enquiry, upon completing its mandate, was required to submit a report containing all supporting documentation and findings to the President.

12. The scope of the ToR was to look into the fitness and propriety of both Jiba and Mrwebi to hold office in their respective capacities. In relation to Jiba, and at the panel's discretion, the Eqnuiry was to consider evidence arising from the cases referred to in in the ToR.

13. Due regard had to be had to all other relevant information, which included but was not to be limited to matters relating to Richard Mdluli and Johan Wessel Booysen.

14. The Enquiry was also required to consider the manner in which Jiba fulfilled her responsibilities as DNDPP, which included considering whether:

- She complied with the prescripts of the Constitution, the National Prosecuting Authority Act, Prosecuting Policy and Policy Directives and any other relevant laws in her position as a senior leader in the National Prosecuting Authority and is fit and proper to hold the position and be a member of the prosecutorial service;

- She properly exercised her discretion in the institution, conducting and discontinuation of criminal proceedings;

- She duly respected court processes and proceedings before the Courts as a senior member of the National Prosecuting Authority;

- She exercised her powers and performed her duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;

- She acted without fear, favour or prejudice;

- She displayed the requisite competence and capacity required to fulfil her duties; and whether,

- She in any way brought the National Prosecuting Authority into disrepute by virtue of her actions or omissions.

15. With regards to Mrwebi, and once again at the Panel's discretion, the Enquiry had to consider matters arising from the cases referred to in the ToR as they relate, directly or indirectly, to his conduct.

16. All other relevant information will also be considered, including but not limited to matters relating to Richard Mdluli.

17. In determining the manner in which Mrwebi fulfilled his responsibilities as SDPP, the Enquiry will consider whether:

- He complied with the prescripts of the Constitution, the National Prosecuting Authority Act and any other relevant laws in his position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service;

- He properly exercised his discretion in the institution, conducting and discontinuation of criminal proceedings;

- He duly respected court processes and proceedings before the Courts as a senior member of the National Prosecuting Authority;

- He exercised his powers and performed his duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;

- He acted without fear, favour or prejudice;

- He displayed the requisite competence and capacity required to fulfil his duties; and

- He in any way brought the National Prosecuting Authority into disrepute by virtue of his actions or omissions.

18. As alluded to above, the Enquiry was required to complete its mandate and furnish its report together with all supporting documentation and recommendations to the President by no later than 9 March 2019 to allow him to make his decision before expiry of the six-month time limit which falls by no later than 25 April 2019. However, as matters turned out, with indulgence from the Presidency, the report was submitted on 31 March 2019.

19. Among the powers delegated to the chairperson in the ToR, were the powers to determine the seat of the Enquiry and the rules by which it would be governed. The South African Law Reform Commission was appropriately and conveniently identified as a most cost-effective seat. Situated at the Spooral Park Building, 2007 Lenchen Avenue South, Centurion Central, Centurion, 0046. The Secretariat carried out its operations here. The oral public hearings, which received regular media coverage, also took place at this location. The rules adopted are discussed in greater detail in the next section.

1.3. Rules of the procedure

20. Putting in place a set of rules was necessary to regulate the Enquiry's operation. Fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. First and foremost, the rules had to enable the Enquiry to best fulfil its mandate according to the ToR. The President, having the statutory power to initiate the process as he deems fit, duly delegated rule-making powers to the chairperson which powers were provided in the ToR.

21. The rules of procedure were drafted in the context of an enquiry, rather than a Commission, disciplinary process or criminal trial. The Enquiry was not required to determine issues of criminal prosecution, civil liability for breach of the law or to determine whether an onus had been discharged. The procedures adopted were therefore inquisitorial as opposed to accusatorial.

22. Following round-table discussions, the rules were agreed to by the Evidence Leaders and the legal representatives of the concerned parties in a meeting held on 22 November 2018 – this included agreement on the status of documents which were to be admitted as evidence.

23. Unlike a Court of law, where evidentiary laws regarding admissibility apply, the Enquiry was not subjected to the same constraints. Various documents were admitted into evidence, including relevant court records containing affidavits deposed to by the parties; case files/dockets; official reports; and memoranda. Media reports, in electronic and print form, were also admitted and did not require sworn or affirmed statements from their authors.

24. The Enquiry sought to harness technology to facilitate its operations. To this end, all documents that were received by the Enquiry had to be placed onto a Dropbox folder. The Panel, evidence leading team, parties and witnesses were all provided with access

to the Dropbox folder to ensure fairness, openness and transparency. As per the rules, and as was agreed to between all the parties, information that was contained on the Dropbox constituted evidence and parties were free to use that information in structuring their arguments as well as during the hearing phase.

25. As a general rule, the Enquiry followed a flexible approach in admitting new information into evidence throughout its process. Parties were free to, and indeed did, hand new evidence up to the Panel in the course of the hearings. The only proviso was that any newly submitted information had to be availed to all parties and be uploaded onto the Dropbox. The principle was that doing so would better enable the Enquiry to comply with its mandate of submitting all accompanying documents to the President.

26. Where individuals who deposed to affidavits gave oral evidence, the transcripts were regularly uploaded to the Dropbox. The Dropbox included statements and affidavits which Jiba and Mrwebi filed or which were filed on their behalf in various court applications, and elsewhere, and included representations which they made to the President, as well as documentation and information obtained, in the main, from the Presidency, the Ministry and Department of Justice and Correctional Services and the NPA, which was included at the Evidence Leaders' discretion. To say that the Dropbox was voluminous is an understatement. To wit, there are 5214 files, some of which contain entire records within a single file.

27. Not all the issues therein could conceivably be traversed during oral evidence and the parties were in agreement that they would not necessarily repeat aspects that had been in the past set out in affidavits on their behalf. Given the circumstances and the timeframes, the process that was followed was aimed at being as fair as reasonably possible. All parties were provided with access to the Dropbox and where it was requested, they, and witnesses, were afforded time to consider documentation, as required.

28. The Evidence Leaders received third party evidence and also solicited evidence on affidavit, which witnesses, though not called to give oral evidence were willing to do so, save for the following: Mr Nxasana (*"Nxasana"*), Adv Mamabolo (*"Mamabolo"*) and Mr Muofhe (*"Muofhe"*). Four third parties had sought to place evidence/submissions before the Enquiry: Kathleen Pawson, Mzukisi Ndara, Council for the Advancement of the South African Constitution (*"CASAC"*) and Freedom under the Law (*"FUL"*). Although the affidavits of all third parties were taken into account in considering the question before the Enquiry, only CASAC and FUL were afforded an opportunity to make oral submissions.

29. Closing written and oral argument were made on behalf of the parties. Both for practical reasons, and because of the inquisitorial nature of the proceedings, the Evidence Leaders made their extensive submissions in writing rather than in oral argument, with the representatives for Jiba and Mrwebi being given an opportunity to raise objections in relation thereto.

30. The only witness scheduled for oral evidence, who did not give evidence was Mr Angelo Agrizzi (*"Agrizzi"*). The affidavits and transcripts of the evidence that he had provided to the State Capture Commission (*"SCC"*) is included in the Dropbox. He had agreed to give oral evidence before the Enquiry but after his arrest, he instructed his attorney to inform the Enquiry that on the basis of legal advice received, he was no longer going to do so.

31. The intention was to galvanise the investigative and inquisitorial nature of the process. However, in the end, many features of the judicial process seeped into the enquiry. Parties raised objections, justified and unjustified, and the Panel was called upon to make rulings on more than one occasion, on those objections.

1.4. Invitation to submit evidence and the need for cross-examination

32. The Enquiry did not have the power to compel witnesses to provide evidence or testimony. A section 12(6) enquiry is not imbued with subpoena powers. Information placed before the Panel came from individuals and institutions volunteering to do so.

33. The evidence leaders went through the painstaking process of following sources and making requests for information. Once witnesses that might be able to offer helpful information to the Enquiry were identified and located, the evidence leaders liaised with the Panel. In turn, the Evidence Leaders we would issue formal invitations to those individuals to come forward to provide testimony. Considering that individuals were fully entitled to refuse the invitation, the exercise was remarkably successful. It speaks to the dedication, commitment, courage and forthrightness of those who responded to the call and we are highly indebted and grateful for their cooperation and efforts to assist.

34. After consulting all the parties and giving due regard to the principle of fairness, the Panel decided that for every witness giving oral testimony, each party would be given the opportunity to cross-examine in order to test the veracity of the witness' version. Re-examination by the party who led the evidence would follow.

1.5. The structure of the report

35. In order to find the best way of presenting the large swathes of information and the evidence traversed before the Enquiry a full and rather voluminous version and an abridged or "more consumable" version of the report have been provided. The aim of the latter is to allow a grasp of the salient issues without having to delve into the full version which traverses the evidence in much detail.

36. Adopting a broader and more purposeful approach to our ToR in the closing section of the report, we make our recommendations in light of our findings, articulate their implications for the NPA and propose ways in which a future recurrence may be avoided. We also describe the practical implications that follow the submission of this report to the President and include a short section of acknowledgement

2. THE PROSECUTING AUTHORITY: IT'S LEGAL FRAMEWORK

37. Starting with section 179 of the Constitution which establishes a single national prosecuting authority – the NPA has a hierarchical structure which is comprised of a NDPP as the head of the NPA, so appointed by the President, the DNDPPs, the DPPs and prosecutors as determined by the NPA Act. This is elaborated upon below.

38. Section 179(7) of the Constitution contemplates that all other matters concerning the NPA must be determined by national legislation. The NPA Act is the national legislation so contemplated in section 179 of the Constitution to ensure that prosecutors are appropriately qualified and to give effect to the independence of the NPA. It is trite that provisions of legislation in relation to the NPA must be consistent with section 179 of the Constitution.

39. The NPA is accountable to Parliament and ultimately to the people it serves. Every prosecutor, directly or indirectly, accounts to the NDPP who, in turn, is responsible for the NPA even though the Constitution provides that the Minister who is responsible for the administration of justice must exercise final responsibility over the NPA. In doing so, should the Minister seek to impede the independence of the NPA or in any way interfere with prosecutions being conducted without fear, favour or prejudice, such conduct would be inconsistent with s 179 of the Constitution.

40. The NPA established in terms of section 179 of the Constitution and as determined in the NPA Act consists of -

40.1. the Office of the NDPP; and

40.2. the offices of the prosecuting authority at every seat of the High Court.

41. Two separate offices of the prosecuting authority are created, one central and the other at the seat of the Courts. The former is the Office of the NDPP which operates nationally. The DPPs in the latter do not form part of the Office of the NDPP, but exercise overall control over their own offices. For that reason, there is a need for the Office of the NDPP to consult DPP's in decisions impacting their geographical area.

42. The NPA is therefore comprised as follows: the NDPP; the DNDPPs; the DPPs; the DDPPs; and the prosecutors. They have a discretion with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within both the letter and spirit of the Constitution.

43. It is critical that every one of them must, on appointment and before commencing in these positions, take an oath or make an affirmation, in the form provided in the NPA Act, that he or she will, in his or her respective capacity, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law of South Africa without fear, favour or prejudice and as the circumstances of any particular case may require.

44. The NDPP must determine a prosecution policy and policy directives to be observed in the prosecution process as they have done over the years. The NPA prosecution policy states that:

"the NPA is a public representative service, which should be effective and respected. Prosecutors must adhere to the highest ethical and professional standards in prosecuting crime and must conduct themselves in a manner, which will maintain, promote and defend the interests of justice".

45. The Policy and Directives as determined **must** be observed in the prosecution process and are binding on the NPA.

46. The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

47. The prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)(a) of the NPA Act.[1] The purpose of the policy, is to set out, with due regard to the law, the manner in which the NPA in general and individual prosecutors should exercise their discretion and to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions in order to make the prosecution process one of fairness, transparency, consistency and predictability.

48. The policy is a guide and ensures a level of consistency. It is for that reason then that the principles it contains were written in general terms to give direction, rather than to prescribe, and to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

49. In practice this means that, in the context of criminal procedure and the law of evidence, a prosecutor has to consider whether in fact the prosecution should be instituted. The policy supplements the law and tells the prosecutors how to go about their business.

50. Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, the prosecution should normally follow, unless public interest demands otherwise. There is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

---

1 Section 21(2) of the NPA Act. The first prosecution policy issued under the NPA Act had to be tabled in Parliament as soon after the NPA Act came into force and not later than six months after the appointment of the first NDPP. Under section 35(2)(a) the NDPP must submit annually, not later than 1 June of each year to the Minister a report referred to in section 22(4)(g) which report must be tabled in Parliament by the Minister within 14 Days if Parliament is in session, or if not in session then 14 Days after its next session ensues.

51. It is important that the prosecution process is and is seen to be transparent and that justice is seen to be done.

52. The Code of Conduct[2] was devised under Simelane as directed by section 22(6) of the NPA Act. Ramaite's evidence was that all members of the NPA, must comply with it, irrespective of rank. It is largely modelled on United Nations Guidelines on the role of prosecutors.

53. The Code prescribes the ethical conduct that members of the NPA must display and adhere to. According to Ramaite this deals with *"the issues of integrity and criteria that you would need to comply with to make sure you function independently and without fear, favour and prejudice".*

54. The relevant portions relating to professional conduct provides as set out below, in our view, also apply to both Mrwebi and Jiba. It provides as follows:

"A. PROFESSIONAL CONDUCT

Prosecutors must—

(a) be individuals of integrity whose conduct is objective, honest and sincere;

(b) respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution;

(c) protect the public interest;

(d) strive to be and to be seen to be consistent, independent and impartial;

(e) conduct themselves professionally, with courtesy and respect to all and in accordance with the law and the recognised standards and ethics of their profession;

2 Code of conduct for members of the National Prosecuting Authority under section 22(6) of the NPA Act published under GN R1257 in GG 33907 of 29 December 2010.

(f) strive to be well-informed and to keep abreast of relevant legal developments; and

(g) at all times maintain the honour and dignity of their profession and dress and act in a manner befitting their status and upholding the decorum of the court."

55. The NPA must observe the prosecution policy in the course of a prosecution process. In other words, all prosecutions conducted in the country must be in accordance with the prosecution policy that has been devised. The directives must be issued pursuant to the prosecution policy regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act.[3] In addition, the NDPP shall, in consultation with the Minister, and after consultation with the DNDPPs and the DPPs, frame a Code of Conduct (Code) which shall be complied with by members of the NPA. This Code of Conduct may from time to time be amended and must be published in the gazette for general information. The Policy, Policy Directives and the Code are treated in finer detail in the full and more comprehensive report. Section 2.3. are here cross-referenced.

56. Prosecutors in South Africa, like their peers the world over, subscribe to international prosecutorial standards set in the United Nations Guidelines. The preamble to the UN Guidelines provide, inter alia, that:

"Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through

3 Both the prosecution policy and policy directives had to be issued by 31 March 2008.

the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions."

57. The principle that prosecutors must act without fear, favour or prejudice is not only firmly entrenched in South African law, it is an internationally accepted principle. The United Nations Guidelines for the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba from 27 August to 7 September 1990. Article 12 requires prosecutors to *"perform their duties fairly, consistently and expeditiously"* and requires them to *"respect and protect human dignity and uphold human rights".* Articles 13(a) and (b) provide that, in the performance of their duties, prosecutors must act *"impartially"*, must avoid all forms of discrimination, must act in the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. Section 22(4)(f) of the NPA Act envisages that the NDPP must bring these guidelines to the attention of all prosecutors and promote respect for and compliance with the guidelines.[4]

58. In addition to obligations under international law, South Africa also has a working relationship with the OECD. The OECD is an intergovernmental initiative to stimulate economic growth. Because corruption has a negative impact on economic growth, the OECD seeks to ensure compliance with the Convention on Combating Bribery of Foreign Public Officials and International Business Transactions (*"the OECD Convention"*). The OECD Convention was adopted by South Africa on 21 November 1997 and was ratified in 2007.

59. Every year each States Party is required to make a submission to the OECD detailing its investigations into any breach of the OECD Convention that it has identified. State parties are also expected to give a detailed breakdown of the progress made with their

4 See also Boucher v The Queen [1955] S.C.R.16 at 23-24; Berger v United States 295 U.S. 78.88 (1935); People v Zimmer 51 NY2d 390 (1980) at 393.

investigations. In addition, the OECD monitors implementation of the Convention by each State Party. The NPA is one of the organs of state which participate in the annual submissions.

60. Turning back to the UN Guidelines, Guideline 1 provides that "persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications".

61. Guideline 7 provides that:

"Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures."

62. Guidelines 10 – 16 set out the role of prosecutors in criminal proceedings and it suffices to say, for purposes of this report, provide among other things that:

62.1. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of Court decisions and the exercise of other functions as representatives of the public interest.

62.2. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

62.3. In the performance of their duties, prosecutors shall:

62.3.1. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

62.3.2. Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

63. In addition the IAP was established in 1995 to, among other things, "promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences" adopted a set of standards for prosecutors in 1999. The standards call upon prosecutors to be independent and to maintain the honour and dignity of their profession. They must conduct themselves professionally and ethically, exercising the highest standards of integrity and care, strive to be, and to be seen to be, consistent, independent and impartial. This must all be done in service to and in protection of the public interest.

64. The Constitution requires that prosecutorial independence must be jealously guarded and must operate independently and in material respects and at all times and no person or organ of state shall improperly interfere with, hinder or obstruct the prosecuting authority or any member of it when they perform their duties and or exercise their powers, duties and functions. There is thus a constitutional guarantee that the NPA would be independent and function effectively without any undue influence. In Glenister, the Constitutional Court, in affirming its earlier decision, stated that:

"The appearance or perception of independence plays an important role in evaluating whether independence in fact exists … We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence…This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence".[5]

5 Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC). para 207

65. The LPA defines a legal practitioner as “an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively”.

66. Section 24 of the LPA reads:

> *“(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.*
>
> *(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—*
>
> *(c) is a fit and proper person to be so admitted...”*

67. This has always been the position in relation to attorneys and advocates.

3. THE STRUCTURE OF THE NPA

3.1. Roles and functions

68. Section 5(1) of the NPA Act, taking its cue from the Constitution, establishes a National Office of the Prosecuting Authority (known as the Office of the NDPP). It is a hierarchical organisation comprised of the NDPP (who is ***both the head of the office and controls the office***), DNDPPs, investigating directors, special directors, other members of the Prosecuting Authority appointed at or assigned to the office and members of the administrative staff.

69. The Office of the NDPP is separate and distinct from the offices of the Prosecuting Authority which established by the Minister and are located at seats of the High Courts around the country. The latter consists of (1) the head of office, who is either a DPP or DDPP and who exercises control of that office; (2) DDPPs; (3) prosecutors; (4) persons appointed to perform specific functions in terms of the NPA Act, and; (5) the administrative staff of the office.

70. Where the NDPP is absent or unable to perform his/her functions, the NDPP must appoint one of the DNDPPs as an acting NDPP. This should be distinguished from the scenario when the Office of the NDPP is vacant, or the NDPP is for any reason unable to make the appointment. In the latter scenario the President may, after consultation with the Minister, appoint any DNDPP as the acting NDPP. *The point being made here is that, in all scenarios, an Acting NDPP must be selected from within the ranks of the 4 DNDPPs.*

71. The DNDPPs, in turn, are each allocated specific divisions which they are responsible for. One of these divisions is the National Prosecutions Service. It is through this division that ordinary criminal prosecutions are carried out in the courts. As they are situated at every seat of the High Court around the country, the DPPs are ultimately responsible for the prosecutorial work that takes place within their respective jurisdictions. They

may institute or discontinue criminal proceedings and carry out any related functions in their area of jurisdiction subject to the control and directions of the DNDPP specifically responsible for the National Prosecutorial Service. DPPs may conduct criminal proceedings only in relation to offences that have not been expressly excluded from their jurisdiction, either generally or in a specific case by the NDPP.

72. A DDPP exercises his or her functions subject to the control and direction of the DPP concerned. A DDPP may function only in the area of jurisdiction in which he or she has been appointed and in respect of cases and in courts where he or she has been authorised to do so. The authorisation is in writing by the NDPP or by a person designated by the NDPP.

73. Prosecutors commence criminal proceedings, discontinue them or exercise any functions incidental to the conduct of criminal proceedings. They operate within their respective jurisdictions under the auspices of the relevant DPP.

74. To better understand how the NPA is structured, the graphics depicted in the pages which follow offer an overview. Table 1 shows the current structure of the national office. Each DNDPP is responsible for the portfolios that are allocated to them by the NDPP. The DNDPPs can be and have been reshuffled and/or cycled between portfolios at the instance of the NDPP.

75. Table 2 represents the various business units within the NPA as described by its website. However the business units are not structured according to a particular hierarchy in relation to one another.

76. Tables 3 and 4 show the organisational structure of the NDPP as it was in 2013. Two fundamental changes have since taken place. Firstly, the Directorate of Special Operations (or “the Scorpions” as they were known) was scrapped and replaced by the Hawks within the remit of South African Police Service. Secondly, the office of the CEO

was removed and its responsibilities subsumed into the administration business unit under the auspices of a DNDPP's portfolio.

Table 1: NPA - National Office: each DNDPP is responsible for overseeing certain portfolios. As it stands, the portfolios are: Administration, National Prosecutions Service (NPS), Asset Forfeiture Unit (AFU) and the Legal Affairs Division (LAD).

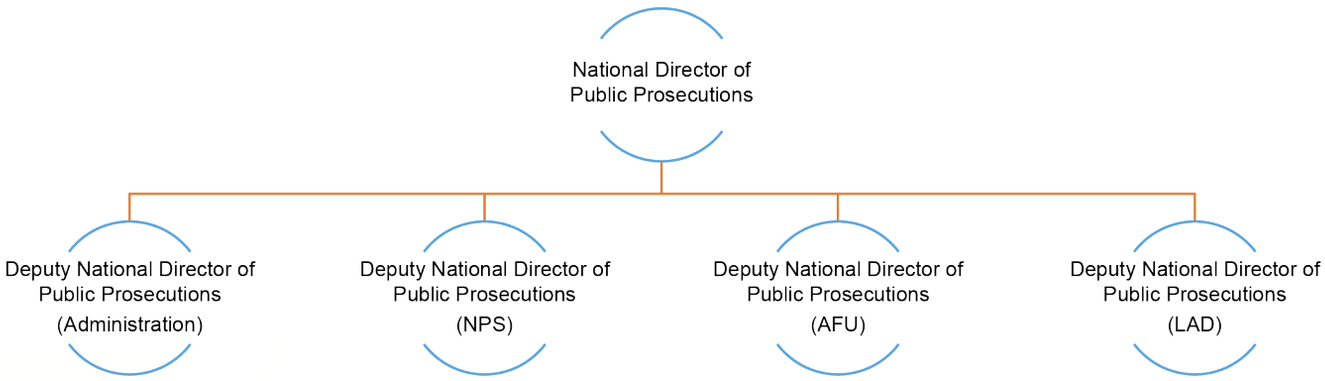

Table 2: NPA - Business Units

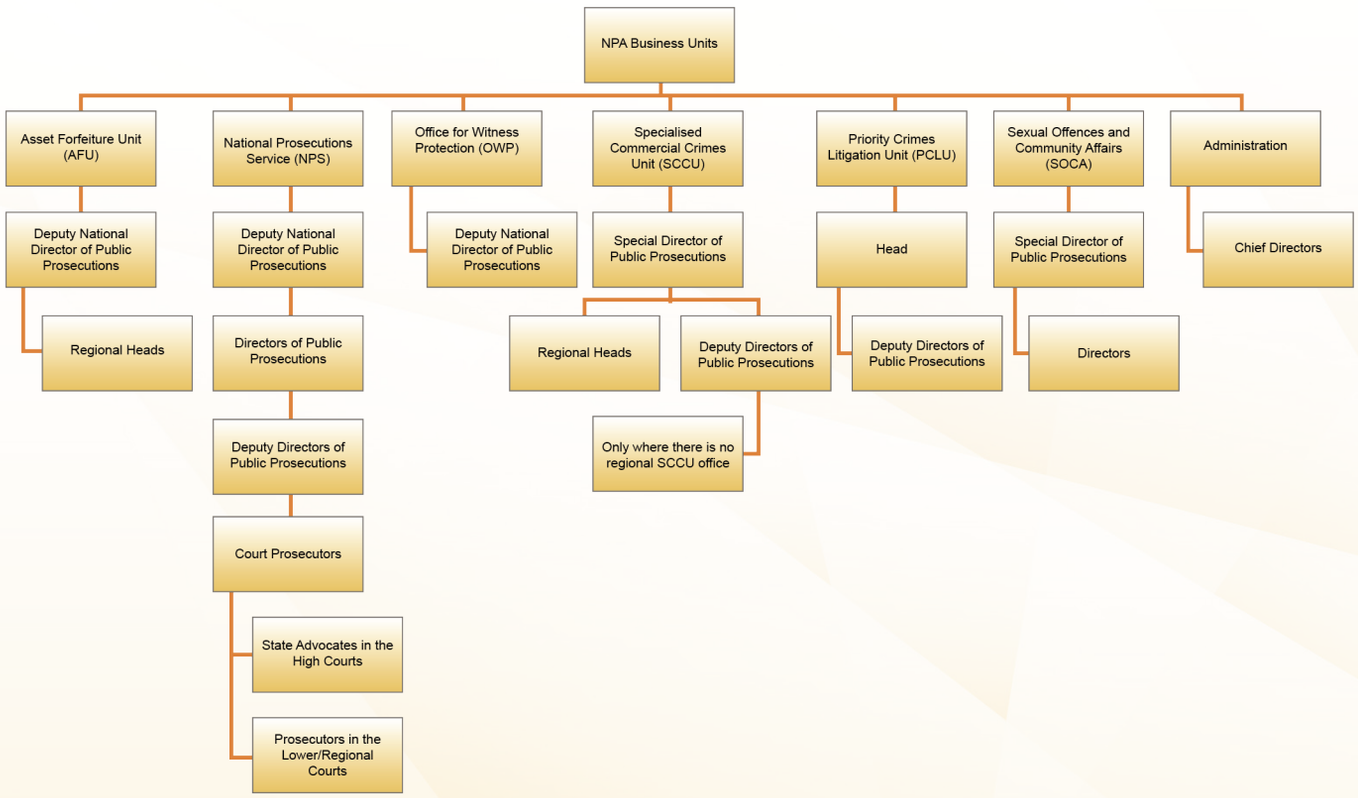

Table 3: taken from a presentation created in 2013 with a hierarchal representation of the NPA Organisational Structure[6]

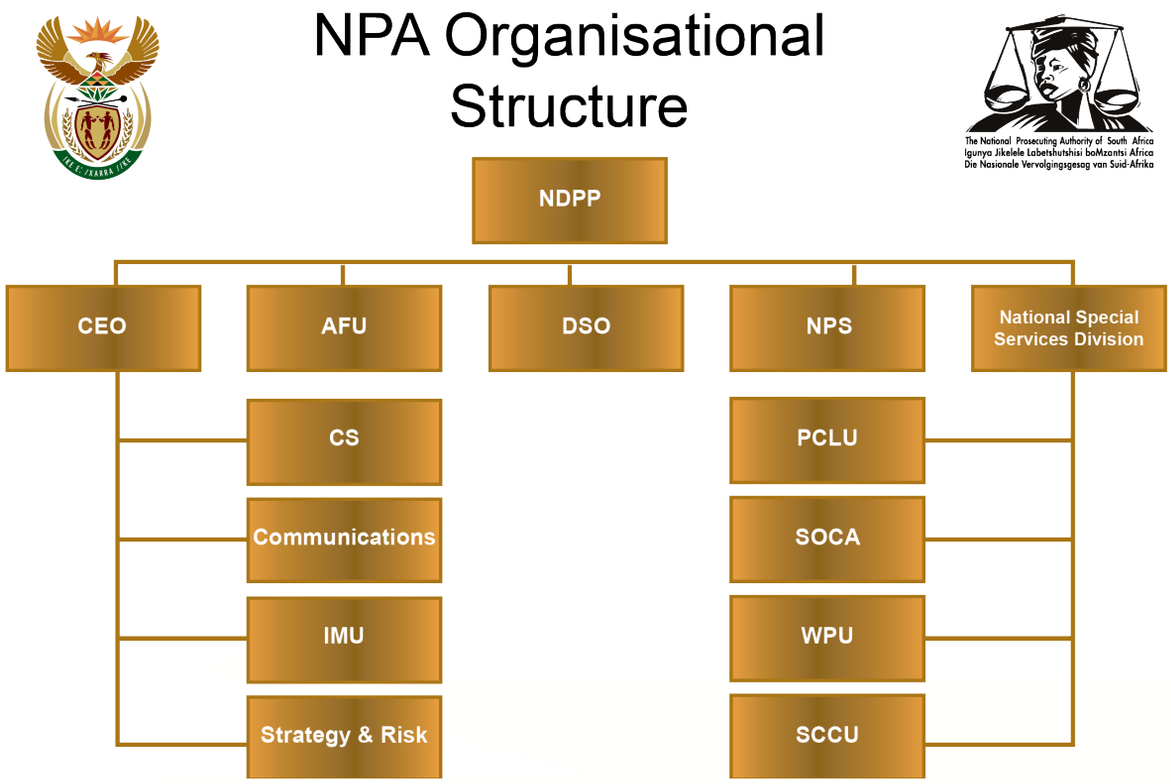

Table 4: Structure within the now defunct CEO office, as it was then in 2013.[7]

6 Source: https://www.slideserve.com/Mia_John/career-opportunities-within-the-national-prosecuting-authority-npa

7 Source: https://www.slideserve.com/Mia_John/career-opportunities-within-the-national-prosecuting-authority-npa

3.2. The National Director of Public Prosecutions

77. The NDPP is appointed by the President as per the Constitution and the NPA Act.

78. Section 9 of the NPA Act prescribes the requisite qualifications and requirements that an NDPP, DNDPP or DPP, must have in order to enable his/her appointment. It reads as follows:

"(1) Any person to be appointed as National Director, Deputy National Director or Director must-

***possess legal qualifications** that would entitle him or her to **practise in all courts** in the Republic; and*

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".

79. In addition to this, the person to be appointed as NDPP must be a South African citizen. The NPA Act proscribes the NDPP's term of office. They are appointed for a non-renewable term of 10 years or up until the age of 65, whichever comes sooner. It is worth noting that, since the adoption of our Constitution, we have yet to see an NDPP complete their 10 year term in office without resigning or being removed. This state of affairs has resulted in a spate of acting appointments.

80. Below is a brief timeline reflecting the various individuals who have held the position of NDPP:

80.1. 1 April 2001 – 31 August 2004: Bulelani Ngcuka

80.2. August 2004 – January 2005: Silas Ramaite (acting)

80.3. 1 February 2005 – 17 February 2009: Vusi Pikoli (suspended and then removed / retired)

80.4. 1 May 2009 – 31 October 2009: Mokotedi Mpshe (acting)

80.5. 1 December 2009 – 1 October 2013: Menzi Simelane (December 2011 Simelane was suspended after the SCA; 8 May 2012 Simelane removed pursuant to the Constitutional Court judgment)

80.6. 20 December 2011 – 30 September 2013: Nomgcobo Jiba in an acting capacity, including her maternity leave which she took between early January and 17 May 2013.

80.7. 1 October 2013 – 31 May 2015: Mxolisi Nxasana

80.8. 18 June 2015 – 13 August 2018: Shaun Abrahams

80.9. 1 August 2018 – 31 January 2019: Ramaite (acting)

80.10. 1 February 2019 – present: Shamilla Batoyi

81. The Constitution delineates the NDPP's functions, explaining that the NDPP:

*"(a) **must** determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;*

*(b) **must** issue policy directives which must be observed in the prosecution process;*

*(c) **may** intervene in the prosecution process when policy directives are not complied with; and*

*(d) **may** review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:*

(i) The accused person.

(ii) The complainant.

Any other person or party whom the National Director considers to be relevant." (Emphasis added)

82. The first two subsections are peremptory whilst the latter two are discretionary.

83. In practice, the scenario in (c) may arise in various ways. For instance, following representations being made to the NDPP, he/she might consider whether the decision was consistent with policy. Alternatively, the NDPP might become aware of an instance where the policy has not been followed and intervene. Intervention might also be brought about through an assessment of a DPP's performance. The NDPP must make sure that policy directives are adhered to.

84. When the NDPP chooses to intervene, reasons are requested from the individual prosecutor for the decision. A distinction is drawn between the power conferred in (c) to that which is set out in (d), the latter dealing with the review of a decision not to prosecute. The scenario in (d) might come to the attention of the NDPP: through inspections; where it is brought to the NDPP's attention; where the NPA has been taken on review; or where there may be differences between a SD and a DPP in respect of a decision to prosecute.

85. According to the NPA Act, the SD prosecutes in consultation with the DPP. Naturally, differences may arise. Situations like this may warrant the NDPP's intervention in the form of a review of the decision. When reviewing a decision to prosecute, the NDPP

must take representations from the accused, the complainant and any other party who the NDPP deems to be relevant. This might include interest groups or any other person who has a sufficient interest in the outcome, including the investigating officer.

86. The upshot of this discussion is that the NDPP is not entitled to exercise a discretion to interfere with or stop a prosecution however she/he deems fit. The NDPP's powers in this regard are constitutionally and statutorily circumscribed. In NDPP's review is confined to the boundaries of compliance with the prosecution policy.

87. In addition to the powers described above, the NDPP has the following duties:

87.1. With the view to exercising his or her powers in terms of section 22(2) of the NPA Act,

87.2. the NDPP may conduct any investigation necessary in respect of a prosecution or prosecution process or directives, directions or guidelines given or issued by a DPP in terms of the NPA Act, or a case or matter relating to such prosecution or prosecution process or directives, directions or guidelines;

87.2.1. direct the submission of and receive reports or interim reports from a DPP in respect of a case, matter, a prosecution or a prosecution process or directives, directions or guidelines given or issued by a DPP in terms of this Act; and

87.2.2. advise the Minister on all matters relating to the administration of justice;

87.3. Maintain close liaisons with the DNDPPs, the DPPs, the prosecutors, the legal profession and legal institutions to foster common policies and practices and promote cooperation in relation to the handling of complaints made against the NPA;

87.4. May consider such recommendations, suggestions and requests concerning the Prosecuting Authority as the NDPP may receive from any source;

87.5. Assist DDPs and prosecutors in achieving the effective and fair administration of criminal justice;

87.6. Assist the DNDPP, DPPs and prosecutors in representing their professional interest;

87.7. Bring the United Nation Guidelines on the role of prosecutors to the attention of DPPs and prosecutors and promote their respect for and compliance with the abovementioned principles within the framework of national legislation;

87.8. Prepare a comprehensive report in respect of the operations of the Prosecuting Authority which shall include reporting on:

87.8.1. the activities of the NDPP, the DNDPP, the DPPs and the NPA as a whole;

87.8.2. personnel management within the institution;

87.8.3. financial data relating to the administrative and operational functions of the NPA;

87.8.4. any recommendations or suggestions in respect of the Prosecuting Authority; and

87.8.5. information relating to the training programmes for prosecutors and any other information which the NDPP deems necessary;

87.9. May have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by administrative staff; and

87.10. May make recommendations to the Minister with regard to the NPA or the administration of justice as a whole.[8]

8 Also the NDPP shall, after consultation with the DNDPPs and the DPPs, advise the Minister on creating a structure by regulation in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the Prosecuting Authority in determining the powers and functions of such structure.

88. The power to investigate which is referred to above is a remnant of the Act which created the DSO. Incorporation of the DSO into the NPA Act permitted criminal investigations. It continues to remain there, but is very limited because, pursuant to the legislated creation of the Directorate for Priority Crimes Investigations (*"DPCI"*), it is now the head of the priority crimes investigations who must request an investigation. Ostensibly, it does not refer to a criminal investigation, but to an investigation into the the prosecution decision itself. This interpretation is supported by the fact that the NDPP has the power to direct DPPs to submit reports to him or her.

89. The office of the NDPP also has a mechanism called a media monitor, which allows the office to keep a watchful eye as to what is happening across the country. Information emanating from there is distributed to all the NPA members.

90. According to Ramaite, the NDPP should not ask a DPP from one area to evaluate the work of a DPP in another area, because the DPPs are appointed and exercise powers in their particular area of jurisdiction. There is no provision in the NPA Act, policy or directives dealing with this scenario. Ramaite had difficulty with a DPP having to take decisions in respect of another DPP's area of jurisdiction.

91. It should be noted that where the NDPP, or authorised DNDPP, deems it in the interest of the administration of justice that an offence committed wholly or partially within the area of jurisdiction of one DPP be investigated and tried within the area of jurisdiction of another DPP then he or she may, subject to the provisions of section 111 CPA Act, direct in writing that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of another DPP.

92. In practice, the affected DPPs confer and agree on the area of jurisdiction in which the trial will take place. They then request a centralisation. The centralisation must be accompanied by the consent of any DPPs involved.

93. The Enquiry was told that a national project is where prosecutors from different jurisdictions work together on a single project, either because it spans different jurisdictions or because it generates national interest. It is normally be driven from the NPA Head Office. It is managed by the NDPP, not arising out of any specific provision, but because it is in the public interest. The considerations are the same as those which determine whether a matter is in the public interest.

94. The different DPPs provide resources and retain supervisory powers. An example of this was the prosecution of the former President. It was a national project but the DPP in KZN retained the power, yet there was a prosecutor from the Western Cape. More particularly, in the case of organised crime, it is normally a national project, especially if a large organised crime syndicate operates across provinces. The consent of the DPP from where the prosecutor comes and the DPP where the prosecutor is placed is required.

4. THE APPOINTMENT AND ELEVATION OF JIBA AND MRWEBI

95. This section briefly canvasses the qualifications and experience of Jiba and Mrwebi as evinced from their curriculum vitae and personnel records. It seeks to establish the skills and competencies which they themselves acknowledge as being the basis on which they were appointed. During the course of the hearings, various allegations were levelled against them which sought to challenge their competence in the positions that they occupy. These allegations are addressed in the section that follows.

4.1. Nomgcobo Jiba

96. Jiba completed her B Juris in 1987 followed by an LLB in 1989 at the Walter Sisulu University. She later obtained a Diploma in Industrial Relations and a LLM in Commercial Law from the University of Cape Town.

97. Between 1988 and 1997, she served as a prosecutor in the Eastern Cape. She resigned from her job as a prosecutor in 1997 and joined Qunta Ntsebeza Attorneys as a candidate attorney.

98. According to her Curriculum Vitae she had been employed as a Senior State Advocate[9] during the period 1999 – 2000 and was appointed as DDPP in 2001 in the Office for Serious Economic Offenses which later, after various developments, evolved into the Directorate for Special Operations (Scorpions).[10]

99. From 2010 to date she has been serving as a DNDPP. In December 2011 she got appointed as an Acting NDPP, after the Court had delivered judgment against Advocate Simelane. She held this position as acting NDPP until 4 August 2013 when Mxolisi Nxasana was appointed, at which point she returned to her position as DNDPP.

9 This is simply a position and she does not become an advocate by virtue of holding this position.

10 Jiba was appointed as DDPP on 1 February 2002 as apparent from personnel records.

4.2. Lawrence Sithembiso Mrwebi

100. Mrwebi's Curriculum Vitae reflects that before his appointment in 1998 as a DDPP to the then Office of Serious Economic Offences (OSEO) in Pretoria, he served as a senior state advocate in the then office of the attorney-general.

101. Shortly after the OSEO became the Investigative Directorate for Serious Economic Offences and merged with the then Investigative Directorate for Organized Crime to form the Directorate for Special Operations (DSO – commonly known as the Scorpions) Mrwebi was appointed as its regional head in KwaZulu-Natal (KZN). He states in his CV that while he was regional head in KZN, he retained his position as Deputy Director of Public Prosecution but with different functions and more added responsibilities.

102. When the DSO was disbanded in 2009, Mrwebi joined the office of the Director of Public Prosecutions (DPP) in Pretoria where he managed the office's Specialised Prosecutions Division (SPD), which was responsible for the prosecution of commercial crimes, tax offences, environmental crimes as well as sexual offences.

103. On 1 November 2011 under Proclamation No: 63 of 2011 published in Government Gazette No: 34767 dated 25 November 2011 he was appointed as a Special Director of Public Prosecutions (SDPP) and head of the NPA's Specialised Commercial Crimes Unit (SCCU).

5. THE ALLEGATIONS AND THE EVIDENCE

104. Our ToR mandate us to look at the findings and adverse comments in specific Court decisions. In addition, the ToR specify that we have due regard to all other relevant information, including information related to Mdluli and Booysen. We must also consider other extranneous information.

105. At this point, it is worth reiterating that because this Enquiry is not a judicial review process, it cannot and will not review the findings of the Courts in the cases discussed below. Where we consider evidence related to the cases under this broader heading, it in no way seeks to undermine or subvert the Courts and, implicitly, the rule of law.

106. What follows is a canvassing of the evidence in relation to each particular case. This portion of the report relies extensively on the submissions of the Evidence Leaders, whose mandate was to place objective information before the Panel to enable us to deliberate. The legal representatives were afforded an opportunity to add their clients' perspectives throughout the process and, to the extent that an inquisitorial exercise such as this allows, we have sought to incorporate those views and to factor them into our evaluation.

5.1. The case law

107. The case summaries below highlight specific findings and comments the Courts made about Jiba and Mrwebi and we address them in turn.

108. The cases that were included in the ToR and which are summarised below are as follows:

5.1.1. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (1) SA 254 (GNP) ("FUL HC")

109. FUL applied for the review and setting-aside of the decisions of Jiba, Mrwebi and the National Police Commissioner relating to the withdrawal of criminal and disciplinary charges against Mdluli and his reinstatement as Head of Crime Intelligence within the South African Police Service (SAPS). FUL also sought an order directing that the charges be immediately reinstated and prosecuted to finalisation. The main issues were the lawfulness of these decisions and the power of the judiciary to review prosecutorial decisions.

110. On 15 May 2012 Freedom Under Law (FUL) launched an application to review and set aside four decisions, 2 of which were taken by the NPA, 1 by the SAPS and one by Crime Intelligence:

110.1. the decision taken by Mrwebi to withdraw the corruption and related charges against Mdluli (which decision is material to the Enquiry);

110.2. the decision taken by Adv Andrew Chauke ("Chauke") on 1 February 2012, who withdraw the murder and related charges against Mdluli;

110.3. the decision taken by the Acting Commissioner, SAPS on 29 February 2012, to withdraw the disciplinary proceedings against Mdluli which were initially instituted based on the criminal charges described above; and

110.4. the decision, of 27 or 28 March 2012 to reinstate Mdluli as the Head of Crime Intelligence.[11]

111. Mrwebi's decision/s to withdraw the charges against Mdluli, was challenged on grounds that he was not empowered to take the decision; it was taken in the face of overwhelming evidence against Mdluli and against the strong recommendations of the regional head of the SCCU at the time, Adv Glynis Breytenbach ("Breytenbach"); it was taken without

11 The latter two decisions are not germane to the Enquiry.

consultation with the DPP; it was based on an error of law in that it was based on irrelevant evidence and the misconception that only the Inspector General of Intelligence ("IGI") had jurisdiction to investigate the matter.

112. On 23 September 2013, Murphy J granted the orders setting aside Mrwebi's decisions as well as ordering that the criminal charges and disciplinary charges against Mdluli be reinstated.

113. Delays occurred in the matter with regards to the filing of the record of the decision to withdraw the charges against Mdluli. Additionally, the Rule 53 record which was filed, was incomplete.[12] Jiba and Mrwebi further filed their heads of argument a month late and only two days before the hearing.[13] On 17 July 2013 FUL submitted a replying affidavit. FUL pointed out that the Acting NDPP and Mrwebi's affidavits were filed late and that Jiba and Mrwebi, who were in possession of all the relevant information in the case, had still not filed a complete record.[14] The affidavits of Mrwebi and Jiba were filed two months after the dies expired and nine days after the due date set by the Judge President, without any application for condonation.[15]

114. The Judge President issued directions on 6 June 2013 that the respondents should file their answering affidavits by 24 June 2013 and their heads of argument by 12 August 2013.[16]

115. Instead, an answering affidavit dated 2 July 2013 dealing with the decision itself, deposed to by Mrwebi,[17] and a confirmatory affidavit, deposed to by Jiba, dated 3 July 2013, which largely dealt with the legal framework and technical issues,[18] were filed. A further affidavit deposed to by Chauke, dated 2 July 2013, was also filed

12 **FUL HC**, paras 20 – 21; a rule 53 is a mechanism created in terms of the Uniform Rules of Court Act. It enables applicants wishing to review decisions before the courts to compel the decision-maker being brought on review to provide the applicant with a record together with reasons for which the impugned decision was taken.

13 **FUL HC**, para 23.

14 **FUL HC**, paras 12, 66.

15 **FUL HC**, para 23.

16 **FUL HC**, para 23.

17 Folder G, Item 3, Item 3.1, **FUL SCA** rec p. 1350.

18 Folder G, Item 3, Item 3.1, **FUL SCA** rec p. 1380.

116. Although Murphy J condoned their non-compliance, he found that the reasons for the delays and late filing were sparse and mostly unconvincing. In granting condonation, he made the following remarks:

"the conduct of the respondents is unbecoming of persons of such high rank in the public service, and especially worrying in the case of the NDPP, a senior officer of this Court with weighty responsibilities in the proper administration of justice. The attitude of the respondents [signal] a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold."[19]

117. In his answering affidavit Mrwebi raised points in limine regarding the authority of the deponent for FUL, and the jurisdiction of the Court.

118. The Court also criticised Jiba for not mentioning the memorandum[20] that had been submitted to her by Breytenbach and Adv Ferreira ("Ferreira") (BF memo) simply saying that "the decisions" of the Special DPP and the DPP who instructed the charges to be withdrawn "have not been brought to my office for consideration in terms of the regulatory framework" implying that she had not made any decision in relation to the representations.[21]

119. Murphy J emphasised the following in relation to Mrwebi's assessment of the reports:

"40. Mrwebi stated in his answering affidavit that after he considered the reports and examined the docket, he concluded that there "were many complications with the matter particularly with regard to the nature and quality of evidence" and how that evidence had been obtained. He was of the view that "there was no evidence, other than suspicion linking the suspects to the alleged crimes". He also had concerns that the evidence had been acquired improperly because documents in relation to the SSA are privileged and that the documents could not be relied on until

19 **FUL HC**, para 24.

20 The memorandum was highly critical of the decision to withdraw charges against Mdluli and suggested that it could not have been the correct legal position to take.

21 **FUL HC**, para 36.

the IGI waived the privilege. And, thus, he believed there would be problems with the admissibility of the incriminating documentation. As will appear presently, this account is inconsistent with the objective facts as reflected in contemporaneous correspondence." (our underlining)

120. The Judge pointed out that the consultative note showed that the sole reason for Mrwebi's decision to instruct that the charges be withdrawn was his belief that those charges fell within the exclusive jurisdiction of the IGI in terms of section 7 of the ISO Act.[22]

121. Concerned that Mrwebi did not disclose what were obviously relevant documents as part of his Rule 53 record, the Court observated that the documents only came to light later as annexures to Breytenbach's founding affidavit in her Labour Court application.[23]

122. The Court therefore rejected Mrwebi's account of his reasons for passing the matter to the IGI. Because in his answering affidavit, he referred the matter to the IGI because "he believed that the IG would not only help with access to documents and information" but could also resolve the issue of privilege. He was merely postponing the matter until the IGI sorted out the evidentiary problems.[24] The Court held that this was not borne out by subsequent events and correspondence.[25]

123. Murphy J assessed the evidence in the answering affidavit of Mrwebi and the confirmatory affidavit deposed to by Adv Sibongile Mzinyathi, the DPP, North Gauteng ("Mzinyathi") concluding that:[26]

123.1. Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the Breytenbach disciplinary hearing (or for that matter with any of the averments in the supplementary founding affidavit);

22 **FUL HC**, para 43.
23 **FUL HC**, para 41.
24 **FUL HC**, para 44.
25 **FUL HC**, para 45.
26 **FUL HC**, paras 52 – 53.

123.2. His account of the events between 5 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific allegations in the supplementary founding affidavit;

123.3. Mrwebi nonetheless maintained that he had consulted Mzinyathi even though the answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi, who initially did not confirm Mrwebi's general account;

123.4. In his confirmatory affidavit filed at the eleventh hour, a day before the hearing, without any explanation whatsoever for filing six months after the delivery of the supplementary founding affidavit, Mzinyathi, differing from his evidence given at the Breytenbach disciplinary hearing, confirmed the allegations in Mrwebi's affidavit as they relate to him.

123.5. Mzinyathi elaborated further, that Mrwebi approached him at his office on 5 December 2011, told him that he was dealing with representations regarding Mdluli and needed to consult with him;

123.6. However, instead Mrwebi mentioned that he was busy researching the ISO and then left his office. The impression created, as mentioned earlier, is that no substantive discussions took place between them on that day showing that there was no concurrence before Mrwebi wrote the consultative note and communicated with Mdluli's attorneys;

123.7. Mzinyathi had written an email on 8 December 2011 to Mrwebi and, together with Breytenbach, met him on 9 December 2011. At that meeting they were persuaded that the matter was not ripe for trial and agreed to the provisional withdrawal of the charges;

124. This differs materially from his original position that he was unable to influence the decision because it had been finally taken but conceded to the characterisation of the withdrawal as provisional as a compromise partially addressing his concerns."

125. Mrwebi had offered no detail in his answering affidavit of any continuing investigation into the fraud and corruption charges either by SAPS or any involvement of the NPA, nor did he name any person supposedly seized. He also did not comment on the recommendation of the IGI that criminal proceedings should be instituted against Mdluli. Murphy J concluded from this:

"His averments in the answering affidavit regarding continuing investigations, on the face of them, are unsubstantiated and hence unconvincing. He sought belatedly to supplement his deficient evidence in these respects in his supplementary answering affidavit filed on 10 September 2013."[27]

126. Criticised for his conduct in relation to the filing of the supplementary answering affidavit, Murphy J found the following:

"Motivated in part, as he said, by a need to respond to what he considers to be a withering attack by Justice Kriegler on his integrity, credibility, and the propriety of his decisions, and hence by implication his suitability to hold his office, Mrwebi delivered the supplementary answering affidavit (making averments going beyond the challenge to his integrity) on the day before the matter was enrolled for hearing, two months after the replying affidavit was filed and one month after the applicant filed its heads of argument. His reasons for taking so long are not compelling and pay little heed to the fact that his timing ambushed the applicant and denied it the opportunity to deal with the allegations made in the affidavit.

For the most part, the affidavit does not take the matter further and basically repeats his assertion that the decision was not unilateral and that investigations are continuing. Mrwebi referred for the first time in this affidavit to five written reports from members of the prosecuting authority who are investigating the matter, the contents of which he was disinclined to share with the court for strategic and tactical reasons on the grounds that disclosure will hamper and prejudice the

27 **FUL HC**, para 65.

investigation. He was however prepared to share with the court the fact that the NPA has experienced "challenges" in relation to the declassification of documents. Moreover, on 25 June 2013, three months before the hearing of the application, it was established by investigating prosecutors that the evidence of the main witness (who is not identified by name) will have to be ignored in its entirety because it is apparently a fabrication not reflecting the true version of events. The exact nature of that evidence and the basis for its refutation is not disclosed.

For reasons that should be self-evident, it is not possible to attach much weight to this evidence. The applicant has been denied the opportunity to respond to it, and by its nature it is vague and unsubstantiated. Mrwebi, by his own account, and for reasons he does not explain, sat on this information for three months before disclosing it to the court on the day before the hearing. The averments accordingly can carry little weight on the grounds of unreliability. The conduct of the Special DPP, again, I regret, as evidenced by this behaviour, falls troublingly below the standard expected from a senior officer of this court.[28]" (our underlining)

127. In relation to the answering affidavit of Jiba, the Court noted that:

"The Acting NDPP fails to mention the representations made to her by Breytenbach, or that Mdluli's written representations of 26 October 2011 were in fact addressed to her. Nor does she refer to the magistrate's finding that an inference of Mdluli's involvement was consistent with the proven facts."

128. On behalf of Jiba, Adv Hodes (*"Hodes"*) initially argued for the NDPP that the Courts have no power to review any prosecutorial decision, only the NDPP may do so and her decision will be final and not reviewable. The Court rejected this argument:

28 **FUL HC,** paras 66 – 68.

"That can never be; if only because the SCA has already pronounced that prosecutorial decisions are subject to rule of law review. It is inconceivable in our constitutional order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission."[29]

129. Murphy J held -

"For all of the many reasons discussed, the decision and instruction by Mrwebi to withdraw the fraud and corruption charges must be set aside. It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it." (our underlining)[30]

130. Murphy J noted the following in relation to FUL's allegation that the Acting NDPP tacitly confirmed the decisions:

"The Acting NDPP did not make any replicating averment in answer to this plea. In the belatedly filed supplementary answering affidavit, Mrwebi merely re-asserted that the court has no power at all to review prosecutorial decisions, which is patently wrong, and, as Justice Kriegler rightly says, a little worrying to hear from a senior prosecutor. In fairness though, Mrwebi did add that the application was in any event "premature". However, Mrwebi did not take issue with the allegation that the NDPP had tacitly confirmed the decisions to withdraw. She clearly has done exactly that.

The dispute that forms the subject matter of this application has been on-going for more than 18 months since February 2012. Given its high profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP

29 **FUL HC**, para 117.
30 **FUL HC**, para 176.

was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by section 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions mero motu; yet despite the public outcry she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by section 195 of the Constitution to be responsive, accountable and transparent.

Besides not availing herself of the opportunity to review the decision, she waited more than a year after the application was launched before raising the point and then did so in terms that can fairly be described as abstruse. Her "plea" made no reference to the relevant paragraphs of the Prosecution Policy Directives, the relevant provisions of PAJA or the principles of the common law. A plea resting only on an averment that an application is "premature" is meagrely particularised and lacks sufficient allegations to found a complete defence that there had been non-compliance with a duty to exhaust internal remedies. Had we to do here with a set of particulars of claim, they would have been excipiable on the grounds of being vague and embarrassing."[31] (our underlining)

131. When dealing with the argument relating to the exhaustion of internal remedies, the Court was critical of Jiba:

"It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted

31 **FUL HC**, paras 196 – 197.

before now to assess them, explain her perception, and, if so inclined, to correct them.

….

For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed solely at shielding the illegal and irrational decisions from judicial scrutiny."[32]

132. Similarly, in relation to a remedy:

"The NDPP and the DPPs have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of what has gone before, will be a foregone conclusion, and further delay will cause unjustifiable prejudice to the complainants and will not be in the public interest."[33]

5.1.2. National Director of Public Prosecutions and Others v Freedom Under Law 2014 (4) SA 298 (SCA) delivered on 17 April 2014 ("FUL SCA")

133. On appeal, it was on conceded, on behalf of the NDPP that such decisions are reviewable on the principle of legality or rule of law.[34]

134. The SCA confirmed that it was well established in our law that the legality principle applied to the exercise of public power, irrespective whether PAJA did.[35] The SCA

32 **FUL HC**, paras 199 – 200.
33 **FUL HC**, para 237.
34 **FUL SCA**, para 19.
35 **FUL SCA**, paras 27 – 28.

noted that this included a review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute as confirmed in Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others.[36]

135. The Acting NDPP also argued that the impugned decisions were provisional and not final. The SCA rejected this argument for two reasons:

136. a decision should not be immune from judicial review just because it can be labelled 'provisional' however illegal, irrational and prejudicial it may be;[37] and

137. the withdrawal of the charge is final until it is revived by a different, original decision to reinstitute the prosecution.[38]

138. The third preliminary point taken by the Acting NDPP was that FUL had failed to exhaust internal remedies. As the SCA found that PAJA did not apply, the SCA noted that the common law position was that a Court would condone a failure to pursue an available remedy, for instance where that remedy was illusory or inadequate.[39] In this regard the SCA indicated that (1) Breytenbach had requested that the NDPP intervene in Mrwebi's decision to withdraw the fraud and corruption charges; and (2) the dispute had been ongoing for many months before it eventually came to Court and, during that period, it was widely covered by the media. But despite this wide publicity, the high profile nature of the case and the public outcry that followed, the Acting NDPP never availed herself of the opportunity to intervene. Against this background FUL could hardly be blamed for regarding an approach to the NDPP as meaningless and illusory in a matter of some urgency.[40]

---

36 2012 (3) SA 486 (SCA), paras 28 – 30; **FUL SCA**, para 29.
37 **FUL SCA**, para 34.
38 **FUL SCA**, para 34.
39 **FUL SCA**, para 36.
40 **FUL SCA**, para 37.

139. The first challenge to Mrwebi's decision was based on section 24(3) of the NPA Act. In this regard the SCA sets out the issues as follows:

140. FUL alleged that Mrwebi had failed to comply with the provisions of s 24(3) of the NPA Act in that he did not take the decision to withdraw the charges "*in consultation*" with the DPP "*of the area of jurisdiction concerned*" as required by the section.

141. It was well established law that when a statutory provision requires a decision-maker to act ***"in consultation with"*** another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of "*after consultation with*" which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.

142. The SCA summarised Mrwebi's version in his answering affidavit to be that he briefly discussed the matter with Mzinyathi, on 5 December 2011, after which he prepared an internal memorandum addressed to Mzinyathi, setting out the reasons why, in his view, the fraud and corruption charges should be withdrawn. Although Mzinyathi did not agree with him at that stage, there was a subsequent meeting between the two of them, together with Breytenbach, on 9 December 2011 at which, although the other two were initially opposed to the withdrawal of the charges, they agreed that there were serious defects in the State's case and that the charges should be provisionally withdrawn.

143. The SCA identified the problems with this version to be the following:[41]

144. Amongst others, it is in direct conflict with the contents of Mrwebi's internal memorandum of 5 December 2011 from which it is patently clear that by that stage he had already taken the final decision to withdraw the charges, in particular, the last two sentences:

41 **FUL SCA**, para 39.

"The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Colonel Barnard immediately."

145. *"The lawyers of Lt-General Mdluli will be advised accordingly."*

146. It was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at the Breytenbach disciplinary hearing, which is set out extensively in **FUL HC**.[42] In sum, Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the aforementioned memorandum; that at that stage he did not know what Mzinyathi's views were; and that he only realised on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn.

147. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was *functus officio*, because he had already informed Mdluli's attorneys of his decision.[43]

148. The SCA concluded that **FUL HC** was correct[44] in concluding that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference thus is that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based and as such the decision cannot stand.[45]

149. Having so concluded the SCA held it was unnecessary to deal with the other reasons given in the **FUL HC** as to why Mrwebi's impugned decision cannot stand,[46] but concluded that, in the main, it found the **FUL HC**'s reasoning convincing and nothing had been argued in the **FUL SCA** to cast doubt on their correctness.

---

42 **FUL HC**, paras 47 – 48.
43 **FUL HC**, para 50.
44 **FUL SCA**, para 41.
45 **FUL SCA**, para 41.
46 **FUL HC**, para 141 et seq; **FUL SCA**, para 42.

150. It differed from the **FUL HC**, in that it remitted the setting aside of Mrwebi's decision (and those to terminate disciplinary charges and reinstate Mdluli) to the NPA (and SAPS) respectively, holding that the **FUL HC** went too far in that regard.[47]

5.1.3. Booysen v Acting National Director of Public Prosecutions and Others [2014] 2 ALL SA 319 (KZD) delivered on 26 February 2014

151. Booysen, then a Major-General in the SAPS, was arrested on 22 August 2012 and served with indictments of seven counts; the first two relating to alleged contraventions of POCA.[48]

152. Section 2(4) of POCA provides that a person may only be charged with committing any of the offences created by section 2(1) if a prosecution is authorised in writing by the NDPP. Jiba was acting NDPP at the time. She issued two written authorisations on 18 August 2012 to charge Booysen with contraventions of sections 2(1)(e) and (f) of the POCA.[49]

153. Booysen approached the KZN High Court for a review and setting of aside of the decisions to issue the authorisations ("the first impugned decision") and the decision to prosecute on the counts confronting him ("the second impugned decision"). The review was successful.

154. The evidence before the Court related only to the first impugned decision. There was no evidence relating to the second impugned decision provided, but it is recorded in the judgment that the parties accepted that if the first impugned decision fell, so would the second.

155. The bases of the attack were twofold.[50] First, the impugned decisions were arbitrary and irrational offending the principle of legality and the rule of law. Second, his right to

47 **FUL SC**, para 51.
48 Booysen Judgment, para 1.
49 Booysen Judgment, para 1.
50 **Booysen Judgment**, para 2.

dignity was impaired merely by having to face a prosecution where there were no facts to support a rational decision to authorise his prosecution and to indict him in the first place.[51]

156. The charges alleged that Booysen participated in the conduct of an enterprise through a pattern of racketeering activity and managed the operations of such enterprise. This is alleged to have been done while he headed a specialised unit based at the Cato Manor police station. The remaining counts related to criminal activity including murder, housebreaking with intent to commit murder, assault, defeating or obstructing the course of justice and unlawful possession of firearms.[52]

157. The issue before the Court related to what information Jiba had before her to justify her decision to authorise Booysen's prosecution on charges of racketeering and whether that information was sufficient to render the decision rational.[53] The validity of the authorisations issued could be determined with reference to the principle of legality. If found invalid, they could be reviewed and set aside.[54] This was precisely what occurred.

158. The attack levelled by Booysen was that Jiba could only have taken such a decision if in addition to the jurisdictional facts she had assessed "the sufficiency and admissibility of evidence to provide reasonable prospects of a successful prosecution as required by policy directives issued pursuant to section 21 of the NPA Act".[55] In other words, the information before her must be rationally connected to the decision taken.[56] It was argued that it lacked rationality in that the material relied on could not, viewed objectively, support the decision to prosecute him for those offences as there was no evidence of a contravention of POCA.

---

51 **Booysen Judgment**, para 4. The dignity argument was not pressed in argument and the Court did not deal with it in the judgment.
52 **Booysen Judgment**, para, 5.
53 **Booysen Judgment**, paras 8-9. There was no dispute that Jiba was authorised to take a decision of the sort at issue.
54 **Booysen Judgment**, para 9.
55 **Booysen Judgment**, para 21.
56 Booysen Judgment, para 22.

159. The Court found that the question at issue was "whether the second part of the twofold test, the rationality aspect, was satisfied". In other words, "the information on which the NDPP relied on to arrive at her decision must be rationally connected to the decision taken".[57]

160. Jiba did not file a record of the decision or put up any reasons because she took the view that the decision to prosecute or to continue a prosecution was not reviewable and hence a Rule 53 record did not have to be provided.[58] However, at the hearing before the Court, it was conceded that a review based on the principle of legality was competent. It would then follow that they would have had to file a Rule 53 record.

161. Prior to the litigation there had been two requests by Booysen to Jiba for further documentation leading to the impugned decisions' application, which had both been declined.[59]

162. After the indictment had been served, the Acting NDPP provided Booysen's attorney with 23 dockets containing 209 statements. Booysen is only mentioned in two of the dockets.[60] Booysen argued that none of the statements in the documents implicated him. In response, Jiba alleged that she relied on four statements annexed to her answering affidavit and which she indicated that she had relied upon. These are the statements of Aiyer (two statements), Danikas and Ndlondlo.

163. The Court concluded that Jiba's response failed to address the averment by Booysen that none of the documents in the dockets implicated him in the offences.[61]

164. The Court went on to deal with Jiba's answering affidavit as it related to how she arrived at the first impugned decision, i.e. to prefer charges under POCA against Booysen.

---

57 Booysen Judgment, para 22.
58 Booysen Judgment, para 20.
59 Booysen Judgment, para 24.
60 Booysen Judgment, para 25.
61 Booysen Judgment, para 25.

165. In this regard, the judgment details what Jiba states in response to Booysen's averment that she had no material before her linking him to the offences which he was being charged with:

> *"16. After due and careful consideration of the information under oath and the evidence as contained in the dockets (copies of which were made available to the Applicant), the Respondents were, and still are satisfied that there is prima facie evidence that an offence has been committed and Applicant is implicated in that:*
>
> *16.1 From January 2007 to March 2010, the Applicant was a Provincial Commander in charge of KwaZulu-Natal Organised Crime. Subsequent thereto, and in 2010, he was appointed as the Provincial Head of the newly established Directorate for Priority Crime Investigations ("DPCI") in KwaZulu-Natal.*
>
> *16.2 During 2006, the Serious Violent Crime ("SVC") Section based at Cato Manner was incorporated into the Durban Organised Crime Unit. The Durban Organised Crime Unit form part of the KwaZulu-Natal Provincial Organised Crime structure. The Applicant then conducted it as an enterprise as defined in the Prevention of Organised Crime Act 121 of 1998 ("POCA").*
>
> *16.3 During 2010, the Organised Crime structures became part of DPCI and as indicated above, the Applicant was heading DPCI in KwaZulu-Natal.*
>
> *16.4 During May 2008 to September 2011, members of the South African Police Service ("SAPS") under the Applicant's command killed members of the KwaMaphumulo Taxi Association who were in conflict with the Stanger Taxi Association, as well as ordinary civilians*

and/or criminal gangs who were suspected of being involved in ATM bombings.

16.5 The information before me suggested that these members of the SAPS, would in most of the killings place a fire-arm next to the deceased person to create the impression that s/he was armed and had attacked the police by shooting at them or endangering their (police) lives.

16.6 The information under oath which was placed before me also indicated that the Applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.

16.7 The information further revealed that the unlawful activities of killing suspects and/or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim documented as "NJ1" in which inter alia the Applicant is recommended for such an award resulting from the deaths of suspects.

17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, Mr Aris Danikas, and Mr Ndlondlo from which it is apparent that the Applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video

footage thereof on YouTube. I annex copies of the statements as "NJ2"; "NJ3", "NJ4" and "NJ5", respectively.

….

21. These are only some of the instances that are referred to in the above-mentioned statements, which were considered together with the other information in the docket before the impugned decisions were made. In this affidavit, I do not intend to detail all of the information that was placed before me prior to me making the decisions in issue. I submit with respect that the aforementioned information is prima facie proof that the Applicant was involved in racketeering activities."[62]

166. The Court concluded[63] that on a factual basis the Acting NDPP only had regard to two categories of information on which the first impugned decision was premised. That being the contents of the dockets[64] and statements under oath which were annexed to Jiba's answering papers marked **"NJ2"**, **"NJ3"**, **"NJ4"**, and **"NJ5"**.[65]

167. The judgment records that in argument it was conceded that it was uncontested that there were no statements in the dockets that implicated Booysen in any of the offences with which he had been charged and as such could not provide a rational basis for arriving at the impugned decision.[66] Adv Hodes SC (*"Hodes"*) later disputed that this was a correct reflection of his argument. However, he later clarified that Jiba herself was of the view that the statements in the docket did implicate the applicant in the commission of the offences.[67]

---

62 **Booysen Judgment**, para 26.

63 Booysen Judgment, para 28.

64 In her evidence before this Enquiry, Jiba testified that in fact she did not have regard to all of the contents of the 23 dockets but that she asked for specific aspects of the dockets which she wished to have regard to. She did not clarify what those specific aspects were.

65 Booysen Judgment, para 28.

66 **Booysen Judgment**, para 29. See Dropbox Folder G, Item 5.1.48, Transcript of Argument before Gorven J, p. 68, lines 3 – 20.

67 Dropbox Folder G, Item 5.1.48, Transcript of Argument before Gorven J, p. 72, lines 17 – 23.

168. With reference to the four annexures on which the impugned decision was based, Jiba's affidavit indicated that, firstly, they were made under oath and secondly, they implicated Booysen in one or more of the offences in question.[68]

169. According to Booysen in reply, annexures **"NJ2"** and **"NJ4"** being sworn statements from one Colonel Aiyer (*"Aiyer"*) related to what was referred to as *"office politics"* and did not implicate him in the offences with which he was charged. In addition, annexure **"NJ4"** did not implicate him in any of the offences in question and in any event, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. Annexure **"NJ3"**, an undated statement from Mr Danikas (*"Danikas"*), was not a sworn statement and not even signed by anyone. Even if attributed to a named person, and even if a sworn statement as claimed by the Acting NDPP, the contents do not cover the period dealt with in the indictment except for one event unrelated to Booysen. Annexure **"NJ5"** did not implicate Booysen in any of the offences in question.[69] These factual averments concerning the nature and contents of the annexures appeared to the Judge to be accurate and were not challenged in argument.[70]

170. The Court referred to Booysen's replying affidavit in which Booysen submitted that Jiba is *"mendacious"* when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the *"docket"* before making the impugned decisions as she could not have considered the statements referred to in her answering affidavit. She was invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision.[71]

171. In addition, the Court pointed out that Booysen was within his rights in reply to deal with inaccurate assertions made by Jiba in her answering affidavit and to issue the challenge and invitation to her to respond thereto. The Court pointed out with relation

68 **Booysen Judgment**, para 30; Dropbox Folder G, Item 5.1.48.
69 Booysen Judgment, para 32.
70 Booysen Judgment, para 33.
71 Booysen Judgment, para 32.

to the inaccuracies that Jiba is *"after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies."*[72]

172. The Court pointed out that, despite the invitation issued to Jiba, no further affidavit from Jiba was placed before the Court to deal with the inaccuracies. In respect of the assertion of *"mendacity"* on her part, the Court noted that there was a *"deafening silence"* and pointed out as follows:

"In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively."[73]

173. The Court held that the first impugned decision was arbitrary, offending legality, and as such was unconstitutional.[74] The Court went further to make the statement that if the Respondents had properly understood the principle of legality, their response to demands for documents or reasons might have been different. The Court points out as follows:

"As mentioned, there is reference to documents and correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them

72 Booysen Judgment, para 34.
73 Booysen Judgment, para 34.
74 Booysen Judgment, para 36.

and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The "rhyme or reason" test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the State in its conduct of the future trial. In my view it would therefore not require an exacting, still less an exhaustive, level of disclosure."[75]

174. The Court went further and suggested that what would have been sufficient was a consideration of a request for authorisation forwarded to the NDPP under cover of a letter summarising the form and content of the charge sheet, setting out a detailed background to the charges and summarising the evidence. It was not necessary to disclose every detail of the State's case, strategy or evidence where this is not subject to the criminal discovery process.[76]

175. Whilst the Court set aside the authorisations and decisions to prosecute, it did not preclude fresh authorisations from being issued or fresh decisions taken to prosecute if there was a rational basis for such decisions.[77]

176. It is apparent from the judgment that there was a finding that Jiba acted irrationally in authorising the prosecution of Booysen. This, in itself, would not justify a finding that she is unfit or proper and would have to be taken into account when one has regard to the totality of the evidence before the Enquiry.

5.1.4. Zuma v Democratic Alliance [2014] 4 All SA 35 (SCA) delivered on 28 August 2014 ("Spy Tapes 2")

177. This matter follows upon the decision of this Court in **Democratic Alliance v Acting National Director of Public Prosecutions**[78] and concerns the interpretation and enforcement of the order made in that case.

---

75 Booysen Judgment, para 38.
76 Booysen Judgment, para 38.
77 Booysen Judgment, para 39.
78 2012 (3) SA 486 (SCA) ("**Spy Tapes 1**").

178. The litigation commenced with the DA application in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision of the office of the NDPP to discontinue the prosecution of Zuma, and for a declaration that the decision was inconsistent with the Constitution (the review application).

179. In the review application, the DA required the office of the NDPP and the Head of the Directorate of Special Operations (DSO) to deliver the Rule 53 record on which the impugned decision was based and which included representations made by Zuma as to why the prosecution should be discontinued.

180. The NPA refused to deliver the record on the basis that it contained the said representations, which it contended had been made on a confidential and without prejudice basis, pointing out that Zuma had declined to waive the conditions under which he had submitted his representations. The DA launched an application to compel the Acting NDPP (Jiba) to dispatch the record of proceedings on which the decision to discontinue the prosecution was based, excluding the representations by Zuma and directing that the prosecution authorities specify, by written notice, the documents or material excluded from the record.

181. The Acting NDPP and Zuma opposed the interlocutory applications and contested that the DA did not have *locus standi*.[79] The High Court accepted this and the matter then went on appeal. The SCA noted the legal truism that the exercise of all public power must comply with the Constitution[80] and that the failure to produce a record would infringe section 34 of the Constitution.[81]

182. The SCA ordered the Acting NDPP to produce a reduced record and lodge it with the registrar within 14 days of the date of judgment. The reduced record was described as follows:

---

79 Yet in **Spy Tapes 1** the SCA accepted that the DA had locus standi.

80 **Spy Tapes 1**, para 27.

81 **Spy Tapes 1**, para 37.

"Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto, or oral representations, if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the first respondent when making the decision and any documents informing such decision."[82]

183. Two days after the reduced record was due, on 12 April 2012, the State Attorney wrote to the DA advising that they were in the process of preparing copies of the reduced record and provided a list of documents which constituted the reduced record. The correspondence refers to the other material 'considered by the Acting NDPP' subject to confidentiality as contemplated in the order as well as to *"certain tape recordings"*, the so-called spy tapes. The State Attorney indicated that the transcripts of the spy tapes would only be made available if there was no objection to disclosure by Zuma's legal team.

184. On 3 May 2012 the DA wrote to the State Attorney asking on what basis the third respondent's legal team was entitled to indicate whether they had objections and whether this was in terms of paragraph 1.3 of the SCA **Spy Tapes 1** order. On 9 May 2012 the State Attorney advised that Zuma's legal team would not consent to the release of the spy tapes, pending further consultation with their client, and that they required some two to three weeks.

185. The DA responded on 29 June 2012 advising that the spy tapes were not covered by the exclusion in the SCA **Spy Tapes 1** Order. In July 2012 the State Attorney advised that the delay was attributable to Zuma's attorney.[83] The SCA in **Spy Tapes 2** viewed the attitude of the NPA as *"supine"*.[84]

82 Order 3.1.3.

83 **Spy Tapes 2**, paras 12 and 15.

84 **Spy Tapes 2**, para 15.

186. The DA approached the High Court for an order that the record should include the spy tapes, a transcript thereof as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or the transcript itself, insofar as these documents do not directly refer to the Third Respondent's written or oral representations. In addition, the DA sought an order that the Acting NDPP be held in contempt of the SCA order.

187. The basis of the application was that in terms of the order in **Spy Tapes 1**, a copy of the transcript of the recordings ought to have been furnished and that the recordings could not possibly have been provided to the Acting NDPP confidentially, as that office quoted publicly and extensively from the recordings when announcing the decision to discontinue the prosecution of Zuma. Furthermore, it was contended that the SCA order envisaged an embargo only on written representations made on behalf of Zuma and any subsequent memorandum or report in relation thereto, if the production thereof would breach any confidentiality attaching to the representations. The recordings and/or transcripts, it was submitted, were neither written nor oral representations nor a memorandum or report related to the representations. In addition, it was asserted that memoranda or reports relating to internal debate within the office of the NDPP concerning the recordings were not covered by any limitation envisaged in the order in the first appeal. The DA was adamant that internal memoranda, reports or minutes of meetings addressing the transcripts must exist and are susceptible to disclosure.[85]

188. The SCA set out the Acting NDPP's position as follows:

"It is important to note that the ANDPP's answering affidavit does not adopt a position in relation to the confidentiality of the tapes or transcripts. It resorts to a metaphorical shrugging of the shoulders, and places the reason for its non-compliance with the order of this court in the first appeal at the door of Mr Zuma's legal representatives, submitting that the present dispute was due to them not

85 **Spy Tapes 2**, para 17.

being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts. The NDPP's office assumes the position that the lack of consent to the release of the tapes or transcripts was sufficient to forestall compliance with the order in the first appeal.

The ANDPP admits that internal records, including memoranda and minutes of meetings and notes, exist and that they relate to internal discussions and consultations leading up to the decision to discontinue the prosecution. The following part of the answering affidavit is a stark revelation of the ANDPP's attitude, dealt with in greater detail later in this judgment:

'However, those memoranda, reports, minutes and notes all arose from and deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are inextricably linked with the recordings or transcripts. Thus all these fall within the ambit of the SCA order and are covered by the limitation for the production of the record.'"[86]

189. The SCA further noted that:

"Before the high court the office of the NDPP, in line with the attitude that appears from what is set out above, informed Mathopo J, who heard the matter, that it would abide the court's decision in relation to the production of the transcripts and that the matter should be argued between the DA and Mr Zuma. The following is recorded in para 13 of the high court's judgment:

> 'During argument counsel for the first respondent unequivocally made the concession that the first respondent has "no view" regarding the transcripts or recordings.'"[87]

86 **Spy Tapes 2**, paras 18 – 19.
87 **Spy Tapes 2**, para 21.

190. When considering the challenges faced by Zuma, the SCA had the following to say about the Acting NDPP:

> *"Telescoped, the procedural and evidential problems faced by Mr Zuma are that the ANDPP filed an answering affidavit in which, essentially, she took no stance on the confidentiality of the materials sought by the DA, other than the written representations in her possession, and further that confidentiality is not specifically claimed by anyone in respect of any particular document or other materials in the possession of the office of the NDPP. In relation to the internal memoranda, that part of the answering affidavit referred to in para 19 above lacks specificity and the generalisation resorted to by the ANDPP, which will be dealt with in greater detail in due course, is, to say the least, disingenuous. Worryingly, much of what the ANDPP stated in her answering affidavit appears not to be first-hand knowledge and seems to be based on what she was told by Mr Mpshe, who was the Acting Director of Public Prosecutions at the time of the decision not to prosecute Mr Zuma. Mr Mpshe did not depose to a confirmatory affidavit. It will be recalled that the ANDPP decided to abide the decision of the high court and did not make an appearance in this court. Thus, the party that filed an inconsequential affidavit took no part in the argument in either court and the party that did not file an affidavit was the only contestant in both."*[88]

191. The SCA held that by no stretch of the imagination could the spy tapes be said to reveal Zuma's confidential representations and ordered that they be produced.[89]

192. The second category of documentation that the Acting NDPP had declined to make available was the internal memoranda, minutes, and notes of meetings by officials in the NPA in the process of internal discussion and consultation leading up to the decision by Adv Mpshe (Mpshe). The reason given by the Acting NDPP in her answering affidavit is as follows:[90]

88 **Spy Tapes 2**, para 26.
89 **Spy Tapes 2**, para 31.
90 **Spy Tapes 2**, para 27.

"However, those memoranda, reports, minutes and notes all arose from and deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are inextricably linked with the recordings or transcripts. Thus all these fall within the ambit of the SCA order and are covered by the limitation for the production of the record."[91]

193. The High Court had viewed this as a blanket prohibition despite the fact that no legal claim of confidentiality was asserted by Zuma. The High Court, approved by the SCA, referred to the **Spy Tapes 1** matter regarding the need for transparency and accountability[92] and held that:

"The documents, sought by the applicant, will assist in enquiring into the rationality of the decision taken by Mpshe. It cannot simply be said that all the documents submitted, whether oral or written, are covered by privilege. That would amount to stretching the duty of privilege beyond the realms of common sense and logic."[93]

194. The SCA noted that the exclusion only applied to matters that Zuma could rightly consider confidential and did not envisage a blanket prohibition. In order to protect legitimate claims of confidentiality, the High Court relied on the SCA decision in **Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works**.[94]

195. Counsel for Zuma argued that the order of the High Court was insufficient to protect Zuma's confidentiality rights because the internal memoranda were to be released to the DA's attorney. He preferred a senior counsel. The parties undertook to reach agreement in this regard and Justice Hurt was ultimately appointed to receive the internal memoranda and to make a determination as to the confidentiality thereof.

196. Finally, the SCA made the following comment on the conduct of Jiba:

91 **Spy Tapes 2**, para 33.
92 **Spy Tapes 1**, para 37.
93 **Spy Tapes 2**, paras 35 – 36.
94 2008 (1) SA 438 (SCA).

"One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA) criticised the office of the NDPP for being less than candid and forthcoming. In the present case, the then ANDPP, Ms Jiba, provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Furthermore, it is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definitive response by the latter or a decision by the NPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country."[95]

5.1.5. General Council of the Bar of South Africa v Jiba & Others 2017 (2) SA 122 (GP)

197. The General Council of the Bar of South Africa ("GCB") brought an application to strike Jiba, Mrwebi and Mzinyathi from the roll of advocates on the basis that they were not fit and proper. This view having arisen from criticisms and adverse remarks made in the aforementioned judgments.

198. The application was brought pursuant to a request to the GCB that such consideration be given by the GCB. In November 2014, the GCB considered the request and decided to proceed with the present application which was instituted on 1 April 2015.

95 **Spy Tapes 2**, para 41.

199. The GCB HC analysed the meaning of the term "fit and proper" and held that the least qualities required by a lawyer are integrity, dignity, the possession of knowledge and technical skills, a capacity for hard work, respect for legal order and a sense of equality or fairness.[96] The GCB HC confirmed that the test to be applied in determining whether an advocate is a fit and proper person is three legged in nature. Firstly, the alleged conduct must be established on a preponderance of probabilities. Secondly, whether the person is in the discretion of the Court not a fit and proper person to continue to practice. The second leg requires that the Court weighs up the conduct complained of against the conduct expected of a fit and proper person to continue to practice. Thirdly, an enquiry into whether the person ought to be removed from the roll or whether a suspension would suffice.[97]

200. The GCB HC extensively set out the legal parameters within which the NPA functioned.

201. The following three points in limine were raised on behalf of Jiba:

201.1. that there was a failure to afford Jiba a proper hearing;

201.2. that the application and relief sought offended against separation of powers; and

201.3. that the application was premature.

202. The GCB HC expressed a view on Jiba's allegations of the application being premature. It found that this allegation was consistent with her conduct in the handling of other cases.[98] With regards to the failure to afford a proper hearing, the GCB HC held that Jiba could not rely on the fact that she was not given an opportunity to give oral evidence as she had all her evidence in documentary form as used in the motion proceedings. The

96 **GCB HC**, para 3; Folder B, Item 18.
97 **GCB HC**, para 9.
98 **GCB HC**, para 25.

GCB HC also held that Jiba had everything at her disposal to deal with the allegations against her and no form of prejudice can be claimed.[99]

203. In addition, Jiba sought admission of a fourth affidavit relating to communication between the GCB and the NPA with reference to the payment of fees of counsel to bring the application. The Court held that insofar as the letter referred to in-fighting or factions within the NPA, the relevant allegations are made in the *founding / replying affidavit* and therefore does not constitute new material.[100] With regards to the fee arrangement between the NPA and the GCB, the Court held that it was irrelevant to the enquiry as to whether the respondents were fit and proper persons.[101]

204. It is clear from the **GCB HC** judgment that whilst removal of an NDPP from office would not amount to a removal from the roll of advocates but, conversely, a removal from the roll of advocates pursuant to section 7 of Admission of Advocates Act would mean that such person would have to vacate the office of the NDPP, DNDPP or DPP, as the case may be,[102] and would preclude that person from practicing in any Court in South Africa.[103]

205. The **GCB HC** held that Jiba had made it clear that she would have addressed some of the allegations in Booysen's reply, but that she had failed to do so on the advice of her counsel.[104]

206. While the Court did not wish to upset Gorven J's judgment in anyway, it explained that certain information was not placed before Gorven J which the Court could now take into account.[105]

---

99 **GCB HC**, para 29.
100 **GCB HC**, para 37.
101 **GCB HC**, para 39.
102 **GCB HC**, para 22.
103 **GCB HC**, para 23.
104 **GCB HC**, para 53.
105 **GCB HC**, para 59.

207. Jiba's explanation before the Court was that when she deposed to affidavit in the Booysen matter she was well acquainted with the facts and evidence against Booysen. She did not know why certain annexures referred to in the affidavit were not included. With regards to the statement by Danikas, the process of attaining his signature had been halted before it was completed by the NDPP, Nxasana.[106]

208. Cognisant of the fact that POCA allows for hearsay evidence to be taken into account by Courts, the Court saw no reason why the same principle could not be applied for purposes of an authorisation granted by an NDPP.[107]

209. In light of these facts, the Court was unable to find any mala fides or ulterior motives in the authorisation by Jiba. Consequently, the Court held that there was no case for removal or suspension from the roll of advocates on the strength of the Booysen matter.[108]

210. With reference to **Spy Tapes 2** the Court looked at the complaints raised by the GCB as a result of the criticism by Navsa ADP of the manner in which Jiba handled the **Spy Tapes 2** case in her capacity as Acting NDPP. This after Mpshe, the previous Acting NDPP had withdrawn charges of corruption against Zuma after having listened to recorded conversations that ensued between Bulelani Ngcuka and Leonard McCarthy. The DA instituted the review of the said decision and it is in the handling of the tail end of this review, with reference to the actual handing over of the spy tapes that Jiba was criticised by the Court.[109]

211. This arose in the context of the filing of the Rule 53 record.

212. With regards to the comments that she adopted a supine attitude, the SCA held that it must be seen in the context of Jiba's response in the current application. Her response

106 **GCB HC**, para 57.
107 **GCB HC**, para 63.
108 **GCB HC**, para 67.
109 **GCB HC**, paras 69 – 72.

was that she erred on the side of caution and thought that in order to comply with the Court order she ought to provide Zuma with an opportunity to raise concerns.[110] The **GCB HC** found that in the circumstances, her conduct did not warrant her as ceasing to be a fit and proper person.[111] The **GCB HC** found that there was no mala fide and ulterior motive on Jiba's part and therefore was unable to find against her on the *"supine attitude complaint"*.[112]

213. The **GCB HC**, in assessing the criticism that Jiba *"metaphorically shrugged her shoulders"* in the **Spy Tapes 2** case, held that the stance adopted by Jiba, that she would abide by the Court's decisions, when the DA filed an application to compel compliance with the SCA's initial order, could not be seen as a shrugging of the shoulders and that there were no mala fides or ulterior motives on her part.[113] With regards to the further criticism against her, e.g. the failure to file a confirmatory affidavit and only relying on hearsay, the **GCB HC** took Jiba's responses into account, in which she indicated that she was under the impression that a confirmatory affidavit was filed.[114]

214. Jiba also indicated that she did not want to fall foul of the SCA directives and the decision was taken on the advice of a senior counsel representing her to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tape recordings.[115]

215. The **GCB HC** proceeded to find that Jiba's failure to take an independent view, in the light of her responses in the current application cannot be seen as conduct worthy of her removal from the roll of advocates and suspension thereof [116] and in terms of the handling of the **Spy Tapes 2** matter, no case has been established against Jiba.[117]

---

110 **GCB HC**, para 86.
111 **GCB HC**, para 91.
112 **GCB HC**, para 91.
113 **GCB HC**, para 94.1.
114 **GCB HC**, para 97.
115 **GCB HC** para 99.
116 **GCB HC**, para 98.
117 **GCB HC**, para 99.

216. With reference to the FUL matters, the **GCB HC** dealt with Jiba, Mrwebi and Mzinyathi separately.

217. With reference to Jiba the **GCB HC** looked at the delay in providing the Rule 53 record and held compliance with Rule 53 regarding time frames and providing a complete record is not just a procedural process, but a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate the Rule 53 timeframes should be met with displeasure by the Courts.[118]

218. The **GCB HC** found that her failure to ensure that there was compliance was therefore not only unwarranted but was also deliberate and or reckless.[119]

219. The **GCB HC** criticised Jiba for indicating that when she dealt with the matter, she moved on the premise that it was still uncertain whether the decisions of Mrwebi and Chauke were not reviewable.[120] This caused a delay in providing the record.

220. In this regard, the **GCB HC** held that she could not make such a claim in good faith as the decision was made in March 2012 and her claim, contained in an answering affidavit, was made on 2 July 2013. The Court held that the delay and reasons for not providing the Rule 53 record was completely unjustified and deliberate.[121]

221. Jiba indicated that she required advice on what should be contained in the record. Here, the **GCB HC** held that she did not require such advice, as she knew or ought to have known as Rule 53 is very clear in this regard. The **GCB HC** held that the delay was Jiba and Mrwebi's own making and was completely unreasonable, unwarranted and viewed in context, signified bad faith on the part of Jiba and Mrwebi.[122]

118 **GCB HC**, para 112.
119 **GCB HC**, para 114.
120 **GCB HC**, para 114.
121 **GCB HC**, para 114.
122 **GCB HC**, para 114.

222. With regards to the provision of an incomplete record, the **GCB HC** criticised Jiba for generalisation and not being specific or helpful. The Court held that, if she was uncertain as to the confidentiality of Mdluli's representations, she should at least have determined from him whether his representation could be provided as part of the Rule 53 record.[123]

223. The **GCB HC** held that Jiba, despite Murphy J's remarks, failed to take the GCB HC in this application in confidence and deal with the allegations in some more details and that the points that she had previously taken, had no merits and that she therefore flouted the rules of the office she held and acted contrary to the oath she took as an advocate.[124]

224. In dealing with Jiba's failure to comply with the Court's directive to file an answering affidavit by 24 June 2013, the Court held that Jiba knew at least by 7 June 2013 of the Court's directive[125] and that she could not place the blame on LAD as the correspondence and pleadings in the litigation would inevitably have had to reach her for a consultation and arrangement of the steps to be taken in the matter.[126]

225. The **GCB HC** held that Jiba did not seem to be worried by the flickering of the red light, she must have known of the e-mail requesting her comments on the draft affidavit by 23 June 2013. This, the **GCB HC** gleaned from the correspondence sent by Motau SC ("Motau") on 25 June 2013. The **GCB HC** held that the fact that the draft affidavit was attached, was not sent to Jiba personally, was not an excuse.[127]

226. With reference to Jiba's attempts to shift the blame for the late filing, the **GCB HC** held that it was worrying that being an officer of the Court who occupies an important high office would adopt that attitude and wash her hands at every opportunity prevailing has a bearing on her fitness to remain on a roll of advocates.[128]

123 **GCB HC**, para 117.
124 **GCB HC**, para 118.
125 **GCB HC**, para 124.
126 **GCB HC**, para 124.
127 **GCB HC**, para 124.
128 **GCB HC**, para 124.

227. The **GCB HC** held that the effect of Jiba's conduct in failing to comply with the Court's directive, when cumulatively considered with the other complaints in respect of her handling of the Mdluli matter, should justify a removal from the roll of advocates.[129]

228. The **GCB HC** held that Jiba attempted to run away from her responsibilities as head of the NPA and an officer of the Court.[130]

229. In dealing with Jiba's failure to heed the advice of counsel and file 2 separate affidavits, the Court held that it is highly unlikely that she never had knowledge of the draft affidavit or the decision to separate the affidavits, because she would have had to give the go-ahead in accordance with the internal processes.[131]

230. The **GCB HC** held that it was highly unlikely and improbable that LAD, either through Chitha ("Chitha") and or Mokhatla would receive a draft answering affidavit, decide to have it deposed to by Mrwebi, against the advice of Motau, and then instruct the State Attorney to file and serve separated affidavits without discussing the strategy with Jiba.[132]

231. The **GCB HC** found that the version provided by Jiba was far-fetched and improbable and that she misled Motau.[133] It further held that her conduct in the current application, in dealing with the allegations about the late filing of papers, were unbefitting of an officer of the Court and of that of a person holding such a high public position in the NPA.

232. With regards to her filing a separated affidavit, contrary to the advice of, and without reverting to counsel, the **GCB HC** held that her conduct was unrepented and that she was *"steadfast to defy logic and advice for as long as her wishes were not accommodated"*. This amounted to her ceasing to be a fit and proper person to remain on the roll of advocates.[134]

---

129 **GCB HC**, para 124.
130 **GCB HC**, para 130.
131 **GCB HC**, para 132.
132 **GCB HC**, para 132
133 **GCB HC**, para 134.2.4.
134 **GCB HC**, para 134.5.

233. Regarding the withdrawal of Halgryn SC ("*Halgryn*"), the **GCB HC** held that the fact that three legal teams withdrew from the same matter in a short span of time, was a sign of unwillingness on Jiba's part not to let go [of] the decision to withdraw charges against Mdluli.[135] The **GCB HC** proceeded to look at the legal opinion provided by Halgryn, in which it is advised that there is a *prima facie* case against Mdluli.

234. The **GCB HC** found that Jiba was not deterred in her tracks by the criticism made by her counsel, Halgryn, instead she and Mrwebi insisted in defending the "sinking ship" which ultimately resulted in the withdrawal of the Halgryn team on 12 August 2013.[136]

235. The **GCB HC** went on to state that Jiba was "steadfast to do everything in her power to ensure that the charges against Mdluli were permanently withdrawn, despite the prima facie evidence against Mdluli". This, despite the failure of Mrwebi to withdraw the fraud and corruption charges in consultation with Mzinyathi. The **GCB HC** held her to be mala fide and having ulterior motives and thus offending against the rule of law and the Constitution. It held that "for that reason she must be found to be no longer a fit and proper person to remain on the roll of advocates".[137]

236. In dealing with the representations provided to Jiba by Breytenbach, the **GCB HC** stated that Jiba was again displayed as an unrepented and dishonest person[138] and that she was driven by the desire to bury the charges against Mdluli once and for all.[139] The **GCB HC** held that her motivation in adopting the attitude as she did must be found in her willingness to protect Mdluli at all means. The **GCB HC** held that her attempts to protect Mdluli, offended against section 179 of the Constitution and the rule of law and that her conduct in bringing the image of the prosecuting authority into disrepute, also questions her suitability to remain on a roll of advocates.[140]

---

135 **GCB HC**, para 135.1.
136 **GCB HC**, para 135.7.
137 **GCB HC**, para 135.9.5.
138 **GCB HC**, para 136.1.
139 **GCB HC**, para 136.2.1.
140 **GCB HC**, para 136.2.2.

237. The failure to disclose Breytenbach's memo to the Court and the failure to consider the request by Breytenbach for internal review, was regarded by Murphy J, as deliberate and intended to mislead.[141]

238. The **GCB HC** held that Jiba was aware that there was no defence against the decision of Mrwebi to withdraw the Mdluli charges, yet she persisted and in doing so, ceased to be a fit and proper person to remain on the roll of advocates.[142]

239. With reference to Mrwebi the **GCB HC** held that it had serious problems with Mrwebi's version that he took the decision on 5 December 2011, when the relevant documentation – discussed below in greater detail - indicated that the decision was taken on 4 December 2011.[143]

240. The **GCB HC** held that Mrwebi took the decision before he consulted with Mzinyathi and misled Mzinyathi into believing that the decision had not yet been taken and that it was taken on 5 December 2011 and not 4 December 2011, after his visit to Mzinyathi.[144]

241. It was found that this was not an error as the date appeared six times on 3 letters.[145]

242. The **GCB HC** held that the view that Mrwebi had taken that the IGI can help in the matter and it has unlimited access to documents and information in possession of Crime Intelligence was a well-planned mission, calculated to give Mzinyathi the impression that a decision to withdraw the corruption and fraud charges against Mdluli was not taken when in actual fact by then it was a *fait accompli*. The **GCB HC** concluded that Mrwebi took the decision before he met with Mzinyathi on 5 December 2011.[146]

---

141 **GCB HC**, para 136.3.
142 **GCB HC**, para 138.
143 **GCB HC**, para 141.2 – 141.3.1.
144 **GCB HC**, paras 141.3.6, 141.2.1.
145 **GCB HC**, paras 141.3.1.-141.3.2.
146 **GCB HC**, para 141.3.6.

243. The **GCB HC** held that the fact one of the documents indicated that it was a consultative note, makes it clear that it must have preceded 5 December 2011, as the consultation took place on that date and the note would have had to be provided before, and in this regard, it was found that Mrwebi lied.[147]

244. With regards to the filing of an incomplete record, the **GCB HC** held that Mrwebi lied, when he indicated that he only had contact with an official in July/August 2013, when he consulted with Halgryn, because he deposed to an affidavit on 2 July 2013. This preceded the appointment of Halgryn.[148]

245. The **GCB HC** held that Mrwebi sought to suggest that he had nothing to do with defying Motau's advice and that he tended to adopt a similar stance as Jiba, i.e. that the application was never personally served on him. Since it was his decision under attack, he should not have taken a passive stance and his failure to disclose the consultative note and provide a complete record was found to have been deliberate.[149]

246. The **GCB HC** held found that Mrwebi took a decision while he ought to have consulted with Mzinyathi in terms of the legislation, by himself and while leaving Mzinyathi under the impression that he would undertake research prior to taking the decision. This, the Court held, can only *"be ascribed to as a betrayal and consultation in bad faith by an officer of the Court"*, justifying a removal from the roll of advocates.[150]

247. The **GCB HC** found Mrwebi to be dishonest indicating that in the current application that he was under the impression that Mzinyathi's concurrence was not required in that at no stage when Mzinyathi makes it clear that he disagrees does Mrwebi communicate his interpretation of the legislation to Mzinyathi.[151]

147 **GCB HC**, para 141.4.
148 **GCB HC**, paras 142.3.1 – 142.3.2.
149 **GCB HC**, para 143.4.1.
150 **GCB HC**, para 146.
151 **GCB HC**, para 152.2.

248. The **GCB HC** quoted extensively from Mrwebi's testimony in the Breytenbach disciplinary inquiry and held that Mrwebi's evidence was *"patently, dishonestly given"* and that he turned himself into an unreliable and dishonest witness who forgot the oath he took as a witness and as an officer of the Court. The **GCB HC** found that he ceased to be a fit and proper person. He knew long before 2 July 2013 that his decision would never have been lawful without the agreement with Mzinyathi. The **GCB HC** found that he brought the prosecuting authority into disrepute.[152] Mrwebi's attempt to distance himself from the decision to defy Halgryn's advice smacks as untruthful and dishonest.

249. Both Mrwebi and Jiba ignored Halgryn's advice which was solid and correct. This does not accord with a fit and proper requirement to remain on the roll of advocates.[153]

250. The **GCB HC** held, that if Mrwebi's contention about the IGI's involvement was genuine, he would not have withdrawn the charges, but would have allowed the prosecution team and investigating officer to utilise the provisions of section 205 of the Criminal Procedure Act in order to obtain material or relevant evidence. The **GCB HC** held that raising of the ISO Act was just a shield behind the real intention of Mrwebi to withdraw the charges despite a prima facie case against Mdluli and with or without the concurrence of Mzinyathi.[154]

251. The **GCB HC** concluded that Mrwebi intended to withdraw the charges against Mdluli and never to have them reinstated.[155] With reference to the correspondence from the IGI which clearly indicated that the NPA has the authority, and not the IGI, to investigate the Mdluli charges and to prosecute it, the Court held that Mrwebi's position displayed his determination to *"flout the rule of law and the Constitution by discontinuing the prosecution against Mdluli in the face [of] prima facie evidence"*.[156]

---

152 **GCB HC**, para 152.3.3.
153 **GCB HC**, para 153.3.1.
154 **GCB HC**, para 156.1.
155 **GCB HC**, para 158.
156 **GCB HC**, para 161.

252. The Court held that Mrwebi's persistence with the line that he took the decision *"in consultation with"* Mzinyathi was intolerable in light of his previous concession in the Breytenbach disciplinary hearing to the effect that he took the decision single-handedly.[157]

253. In conclusion against Jiba and Mrwebi, the Court stated:

> *"Mzinyathi, Breytenbach and other prosecuting officials who were involved in the investigation of charges against and prosecution of Mdluli, were like foot soldiers in a war- zoned area crying loud for the freedom and space to declare war and to fight against serious crimes that are crippling our country and threating investment. Jiba on the other hand, was like a commander-in-chief and in charge required to lead by example. But instead, she flouted every rule in the fight against crime. Her failure to intervene when she was required to do so, has failed the citizens of this country and in the process, brought the image of the legal profession and prosecuting authority into disrepute".*[158]

254. The Court found that the application needn't proceed against Mzinyathi and commended him for standing firm against Mrwebi on the decision to withdraw. His evidence during Breytenbach's disciplinary inquiry was consistent with his stand point about what transpired on 5, 8 and 9 December 2011. It held that, having the benefit of Mzinyathi's responses to the remarks against him, it could not find any validity therein.[159]

255. The GCB HC ordered the removal of Jiba and Mrwebi's names from the roll of advocates.

5.1.6. Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa 2019 (1) SA 130 (SCA) (10 July 2018)

256. The GCB HC was appealed to the SCA. The GCB SCA (per Shongwe ADP (Seriti and Mocumie JJA concurring) reiterated the test to be applied in a striking off application.[160]

---

157 **GCB HC**, para 165.

158 **GCB HC**, para 170.

159 **GCB HC**, para 175. As Mzinyathi is not the subject of the Enquiry we do not deal with the allegations and findings insofar as it relates to him.

160 **GCB SCA**, paras 5 – 6.

257. In relation to Jiba, the GCB SCA did not traverse the facts as they agreed with the GCB HC finding of no mala fides or ulterior motive in the authorisation by Jiba as contemplated in POCA.[161]

258. With reference to Spy Tapes 2[162] the GCB SCA also agreed with the GCB HC concluding that the GCB failed to show any mala fides on Jiba's part or that she was motivated by an ulterior motive.[163]

259. The GCB SCA held that the GCB HC, with reference to the latter's characterisation of Mdluli's personality, characterising him in an egregious manner as if he was already convicted of the allegations against him. This, it held, negatively influenced the GCB HC's evaluation of the manner in which Jiba and Mrwebi handled the Mdluli case.[164] Reference was made to a letter by Mdluli to Zuma which stated that the charges against him were a conspiracy. The Court was unable to find any relevance in the letter, stating that its contents was far-fetched and did not establish whether Jiba was a fit and proper person to practise as an advocate.[165]

260. The GCB SCA pointed out the following specific complaints against Jiba:

260.1. that she failed to file a full complete Rule 53 record even after a Court order to that effect;

260.2. that she failed to file an answering affidavit after the DJP had directed her to do so and that she did not file her heads of argument timeously;

260.3. that her reason for the delays were sparse and unconvincing;

260.4. that her conduct as a person of high rank in the public service was unbecoming;

161 **GCB SCA**, para 10.
162 **GCB SCA**, para 10.
163 **GCB SCA**, para 11.
164 **GCB SCA**, para 12.
165 **GCB SCA**, para 12.

260.5. that she failed to disclose that she had received a 24-page memorandum from Breytenbach and that she deliberately attempted to mislead the Court with reference to the memorandum;

260.6. that the SCA had criticised her conduct in the handling of the Mdluli matter; and

260.7. that she failed to make a full and frank disclosure to refute, explain or ameliorate the serious allegations against her.[166]

261. The GCB SCA proceeded to consider the complaints together with Jiba's answers and explanation in the context of her position as Acting NDPP. Jiba's explanation for the delay and incomplete record was that counsel was briefed to advise on the Rule 53 application and that it was prepared by LAD, after consulting with Chauke and Mrwebi.[167] The GCB SCA held that her relationship with counsel is similar as that of attorney and client and must be viewed in that context. It stated that her opinion would be secondary to that of counsel and LAD. The GCB SCA held that Jiba cannot be said to be not a fit and proper person because she was advised otherwise. The Court stated that she did not benefit from providing an incomplete record "nor did she act dishonestly".[168]

262. The GCB SCA stated that legal practitioners took incorrect instructions or decisions daily and filed processes late all the time. In such a case, an application for condonation is usually brought and granted if no prejudice is present. In this regard, those legal practitioners are not necessarily unfit to practise as advocates or attorneys.[169]

263. In considering Jiba's failure to disclose the Breytenbach memorandum before Murphy J, the GCB SCA stated that the memo was already out in the public domain in the Labour Court and hence it is not fair to accuse Jiba of failing to disclose the memo before Murphy J. It concluded there was no failure to disclose.[170] As to Jiba's refusal to consider the Breytenbach/Ferreira request to review Mrwebi decision the GCB SCA held that Jiba

166 **GCB SCA**, para 13.
167 **GCB SCA**, para 14.
168 **GCB SCA**, para 15.
169 **GCB SCA**, para 15.
170 **GCB SCA**, para 16.

should surely be entitled to her own opinion based on facts at her disposal and that she should not be punished for differing with Breytenbach. The Court in this regard stated that "Jiba cannot, fairly be accused or alleged not to be a fit and proper person for failing to consider the request by Breytenbach for the internal review of Mrwebi's decision".[171]

264. With reference to whether or not she had been dishonest in relation to the draft received from Motau when she said that she hadn't received it, the GCB SCA held that she lied could not be the only inference. Having looked at the description of LAD as an in-house legal department, the explanation could be that Jiba's team was of the view that the impugned decision in the Mdluli matter was that of Mrwebi and that he needed to sign, whereas Jiba would only sign a supporting affidavit.[172]

265. The GCB SCA stated that the difference of opinion between Motau and Mr Sebelemetsa ("Sebelemetsa") (referring to the fact that Motau advised that one affidavit ought to be filed and that Jiba should be the deponent, whereas Sebelemetsa advised that two separate affidavits were required) could not justify Jiba being labelled as dishonest person and consequently not fit and proper to remain on the roll of advocates.[173]

266. When addressing the advice given by Halgryn, the GCB SCA stated that in light of Jiba's explanations, i.e. that the advice was premised on assumptions that there was a prima facie case against Mdluli and that Chauke's decision to refer to an inquest was incorrect and that she stood back and did nothing, however she explained that the charges were withdrawn in order to investigate further and the intention was to reinstate the charges if any incriminating evidence came to light, the difference of opinion should not and cannot fairly be considered sufficient to conclude that Jiba is not a fit and proper person to remain on the roll of advocates.[174]

171 **GCB SCA**, para 16.
172 **GCB SCA**, para 17.
173 **GCB SCA**, para 17.
174 **GCB SCA**, para 18.

267. The GCB SCA then proceeded to state that it was possible to infer some form of incompetence with regards to her duties in terms of which she might be removed from her position as DNDPP but that was not sufficient grounds to remove her from the roll of advocates.[175] The GCB SCA also relied on Jiba's reference to the views of Andre Becker and Rita Viljoen, that there was insufficient evidence to prosecute on the fraud and corruption charges.[176] The appeal was upheld.[177]

268. In relation to Mrwebi the primary complaint was that he had sought to mislead the FUL Court as to the consultation that had ensued between himself and Mzinyathi, when in fact he had taken the decision to withdraw charges against Mdluli before he consulted with Mzinyathi in terms of section 24(3) of the NPA Act. He also sought to mislead the Court by not providing a proper record of all the documents and facts relevant or the determination of the FUL review proceedings. Mrwebi is said to have persisted with this conduct even after having been advised by Motau and Halgryn that he was wrong.[178]

269. The GCB SCA held that what weighed heavily against Mrwebi are the answers and explanation given by him against these allegations.[179] Mrwebi had furnished contradictory explanations of when and why he decided to withdraw the charges against Mdluli. It was clear from Mzinyathi's confirmatory affidavit that he disagreed with Mrwebi that a consultation had taken place on 5 December 2011. Furthermore, Mrwebi created the impression that the matter fell within the mandate of the IGI.[180]

270. The GCB SCA held that "it was highly possible that Mrwebi, genuinely, did not comprehend what the concept 'in consultation" meant, however the concessions he made under cross examination by counsel in the Breytenbach disciplinary inquiry, indicated that he was at most confused and his explanations should not be classified

175 **GCB SCA**, para 18.
176 **GCB SCA**, para 18.
177 **GCB SCA**, para 29.
178 **GCB SCA**, para 19.
179 **GCB SCA**, para 20.
180 **GCB SCA**, para 20.

as dishonest.[181] In its conclusion the GCB SCA held that Mrwebi was treated harshly by the GCB HC and that his failure to understand the term "in consultation" should be attributed to his incompetence or naivety rather than any lack of honesty.[182] Moreover that as it transpired later the charges against Mdluli were not permanently withdrawn but a provisional withdrawal and that the GCB HC misdirected itself by focusing on the Mdluli charges instead of the handling and conduct of administrative procedures and negative remarks by members of the judiciary, which were the cause of complaint.

271. The GCB SCA held that all the complaints against Mrwebi, collectively did not justify a removal from the roll as these are common mistakes made by counsel daily and are mostly excusable. The GCB SCA held that Mrwebi was a litigant, acting on the advice of LAD and counsel. Though misconduct was established, in the absence of personal gain they set aside the striking off, instead ordering a suspension as an appropriate sanction, concluding that the GCB HC misdirected itself.[183]

272. The minority judgment (Van der Merwe JA, with Leach JA concurring), held the view that both Jiba and Mrwebi's appeals against the GCB HC decision ought to be dismissed with costs, finding that only the GCB's cross-appeal in respect of Mzinyathi ought to be upheld.[184]

273. In considering whether a person should be struck from the roll of advocates for failure to comply with the expected standards of "complete honesty, reliability and integrity",[185] the minority explained that this involved a three-step test to which we have already referred above.

274. The minority pointed out the appeal Courts are circumscribed when it comes to interfering with the trial Court's discretion.[186]

181 **GCB SCA**, para 21.
182 **GCB SCA**, para 27.
183 **GCB SCA**, para 28.
184 **GCB SCA**, paras 32, 74.
185 **GCB SCA**, para 33.
186 **GCB SCA**, para 34.

275. The minority proceeded to scrutinise the various cases that had been presented before the Court, raising issues around Jiba's "baffling lack of interest in being of assistance to the court" in the Zuma matter,[187] her failure to describe mistakes made under oath despite having an opportunity to do so in the Booysen matter,[188] her "lack of appreciation of the duty of an advocate to assist the Court to come to a speedy and just conclusion" and lateness in filing affidavits with the Court in the FUL matter.[189]

276. The minority highlighted that different versions emerged from Jiba's affidavits in relation to the Mdluli prosecution, with one indicating that she did not wish to "descend into the arena" and another showing that she had taken representations from Mrwebi and Chauke immediately after learning of the withdrawal of charges.[190]

277. The minority found that Jiba's view concerning the BF memo "could not have been honestly held" and that the memorandum was "certainly worthy of consideration", with the minority ultimately finding that: "[t]he statement that [the memorandum] emanated from a person that was not and should not have been considered relevant, is simply spurious".[191]

278. In the minority's view of the evidence, Jiba's actions extended beyond mere incompetence or unsuitability for the position. They demonstrated a serious lack of appreciation or disregard of an advocate's duty to be of assistance to the Court and uphold the administration of justice. Being a litigant in an official capacity was found to be no excuse. In fact, it was more reason to conduct the litigation with the utmost trustworthiness and integrity. In all three matters, the minority found that Jiba gave untruthful evidence under oath, displaying dishonesty and a lack of integrity.[192]

187 **GCB SCA**, para 42.
188 **GCB SCA**, para 45.
189 **GCB SCA**, paras 46 – 47.
190 **GCB SCA**, paras 50 – 51.
191 **GCB SCA**, para 53.
192 **GCB SCA**, para 55.

279. The minority questioned Jiba's persistent denial under oath of misconduct on her part, finding that this displayed a lack of insight into what she had done wrong. This, in turn, reflected adversely on her character. In addition to this, she berated the GCB, making unsubstantiated allegations against them – a quality, which the minority found, was not consistent with the high standards of integrity expected from a practicing advocate. With regards to Jiba, the minority concluded that the GCB HC was correct in ordering removal of Jiba's name from the roll and there was no basis for interfering with the exercise of that Court's discretion.[193]

280. In relation to Mrwebi, the minority honed in on his decisions in relation to the Mdluli prosecution. In relation to the Breytenbach disciplinary inquiry, Mrwebi's evidence was found to have been patently dishonest.[194] After canvassing events relating to the withdrawal of charges, the minority held that the "inference is irresistible that Mr Mrwebi had throughout used his senior position in the prosecutorial service to advantage Mr Mdluli and to ensure that he not be prosecuted".[195]

281. Concluding on its position regarding Mrwebi, the minority stated as follows:

> *"Mrwebi lied about the event of both 5 and 9 December 2011 and abused his position. Not only has [Mrwebi shown himself to be seriously lacking in integrity, but has failed in these proceedings to have taken the court into his confidence and fully explained his actions. All of this hallmarks him as a person unfit to practice as an advocate, particularly in light of the authorities already referred to when dealing with [Jiba]. I have no hesitation in endorsing the order of the court a quo that [Mrwebi] should be struck from the roll of advocates."*[196]

193 **GCB SCA**, paras 56 – 58.
194 **GCB SCA**, para 62.
195 **GCB SCA**, para 67.
196 **GCB SCA**, para 68.

5.1.7. Freedom Under Law v National Director of Public Prosecutions & Others 2018 (1) SACR 436 (GP)

282. This case concerned a review which was brought against two impugned decisions. The first was a decision to decline to prosecute and withdraw charges of perjury and fraud against Jiba. The decision was found to have been taken by the NDPP at the time, Adv Shaun Abrahams ("Abrahams"), and was based on an opinion provided by one the Regional Heads of the SCCU, Adv Marshall Mokgatlhe ("Mokgatlhe"). The second decision concerned the President's failure to act in terms of section 12(6) of the NPA Act to suspend Jiba and Mrwebi pending enquiries into their fitness to hold office and to institute those enquiries in the first place.

283. The review applications were brought of the strength of several sources which had been critical of the officials, namely: the Booysen Judgment the FUL HC, the Spy Tapes 2, the Yacoob report, discussed below, and a report which had been prepared by the former NDPP, Nxasana. Booysen and Spy Tapes 2 focused on Jiba, but the remaining criticisms were levelled against both officials.

284. In relation to the first decision, which resulted in the charges of perjury and fraud against Jiba being withdrawn, the Court explained the series of events which led to the review. After being faced with the adverse comments that had been made by the Courts against Jiba, particularly in the Booysen Judgment, Nxasana requested that the President institute an enquiry into her conduct. When the President did not respond to the request, Nxasana proceeded to institute the fraud and perjury charges against her in March 2015. In June 2015, some 3 months later, Nxasana was replaced by Abrahams as NDPP. On 18 August 2015, two days before Jiba's trial was set to start, Abrahams announced that the charges against Jiba were withdrawn. The withdrawal was made on the strength of an opinion that had been provided by Mokgatlhe and which Abrahams had received just the day before.[197]

197 Freedom Under Law v National Director of Public Prosecutions & Others 2018 (1) SACR 436 (GP) (FUL 2018) paras 33, 35.

285. The opinion was structured around section 78 of POCA, which extends indemnification to persons who perform functions in terms of the Act. The Court found that Abraham's reliance on the provision was a material error of law, as it was inapplicable to the perjury and fraud charges – the latter of which were instituted based on Gorven J's findings in the Booysen Judgment. The Court criticised several defences which were raised, stating that ex post facto reasons were being advanced even though those reasons were not available at the time that the decision was taken. The Court stated that Abrahams' and Mokgatlhe's versions raised serious questions of credibility,[198] that disguising the decision as a recommendation was "bizarre in the extreme"[199] and that doing the latter "is disingenuous and lacks integrity"[200]. The decision was found to have been unlawful, irrational and was ultimately set aside.[201]

286. In terms of the second decision, the President's failure to suspend the two officials and institute enquiries into their fitness to hold office, the Court took issue with the President's lack of action. The adverse judicial comments made against Jiba and Mrwebi's conduct "was a matter of public knowledge and disquiet".[202] Even after the SCA in Zuma v DA made a "scathing attack on Jiba. . . . [t]he President did not act".[203] Furthermore, despite receiving an express request from the NDPP at the time, Nxasana, to take action, "[t]here [was] no explanation provided in the papers as to why the President failed, for a period exceeding 1 year, to act".[204]

287. After traversing the content of those decisions and reports, the Court explained how the President ought to have acted and expressed strong views regarding Jiba and Mrwebi continuing to hold their respective offices:

"This Court is of the view that the adverse findings and comments made by the courts against Jiba and Mrwebi have a direct effect on and erodes the public

198 **FUL 2018**, para 55.
199 **FUL 2018**, para 57.
200 **FUL 2018**, para 58.
201 **FUL 2018**, paras 59-61.
202 **FUL 2018**, para 91.
203 **FUL 2018**, para 92.
204 **FUL 2018**, para 93.

confidence in the NPA as a law enforcement agency. It is therefore essential for the President as authorised, to act decisively and swiftly when the situation calls for such as in this case. We accept the view of the SCA that the continued presence of such high profile public officers in their positions under the circumstances, even for one day longer, should not be countenanced."[205]

288. The President's failure to act under the circumstances was held to have constituted a "dereliction of his constitutional and statutory duties in terms of section 179 of the Constitution read with section 12(6)(a) of the NPA Act. His failure to act as authorised [was] reviewed and set aside."[206]

289. The Court found that FUL had made out a case for the President to be directed to suspend and institute enquiries against Jiba and Mrwebi. However, at the time that the judgment was being prepared, other Courts were simultaneously engaging with the striking off application against Jiba and Mrwebi in the GCB matters. Citing concerns over the running of parallel processes, the order directing the President to suspend and institute enquiries against the officials was stayed.[207]

290. In explaining how the outcome of the GCB matters may have an impact on the Court's decision to stay the order, the Court relied on the exposition by Legodi J in the GCB matter. Emphasis was placed on the distinction between being fit and proper as an advocate and the fit and proper requirement as it applies to an NPA official. It was held that "removal from the roll as an advocate will certainly impact on the fitness to hold office as an employee of the NPA. However, an advocate in good standing may not necessarily be fit and proper to hold office in the NPA".[208]

291. In the interim, the Court expressed certain reservations regarding the conditions of Jiba's and Mrwebi's suspension pending the finalisation of the appeal process in the

205 **FUL 2018**, para 94.
206 **FUL 2018**, para 95.
207 **FUL 2018**, paras 99-100.
208 **FUL 2018**, paras 96-98.

GCB matter. Abrahams had placed them both on "special leave", in terms of which they were entitled to keep their official computers and have access to their offices. They were effectively "continuing with their functions in the normal way". The Court was unable to determine the source of Abrahams' authority to suspend Jiba and Mrwebi under the special conditions, finding that the arrangement was unsatisfactory. Instead, the Court altered the suspension to ensure that the two officials did not perform any functions pending the finalisation of their appeals.[209]

292. Both decisions brought under review were set aside, with the aspect of the order requiring the President to act under section 12(6) of the NPA Act being suspended until the outcome of the ultimate appeal of the GCB judgment. Pending the finalisation of the GCB appeal, Jiba and Mrwebi were further prohibited from performing any functions relating to their positions at the NPA, from presenting themselves at the NPA offices and from engaging in any discussion concerning any pending cases under consideration by the NPA.[210]

293. The dissenting judgment proposed a harsher order. The Judge would also have set aside both impugned decisions, without attaching any suspensive conditions to the order. The respondents, in their official capacities, would have also been ordered to pay FUL's costs.[211]

5.2. Evidence surrounding the cases

5.2.1. Booysen

294. This section hones in on nuanced aspects of the Booysen matter and deals with the issue of racketeering authorisations. It is relevant to Jiba and not Mrwebi. The purpose of this evidence is not to evaluate or determine the guilt or innocence of Booysen in relation to the criminal charges he is currently facing, so no conclusions are drawn on that aspect. Rather, the Booysen matter is being considered with reference to the TOR

209 **FUL 2018**, paras 102-103.
210 **FUL 2018**, para 108.
211 **FUL 2018** (dissenting judgment), para 90.

vis-à-vis the lawfulness of the decision taken by Jiba to authorise the prosecution of Booysen for racketeering.

5.2.1.1. Booysen v Acting NDPP

295. We have three affidavits from Booysen. The founding affidavit in the Booysen matter in the KZN High Court in which he sought to review and set aside Jiba's decision to authorise his prosecution for racketeering. The second was provided to the Enquiry in December 2018. The third is his answering affidavit filed in the High Court Interdict Application which had been brought against Bongani Mkhize.

296. The evidence before the Enquiry relates to the following:

296.1. The authorisation by Jiba to charge Booysen with racketeering. It was found by Gorven J to be unlawful and was set aside. First, there is evidence before the Enquiry that was not before Gorven J, and second, the purpose for which the Enquiry is considering the evidence underlying the Booysen matter is materially different to what Gorven J was seized with. Gorven J may have either come to a materially different conclusion had he had the same information before him as we do or may have come to the same conclusion for the same or different reasons. We do not intend to second-guess the KZN High Court in this regard, meaning that Jiba's conduct must be measured against that finding in our evaluation. However, insofar as these new facts may require an evaluation in their own right, that ought to be considered.

296.2. Second, the lawfulness and proprietary of Jiba's conduct in ordering that the prosecution of Booysen and others in the Cato Manor unit be done by a team of prosecutors, including a DPP and DDPPs from outside KZN, where the case was to be heard.

296.3. Third, the involvement (or lack thereof) of Adv Simpiwe Mlotshwa (*"Mlotshwa"*), together with instructions to him, ostensibly either at the behest of Jiba, or at the

very least with her knowledge and consent to sign an indictment in the absence of supporting evidence.

296.4. Fourth, Mlotshwa's removal as Acting DPP and the appointment of Adv Moipone Noko (*"Noko"*), in his stead, is dealt with.

5.2.1.2. Powers of the DPP to prosecute outside of their jurisdiction

297. As indicated, section 179(3) of the Constitution provides:

> *"(3) National legislation must ensure that the Directors of Public Prosecutions-*
>
> *(a) are appropriately qualified; and*
>
> *(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).*
>
> *(5) The National Director of Public Prosecutions-*
>
> *(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;*
>
> *(b) must issue policy directives which must be observed in the prosecution process;*
>
> *(c) may intervene in the prosecution process when policy directives are not complied with; and*
>
> *(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:*
>
> *(i) The accused person.*

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant."

298. Section 20(4) provides:

"20 Power to institute and conduct criminal proceedings

(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings,

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

(2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.

(3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of-

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.

(4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of-

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director.

(5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.

(6) A written authorisation referred to in subsection (5) shall set out-

(a) the area of jurisdiction;

(b) the offences; and

(c) the court or courts,

in respect of which such powers may be exercised."

299. In her evidence-in-chief, Jiba cautioned that reliance should not be placed on the interpretation of the NPA Act as provided by Hofmeyr. Instead, it must be the interpretation contended for by her of section 20(4) of the NPA Act. This entitles DPP's to prosecute outside of their jurisdiction, with the permission of the NDPP. The ELs were of the view that as a matter of statutory interpretation the interpretation of section 20(4) put forward by Jiba is not sustainable, especially given the presence of "and" as a conjunctive in section 20(5) of the NPA Act.

300. Moreover, Jiba pointed to the fact that Adv Billy Downer ("Downer") was used to prosecute Shabir Shaik in KZN, notwithstanding the fact that he was not appointed as a DPP in KZN. However, there is no evidence before the Enquiry as to the authorisation, if any, given to Downer, and no confirmation in relation thereto. At the time this prosecution ensued he was a member of the DSO (Scorpions), which we understand to be an office distinct from a specific DPP office. This also appears to have been the case when the Zuma prosecution was commenced. In the absence of any further evidence, the Els were unable to conclude that those cases were in fact comparable to the prosecution of **Booysen**.

301. Mokhatla testified that on 26 June 2012, Exco queried the use of "outside" prosecutors. She was tasked with seeking a legal opinion from Adv Gerhard Nel ("Nel"). This was provided on 24 July 2012.

302. Nel concluded as follows:

"Section 20(3) of the NPA Act provides that subject to the provisions of the Constitution and the NPA Act, "any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of (a) the area of jurisdiction for which he or she has been appointed; and (b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director,"

The definition of Director is any Director appointed in terms of section 13(1) of the NPA Act. It is important to emphasise that the letter of appointment or proclamation effecting the appointment must determine the area of jurisdiction for which such section 6(1) Director is appointed;

Unless specifically excluded in the President's Minute of Appointment or the Proclamation, or by the NDPP generally, or in a specific case;

A section 6(1) DPP has original prosecutorial powers in respect of any offence in his/her area of jurisdiction and not in the area of jurisdiction of another section 6(1) DPP;

A SD has original prosecutorial powers in respect of those offences identified in his or her Presidential Proclamation in any area of jurisdiction, but subject to the concurrence of the section 6(1) DPP concerned.

Any DDPP appointed by the Minister in terms of section 15(1)(b) of the NPA Act to the Office of a DPP at the seat of a High Court, has original prosecutorial powers. However, he/she may only exercise such powers in the area of jurisdiction for which he/she has been appointed and in respect of such offences and in such Courts as he/she has been authorised in writing by the NDPP or a person designated by the NDPP.

303. In Nel's view, the NDPP cannot designate a section 6(1) appointed DPP of one area of jurisdiction to authorise a prosecutor within his or her area of jurisdiction to exercise prosecutorial powers in the area of another section 6(1) DPP. The NDPP also cannot authorise a prosecutor from the NDPP office to exercise prosecutorial powers in the area of another section 6(1) DPP, without consulting such DPP. Transfers of prosecutors without the consent of the DPPs would also be unlawful. Also, as a DDPP has original prosecutorial powers in the area in which he or she has been appointed, and cannot exercise such powers in another jurisdiction, unless it is done in consultation with, and under the direction of, the applicable section 6(1) DPP. Moreover, there does not appear to be a circumstance where one DPP can oversee prosecutions taking place in the jurisdiction of another DPP.

5.2.1.3. The offence of racketeering

304. Gorven J described the purpose of section 2(4) of POCA - which singles out a section 2(1)(f) racketeering charge for particular authorisation by the NDPP – as seeking *"to exclude other persons who would be entitled to make such a decision in respect of*

other offences. The object is clear. The decision should be made by a person of higher position, presumably due to their qualifications and experience."[212] In order to comply with section 2(4), the Acting NDPP had to have satisfied herself that it is an appropriate case for a racketeering charge because the charges are serious and should be limited to serious cases.

305. Generally, DPPs are empowered by section 179(3) of the Constitution, read with section 13 of the NPA Act, to institute prosecutions in the jurisdictions in which they are appointed. Given the nature of the racketeering charge section 2(4) of POCA creates an exception to this rule as it empowers the NDPP to authorise a prosecution. Though it was put to Hofmeyr in cross-examination that Jiba had granted 23 POCA authorisations, the details and circumstances of those authorisations were not before the Enquiry.

5.2.1.4. The process of evaluation of racketeering charges within the NPA

306. The Enquiry was informed that within the Head Office of the NPA, a committee was tasked with dealing with racketeering offences. Adv Elijah Mamabolo ("Mamabolo") was, at the relevant time, a Senior State Advocate in the Special Projects Division, dealing with organised crime. In this capacity, Mamabolo was responsible for processing applications for the NDPP for the authorisation of racketeering prosecutions. Hofmeyr's evidence was that he had worked closely with Mamabolo on certain cases and indicated that the purpose of this committee was to evaluate and interrogate possible racketeering charges before they were placed before the NDPP to authorise. Precisely the work of the SPD to which Mamabolo refers and which would scrutinise applications in detail before writing a report to the NDPP on their findings. This process involved the team, seeking to charge an accused with racketeering coming to Head Office to engage with the racketeering, committee / SPD. It is a fairly comprehensive process of interrogating the prosecution team's assumptions and assessing the evidence to ensure that racketeering is used effectively.

212 Booysen Judgment, para 19.

307. During her tenure as Acting NDPP Jiba appointed Adv Andrew Mosing (*"Mosing"*), a DDPP, as head of the SPD still based at the office of the NDPP. He was placed in charge of the **Savoi** racketeering matter, from which Mamabolo was then excluded. In November 2014 it was relocated by the NDPP to the NPS with its tasks still including advising on racketeering and other applications.

308. Mamabolo was excluded from working on the **Booysen** matter and the **Savoi** matter although he was not aware of a reason for this. Jiba had appointed DDPP Mosing as the Head of the SPD and placed him in charge of these matters.

309. Mamabolo reports that Nxasana, the then NDPP and Mokhatla had indicated to him that they had been informed at an Exco meeting that Mamabolo was advising her on the **Booysen** matter but that this was not true. At that stage Mamabolo provided a report dated 6 March 2014 to Nxasana and Mokhatla on the issue, which report is annexed to his affidavit.

310. In the report, Mamabolo, inter alia, explains that in the normal course, racketeering applications were referred to him before being presented or tabled before the NDPP or Acting NDPP. The **Booysen** matter, the **Savoi** matter and the **John Block** matters were all handled with *"utmost confidentiality or secrecy"* by Mosing and Jiba, and were held in a highly fortified safe under lock and key. When he requested to see the files, he was informed that the file is kept under lock and key by Mosing, together with other high profile matters. Everything was shrouded in *"puzzling confidentiality or secrecy*."

311. The team dealing with the **Booysen** matter included Mosing, Maema, Mathenjwa, Moeletsi and Ghangai. They advised Jiba.

312. According to Mamabolo, the case docket and the racketeering authorisation application was never made available or presented to Mamabolo in order for him to make an informed recommendation to the Acting NDPP.

313. Generally, the procedure in relation to racketeering matters was as follows:

314. Mamabolo and Adv JJ Kruger (*"Kruger"*) would be contacted by the regions about the existence of potential racketeering matters;

315. They would set aside a day or two to travel to the particular province, meet with each advocate from the Organised Crime Division and physically go through the docket/s with the individual prosecutor and identify any other potential racketeering matters;

316. On an ongoing basis, Mamabolo and Kruger would liaise with the prosecutors across the regions until a formal racketeering application would be brought to the NDPP for authorisation –either through Mamabolo and Kruger – or through the Organised Crime Office in the Office of the NDPP.

317. Mamabolo and Kruger would then go through the prosecution memorandum. Using their particular skill and expertise, they would scrutinise the memorandum to see if the accused is properly linked and cited. They would then go through the indictment and charge sheet to ensure that the charges and averments are in perfect order. Once they were satisfied that all was in order, including the identification of the enterprise and that each accused committed more than one scheduled offence, they would prepare a certificate to be signed by the NDPP.

318. The prosecutor or advocates concerned would next make a presentation to the NDPP in the presence and with the assistance of Mamabolo and Kruger.

319. This process was referred to by Hofmeyr and corroborated by Mamabolo.

320. This was not the process followed in the **Booysen** matter and no explanation has been provided as to why the accepted process was not followed. Jiba's evidence was that

this role was served by Mosing, who was Head of the SPD, the reference being that there was nothing sinister about the process followed.

5.2.1.5. Booysen's version

321. At the time that Booysen was arrested and charged, he was the Provincial Head of the DPCI (Hawks). An organogram of the structure of the KZN Hawks for the period of the indictment against Booysen was provided. It shows that between 2008 – 2010, Booysen reported to Major General Brown, Major General Masemola and Lt General Ngidi, as the Provincial Commissioner of the SAPS in KZN. It further shows that the Cato Manor Unit (which is the alleged enterprise that Booysen managed) was in fact headed by a Colonel Olivier who reported in turn to Col Aiyer. Booysen was Aiyer's superior.

322. During the period March 2010 – September 2011, the Organogram shows that Booysen reported to Dramat (National Head of the DPCI) and Ngobeni (Provincial Commissioner, KZN). During this period, there was an even greater degree of separation between Booysen and the Cato Manor unit in reporting structures.

323. In contrast to this structure, when Maema attempted to draw an organogram of the reporting structure of the Cato Manor Unit to prove the enterprise that would form the basis of the racketeering charge against Booysen, he roughly sketched an organogram in his notebook. In Booysen's view, that organogram was incorrect. Not only did it not reflect the entire indictment period but more particularly, it missed out a layer of reporting structure between Booysen and the Cato Manor Unit. It was not challenged that this was the structure that Maema took into account, as one of the prosecutors recommending authorisation of the racketeering charges against Booysen and the author of the prosecution memorandum placed before Jiba. Maema is a DDPP based in the North West Province and who was appointed to the **Booysen** matter by Jiba.

324. At the time that he was charged, according to both Booysen and Padayachee, he was working on a particularly sensitive and high profile case, namely the Thoshan Panday

investigation. This case involved a multi-million-rand corruption investigation against wealthy businessman Thoshan Panday is alleged to have had business links to direct family members of Zuma.

325. The case also concerned procurement irregularities within the SAPS. Initial investigations by the investigating officer revealed possible corruption involving senior SAPS officers and a private individual. During this investigation Booysen reported various incidents during which attempts were made to thwart his investigation from within the SAPS. One of the suspects in the investigation, Colonel Madhoe, subsequently tried to bribe Booysen and pressurise him to compromise the investigation. Booysen set up a sting operation and caused Madhoe to be arrested for attempting to bribe him with a R2 million payment.

326. Thereafter, another suspect, Thoshan Panday, was arrested in connection with the investigation. The charges against both Madhoe and Panday were subsequently provisionally withdrawn on 11 February 2013 but were later reinstated by Abrahams.

327. During this period, an article appeared in the *Sunday Times* stating that Cato Manor SVC section was a *"death squad"*. The article also accused Booysen of being complicit in their alleged actions.

328. Booysen was then suspended from duty. He successfully challenged his suspension in the Labour Court on two occasions.

5.2.1.6. The findings of Cassim SC

329. A disciplinary hearing chaired by Nazeer Cassim SC (*"Cassim"*) was held. The issue before Cassim concerned Booysen's conduct in relation to the Cato Manor Unit. The charges of misconduct against Booysen included that he had not properly supervised and controlled the Cato Manor Unit and had brought the SAPS into disrepute. Cassim made the following findings:

329.1. The SAPS had not discharged the onus to demonstrate that Booysen misconducted himself in relation to this charge.

329.2. The witnesses placed before him could not directly implicate Booysen in any wrongdoing;

329.3. It was wrong to single Booysen out as being responsible for the Cato Manor Unit when there were two Deputy Provincial Commissioners, namely, Masemola and Brown who were also in positions of authority;

329.4. The evidence of Col Aiyer (*"Aiyer"*) who accused Booysen of controlling the Cato Manor Unit, despite the fact that Aiyer was the direct commander of that Unit, was unpersuasive. Aiyer was found to have been a dismal witness, obsessed with notions of his own importance. Cassim in fact questioned whether Aiyer should continue to be employed by the SAPS. He also found that Aiyer was determined to tarnish Booysen's reputation irrespective to the overall interests of the SAPS. He hated Booysen and appeared to have a vendetta against him.

330. This is the same Aiyer whose statement was relied on by Jiba to justify a racketeering charge against Booysen.

5.2.1.7. Monetary award

331. A central part of the charge against Booysen is that he managed and supervised the Cato Manor unit's alleged criminal conduct in return for a monetary award. The monetary award referred to was a once off R10 000 payment awarded by the SAPS for good service by its officers.

332. In fact, the awards are discretionary and are determined by senior officers, on the recommendation of the provincial commissioner, sitting in a committee nationally.

333. Neither Booysen nor the Cato Manor Unit officers had any guarantee or entitlement to the monetary award. Booysen was awarded a once-off payment of R10 000.

334. In response to the evidence that Jiba had before her when she authorised the prosecution of Booysen, he confirmed that he had seen the dockets provided to him by Maema, the main prosecutor and indicated as follows:

334.1. Of the 23 dockets, only two mention Booysen.

334.2. Of the 290 statements in the dockets, only 3 statements mention him.

334.3. Two of these statements (by Naidoo and Williams) simply place Booysen at the scene of the incidents after they took place when the police were investigating the scene.

335. In view of the scant evidence against him, and the timing of his suspension and then prosecution, Booysen attributed his prosecution to the fact that he was investigating Thoshan Panday. During the investigation it had come to light that a contract worth R60 million had been acquired by Thoshan Panday from the SAPS. The Investigators informed Booysen that R45 million had already been paid out and the remainder was still to be paid. Booysen wrote to SAPS financial services instructing them not to pay out as there was a corruption investigation pending.

336. Soon thereafter, Booysen received a visit at his office from Edward Zuma, indicating that he needed Booysen to unfreeze the R15 million which had been frozen as he was a silent partner of Thoshan Panday, had invested R900 000 and needed his dividends. Booysen refused to do so.

337. Booysen's version is that this series of events, together with his ongoing investigation of Thoshan Panday and Navin Madhoe resulted in him being prosecuted.

5.2.1.8. Padayachee affidavit

338. Booysen's version in relation to Edward Zuma was corroborated in an affidavit deposed to by Colonel Brian Padayachee, head of Crime Intelligence in Durban and who is

currently the section commander at Intelligence Collection. He was prepared to provide oral evidence to the Enquiry.

339. Padayachee confirms that during the course of an investigation into World Cup Corruption, large scale corruption was uncovered involving *inter alia* Senior SAPS officials and influential and prominent Government Officials or individuals. This evidence is being placed before the State Capture Commission.

340. One of the individuals implicated in this investigation is Edward Zuma. Padayachee's investigation revealed that Zuma approached Booysen with regard to the Thoshan Panday corruption cases and requested his assistance in retrieving money that was being withheld by the State because of the pending case against Panday. Padayachee states that he has evidence that Zuma contacted Panday and met with Booysen.

341. He also confirms that several intercepted calls revealed serious death threats against Booysen. During one of the intercepted communications between Panday and Aiyer, Panday said to Aiyer *"the only way you can help me is to take Booysen out."* This was considered a serious threat and Booysen was contacted by the SAPS and warned to be vigilant and take proactive steps to safeguard himself and his family. Padayachee heard the intercepted call personally.

342. The investigation also revealed that Aiyer sounded and appeared desperate both financially and emotionally. It was also established that Aiyer was in possession of a fully automatic R5 Assault Rifle. This is a non-standard weapon and is only issued to operational members during specific operations. Aiyer should therefore not have been in possession of this weapon. This was communicated to the Section Head of Commercial Crime, Brigadier Lategan who took possession of the rifle from Aiyer.

343. Other evidence revealed in Panday's investigation is that Panday was desperate to get rid of Booysen. To this end, he attempted to get the assistance of several prominent

high-profile individuals as well as senior police officials. Large sums of money were also paid to corrupt officials.

344. The investigation also revealed that Panday had requested Deebo Mzobe (*"Mzobe"*) to assist him in getting rid of Booysen. Panday told Mzobe they need to clip Booysen's wings and suggested that they have a meeting on *"how to take care of Booysen because he is obviously now standing in the way of everything.*" Padayachee listened to this recording himself. Mzobe requested money from Panday and Panday responded that he would *"sort it out"* for him. The SAPS is in possession of transcripts of these recordings. Mzobe is the cousin of former President Zuma.

345. The investigation also revealed evidence of a conspiracy between Aiyer, Panday and Sunday Times journalist, Mzilikazi Wa Africa. Wa Africa was well informed and knew when Booysen would be arrested. Aiyer provided crime scene photographs to Wa Africa which were later used in the Sunday Time expose of the Cato Manor Unit.

5.2.1.9. The decision to authorise the prosecution and the steps taken

346. Mlotshwa was Acting DPP in KZN during the period 17 May 2010 to 9 July 2012. Some time between January and March 2012,[213] he received a call from Jiba, whilst on route to Port Shepstone. She informed him that there was a matter which, because of pressure, had to be enrolled as a matter of urgency. Mlotshwa informed her that he would first need to read the docket and then make a decision accordingly. She repeated that the matter was urgent and she would call him back. She did not identify the source of the pressure or the case. Nor did she call him back. Jiba does not dispute the call, but denies that she had indicated there was any pressure to conduct the prosecutions.

347. Maema provided the ELs with an unsigned affidavit from his laptop which contained a paragraph 3 which stated as follows:

213 Mlotshwa surmises that this was either on 9 January 2012 or 1 March 2012 based on his diaries at the time. Jiba's evidence was that it was likely in March.

"In March 2012 I was approached by the then Acting National Director of Public Prosecutions (ANDPP), Adv Nomgcobo Jiba with a request to assist in the perusal of a number of dockets which were originating from the KwaZulu-Natal Division, which later came to be known as the Cato Manor prosecution. The then Acting Director of Public Prosecutions, KwaZulu-Natal, Adv Simphiwe Mlotshwa had approached the then Acting National Director for assistance in deciding the matters as advocates in his office had been working closely with the members of the Cato Manor section of the Durban Organised Crime Unit and the request was that a fairly neutral team of prosecutors were required to decide the dockets."

348. The affidavit that had been signed by Maema was in slightly different terms in that it stated:

"In March 2012, I was informed by my DPP, Adv Johan Smit SC about a request by the then Acting National Director of Public Prosecutions (ANDPP), Adv Nomgcobo Jiba to form part of a team that would peruse a number of dockets which were originating from the KwaZulu-Natal Division, which later came to be known as the Cato Manor prosecution. The reason that was given at the time by the ANDPP was that the then Acting Director of Public Prosecutions, KwaZulu-Natal, Adv Simphiwe Mlotshwa had approached her with a request to appoint (a) prosecutor(s) from other divisions to look into the matter as prosecutors in his division had worked over a number of years closely with the members of the Cato Manor section of the Durban Organised Crime unit. The request was that a team of prosecutors who were unknown to the suspects and who were unfamiliar with the facts of the matter be appointed to decide the dockets. I was asked to be the Lead Prosecutor assisted by a Deputy Director of Public Prosecutions, Adv Raymond Mathenjwa and four (4) Senior State Advocates, Adv Mlotshwa, Futshane, Moleko and Ntlakaza who were all based at the DPP office, South Gauteng Division under the leadership of Adv Andrew Chauke. A meeting was held at VGM building on 9 March 2012 with the team members, the Acting NDPP, the DPP, Adv Chauke and Adv Mosing. In

furtherance of this meeting, a communique was sent to Adv Smit SC, the DPP of the North West by the Acting NDPP's PA, Jackie Lepinka a copy of which is marked "SM1"."

349. In an email dated 13 March 2012 from Adv Smit, the DPP, North West (Smit) to Jiba he states as follows:

"I am informed by Adv Maema that you have decided that he must be part of the team that will handle the "Cato Manor" case in KZN.

He is not very clear as to what exactly his role should be and he has indicated to me that he would only be required to:

> *Attend the initial planning sessions to help in putting together a plan of action and to help in ensuring that all the agencies appreciate and understand their role in the operation;*
>
> *Provide guidance and advice from time to time regarding the investigations and prosecution.*

He would not be required to:

> *Read the dockets and prepare the indictments; and*
>
> *To do the prosecution.*
>
> *Also his travelling and accommodation costs will not be carried by my office.*

In order for us to clearly understand his working relationship with the rest of the team, and to understand what would be required of him, and indirectly of me as the Head of his office, kindly confirm or correct our abovementioned perceptions so that we at least could have some kind of m.o.u."

350. Subsequently, the memorandum from Lepinka to Smit, in response to this email, as referred to in Maema's affidavit above, informed Smit that Maema was required to work on the matter as this was a National Project. Ramaite was asked what a National Project was. He explained that it was a management tool. There is no specific provision for a National Project but it is understood to be a project with prosecutors from different jurisdictions working together. It is necessary when a prosecution spans different jurisdictions or when a matter is of national interest. Such a project is normally driven from Head Office – under the management of the NDPP.

351. In oral evidence before the Enquiry Mlotshwa vehemently denied that he had requested assistance with this prosecution from Jiba. His email exchanges with Chauke, together with his oral evidence, establish that he was not in possession of any dockets in terms of which he could have required assistance. Furthermore, since the KZN DPP was based in Pietermaritzburg and Durban, he testified that he could readily have dealt with matters of a sensitive nature. It was clearly apparent that he would have had no need to seek Jiba's assistance and had not done so.

352. Under cross-examination Jiba's evidence was that Mlotshwa never asked for assistance nor did he *"plead"* for assistance as his prosecutors were conflicted. Rather she testified that she had met with a number of officials from the Independent Policy Investigating Directorate (*"IPID"*) who had been assigned to investigate the conduct of the Cato Manor police officials. They were concerned that the case was not moving. There had been media coverage about the Cato Manor police killing 117 people in one year. The IPID officials requested her assistance and expressed concerns about the fact that members of the NPA in KwaZulu Natal and the police officials were known to each other. Jiba did not cast aspersions on her KwaZulu Natal prosecutors but felt that she should make sure that what was required was complied with. This evidence must be considered against Jiba's signed written submissions to the President as recently as 10 August 2018 wherein it is stated that:

"the reason why a national prosecution team was established is because the then KZN Acting DPP pleaded that the suspects are known and have worked closely with members of the sub-unit and some of the cases have fallen through the cracks of the Provincial prosecutors."

353. Mlotshwa further testified that a few months later, he received a call from Chauke, informing him that he had been instructed by Jiba to send a team of prosecutors to prosecute the accused in the Cato Manor case. He told Mlotshwa that there were very sensitive security issues surrounding the matter. They decided to discuss the matter further at the upcoming meeting of DPPs in Pretoria on 29 May 2012.

354. On 29 May 2012, Mlotshwa attended the DPPs meeting at the VGM Building in Pretoria. During that meeting, Chauke told him that Jiba wanted to see them urgently in her office. They left the meeting and went to meet with Jiba. At the meeting, Chauke indicated that he could not discuss everything surrounding the case in light of the fact that there were security issues surrounding the Cato Manor case and that he was of the view that it would lead to the arrest of advocates in Mlotshwa's office. To date no such advocates have in fact been arrested and there is no indication in the dockets or prosecution memoranda that any of the advocates from the DPP, KZN implicated. Under cross-examination Jiba agreed that nobody in the NPA KZN was implicated in the Cato Manor killings. Jiba was asked by the Panel why she had not investigated allegations by IPID. Jiba said that this may have been an oversight because her focus was to ensure that the case went on.

355. Mlotshwa testified that Jiba told him that she had received an opinion from Nel to the effect that he was empowered to sign the delegation document allowing the prosecutors from outside of his jurisdiction to prosecute cases in KZN.[214] He was also empowered to sign the indictment. Mlotshwa agreed on the basis that he would sign the indictment if it was sent to him with all the supporting documentation and evidence.

214 There was in fact no opinion from Nel at the point at which Jiba indicated as such to Mlotshwa. Jiba, under cross-examination instead referred to an opinion from Maema to Nxasana which the Enquiry has not had sight of. This is dealt with in greater detail below.

356. However, Mlotshwa was never provided with the supporting documentation despite a rather heated exchange with Chauke, in which Jiba was copied. On 12 June 2012, Chauke's personal assistant emailed Mlotshwa the indictment without the supporting documentation, prosecutor's memo or evidence. Mlotshwa then wrote several times to Chauke, copying Jiba and Thoko Majokweni (*"Majokweni"*) to ask for the outstanding information. This was not forthcoming, and in the absence thereof, he continued to refuse to sign the indictment.

357. Chauke also asked Mlotshwa to consider re-opening a series of inquests. Mlotshwa refused to do so without having the files, stating that he needed them so that he could obtain an overall view of the matter. Chauke refused, saying that Mlotshwa had sufficient information before him. This exchange ended with Chauke withdrawing the request for Mlotshwa to re-open the inquests as he had been asked to do. Jiba was copied in on this sequence of heated communications in which Mlotshwa was effectively accusing Chauke of asking him to do something unlawful. At no stage during this exchange did Jiba intervene. When asked why she did not intervene, Jiba said:

> *"You know Chairperson if I were to intervene in all the differences that those DPP's have we would miss the point of why we are here, they argue about many things, I remember in one meeting when Advocate Simelane was still our NDPP he used to say today there is going to be blood on the floor because each and every NDPP feels strongly about his particular view so it is in those circumstances where you really come né, you must then come and then raise the issue and that is really the time when you will say oh okay let us try and resolve the impasse that is actually between the two of you otherwise under normal circumstances they are able to resolve these things amongst themselves and you would think that you were in a meeting they will never speak to each other but by the time you get out of the meeting they are calling themselves my chief, my chief, my chief."*

358. Jiba also said she didn't understand why Mlotshwa was asked to sign the indictment in any event, because DDPPs were required to do that – not DPPs.[215] This was not put to Mlotshwa in cross-examination, nor did she raise it in the email exchange in respect of which she was included.

359. Mlotshwa's evidence was that after this exchange, he heard no more about the Booysen prosecution.

5.2.1.10. No re-appointment of Mlotshwa

360. According to Mlotshwa's evidence he had an expectation that he would be appointed permanently to the position of DPP, KZN but that the *"corridor talk"* was that Noko was going to take over from him as Acting DPP. He therefore asked the CEO, Van Rensburg, who told him that no official position had been taken in this regard but that he should consider himself the DPP, KZN.

361. Shortly, thereafter his acting appointment came to an end on 9 July 2012. He was simply informed abruptly that his acting stint was over, and he returned to the position of DDPP. In effect he had nothing to do with the **Booysen** and other matters that were sensitive and pending thereafter.

362. In his stead, Noko was appointed Acting DPP for KZN.

363. In her evidence in chief, Jiba testified that Noko was chosen to improve gender representation and because the Minister had indicated that he wanted an African woman appointed. Under cross-examination she elaborated that there were few women DPPs.

364. However, when Jiba's memorandum dated 26 June 2012 to Minister Radebe seeking the appointment of Noko, was produced during cross examination, it indicated that Jiba had motivated for the appointment of Noko and had done so on the basis that

215 It is understood that the indictment was ultimately signed by Maema, the lead prosecutor in the matter.

her appointment was necessary to ensure adherence to the prescripts of the Senior Management Service Handbook (*"SMS handbook"*) and to ensure that no expectation of an extended acting appointment was created by retaining Mlotshwa. Mlotshwa had been acting from 17 May 2010 until 9 July 2012 on the basis of previous communication with the Minister and had anticipated doing so until Adv Baloyi (*"Baloyi"*) returned.

365. Jiba's response when asked about the inconsistency was

"ADV. BAWA: Ja. So it was not just gender representivity you effectively did not want Advocate Mlotsha to get too comfortable in the acting position which is what you effectively told the Minister.

ADV. JIBA: Part of the reason was that, though he is not included in here, that was part of the reason."

366. Noko deposed to an affidavit dated 31 March 2015 in which she indicated that as DPP, KZN she did not directly oversee the Cato Manor case until around March or April 2014 when the NDPP, Nxasana, instructed her to start directly dealing with the case. The instruction was given to her during a meeting when the Prosecution Team was briefing him on the developments of the case. Noko confirmed that before this instruction, Chauke was directly overseeing the case. He also supervised the Prosecution Team and they reported to him directly as far as the case was concerned. She further confirmed that the Prosecution Team was established before her involvement and that the team comprised Maema, Mathenjwa, Ntlakaza, Moleko, Mlotshwa (Jabulani Mlotshwa not Simphiwe Mlotshwa from KZN) and Futshane.

367. Furthermore, that during August 2012, not long after her appointment as Acting DPP, KZN she was requested by Chauke to sign a covering letter to a prosecution memorandum intended for Head Office of the NPA. She did so as she was the Acting DPP, KZN, where the matter was pending, but that she had not at that stage been directly overseeing the case as Chauke was doing that. Noko made representations to the Enquiry to the effect

that she had not signed the memorandum which the cover letter had been appended to. The memorandum had in fact been signed by Chauke. Chauke himself confirmed that the signature was his.

368. This is not consistent with Jiba's version in her evidence that Chauke was not responsible for the **Booysen** prosecution, but merely *"supervised"* it because some of the prosecutors came from his office. According to Jiba, the prosecutors reported to Chauke for "daily operations". Jiba surmised that the prosecution team reported regularly to Noko to keep her informed of the developments in the case.

5.2.1.11. Nel's opinion

369. We have referred above to Nel's opinion provided to Mokhatla on the question of appointment of DPP's to jurisdictions outside the one for which they had been appointed. As indicated above, it was apparent from the affidavit deposed to by Mlotshwa that Jiba had indicated to him that she had been provided with an opinion from Nel saying that it was lawful for Mlotshwa to sign the delegations in the **Booysen** prosecution.

370. In his evidence before this Enquiry, Nel made it clear that by 29 May 2012, when Jiba said this to Mlotshwa, Nel had not provided Jiba with an opinion on whether Mlotshwa could sign delegations for prosecutors / DDPPs to prosecute the Cato Manor case outside of their jurisdiction. But that in August 2012, he provided an opinion dated 6 August 2012 to Mokhatla. Mokhatla in her evidence referred to Nel's in relation to the power of prosecutors to prosecute outside of their jurisdiction. The initial advice sought from Nel was without her knowledge but subsequently an issue arose at an Exco meeting on 26 June 2012, that required an opinion from Nel. This, in the context of a query as to why DPPs are being used to prosecute outside of their jurisdiction. Mokhatla obtained that opinion from Nel but had nothing further to do with the **Booysen** matter.

371. When asked under cross-examination what opinion she meant when she told Mlotshwa that she had an opinion from Nel that said he could sign the delegations, Jiba's response was somewhat confusing:

"ADV BAWA: In your evidence in direct said that an opinion had been furnished which allowed you to, which had said you could do it under those provisions, now it is not the opinion of Gerhard Nel so I am asking you if you can recall what opinion that was or whose opinion that was.

ADV JIBA: Now when I was referring to an opinion which was later requested by Mr Nxasana when he, in a meeting he expressed opinions as to whether our case is not going to be found wanting for lack of process and all I was saying is that that opinion was submitted to him and he did not disagree with it and that was the opinion that was given by Advocate Maema.

ADV BAWA: So it was an opinion from Advocate Maema that was provided to Mr Nxasana.

ADV JIBA: Yes Chairperson.

ADV BAWA: Okay and when Advocate Mlotsha says that you relied on an opinion from Advocate Nel do you recall what he is referring to?

ADV JIBA: I think Advocate Mlotsha was referring to, he was speaking about delegations essentially and the issue of delegations did not require any opinion, those opinions have been there for quite some time and that is exercised all the time, we know that prosecutors prosecute on delegations. The issue about all of these authorisations that were issued by myself and the delegations that were issued by Advocate Mlotsha they came at a particular time when odds were against me in terms of having made this authorisation so I just want all of these things to be understood in that context and at no stage did anybody ever come to me to say that you were wrong by doing this, you were wrong by doing this, you were wrong by doing this.

ADV. BAWA: It does seem that it emanates from a previous practice when the Scorpions were still around they had national jurisdiction and the prosecutors was attached to the Scorpions could prosecute in any division correct?

ADV. JIBA: He would still have to have some form of authorisation you cannot just go and prosecute in the Western Cape for example, remember there were prosecutors even in the Scorpions, the Scorpions had regional heads né so under the office of a regional head there were then prosecutors who were actually assigned to prosecute in that particular jurisdiction so if you have to move from Pretoria for example you would have to have some form of authority that authorises you now to go to prosecute a case in another jurisdiction."

372. Consequently, it raises one of two questions:

373. Whether indeed there was another opinion which to date has not been produced to this Enquiry. One would have expected this to have been raised with Nel, in cross-examination, if this was the case as in all likelihood, he was at best the author of such opinion, or at the very least the person who ensured that there was a repository of opinions. But this was not done.

374. Whether by the aforesaid sequence of events, what reason – and what outcome was achieved – by Jiba having indicated to Mlotshwa, as he has indicated, that she had an opinion from Nel confirming that Mlotshwa was entitled to sign the delegations in question, when, on Nel's version, that opinion had not yet been sought or provided?

5.2.1.12. Prosecution memo

375. Soon after Noko's appointment as Acting DPP, KZN, as already indicated, on 15 August 2012, Noko signed what she regarded to be the *"covering letter"* to the prosecution memo at the request of Chauke, even though at that juncture she was not overseeing the prosecution. She clearly did what Mlotshwa had refused to do without first having sight of the dockets. Authorisation was then sought from Jiba under POCA.

376. The prosecution memo attached to the application for authorisation was drafted by Maema. Jiba authorised the prosecution of Booysen on 17 August 2012. It was put by Counsel for Jiba that seasoned prosecutors, Noko and Maema considered that there was sufficient evidence before Jiba to authorise the racketeering charges. Fairly put, so did Mosing and presumably, Chauke. There is no indication that Noko considered the dockets as her affidavit does not indicate that she had access thereto. In contrast, is the opinion of Ferreira and Gerhard Van Eeden (van Eeden) dated 5 August 2015. The opinion was prepared some years after the POCA charges were authorised. This was done at the request of Abrahams at the time when he was considering whether a prosecution against Jiba should be pursued.

377. Ferreira and Van Eeden point out the following:

377.1. Jiba indicated on oath that she had considered the information under oath and the evidence considered in the dockets and was satisfied that there was a *prima facie* case that an offence had been committed.

377.2. She made particular reference to the statements of Aiyer, Danikas and Ndlondlo as supporting the charges, and stated that Booysen was directly implicated under oath in the statements placed before her in Annexures **"NJ2" – "NJ5"**.

378. They pointed out a series of inconsistencies and difficulties with Jiba's version. The following was noted:

378.1. Inquests were conducted and finalised in some of the murder charges. If public prosecutors declined to prosecute and inquests were held, absolving the Cato Manor officers of guilt, Booysen could rely on this to show it was reasonable for him to believe that the officers had done nothing wrong.

378.2. There was no direct evidence linking Booysen to the individual offences in the dockets as alleged by Jiba.

378.3. It was uncertain how the prosecution team intended to get past the evidence that primer residue was found on the hands of the deceased, indicating that the deceased had recently fired a gun. Booysen could reasonably have believed that the SAPS members had acted in self-defence – this would affect his knowledge of wrongfulness on the charges in the indictment.

378.4. No identification parades were done. Witnesses merely referred to Cato Manor Unit members by race. In many cases, the firearms of the individual members were not tested to link it to the bullets that killed the deceased.

378.5. Jiba appeared to rely heavily on the statement of Aiyer (**"NJ2"**) and (**"NJ4"**). **"NJ2"** is largely a *"complaint session"* about how he was victimised and targeted by Booysen. His statement is dated 3 August 2014, and gives no evidence, even speculative as to any involvement by Booysen in the alleged offences in the indictment. **"NJ4"**, the second statement of Aiyer, is dated 31 August 2012, after the authorisation of the charges.

378.6. Cassim, in the Booysen disciplinary inquiry, found Aiyer to be an unsatisfactory witness with a vendetta against Booysen. In any event, Jiba could not have considered the second affidavit of Aiyer in making her decision, because it was dated after the authorisation.

378.7. In relation to Danikas, Ferreira and Nel point out that the *"statement"* is unsigned and does not contain any evidence relevant to the indictment.

378.8. In relation to the statement of Ndlondlo (**"NJ5"**), Ferreira and Nel are of the view that the statement is of no use as it constitutes disputed hearsay evidence twice removed. The two witnesses who allegedly told Ndlondlo certain things have categorically denied his version, through their attorneys. Moreover, it's not clear why the investigators did not interview and obtain statements from these witnesses in the first instance.

379. Ferreira and Van Eeden also point out that in her affidavit to in the GCB matter, Jiba states categorically that the 4 statements of Danikas, Aiyer and Ndlondlo were in the docket. But according to Booysen this is not correct as he was provided with the dockets as part of the criminal trial process and these were not included. A precise recordal of what he was given is attached to his affidavit furnished to the Enquiry marked "A". This was not disputed nor challenged under cross-examination.

380. Booysen was provided with the statements for the first time when Jiba's statement was filed in the KZN High Court. They were annexures to her affidavit marked **"NJ"** and not "A" as they would have been had they been in the docket. In an email to Maema dated 8 February 2013 from Booysen's attorney, Carl Van Der Merwe, it is recorded that the documents provided to him on 5 February at the Durban High Court were incomplete. He also confirms that Maema promised to disclose additional documents to him as per the attached list within two weeks. Finally, he confirms that Maema advised that no further charges would be added and that he was awaiting the statement of Aiyer who was unwell.

381. Ferreira and Van Eeden concluded that there was insufficient evidence to charge Booysen and that Jiba committed perjury under oath as set out above.

382. Ferreira, under cross-examination, explained that for purposes of drafting the opinion with Van Eeden, he was provided with 23 dockets, in the prosecution of Booysen as it was discovered to him, the open case docket, statements contained therein, and other material.

383. Mamabolo explained in his affidavit that a detailed, careful and comprehensive process was generally followed in racketeering cases, before authorisation was sought from the NDPP. It is not evident that such a process had been followed in the Booysen case.

384. If so, these gaps in the evidence and investigation as identified by Ferreira and van Eeden would have been picked up earlier and interrogated before authorisation was sought. In these circumstances, it is also difficult to understand why Jiba and Mosing excluded Mamabolo from this process – and deviated from what Mamabolo / Hofmeyr regarded as standard protocol.

385. Moreover, Jiba indicated in her affidavit that she had regard to the evidence in the dockets. Under cross-examination, Jiba stated that she did not have regard to the dockets in their entirety but only to certain aspects of the dockets that she asked for when they appeared relevant.

386. In relation to what was in fact before Jiba when she took her decision to authorise the prosecution of Booysen, the Prosecution Team compiled an internal memorandum for Counsel in response to the Booysen review application. This had been provided to Adv Hodes SC (*"Hodes"*) and Adv Manaka (*"Manaka"*). The memorandum records that the following information was before Jiba when she took her decision:

386.1. The applicant was the *de facto* commander of the Cato Manor Unit;

386.2. The monetary awards documents;

386.3. The statements of Ndlondlo, Aiyer and Danikas – which implicated Booysen; and

386.4. Booysen's interdict Affidavit in which Booysen's personal knowledge of the Taxi Violence Killings is recorded.

387. That is the extent of the information which the Prosecution Team recorded in their memo to counsel as to what was before Jiba when she took her decision. They do not mention the dockets. This should not be understood to be saying that Jiba for purposes of issuing the authorisation should have considered each page in the docket. It simply sets out what the versions are around what she had in fact considered.

388. In her evidence before the Enquiry, Jiba repeatedly referred to photos of the killings – particularly that of Bongani Mkhize (*"Mkhize"*). She testified that the photos were gruesome and she expressed a desire to seek justice for those that were killed. However, what was not clear – and Jiba was unable to explain under cross-examination – was what the relevance of the photos were to whether or not the evidence showed a prima facie case of racketeering. She was also unable to explain how she reconciled the evidence that the deceased had primer residue on his hands in her conviction that he had been unlawfully killed.

389. Next, Jiba indicated that she had relied on the Booysen Interdict Affidavit as evidence that he managed the enterprise. Booysen was the Fourth Respondent and deposed to the affidavit on behalf of the SAPS Respondents. She concluded this because the information in the affidavit, it showed that he had knowledge of the operations that were conducted by the people that were under his control. It was pointed out to Jiba that one would expect the head of the Organised Crime Unit to know what was going on by virtue of the fact that he had been required to depose to an affidavit on behalf of the SAPS – because of his position as head of the Unit. It is generally what happens when one is asked to depose to an affidavit – one looks at all the files and relevant materials, familiarises oneself with the documents and then deposes to the affidavits. Paragraph 2 of Booysen's answering affidavit read inter alia that *"the facts stated herein … within my personal knowledge, alternatively have been obtained by me from files and documents under or in the control of SAPS"*. The proposition was that it could not be suggested from the Booysen Interdict Affidavit that he had personal knowledge of all the contents of the affidavit. In fact, Mkhize's reply rebuts that, indicating that *"As I was not at any of the shooting incidents, I did not have first-hand knowledge and was in fact relying on reports."* Jiba objected to answering this question and indicated that she had already explained her process and thinking.

390. The Els identified a certain discrepancy in the docket in their submissions. The application for authorisation referred to 18 accused, while there are 30 accused in the indictment.

On face value this would be a misjoinder because the other accused (Accused 12, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29 and 30) in the proposed indictment are not charged with racketeering. They did not, according to the prosecution memo, commit more than one offence in the predicate offences as is required for a charge of racketeering.

5.2.1.13. Manner in which the Booysen matter was dealt with

391. Mokhatla indicated that she had no knowledge of the Booysen matter and was not consulted on it, nor did she advise on it. It had not been allocated to LAD or allocated out by her. From the documents which she has since seen, she surmises that no one in LAD worked on the matter.

392. Under cross-examination Mokhatla was asked to agree that LAD had been involved in the Booysen matter. She refused to do so, saying that to her knowledge LAD was not involved because the Booysen case concerned a criminal prosecution and not a civil matter – however, if the work required was something minor like briefing counsel, it was possible that LAD assisted with that – but it would not be anything substantive.

393. When shown the Exco minutes of 5 March 2014 in which Nxasana raised concerns around the **Booysen** prosecution, Mokhatla recalled the meeting. She also confirmed that it was at that meeting that Jiba indicated that Chauke would provide a report on the **Booysen** matter to Nxasana but that she was not aware whether that report was provided to the NDPP. She confirmed however, that the report stayed on the action log on subsequent exco minutes for some time, indicating that the report was not provided for some time.

5.2.1.14. Mosing's version

394. Mosing deposed to an extensive affidavit, dated 5 May 2015, dealing with several aspects of the Booysen prosecution and Jiba's version on oath in the Booysen matter and thereafter.

395. Of relevance to the Booysen matter is the fact that Mosing does not mention that the standard process of evaluating and vetting potential racketeering charges was ever conducted in the Booysen matter. Instead, Mosing states that one of his duties was to advise the NDPP on all applications for authorisation in terms of section 2(4) of POCA. This is not incorrect, simply incomplete if Hofmeyr / Mamabolo is believed.

396. As part of his duties he attended a meeting on 8 March 2012 with three members of the IPID who were investigating the Cato Manor Unit.

397. At the 9 March 2012 meeting, IPID members referred to the fact that the Minister of Police and the Acting National Commissioner of Police had expressed dissatisfaction with the slow progress made by the two investigating units since December 2011. They needed to *"rope in prosecutors"* because prosecutors that had been promised by the Acting DPP KZN, Mlotshwa, were not materialising. Notably, Mosing does not state that Maema and other prosecutors from outside of KZN were also at the meeting and had already been tasked with prosecuting the matter. They therefore decided to meet with the NDPP to ensure that a joint approach would be taken to achieve results. Mosing was subsequently informed (he does not say by whom) that Maema was the lead prosecutor on the team of DDPP's from Gauteng because of his experience in racketeering matters. It remains unclear what that experience was.

398. Mosing indicated that Chauke's role was merely to manage the team as they were mainly from his office but he would not be vested with any decision-making powers regarding prosecutorial decisions as the case fell outside of his jurisdiction. Notably, Mosing does not deal with the fact that none of the other DDPPs were from KZN where the crimes were committed and the cases would be prosecuted – so they also lacked jurisdiction.

399. Mosing indicated that he had not involved any other members of his own unit, the SPD, in the matter because he was aware that some of them knew Booysen.

400. His role in the matter was to interact with the prosecuting team and guide them as far as racketeering issues were concerned and to act as liaison between the Acting NDPP and the team and to advise the Acting NDPP on developments as conveyed by the team or as gleaned by him. He was not an integral part of the prosecuting team but he did deliberate with them on the merits of the evidence.

401. On or about 15 August 2012, Mosing received the application for racketeering authorisation from the prosecuting team under cover of the letter from the DPP, KZN (Noko) dated 15 August 2012. At the same time, he received an application for centralisation under cover of a letter from the DPP South Gauteng. He drafted a letter to the Acting NDPP recommending the approval of the application for authorisation of the racketeering prosecution and centralisation on the following day, 16 August 2012. On 17 August 2012, Jiba approved the authorisation and the application for centralisation. There appears that there was no presentation from the prosecution team in accordance with the practice which Mamabola describes.

402. After the prosecution was authorised, and on 27 August 2012, another application for centralisation was received in respect of an offence committed in the North West Province under cover of a letter from Noko, dated 20 August 2012. It pointed out that the first application for centralisation was erroneously submitted under cover of letter from the DPP: South Gauteng instead of KZN. Mosing wrote a memo to Jiba clearing up this error and a new centralisation directive was issued on 27 August 2012.

403. This raises the question of why a centralisation directive was sought *after* the authorisation of the prosecution and *after* months of work had been done by a prosecuting team from outside of the province in which one of the crimes was committed.

404. In our submission, to the extent that a centralisation directive was required to link the one crime in the North West to the KZN based crimes – this should properly have been sought before the authorisation to prosecute was granted.

5.2.1.15 Evaluation of racketeering case law

405. At issue in relation to Jiba, was whether the evidence before her justified the decision to authorise the prosecution of Booysen. While there are very few racketeering cases of assistance, we were directed to certain decisions by the ELs and Jiba's representatives during the hearing and in submissions. Racketeering is amongst the most serious offences with which one can be charged. It has serious consequences. Section 3 of POCA provides for the penalty in respect of a contravention of section 2(1):

"(1) Any person convicted of an offence referred to in section 2 (1) shall be liable to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life."

406. Specific authorisation is required from the NDPP in terms of section 2(4) of POCA, before a person can be charged with racketeering.

407. The seriousness of the crime is also reflected in the process adopted by the NPA to consider, evaluate and decide whether to recommend a prosecution of racketeering. Mamabolo and Kruger were responsible for doing this and the process generally took approximately 14 days before a final decision could be obtained from the NDPP. In the **Booysen** matter, Mosing stated that the application for authorisation was received on 16 August 2012 and was approved on 17 August 2012. No mention is made of a presentation to Jiba or any similar interaction and interrogation of the charges. Jiba indicated under cross-examination that a presentation was made to her. It is not clear when this happened and who was included.

408. Within this context, a summary of the case law relating to racketeering follows:

409. In **Elran**[216] the Constitutional Court held that POCA was enacted "in pursuit of legitimate and important government purposes of combating serious organised crime and preventing criminals from benefiting from the proceeds of their crimes,"

410. In **Savoi**,[217] the Constitutional Court was faced with a challenge inter alia to the constitutionality of the definition of *"pattern of racketeering activity"* and *"enterprise"* in section 1 of POCA on the grounds that they are void for vagueness, overbroad, retrospective and violated the right to a fair trial. Ultimately the Court upheld the constitutionality of the impugned provisions.

411. In relation to the pattern of racketeering activity required, the Court held that the participation or involvement in the individual offences must be ongoing, continuous or repeated. There must be an interconnectedness between the offences with the result that they must form a sequence. They must all be part of an elaborate plan. There must be forward planning that there will be participation or involvement in the offences.[218]

412. In considering the definitional challenge, the Constitutional Court placed the sections in the context of POCA, which is described as follows:

"In Mohamed NO 2 this Court stated the purpose thus:

"The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: the rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the

216 **NDPP v Elran** 2013 (1) SACR 429 (CC), para 22.
217 **Savoi v NDPP** 2014 (5) SA317 (CC).
218 **Savoi**, para 18.

fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act."

POCA seeks to ensure that the criminal justice system reaches as far and wide as possible in order to deal with the scourge of organised crime in as many of its manifestations as possible."[219]

413. Finally, the Court found that the phrase *"ought to have known"* as contained in section 2 of POCA infuses an element of subjectivity into the pure objective test – a recognition of individual frailties and shortcomings. . . the *"objective criterion of negligence, tempered with a measure of subjectivity."*[220]

414. This is relevant to the evaluation of the Booysen Interdict Affidavit and to the consideration of what Booysen *"ought to have known"*.

415. In **Moodley**[221] the High Court upheld the accused's application to review and set aside the three racketeering counts. The ground upon which it did so was one raised mero motu and not argued by the parties, namely, that the appellant's authorisation was inadequate because it *"was too broad and lacked the necessary specificity required"*.[222] In support of this conclusion, Nicholson J observed that there *"was a total failure to mention any dates, or places at which the offences were committed"* and that *"it would lead to abuse for such an authorisation to be permissible"*.[223]

416. The respondents, on appeal to the SCA, abandoned the judgement insofar as it was held that the authorisation in terms of section 2(4) of POCA was declared to be invalid. The SCA commented as follows:

---

219 **Savoi**, paras 14 – 15.
220 **Savoi**, para 91.
221 **NDPP v Moodley** 2009 (2) SA 588 (SCA).
222 **Moodley**, para 9.
223 Ibid.

"[10] In view of the abandonment, it is unnecessary to say anything more about the validity of the authorisation save to comment that in my view the respondents were correct in the circumstances to abandon para (a) of the order, which is clearly not to be regarded as a precedent."

417. Therefore, some degree of specificity is required to be provided in the authorisation.

418. In **Chao**,[224] the case was struck off the roll in terms of section 342A of the Criminal Procedure Act 51 of 1977 *("the CPA")*. When it was re-enrolled, with the NDPP's permission, the state did not obtain new authorisations in terms of section 2(4) of POCA, but handed up certified copies of the section 2(4) authorisations granted before the matter was struck off the roll.

419. The accused raised two special pleas, including that the authorisations had lapsed when the matter was struck from the roll, alternatively that the State had failed to prove that the NDPP had followed the correct procedure in arriving at his decision to authorise the prosecution, obliging the Court to rule that the authorisation was invalid for the lack of rationality.

420. The court per Erasmus J, considered the requirements for a section 2(4) POCA authorisation. The defence had raised two issues: that it is incumbent upon the Court to enquire into the process followed by the NDPP before issuing the written authorisation; and further that the said authorisation amounted to a blank cheque.

421. Erasmus J noted that the authorisation was the exercise of public power and *"consequently subject to the rule of law generally and the principle of legality specifically"*. Erasmus also noted that the SCA in **Moodley** had made no findings in terms of the arguments postulated in the High Court judgment in relation to the inadequacy of the authorisation.[225]

224 **S v Chao** 2009 (2) SA 595 (C).

225 **S v Chao** 2009 (2) SA 595 (C), paras 28 – 29.

422. Of relevance to **Booysen**, the Court in **S v De Vries** held:[226]

"To require the NDPP to read the contents of an entire docket before making a decision whether to authorise charges under POCA is both unnecessary and impractical. In many cases, reading the entire docket would be a hugely time-consuming exercise. In reading a letter summarising the form and content of the charge-sheet, setting out a detailed background to the charges and summarising the evidence, the NDPP would be following reasonable procedures and methods in arriving at his decision."

423. Bozalek, J, in **De Vries** explained his finding, referred to above, that it was not necessary to read the entire docket as follows:

"It has been held, albeit in a different context, that in considering the adequacy of the material available to the executive decision-maker in arriving at his/her decision, the court has to adopt a realistic and pragmatic approach. In Robinson v Minister of Justice and Constitutional Development and Another 2006 (6) SA 214 (C) (2006 (2) SACR 503) Davis J, Moosa J concurring, after reviewing the authorities at some length, stated as follows at 225H-J (515c-e (SACR)):

> *A balance needs to be struck between the interests of the affected party and the operational requirements of the State which is obliged, in terms of the Constitution, to play an active role in the development of the country. The demand that decision-makers act in the same fashion as an appellate tribunal would be to place an excessive burden on the Executive arm of the State. It could overwhelm the capacity of the Executive to perform its mandated functions. In short, a measure of proportionality must be adopted in the evaluation of the interests of the affected party and the burdens placed on the decision-maker to arrive at a reasonable decision.*

226 2008 (4) SA 441 (C), paras 27 – 28 450D-E and 450I.

[28] In my view, these remarks apply equally to the situation in which the NDPP finds himself in considering the requests for POCA authorisations. In reading a letter summarising the form and content of the charge-sheet, setting out a detailed background to the charges and summarising the evidence, the NDPP followed reasonable procedures and methods in arriving at his decision."[227]

5.2.1.16. The Booysen case

424. Other than **De Vries**, **Booysen** is the only case which deals with a substantive application challenging the rationality of the decision to authorise the prosecution, as opposed to the absence or timing of an authorisation.

425. Govern J notes the need for a high ranking official to make the decision, indicating the seriousness of the charges:

"[19] As regards the first impugned decision, the legislature introduced two formal requirements. First, the decision must be taken by the National Director of Public Prosecutions. For the purpose of s 2(4) of POCA this is defined to include a Director of Public Prosecutions and a Special Director of Public Prosecutions referred to in s 1 of the National Prosecuting Authority Act. In that Act, a definition is given of the word 'Director' as being a Director of Public Prosecutions appointed under s 13(1). This section refers to the two named officials. It is clear that the National Director, a Director and Special Director are high-ranking officials within the National Prosecuting Authority. Accordingly, the purpose for which the power in s 2(4) of POCA was conferred is to ensure that the decision making process is limited to a few high ranking officials within the National Prosecuting Authority. It seeks to exclude other persons who would be entitled to make such a decision in respect of other offences. The object is clear. The decision should be made by a person of higher position, presumably due to their qualifications and experience."

227 **S v De Vries** 2012 (1) SACR 186 (SCA).

426. The Court, similarly to **Chao**, confirms that the decision to authorise is subject to scrutiny based on the principle of legality. The Court noted the content of the principle of legality must be worked out from the Constitution as a whole, legality is an evolving concept in our jurisprudence.[228] The minimum requirement of the exercise of all public power is rationality. Gorven J held that the test to be applied was whether the information on which the NDPP relied to arrive at her decision was rationally connected to the decision taken.[229]

427. In relation to what the rationality test requires of the decision maker, the Court elaborated:

[36] It is not necessary to attempt to set a threshold for the rationality test applying to the decision to issue authorisations to prosecute under s 2(4) of POCA. Kate O'Regan says that rationality boils down to the 'rhyme or reason' test. 'As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.' Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law and were unconstitutional."

428. However, Gorven J continues:

"[38] I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute under s 2(4) of POCA. If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her

228 Booysen Judgment, para 14.
229 Booysen Judgment, para 22.

prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The 'rhyme or reason' test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. De Vries found that the consideration of a request for authorisation 'forwarded to the NDPP under cover of a letter summarising the form and content of the charge-sheet, setting out a detailed background to the charges and summarising the evidence' was sufficient. It is certainly not necessary to disclose every detail of the state's case, strategy or evidence where this is not subject to the criminal discovery process. In the light of the provisions of POCA, it is also not necessary to have before her sworn statements from witnesses on which the state intends to rely. I expressly refrain, however, from making a positive finding as to the level of disclosure necessary in meeting an application such as the present one or the detail required. This can only be assessed on a case to case basis."

429. For present purposes, therefore, the test for evaluating Jiba's decision to authorise the charges against Booysen is as set out in Gorven J's judgment. The standard is one of rationality. Although the cases on racketeering focus on what is required of the actual authorisation, the authorisation document in Booysen has not been challenged – rather the question concerns what was before Jiba when she took her decision and whether her reliance on a docket which did not implicate Booysen, was justified.

5.2.1.17. Jiba's evidence on Booysen

430. In relation to **Booysen**, Jiba's evidence was that there was nothing unlawful about the decision she made in issuing a racketeering authorisation to prosecute Booysen. She explained that such an authorisation was done in terms of POCA and was different to the general standard of charging, the intention of the legislation was to be able to *"touch those who will never be touched by the law and by the might of the law precisely because they never get to the scene of crime but they have others that are at the scenes of crime"*.

431. Sections 2(1)(e) and (f) both required that she must show that there was an enterprise, that there was a manager and that the operations of this enterprise are conducted through a pattern of racketeering activities; the difference was that in 2(1)(f) it was sufficient if the state has evidence to prove the management and the knowledge of what this enterprise is actually doing, whereas in 2(1)(e) the person also had to participate.

432. Jiba set up a team of prosecutors, senior and junior, from other provinces to run with the case. She requested Mosing, who was leading Organised Crime from North Gauteng, to become part of this team. He was the liaison between her and the team and kept her informed about developments in the case.

433. Jiba described the killing of Superintendent Zethembe Mawakile Chonco, a police official responsible for the taxi violence between Kamapumulo Taxi Association and the Stanger Taxi Association. He was transporting suspects to court when he was attacked and murdered. The persons who killed Superintendent Chonco were then killed by the police. One of the deceased, prior to his death, had instructed attorneys who advised that he would cooperate with the police. Due to eight or nine deaths, the deceased prior to his death, had obtained an interdict against the police from killing the members of Kamapumulo Taxi Association. He was the last remaining suspect in the murder of Superintendent Chonco. He was killed after the interdict was made final.

434. Jiba disputed the evidence of Hofmeyr that there was a committee in place that dealt with authorisations. She had never seen such a committee in her time as DNDPP and acting NDPP. There was a team of advocates in place, led by Mosing, who worked with the prosecutors in a number of provinces, and assisted in the evaluation of the applications before they were submitted to the NDPP. They ensured that there was sufficient evidence to cover the elements of racketeering authorisations. As DNDPP, Jiba would invite the prosecutors from Organised Crime to make presentations to her before recommending to the then Acting NDPP to authorise.

435. In cross examination Jiba stated that racketeering applications went to the head of the Organised Crime special projects division who assigned them to someone. Jiba agreed that she appointed Mosing to head the unit. Before that there was a system, Mosing, Mamabolo and Kruger dealt with the applications. After Mosing was appointed head, it was up to him whether he dealt with the matter alone or with someone. Mosing had dealt with the Booysen matter.

436. Jiba, in considering the authorisation, looked at a motivation for performance awards for the police dated 14 October 2008, including Booysen. She read a paragraph which illustrated that the performance reward was not for arresting the suspects to appear in court, but for shooting them.

437. Jiba confirmed what she had said in her affidavit in the Booysen review application. In relation to Gorven J's criticism of her, she said Gorven's criticisms were premised on the fact that there was insufficient evidence before him, this was because the Rule 53(3) record had not been filed; Hodes was of the view that there was no need to file a Rule 53(3) record. The affidavit itself had given a summary of the nature of the evidence which led to the authorisation of the prosecution. Of importance was that Gorven J did not say that an authorisation could never be issued, the only issue that he had was the insufficiency of evidence.

438. Jiba was then charged with fraud and perjury arising out of her affidavit in the Booysen case. Jiba felt betrayed by the NPA for charging her and parading her before a criminal court for exercising a discretion. People had been killed in circumstances where they posed no danger at all. The only defence offered by the perpetrators was that they were acting in self-defence – none of them ever got injured or shot at. She believed it was for a court of law to determine whether they acted in self-defence or exceeded the bounds of self-defence. 28 people were killed and there was no evidence that they had attacked the police, they were killed in circumstances where they were subdued. Maema was an expert in the field and he was on the case.

439. The latest status that Jiba had was that the DPP, North West declined to prosecute the criminal charges against her, but this had not been communicated to the Enquiry in writing.

440. It is not clear how the North-West DPP has the power to make such decisions. There was no clarity as to the future of the charges.

441. Jiba disagreed with Hofmeyr's interpretation of the NPA Act in relation to the use of DDP to prosecute in another DPP's jurisdiction. They had always utilised section 20(4)(b) when they wanted to utilise DPPs to another province. This was done in the Zuma and Shabir Shaik cases. If she had acted irregularly then Nxasana and Abrahams would have corrected it. Maema had submitted an opinion to Nxasana which said that the authorisation could be issued in terms of section 20(4)(b) allowing a DDP to prosecute in "any other courts" with the written authorisation of the NDPP.

442. Jiba denied that her decision to prosecute Booysen was to get rid of someone in law enforcement who was prepared to do their job properly. She did not even know Booysen. Hofmeyr (at para 44) had said that the authorisation had not gone through the normal quality assurance process which included all such charges being vetted and approved by Mosing and Mamabolo, who served on the Organised Crime desk in the office of the

NDPP. Jiba responded that she had already explained the process and that Mosing had vetted an approved the authorisation.

443. In response to the question of the strength of the case against Booysen, Jiba's evidence was that the prosecution team was adamant that they had a strong case, Maema and Mathenjwa had been in court to oppose an application to have the case struck off the roll.

444. In cross examination Jiba agreed that racketeering is a serious offence and this was why the legislature required the NDPP to make the decision. Further, that whether it was a committee or a team, there was a process in place to ensure that racketeering authorisations were made and that it was done properly. Whatever evidence serves before an NDPP when the decision is made must show a *prima facie* case of racketeering.

445. According to Jiba, the evidence before her that showed that Booysen was controlling and managing the enterprise was *"the evidence of Colonel Aiyer together with the reports then that would also be submitted to him"*. Jiba explained that reports meant the *"the report of the operations that have then been conducted by the members of the Cato Manor unit yes that have been charged"*.

446. It was put to Jiba that in 4 or 5 of the killings, magistrates had made findings after inquest proceedings that the killings were justifiable, and so one could not be said to have reasonably known that the shootings were unlawful. Jiba said that it was important to establish that Booysen reasonably ought to have known. She gave the example of the Mkhize case, where Booysen had filed an answering affidavit that he knew "how these things have occurred". Booysen's affidavit in the Mkhize case has been dealt with above.

447. Booysen's defence might have been that he was not the direct supervisor of the unit and so there was no direct link. Ayer's statement was the basis for that link. Jiba agreed

that Olivier was the immediate superior of the Cato Manor team but said that he was also an accused.

448. In relation to the inquests Jiba said that it depended on what evidence was before the Magistrates. There were ballistic reports that disproved self-defence and witnesses who say how their partners were shot. It was put to her that the magistrate finding the shooting justifiable, and the fact that there was primer on the hands of some of the deceased, including Mkhize, raised questions regarding a pattern of racketeering. Jiba said that there were two sides to it, and they may raise that as a defence, but to her this was something that went on continuously and repeatedly, there was a plan. None of the accused had been struck by any bullets and a court of law must make a determination whether or not they were acting in self-defence.

449. At paragraph 16.6 of her affidavit in the Booysen review matter Jiba stated that *"after due and careful consideration of information under oath and the evidence as contained in the dockets"* before her that indicated that Booysen had known or ought to have known that they were killing suspects. Jiba explained that she was referring to the affidavit of Booysen in the Mkhize matter, the reports that Aiyer was referring to and his statement in the one matter that he was involved in the killing of one deceased.

450. Jiba was referred to the motivation for performance rewards which was signed by the provincial head of service detective service KZN, and thus not self-motivated. Jiba said that she had meant that in her environment such motivation was done by the person themselves. She did not take issue with the process that Booysen had explained, that one was nominated for an award, it was sent to the provincial commissioner, a committee then decided and there was a ceremony. It was the higher echelons that made the call who got the awards. Booysen did not compile the document and somebody else nominated him. Jiba said his role was set out in the nomination, which she took into account.

451. Jiba agreed that the motivation set out the steps that that they had taken to follow up a lead in respect of finding the person who had assassinated one of the police officers and the only involvement of Booysen was providing the information related to a car chase which resulted in the person in the car being killed. When asked if she read in an instruction to shoot, Jiba said "[i]t is showing his element of his own involvement as well". Jiba accepted that it was part of the ordinary duties of a police officer to share information regarding a criminal getting away. Jiba added that the point she was trying to make was that Booysen could not claim that he did not know, this was not the first killing, *"the pattern of these police officials when they do enforce the law in terms of bringing the suspects before the court it is not what is expected from"* SAPS.

452. In the next part of the report, the Panel will have regard to the evidence in relation to the internal memorandum of the prosecution team, Jiba's version on oath, on affidavit and in her submissions to the President – and what she said in evidence before us for purposes of making an evaluation.

453. Finally, the evidence indicates that the decision to withdraw the application for leave to appeal the judgment of Gorven J, drafted by Hodes, was taken by Nxasana. The prosecution team in a memorandum addressed to Chauke, dated 5 March 2014 (and intended to update the NDPP and Jiba) in which they indicated that they had disagreed with what had been placed before the Court, they did not intend appealing the judgment and that instead would withdraw the charges and simply seek a fresh authorisation.

5.2.2. Mdluli

5.2.2.1. SCCU

454. The SCCU functioned as a separate business unit established in January 2001, initially as a pilot project which was rolled out, to prosecute commercial crimes countrywide in both Regional and High Courts. The SCCU followed a methodology of Prosecutor Guided

Investigations (*"PGI"*) and followed DPP directives as guidelines for the acceptance of cases.

455. Ferreira asserted that Adv Chris Jordaan (*"Jordaan"*), the first appointed head of the SCCU,[230] acted independently, without interference from the DPP. Jordaan said:

"We were fairly independent, but did speak and meet with DPP's, that there was never a case where DPPs urged me to prosecute for some or other reason, or urged me to decline to prosecute. We were all left to independently decide whether there was prima facie case, whether there was a reasonable prospect of a successful prosecution or not. In that case they would decline to prosecute. But I do not recall any notion from any DPP to interfere in any way with any of our work. I would not say that there were frequent consultation in order to withdraw charges, I am not saying it never took place I cannot say it happened frequently, but I cannot say either that it never happened."

456. Jordaan was appointed pursuant to Proclamation 44 of 2003 as a SD to exercise the powers, carry out the duties and perform the functions necessary, within the office of the NDPP, as directed by the NDPP and in particular to head the SCCU and to manage and direct the investigation and prosecution of commercial crime and, generally, to assist the NDPP with his or her functions.

457. Unlike Mrwebi, Jordaan had been a specialist prosecutor for all commercial crime cases emanating from the Commercial Branch and had actual experience in the prosecution of commercial crimes.

458. Simelane, as reflected in a letter dated 3 December 2010, effected changes to the NPA structure. "Officials who formerly resided in the SCCU" had to "report directly to the Director of Public Prosecutions in whose area they operate".

---

230 Served from 1 March 2003 – 31 March 2011 and retired in March 2011. Under section 13(1)(c) it is stated that the President may, after consultation with the Minister and the NDPP, appoint one or more DPPs as special directors to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed or assigned to him or her by the President by proclamation in the gazette. The powers, duties and functions must thus be done via proclamation in the gazette.

459. The changes made by Simelane were approved by the Minister and the Director General (*"DG"*). It was subject to review at the end of each financial year. The SCCUs were instructed to report to the DDPs in those areas.

460. These changes effected by Simelane were supported by Jiba and Mrwebi. According to Breytenbach, Mrwebi was particularly vocal about closing down the SCCU prior to his own appointment as SD, because he regarded it to be elitist and was of the view that prosecutors should be generalists and not specialists.

461. As such the SCCU formed part of a component in the relevant DPP's office called the Complex Commercial Crime (*"CCC"*) under the auspices of the DPP. These commercial teams, as part of the CCC (or SCCU) were mandated to deal with complex commercial cases where the value was R5 million, or above, and cases which would have a negative impact on the criminal justice system. The SCCU prosecutors prosecuted the cases on a delegation received from the DPP and hence could make prosecutorial decisions pursuant to that delegation.

462. As Mrwebi had not been a member of the SCCU, prior to his appointment as head of the SCCU, and given that Simelane had effected changes even prior to Jordaan's retirement, it is unclear on what basis Mrwebi now seeks to rely on Jordaan's evidence to bolster a lack of consultation or to justify his failure to adhere to section 24(3) of the NPA Act. Moreover, at the time the prosecutorial decision had been taken, it had occurred under the auspices of the DPP, a scenario different to what Jordaan experienced.

463. At the first Exco meeting on 24/25 January 2012, after Jiba's appointment as Acting NDPP, it was decided that the *"regional offices of the SCCU will report to and be accountable to the special director and head of the SCCU"*, Mrwebi, with effect from 1 April 2012. This was recorded in the SCCU strategic sessions meetings held in February 2012, and confirmed in the evidence of several of the senior NPA witnesses. Jiba and Mrwebi now take a *"completely opposite view of what the position of the SDPP would entail".*

464. This was one of the reasons why Breytenbach held the belief that Mrwebi had been giving instructions (in relation to the withdrawal of the Mdluli case) even prior to him being legally entitled to do so because at that juncture the proper channel of reporting was via Mzinyathi and delegations to prosecute were received from him. It is for this reason that the prosecutors in the SCCU, who were dealing with the Mdluli matter, addressed correspondence to Mzinyathi, copying in Mrwebi, when the latter instructed them to report to him in relation to the Mdluli matter.

465. Breytenbach, and her staff did not receive any instructions between November 2011 and April 2012, when she was suspended, from Mrwebi in any other matter. Moreover, the decisions in relation to the prosecution of Mdluli was one instituted by the SCCU, reporting to the DPP, and not one that Mrwebi was lawfully entitled to interfere with.

466. Contrary to the expressed views that the SCCU should be dismantled and, according to Breytenbach, *"out of the blue"* Zuma appointed Mrwebi as SD and Head of the SCCU. This was based on a recommendation to Radebe by Simelane that he had *"been involved in a number of cases of which he handled with skill and success*". Mrwebi's CV had been provided to the President. Whilst there are no details of any such cases in the CV which served before Radebe, Mrwebi testified that his experience related to oversight and not actual prosecutions, as team leader in the DSO and Regional Head of the Scorpions, KZN. In this capacity he mentioned the **Hyundai** case which he dealt with at Office for Serious Economic Offences.

467. There is also no mention in Mrwebi's CV of having previously being put on special leave, though nothing turns on this, as this would have been known to the Minister, the latter having been instrumental in settlements being secured for Jiba and Mrwebi.

468. Although Mrwebi's direct evidence was that he was appointed from 1 November 2011, as reflected in a letter furnished to him dated 7 November 2011 from Radebe and as also reflected in Mrwebi's CV pursuant to a letter of appointment from Radebe – he accepted

under cross-examination that his legal appointment only took effect on publication of the presidential minute in Proclamation 63 of 2011, dated 25 November 2011.

469. As noted from the Proclamation Mrwebi **acts subject to the control of the NDPP in the Office of the NDPP** and is bestowed with the following powers, duties and functions:

469.1. To head the SCCU in the Office of the NDPP and to **conduct prosecutions** of commercial crime cases;

469.2. To **manage** and **direct** the investigation and prosecution of serious organised and complex financial crimes;

469.3. To manage special projects and operations as per the directives of the NDPP; and

469.4. Generally, to give such advice or render such assistance to the NDPP as may be required to exercise the powers, carry out the duties and perform the functions which are conferred, imposed or assigned to the NDPP by the constitution or any other law.

470. *Ex facie*, it is not entirely clear that corruption cases (like the **Mdluli** case) would in fact fall within his mandate unless so directed by the NDPP.

471. Breytenbach's evidence was that Mrwebi had never demonstrated any expertise in commercial matters. She was of the view that Mrwebi had none of the skills to hold that position such as being a good manager, engaging in stakeholder management, and attention to detail. Breytenbach had worked with Mrwebi and he had not demonstrated a particular grasp of the issues (facts, merits, and the law).

472. According to her, Mrwebi's reputation was not *"covered in glory"*, when he was head of the DSO, his post was advertised while he still occupied it and McCarthy had tried to persuade Jordaan to accommodate him at the SCCU, but the latter refused. According

to Mrwebi, he had looked into irregularities by certain prosecutors relating to the funds used to pay informers, following which he was suddenly accused of non-performance and became a target of victimisation.

5.2.2.2. Background

473. General Richard Mdluli (*"Mdluli"*), then head of the SAPS Crime Intelligence ("CI"), so appointed on 1 July 2009, was arrested in March 2011 on 18 charges, including murder, intimidation, kidnapping, assault with intent to do grievous bodily harm and defeating the ends of justice. SAPS obtained information from CI members implicating Mdluli and others in fraud and corruption. These charges were investigated and Mdluli and Hein Barnard (*"Barnard"*) were arrested and charged with fraud, corruption and unlawful gratification on 20 September 2011. Smith, a senior state advocate in the SCCU who reported to Ferreira was the prosecutor. The investigating officers (i/o) were Viljoen (now retired) and Roelofse.

474. The latter charges related to alleged unlawful utilisation of funds held in the Secret Service account (*"SSA"*) – created in terms of the Secret Services Act 56 of 1978 – for the private benefit of Mdluli and his wife, Theresa Lyons (*"Lyons"*). Broadly stated, it is alleged that one of Mdluli's subordinates, Barnard, purchased two motor vehicles ostensibly for use by the Secret Service but structured the transaction in such a manner that a discount of R90 000 that should have been credited to the SSA, was utilised for Mdluli's personal benefit. Mdluli sought to trade in his personal 7-series BMW with Leo Haese BMW in Pretoria (*"Leo Haese"*). He owed more on the car than the trade-in-value offered. Barnard, Mdluli's subordinate, arranged a transaction in which a 3-series and a 5-series BMW were purchased from Leo Haese by CI and the 7-series was traded in as part of that transaction. The further allegation was that those two motor vehicles were then registered in the name of Mdluli's wife and appropriated and used by the two of them at their Cape Town residence.[231]

231 **FUL SCA** at para [9].

475. Mdluli's shortfall on the 7 series was covered in two ways:

475.1. a discount due to SAPS on the purchase of these two vehicles;

475.2. a loan to Mdluli from another car dealer, Atlantis Nissan, the biggest supplier of covert vehicles to the CI unit.

476. The affidavit of Viljoen in obtaining a warrant for the arrest of Mdluli was attached to the FUL founding papers. Viljoen sets out the transactions which reflect the purchase of the two BMW motor vehicles (registered in the name of Mdluli's wife) in order to cover the shortfall on the trade in value of Mdluli's vehicle. This was at the very least contrary to the SMS Handbook and policy. The nett effect was that the amount of R90 526.01 was generated through discount and trading assistance negotiated by Barnard which enabled Mdluli to cover the settlement shortfall of R90 526.01 in respect of his private vehicle.

477. Mdluli was advised of his arrest and given an opportunity to instruct an attorney and prepare for a bail application on the date of arrest.

478. The investigating team applied for a warrant of search and seizure for SAPS CI premises. This had NDPP approval. The search warrant was issued by a magistrate. However, the warrant was not executed as satisfactory arrangements were concluded for the relevant documents to be handed over to the i/o. To date, Roelofse is still in possession of these documents as per the arrangements. We revert hereto given Mrwebi's challenge to the validity of these warrants.

479. According to Ferreira:

"this was actually a very ordinary case in the sense that there was not a lot of detail required. I mean, it is the three motor vehicles and it is the alleged loan from

Atlantis Nissan. There is not a lot of transactional investigation that needed to be done at that stage."

480. Ferreira testified that there was sufficient documentary evidence to prove corruption, which could be confirmed by a witness in court. They had all the documentation from the two motor vehicles branches (Leo Haese and Atlantis Nissan) and an acknowledgement of debt entered into by Mdluli. It was not the *"sum total"* of the evidence but was enough to show that at the very least Mdluli received an unlawful gratification. The docket also contained statements from witnesses from Leo Haese and Atlantis Nissan.

481. The state discount was utilised to cover the shortfall on Mdluli's private vehicle. The relevant witnesses to this were the dealer principle and sales person at Leo Haese. In addition, Mdluli was the head of CI and he obtained a loan from the biggest supplier of covert vehicles to CI, with an acknowledgement of debt only being concluded after the money had in fact changed hands. This amounting to gratification under the Corruption Act.

482. In addition, further documentation was obtained reflecting a memorandum signed by Lazarus authorising the purchase of the 3- and 5 Series BMWs by CI. This had not been in the docket at the time of the decision and in Ferreira's view was not essential for the trial.

483. The documentation in the possession of Atlantis Nissan and Leo Haese was not subject to CI secrecy provisions. These were normal public business records of a motor dealership. The acknowledgement of debt was also not a secret or confidential document and was clearly not inadmissible evidence. These clearly implicated Barnard, Mdluli's co-accused.

5.2.2.3. Prevention and Combating of Corrupt Activities Act 12 of 2004 ("the Corruption Act") and the acknowledgement of debt

484. Section 10 provides:

"Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship

Any person-

(a) who is party to an employment relationship and who, directly or indirectly, accepts or agrees or offers to accept from any other person any unauthorised gratification, whether for the benefit of that person or for the benefit of another person; or

(b) who, directly or indirectly, gives or agrees or offers to give to any person who is party to an employment relationship any unauthorised gratification, whether for the benefit of that party or for the benefit of another person,

in respect of that party doing any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering an unauthorised gratification."

485. Section 2 headed *"Interpretation"* provides:

"(1) For purposes of this Act a person is regarded as having knowledge of a fact if-

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that-

(i) the person believes that there is a reasonable possibility of

the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact,

and 'knowing' shall be construed accordingly.

(2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

(3) (a) A reference in this Act to accept or agree or offer to accept any gratification, includes to-

(i) demand, ask for, seek, request, solicit, receive or obtain;

(ii) agree to demand, ask for, seek, request, solicit, receive or obtain; or

(iii) offer to demand, ask for, seek, request, solicit, receive or obtain,

any gratification.

(b) A reference in this Act to give or agree or offer to give any gratification, includes to-

(i) promise, lend, grant, confer or procure;

(ii) agree to lend, grant, confer or procure; or

(iii) offer to lend, grant, confer or procure,

such gratification.

(4) A reference in this Act to any act, includes an omission and 'acting' shall be construed accordingly.

(5) A reference in this Act to any person includes a person in the private sector."

486. It was put to Ferreira that the acknowledgement of debt was perfectly legitimate. Ferreira said that it was not, because it was the head of CI borrowing money from the biggest provider to CI – that this was textbook corruption as one would normally take a loan from a financial institution and not a supplier of motor vehicles.

487. It was also put to Ferreira that the matter was not fully investigated because they had not spoken to somebody from CI about the loan agreement, the implication being that without knowing whether it was authorised or not, and if it was, then there was no unauthorised gratification. Ferreira said it was not a question of the case being fully investigated, there was enough to go to trial. Firstly, the investigations did not need to be fully completed before the matter was placed on the roll and in this regard Ferreira, who had been at the SCCU almost since inception, disputed Mrwebi's evidence that commercial matters were only enrolled once fully investigated. Secondly, the investigating officers had been working with CI. Thirdly, if a case was not fully investigated one did not withdraw the matter, one postponed for further investigation. This occurred on a daily basis, though he accepted that different prosecutors may decide differently.

5.2.2.4. Mdluli – prima facie case

488. The table provided below sets out a timeline as to which individuals involved in the case believed that there was a prima facie case against Mdluli and which did not.

Date	Prima facie case	No Prosecution, no prima facie case
5/12/2011 5/12/2011 5/12/2011 5/12/2011 5/12/2011 1/4/2012 19/3/2011	Chris Smith Jan Ferreira Glynis Breytenbach Sibongile Mzinyathi Kobus Roelofse Anwar Dramat Inspector General	Mrwebi (5/12/2011 Jiba (accepted what Mrwebi indicated April 2012)
21/11/2012	Memo by Becker to Mokgatlhe, Docket comprises 3 matters, BMWs is phase 1. Re Mrwebi's concerns: I/O received written confirmation that IGI does not have jurisdiction, wants matter re-enrolled and that AG did not investigate the transactions in question. Need to meet with Venter whose original statement was very brief and was edited by suspects, he wishes to change it. Becker, Ramaite, Roelofse meet to discuss the way forward	
27/11/2012	Memo by Mashamaite to Mokgatlhe. Phase 1, could prove: 1. Mdluli's car was traded in by Barnard; 2. Mdluli went to Atlantis Nissan to request a loan of R50 000 to settle the shortfall on the trade in of the 7 series with Leo Haese BMW;	

Date	Prima facie case	No Prosecution, no prima facie case
	3. Mdluli's car was settled with the BMW Financial service Need to ascertain whether Mdluli knew that payment was made to Atlantis Nissan by Leo Haese BMW to the credit of his loan account with Atlantis Nissan and whether Mdluli and Barnard acted with common purpose. Need to meet with Visser re breakdown of R42 313 (and why not recorded) and about additional discount of R12 687. Need to meet with Venter re whether he knew Mdluli already when Mdluli approached him for the loan, need to follow up on a second acknowledgement of debt signed by Mdluli and Venter (in June 2011)	
28/03/2013	Memo from Mashamaite to Mokgatlhe Venter refused to consult because his statement was made with the help of Barnard. Venter agreed to provide a new statement thereafter a decision will be taken whether or not to use him as a section 204 witness. Awaiting Venter's statement. Challenge of linking Mdluli or Barnard to the offence without Venter statement. Venter said that Naidoo took the agreement to Mdluli to sign. Need to confirm Mdluli's signature. Statement of sales manager explaining the breakdown of the R42 313 had been obtained. Need to establish whether Mdluli was aware of transaction between Venter and Barnard. Need to work out whether Nissan Atlantis' granting of loan to Mdluli qualifies as gratification.	

Date	Prima facie case	No Prosecution, no prima facie case
22/05/2013	Memo from Mashamaite to Mokgatlhe Awaiting statement from Venter. Venter's evidence is crucial to show that there was a loan agreement between him and Mdluli. Visser's evidence not adding much value against Mdluli. Visser claims to have dealt with Bernard and not Mdluli and cannot deny or confirm whether Mdluli was aware of transaction. Signature comparison still outstanding.	
25/06/2013	Becker and Viljoen to Mokgatlhe Investigation located in bigger picture of CI slush fund. Will discuss adding this to Gerrie Nel case	
26/08/2013	Memo from Viljoen to Mokgatlhe. Awaiting Venter's statement, which is needed before can decide on way forward.	
09/05/2014		Memo from Mrwebi to Nxasana. (9 May 2014) Memo from Mrwebi to Nxasana. Still no basis in law and in compliance with the NPA Prosecution. Met with Jiba and Dramat to discuss status of the matter and informed them that Breytenbach to advise prosecutor to provisionally withdraw

Date	Prima facie case	No Prosecution, no prima facie case
		matter in light of concerns raised. Suggested to I/O using Barnard as witness against Mdluli. No decision made yet as to whom to charge and with what charge. In December 2013 Mrwebi was advised that the investigating officer had requested a forensic audit report.
27/06/2014	Memo from Viljoen to Mokgatlhe After the matter was withdrawn it became known that Venter lied. Reliance to be made to the forensic report and paper work. Witness statements. Further statements from witnesses on further charges to be compiled from the forensic report. They had several IOUs that were signed by Mdluli, the first of which was after the investigation started (after the money was transferred). The payment from Nissan to BMW was paid from the BARUT account. Mdluli wife's trip to China paid for by BARUT. Need to establish whose account BARUT is. The forensic auditor's provisional report was that money was stolen from both UTE and Nissan in Gerrie Nel's case. A forensic audit was requested in Mdluli case and would form the basis of possible future charges, alternatively Mdluli case to be added to Gerrie Nel case.	

Date	Prima facie case	No Prosecution, no prima facie case
14/07/2014		Mrwebi report to Nxasana on FUL Still no basis in law and in compliance with the NPA Prosecution. Advises that there was still no evidence linking Mdluli, that there is no option but to decline to prosecute and "the matter must simply be closed".
23/02/2015	Memo from Louw, Rossouw, Broughton and Zikhali The security legislation referred to Mrwebi's consultative note is not relevant to the BMW's transactions. The IGI did not have jurisdiction. The AG did not examine the transaction or reach the conclusion as suggested by Mrwebi. The SSA received a qualified report, the BMW transactions would have raised a management query is audited and the state is not permitted to trade in vehicles when new ones are bought. It would be possible to prove the fraud and corruption without reference to the secret service account or documents in the custody of CI and UTE. Supporting documentation had been obtained in any event. The transactions violate the conflict of interests and duties of public officers, section 17 of PRECCA, Treasury regulations, concealment of the conflict and non-disclosure, witness tampering (Barnard).	

Date	Prima facie case	No Prosecution, no prima facie case
	The BARUT account was misleading, UTE/SAPS did not owe anything, the amount was generated by over-invoicing. The acknowledgement of debt, apart from violating Treasury Regulations, constituted a gratification received by a state official from a state service provider and had the effect of disguising the true origin of the funds. Recommends re-enrolment in the CC Court, with Lazarus as an added accused. The security legislation may apply in the case of the overseas trips. Of the view that there is sufficient evidence to prosecute.	

489. At all material times Mrwebi remained of the view that there was no *prima facie* case against Mdluli and testified as follows:

489.1. The matter involved very simple facts: the fraud was in relation to the shortfall in Mdluli's car, the shortfall was financed by a R50 000 loan from Nissan and a second amount in respect of the sale of two BMWs.

489.2. None of these transactions were done by Mdluli, they were all done by someone else (Barnard). There was no evidence in the docket linking the transactions to Mdluli.

490. Mrwebi denied that when ownership of a car was transferred the owner would have reasonable knowledge of that.

491. Roelofse, Dramat, Ferreira, Smith, Breytenbach and Mzinyathi were of the view that there was enough information to go to trial in relation to the charges that were in existence

in December 2011. The documents in the docket *"were sufficient"* to prosecute that charge. Even if further investigations were needed it did not warrant a withdrawal and the matter could have been postponed, whilst finalisation was obtained in relation to the involvement of the IGI. According to Ferreira given the documents it could alone be re-enrolled and prosecuted even *"today"*.

492. Ferreira was not involved after August 2012, but it was his firm view that in 2011 and 2012 they could have proceeded without documents needing to be declassified. However, further charges were added that did require declassification, which resulted in the matter being delayed as respected promises to declassify such documents never materialised.

5.2.2.5. Representations in relation to Mdluli

493. Part 6 of the Policy Directives provide as follows:

"Representations

1. *Representations made to the NPA vary in subject matter, ranging from requests to reconsider the institution of prosecution to complaints about the conduct of individual prosecutors. The right of the public to approach the NPA is a vital element of access to justice. Accordingly, representations warrant earnest attention. Proper conduct towards representors will, whatever the ultimate decision, promote confidence in the impartiality and accessibility of the NPA.*

2. *It is preferable that representations be in writing. At lower court level, informal approaches (e.g. by legal representatives) may be accommodated more readily.*

3. *Where an accused person tenders a version of events which contradicts those of State witnesses, the witnesses should be given an opportunity to respond to these allegations. Where confronted with inherently opposing*

versions, prosecutors should refrain from making a "credibility finding" based on written statements and should rather refer the matter for trial.

4. *Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter of a representation, the prosecutor must refer the representor to his or her immediate superior. If still dissatisfied, they should be directed to the DPP, before a final appeal is made to the National Director. Potential representors should, where possible, be advised accordingly.*

5. *As a matter of law and policy, the National Director requires that the remedy of recourse to the DPP be exhausted before representors approach the National Director.*

6. *Pending the issue of regulations in terms of section 22(5) of the NPA Act, representations concerning the conduct of a prosecutor of whatever rank, should be directed to the said prosecutor's immediate superior, and if unresolved, the dissatisfied representor should be directed to the Senior Public Prosecutor or the DPP as the case may be.*

7. *Where a DPP, in response to representations, refers a matter to a prosecutor for comment, urgent attention should be given to the request. The prosecutor's full report, accompanied by the police docket or statements, where applicable, should be submitted to the DPP without delay.*

8. *These provisions apply, with the necessary changes, to requests made by the National Director to a DPP, unless the terms of the request indicate otherwise.*

9. *Representations by prosecutors with regard to criminal matters, including traffic offences, may only be made to the DPP having jurisdiction of that area."*

494. It is clearly contemplated by clause 4 that representations are directed to the prosecutor who is involved in a case where his or her immediate superior, i.e. in the **Mdluli** matter that would have been Smith or Ferreira or Breytenbach, rather than it being directed to the newly appointed Head of SCCU, Mrwebi. It is also apparent from paragraph 7 that the DPP would receive representations and that it should be accompanied by a full report and police dockets or statements where applicable.

495. Breytenbach's evidence and concern in relation to representations made to Mrwebi arose from the fact that it was directed to him at a time when *"everybody else was unaware"* that he was heading the SCCU and whilst the matter resided under Mzinyathi. Mrwebi testified that he started at head office in the first week of November 2011. He also had other work at SCCU at the time that he received the representations.

496. There were 3 sets of representations:

496.1. hand delivered written representations to Mrwebi, as the SD on 17 November 2011 from Mdluli's legal representatives seeking the withdrawal of the fraud and corruption charges because it constituted an abuse of the criminal justice system and result in an unfair trial. This arrived prior to his appointment having been gazetted (*"Nov 2011 reps"*);

496.2. hand delivered written representations to Jiba as the NDPP dated 26 October 2011 in relation to the matter pending in South Gauteng; and

496.3. secretrepresentations made to Mrwebi both in writing and orally; which emerged during cross-examination at the Breytenbach disciplinary enquiry and again during the Enquiry (cross-examination) though this had not been dealt with by Mrwebi as representations (*"the secret reps"*).[232]

497. The Nov 2011 reps alleged that the charges arose from a conspiracy against Mdluli involving the most senior members of the SAPS, stating:

232 This is dealt with under a separate heading below.

"it is for these reasons and against the abovementioned background that we are making these representations for the withdrawal of the charges against Mdluli or that ***you decline to prosecute irrespective of what may appear to be the merits of the case against him."***

"We hereby make representations to you as to why you should review the preference of charges against our client Lt Gen Mdluli and possibly withdraw the charges against him, as proceeding against him is less likely to result in a conviction on any of the charges preferred against him."

498. Little mention is made of the merits of the corruption and fraud charges. In this regard it bears noting:

498.1. Mdluli denied the allegations and expresses the view that there is no case again him.

498.2. The alleged breach of security legislation raised by Mrwebi is not apparent from the representations.

498.3. There was no allegation that SAPS was not entitled to investigate, or that only the Inspector-General of Intelligence (*"IGI"*) could investigate.

498.4. There was no reference to abuse of process by SAPS acting illegally or any fabrication of evidence.

498.5. Accepted that Barnard was responsible for the purchase of vehicles and that he would have to answer if there was criminality with regard to the transactions.

498.6. Mrwebi agreed that the representations made no mention of the IGI – he said he did not think that it had to be mentioned.

499. Mrwebi accepted that the representations were made to him on behalf of Mdluli and not Barnard. Though he had testified that Barnard's fingerprints were all over the transactions, he still mentioned that the withdrawal against both Mdluli and Barnard was

correct. Mrwebi explained that the fact that the transactions were made by Barnard did not meant that there was evidence against him. There were complications in Barnard's case too and he felt that the case should be done as a whole and not piecemeal.

500. *Ex facie* these representations are unhelpful in that it provides no evidence or reasons why the charges should have been withdrawn against Mdluli. It was put to Mrwebi that there was no evidence in the representations of an abuse of the criminal justice system. Mrwebi responded that he would only be able to determine that once he read and looked at the evidence. Similarly, he would only be able to determine the allegations related to infringement of a fair trial by looking at the evidence.

5.2.2.6. Steps taken after receipt of the 2011 Nov representations

The request on 21 November 2011

501. On 21 November 2011 Mrwebi forwarded the Nov 2011 reps to Breytenbach, then Regional Head SCCU: Pretoria, requesting a full report with docket by 25 November 2011. Breytenbach and Ferreira reported to Mzinyathi and Breytenbach did not believe that Mrwebi should correspond with her directly and give her instructions. Breytenbach was suspicious because the representations were addressed to Mrwebi in his capacity as SD, when this had not yet been gazetted.

502. Prior to this, Breytenbach was peripherally involved in a supervisor capacity in the Mdluli matter, trusting Adv Chris Smith (*"Smith"*) to handle it. Breytenbach was aware that the matter had been enrolled and that a search and seizure had taken place and ensured that Mzinyathi was kept abreast of developments given that this was a high-profile matter. She had read the docket and in her view there was a *prima facie* case against Mdluli. As soon as Mrwebi started engaging on the merits of the prosecution, Ferreira was concerned that this was directed at stopping the prosecution. This was because Mrwebi was dealing with the representations, instead of Mzinyathi, as should have been the case. Ferreira had heard rumours that Mrwebi had been appointed as

SD of the SCCU but the extant reporting structure was that they reported to Mzinyathi. It was as a result of his concerns that Breytenbach became involved. She shared those concerns when she saw Mrwebi's request, and was of the view that Mrwebi was going to interfere in the matter. This was because Mdluli was well connected (openly so), held an important post in SAPS and Roelofse was experiencing a lack of cooperation and some pressure not to complete the investigation. Her view was shaped by her 26 years of experience as a prosecutor as well as a variety of things happening in the NPA and elsewhere which built up to this feeling. There was no one single thing she could pin it on.

503. Mrwebi accepted that the representations were addressed to him before he was legally empowered to take decisions as a SD, as his appointment proclamation was dated 25 November 2011.

504. Breytenbach instructed Smith, the prosecutor, and Ferreira, to provide a response to the representations, but not to send them to Mrwebi. Breytenbach read the memorandum, which recommended that the prosecution be continued, and sent it to Mzinyathi, copying in Mrwebi on 24 November 2011. They motivated that the charges should not be withdrawn. There appears to be no delay in the response though this seemed to have been inferred. Smith then gave Breytenbach the docket and she indicated that she would *"run interference"*.

505. In his evidence, Mrwebi says his request for a report and docket was ignored. According to Mrwebi, the normal procedure is to request a report from the prosecutors concerned and a copy of the docket. The report should address the evidence, its quality and nature and the legal issues. He felt very disrespected and had to send a reminder to Breytenbach. It merely said point by point *"we cannot entertain this"*, without giving reasons. This was not helpful and so he asked for the docket and a proper report. He never discussed his dissatisfaction with Breytenbach/Smith.

The response on 30 November 2011

506. On 28 November 2011 Mrwebi, with only the representations and the initial response, asked for a summary of the docket, an analysis of the evidence and an analysis of the applicable law, together with the entire docket by no later than 2 December 2011. He also asked the prosecutors to comment on the nature of the evidence at the time the warrant was applied for and why the matter was taken to Court before the investigation was finalised. It is not clear how he ascertained either of this at that juncture.

507. Mrwebi conceded that there was no information in the representations to question the warrant of arrest, but although he did not know how he had received it, he said that he had got *"that information, somewhere"*. He further stated that he did this because he was aware that there was a warrant of arrest and the matter had been postponed for further investigation. The standard practice was that commercial matters were not enrolled until the investigation was finalised, unless there were exceptional circumstances like a flight risk or that evidence would be destroyed. Both Breytenbach and Ferreira disagreed with this approach. In cross-examination, Mrwebi agreed that this was not a hard and fast rule and that it was commonplace to postpone and for more evidence to emerge once matters were enrolled.

508. Smith prepared a response dated 30 November 2011 which was provided to Mzinyathi, copied to Mrwebi, and came together with an electronic version of the docket. It set out the contents of the docket in detail and provided a summary and analysis of several documents which link Mdluli to the vehicles. The summary referred to an affidavit from Venter (A28) which states that Mdluli approached him and introduced himself as the head of Police Intelligence and wanted to sell his BMW. Smith indicated that as the prosecutor he had exercised his discretion in enrolling the matter whilst the investigation was ongoing and that there were already 39 pieces of evidence compiled pursuant to section 43 of the Criminal Procedure Act. The prosecutors recommended that the prosecution proceed as the representations were without merit.

509. Although Mrwebi had testified that he got it sometime later, the response had in fact been provided before his deadline of 2 December 2011.

510. Mrwebi testified that this memorandum and docket provided no evidence linking the transactions to Mdluli.

511. In cross-examination Mrwebi was taken through some of the evidence in the docket. He raised the following concerns in relation thereto:

511.1. The charge sheet and summary of evidence was not evidence;

511.2. They listed documents in the docket but did not prove the crime in question.

511.3. Mdluli did get the benefit of the cars that were purchased but there was no evidence linking him and though there was evidence that it was Mdluli's car, the transactions could have been done without his knowledge. It appeared to be Mrwebi's position that there was no evidence that confirmed that Mdluli's vehicle was traded in with his knowledge.

511.4. The acknowledgement of debt was not an unlawful gratification and proved nothing as there was no evidence that it was unlawful.

511.5. Section 10 of POCA did not apply because there was no evidence that the transactions were unauthorised, although this was not in the representations did not indicate that it had been authorised.

511.6. Mrwebi disagreed that the *"easiest thing"* would have been for Mdluli's lawyers to say *"this is an authorised transaction, here is the authorisation"*. As far Mrwebi was concerned the evidence that it was not authorised should have been in the docket.

511.7. Mrwebi did not know if it was Mdluli's defence that he was authorised to do the transactions.

512. Mrwebi accepted that there was more than just the affidavit of the investigating officer, Viljoen, in the docket.

513. It was put to Mrwebi that it was irrefutable that the BMW 7 series was owned by Mdluli; and improbable that it was traded in without his knowledge; and that a shortfall was covered from a loan and from state funds. It was unlikely that Mdluli was not involved in the settlement of the financing of his car, and he signed the acknowledgement of debt. Thus, there was enough evidence in the docket to show that Mdluli obtained a benefit from the purchase of the two new BMWs and the trade in of his personal BMW. Mrwebi completely disagreed. In re-examination he said that the test was not one of probabilities but beyond reasonable doubt, yet what was being established at that juncture was a prima facie case.

The consultative note of 4 December 2011

514. Mrwebi prepared a memorandum and a consultative note, dated 4 December 2011, setting out his reasons (the consultative note) and sent them to both Mzinyathi and Breytenbach.[233] The covering memorandum attached to the consultative note instructs that *"the charges against Lt-General Mdluli and Colonel Barnard must be withdrawn immediately"*. The *"only reason"* advanced in the consultative note for the withdrawal was that the charges *"fell within the **exclusive preserve** of the"* IGI in terms of section 7(7)(cA) of the Intelligence Services Oversight Act 40 of 1994 (*"the ISO Act"*), and because Mrwebi held this view he stated that the merits need not be traversed because *"whether there was evidence in the matter or not, is in my view, not important for my decision in the matter"*. He regarded the absence of the IGI to be *"dispositive"* of the matter.

515. Mrwebi alleged that the memorandum and consultative note and the subsequent letter to Mdluli's attorneys were incorrectly dated and were actually prepared on

233 Murphy J characterised him as being *"determined to withdraw the fraud and corruption charges against Mdluli"*.

5 December 2011 after his meeting with Mzinyathi.[234] As to the date, Mrwebi's evidence was as follows:

"This is the error, I think we continue to make. When you create a document, if you do not have a letterhead, sometimes you take a letterhead from an existing document, then you remove certain, certain information that is not relevant. Sometimes it happens that you forget to remove all the information. That is how that document was created. But another thing that I may add maybe is this. The 4th was a Sunday, I was not at work on Sunday. So though no work, or no document could have been sent to somebody on a Sunday, and the error in that date of the 4th was because of how this document was used as a pro-forma for the letters and other documents that I was supposed to prepare."

516. Despite giving the answer that it was an error, and that he had cut and pasted the letterhead from an older document and omitted to change the date at the beginning and end of the document, the same date appears on page 4 paragraph 8 of the consultative note itself where it is stated that:

"Later on 28 November 2011 I wrote a further correspondence to the Regional Head of SCCU; Pretoria requesting a motivated report on the matter on order to enable me to meaningfully respond to the presentation. The report was received on 4 December 2011."

517. When asked to comment on this Mrwebi said:

"Chairperson I see that but I do not know how it could have been the 4th because the 4th was a Sunday you know."

518. Mrwebi could not provide an explanation when it was impressed upon him that it was not possible for him to have a document dated 4 December 2011 since his evidence

234 Murphy J said that "while there is some doubt about this" not much turned on it and he would accept that the note was written on 5 December 2011. **FUL HC**, para [42].

was that he did not prepare the documents on that day because it was a Sunday and he claimed that he did not do work on a Sunday. He simply agreed that the proposition was correct and restated his point thus:

"Chairperson that is also why I could not understand, I could not explain because I explained it to the extent that this is how we do it but the point is, factually I was not in the office on Sunday, I did not work on Sunday."

519. He further pointed out in his Handover report to Nxasana (at para 2.8) that "During the week of 28 November 2011, I worked on the matter up to and including the weekend of 4 December 2011".

520. If that date is correct, Mrwebi took and conveyed the decision before he consulted with Mzinyathi on 5 December 2011.

521. At paragraph 1 of the consultative note Mrwebi stated that "[a]s required by section 24(3) of the NPA Act I have consulted with" Mzinyathi, "with the purpose of conveying my views on the matter", summarising as follows:

"Essentially my views ***related to the process that was followed in dealing*** *with the matter particularly in view of the fact that the* ***matter fell squarely*** *within the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is* ***authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigations can never be complete without access to such documents and information.*** *In my view the process followed is* ***possibly illegal*** *as being in contravention of the said provisions of the Intelligence Services Oversight Act, 40 of 1994." (our emphasis)*

522. This distinguishes Mrwebi from Jordaan. Clearly Mrwebi laboured under no misapprehension that there had to be consultation under section 24(3) of the NPA Act, irrespective of the position under Jordaan.[235]

523. This perpetuated the position adopted by Mdluli in his submissions to SAPS and the disciplinary proceedings held on 21 November 2011 that any investigation without the IGI's involvement would be unlawful. As a matter of law, Mrwebi is incorrect in relation to the mandate of the IGI, who can access classified documents and that the ISO Act had been contravened in the process followed. Not having had any discussions with any member of SAPS involved in the process, it is astonishing that Mrwebi reached that conclusion.

524. Paragraph 11 records that *"the prosecutor's report, strictly speaking, does not add any value to what is already contained in the representations."* One only has to compare the representations that barely mention the charges with the prosecutor's report setting out the contents of the docket to know that this allegation is without substance. Mrwebi expresses the view that the docket does not detail the role of Mdluli, placing doubt on the basis of his arrest despite the fact that the transactions appear to be for his benefit. It involved his motor vehicle and that there was evidence of a loan agreement concluded between him and Atlantis Nissan. Mrwebi concluded that there were no reasonable and probable grounds for prosecuting Mdluli, as there was no evidence against Mdluli.

525. Paragraph 17 of the consultative note states that "[w]hether there was evidence in the matter or not, **is in my view, not important for my decision in the matter.** The proposition which I allude to below, should alone and without any further ado, be dispositive of the matter."

526. Mrwebi disputed that his view was not based on the merits of the matter. He said that he had gone through the merits and concluded in paragraph 16 that there were

235 In paragraph 2 of his note, Mrwebi stated that the purpose of the consultative note was to "deal with and record a decision on the matter", with the further aim to "serve as a consultative document with the Director of Public Prosecutions, North Gauteng as required by section 24(3) of the NPA Act".

no reasonable prospects then stated in paragraph 17 *"I do not propose to traverse the merits of the case and the other questions any further"* which implies that he had traversed the merits (which was not the case) but that this other issue was *"dipositive"* of the matter.

527. Mrwebi denied that paragraph 16, which referred to questions he had about how the investigator and prosecution handled the matter, was intended to cast aspersions on the prosecutors. He was robust so that the message was understood. He had said that the way they had handled it was a possible breach of the security legislation (para 26) because this was his concern. Mrwebi conceded that section 7(7)(cA) of the ISO Act did not preclude SAPS investigating crime, but that going to the IGI would be the easiest.

528. Mrwebi also conceded that the only affidavit he referred to in the consultative note was that of Viljoen and that it was commonplace for the i/o to depose to the affidavit and sum up the docket when applying for warrants of arrest. However, given the approach Mrwebi adopted, he called into question the *bona fides* of both the prosecutor and magistrate in relation to the warrant of arrest that had been obtained.

529. Mrwebi laboured under the misapprehension that the investigator and the prosecutor had failed to execute the search warrant.[236] In cross examination he conceded that in light of Roelofse's evidence that the search warrant was served by agreement, he was wrong in his averments in this regard.

530. The provisions of section 7(7)(c)(a) of the ISO Act trumped the Constitution - Mrwebi testified to this effect when he indicated that the criminal investigation should be deferred until the IGI completed an investigation and *"advised if there was any reason to pursue criminal investigations"*, his language was not *"strictly correct"*. He had meant that the manner they obtained their evidence must be beyond reproach and everything must be done properly.

236 There is also no section 8(1)(i) in the ISO Act as Mrwebi suggested in para 24 of his consultative note.

531. Mrwebi advises that the prosecution "cannot continue" and the investigator should advise the members of the CI that made the complaint against Mdluli to ***"refer their complaint to the Inspector-General for consideration and any subsequent steps will be guided by what the Inspector-General advises"***. He also indicated that the i/o assisted by members of the NPA *"possibly"*, albeit in good faith, breached security legislation. The only section that he could identify in cross-examination as having been breached is section 7(7)(cA) of the ISO Act.

532. In suggesting that members of CI not report *"corrupt activities"*, Mrwebi disregarded section 3 of the Corruption Act that required such reporting to SAPS.

533. Mrwebi instructed that the charges be withdrawn immediately and himself advised Mdluli's attorneys of the withdrawal in a letter dated 4 December 2011, though he testified that it was sent during the afternoon of 5 December 2011. Charges were also withdrawn against Barnard.

534. Mrwebi had in fact, by the time this had reached Mzinyathi and Breytenbach, already informed Mdluli's attorneys of the withdrawal. Neither Mzinyathi nor Breytenbach was aware that he had done so until 9 December 2011.

535. Mrwebi did not take this decision in consultation with Mzinyathi as required in terms of section 24(3) of the NPA Act. He also did not consult SAPS or even the prosecutor as to the contents of the consultative note which neither reflected Mdluli's representations, nor the prosecutor's views.

536. It was suggested to Ferreira under cross examination that there was no prosecution directive or code of conduct that set out how a person in Mrwebi's position should tabulate his reasons when coming to a decision. The Directives provide:

"B. Reasons for decisions

1. *Prosecutors should record the reason/s for declining to prosecute a matter in the docket.*

2. *Prosecutors are often requested by complainants, family members of deceased persons, accused persons or legal representatives to furnish reasons for the exercise of their prosecutorial discretion (especially in the case where the decision was not to institute criminal proceedings). Only requests emanating from persons with a legitimate interest in the matter should be entertained. With reference to media enquiries see Part 47.*

3. *In the interest of transparency and accountability - and in accordance with section 33(2) of the Constitution - reasons should as a rule be given upon request.*

4. *The nature and detail of the reasons given will depend upon the circumstances of each case, although in general the ratio, rather than specific detail (e.g. the evaluation of a particular witness's evidence or credibility), should be given. Prosecutors should be careful not to infringe the rights of anyone when providing such reasons.*

5. *Typical reasons for a decision not to prosecute may be the following:*

    (a) *The State would not be able to prove that the accused person had the necessary intention to commit the offence in question.*

    (b) *The State would not be able to disprove the defence of the accused person (e.g. self-defence, alibi, criminal incapacity or ignorance of the law).*

(c) The complainant is a single witness. However, there are several defence witnesses who corroborate the version of the accused person.

6. Reasons as to why criminal proceedings are to be proceeded with, or why particular charges are formulated, should also be handled with care in order not to cause embarrassment or unnecessary debate. The following is an example of reasons for proceeding with criminal proceedings: "Although the complainant has requested the withdrawal of the charge, the case is too serious".

7. In the case of high profile or contentious matters, prosecutors should consult the relevant Control Prosecutor, Senior Public Prosecutor or DPP." (emphasis added)

537. We note that Mrwebi recorded no reasons in the docket, and in fact when Breytenbach shared the consultative note (and its reasons) with the i/o and IGI, Mrwebi threatened disciplinary proceedings.

538. In the provision of reasons, the evidence should be evaluated and dealt with in systematic manner. Mrwebi had not dealt with the actual evidence that was in the docket. Reasons given must be rational, comply with the Constitution and prosecutors must always act within the principles of legality.

539. According to Breytenbach it was "evident from these documents that Mrwebi had already taken a decision to withdraw the charges against Mdluli (and not only provisionally) when these memos were written."

Meeting on 5 December 2011 between Mrwebi and Mzinyathi

540. The trite legal principles insofar as they relate to the meaning of *"in consultation with"* have already been set out earlier. These existed at the time Mrwebi made his decision in 2011.

541. The meeting that took place between Mrwebi and Mzinyathi was not lengthy. There was no discussion of the merits in any great detail. Mrwebi had brought along the proclamation of his appointment and further indicated that the matter required further research.

542. In Mrwebi's view, he was consulting Mzinyathi. He testified that he did this as a courtesy because *"[c]onsultation was never done in the NPA."* He felt that he should at least do the consultation the way he thought was sufficient at that point in time. This appears to be contradicted by the consultative note which sufficiently refers to section 24(3) of the NPA Act as well as Mzinyathi's email of 8 December 2011 wherein he specifically recorded that Mrwebi had alluded that a SD needed to consult with a DPP in terms of the NPA Act.

543. The consultation was indeed perfunctory – Mrwebi says that he did not discuss the merits *"in any detail"* with Mzinyathi but had reference to the facts "*by way of background."* Mrwebi told Mzinyathi that he was *"busy with this matter of Mdluli"*, and was still doing research which he was hoping to finish before the end of that day. Mrwebi testified that he did that and then prepared the consultative note *"recording the fact that I consulted Mzinyathi"* and then drafted a letter to Mdluli's lawyers.

544. Mrwebi's interpretation of what is meant by "in consultation with" was that all that was required was that he consult with Mzinyathi on the withdrawal of the prosecution of Mdluli and that notwithstanding the absence of consensus between the two, Mrwebi's decision would take precedence. However, in cross-examination Mrwebi conceded that

he *"got it wrong"* when it came to consultation. He said that he had come to accept this after Murphy J's judgment (**FUL HC**).

545. Prior to the **FUL HC** judgment the matter had been considered at NPA EXCO level and all senior management, save for apparently Mrwebi, agreed with what the term "in consultation with" meant. The BF memo made it clear what section 24(3) of the NPA required, it had been raised with Mrwebi in cross-examination in the Breytenbach disciplinary hearing and categorised as trite law. Mrwebi's version that there was a historical practice that consensus was not required, while supported by Jiba, does not accord with the evidence of Hofmeyr, Mokhatla or Mzinyathi. The latter referred to the fact that Mrwebi would not be moved from his understanding of the legal requirements of section 24(3).

546. On Mrwebi's version, inasmuch as the decision to withdraw the prosecution was regarded as provisional, had Mrwebi applied his mind to the legal arguments raised about the insufficiency of his consultation with Mzinyathi, the prosecution against Mdluli should have been reinstated and a proper consultation process to obtain consensus, should have been embarked upon.

547. When Nxasana enquired from Mrwebi specifically what his interpretation of *"in consultation with"*, meant, he responded that the SCA set aside the decision of the SD to withdraw the prosecution of Mdluli *"on a mere technicality"*, stating:

> *"It is the first time that the NPA was confronted with a situation of dealing with and applying the provisions of this section. It is, as it were, an unchartered territory where no precedent exists and where, unfortunately the Supreme Court of Appeal did not attempt to provide any guidance in this regard. With respect, in my view, section 24(3) is a meaningless and useless provision if read and understood within the scheme and purpose of the NPA Act as a whole."*

548. Murphy J held that

"In light of the contemporaneous evidence, Mrwebi's averment in the answering affidavit that he consulted and reached agreement with Mzinyathi before taking the decision is equally untenable and incredible to a degree that it too falls to be rejected."[237]

549. Further Murphy J concluded that

"58. Mrwebi's reference to "my decision" in his answering affidavit implies that he believed the decision to withdraw the charges against Mdluli was his decision and one made prior to the meeting of 9 December 2011 without the concurrence of Mzinyathi. His use of the term "closed" in the letter to Dramat, albeit a few months later, supports Mzinyathi's evidence that Mrwebi viewed himself as functus officio, was unwilling to re-instate the charges and that the decision was presented to him as a fait accompli. The subsequent agreement to categorise the withdrawal of charges as "provisional" was a concession to his concerns, which did not alter Mrwebi's prior unilateral decision and instruction that the charges should be withdrawn. Mrwebi's own evidence thus supports a finding that the decision to withdraw the fraud and corruption charges was taken by him alone before the meeting of 5 December 2001, and prior to his writing of the consultative note, without the concurrence of Mzinyathi."

550. After having concluded that the decision could be reviewed **FUL HC** made the following findings:

"154. The evidence, extensively analysed above, shows that Mrwebi did not consult with Mzinyathi before taking the decision to withdraw the charges, let alone obtain his concurrence. By the time he met Mzinyathi he had formed a fixed, pre-determined view and was not open to persuasion never mind willing to submit

237 Mzinyathi explained this in the subsequent matter brought against him by the General Council of the Bar.

to disagreement. Both he and Mzinyathi confirmed under oath in the Breytenbach disciplinary proceedings that the decision to withdraw was a fait accompli by the time Mrwebi raised it with Mzinyathi. Under cross examination by counsel for Breytenbach, Mrwebi conceded that he had taken the decision to withdraw the charges before he wrote the consultative note. It is evident from both Mzinyathi's email of 8 December 2011 and his testimony that Mrwebi did not seek Mzinyathi's concurrence because he believed he was functus officio.

155. Mrwebi did not claim in his answering affidavit that Mzinyathi assented to the withdrawal of the charges at the 5 December 2011 meeting. He hardly could because Mzinyathi repeatedly confirmed that he did not support the withdrawal of the fraud and corruption charges against Mdluli. It is clear from the contemporaneous correspondence and his evidence in the disciplinary proceedings that Mzinyathi wished the case to continue. Mzinyathi's changed version of the position he took in the meeting of 9 December 2011, set out in his belatedly filed confirmatory affidavit, for the reasons stated, is not credible or reliable."

Meeting of 9 December 2011: Mzinyathi, Mrwebi and Breytenbach

551. On receiving the consultative note Breytenbach went to see Mzinyathi. She was aware that he shared her view that there was a case against Mdluli to be answered. He was the DPP who had jurisdiction over the matter and it could not be withdrawn without his *"final say"* and she was not aware that he had been consulted.

552. After considering the docket Mzinyathi confirmed that there was a *prima facie* case and the prosecution should continue.

553. On 8 December 2011 Mzinyathi, Breytenbach and Brig Van Graan went to see Adv Jay Govender (*"Govender"*), the legal advisor to the IGI. Govender indicated that the IGI had no mandate to investigate criminal matters.

554. Mzinyathi sends an email on 8 December 2011 to Mrwebi in which he makes it clear that he did not agree with Mrwebi and the latter had no mandate to instruct prosecutors in the DPP's office, irrespective of Mzinyathi's views on the matter. (It may also be apposite at this juncture to point out that at no stage did Jordaan in his evidence indicate that he had done so.) Mzinyathi made it clear that he did not support the withdrawal of the charges.

555. The meeting commenced on 9 December 2011 with Mrwebi stating, *"colleagues I presume you are here to test my powers"*.

556. Mzinyathi and Breytenbach told Mrwebi that they did not agree with his decision, that he had no authority to take the decision and there was no consensus and that Mrwebi had not consulted him or Breytenbach. Mrwebi's stance initially was that his meeting with Mzinyathi on 5 December 2011 was a consultation and that he was functus officio and could not change his decision. Breytenbach noted that she recalled saying to him "you are mad" whilst Mzinyathi sought to reason with him tactfully. When he advised them that he had already informed Mdluli's attorney that the charges would be withdrawn, this was the first time that Breytenbach and Mzinyathi were made aware of the fact.

557. To avoid the NPA facing embarrassment if the prosecutor informed the Court that the DPP had instructed the opposite to the SD, Mzinyathi and Breytenbach agreed to the matter being withdrawn on a provisional basis to sort out the impasse.

558. Breytenbach's understanding of what was required before the matter could be re-enrolled was (1) confirmation needed to be obtained from the IGI as to her role and the impasse between Mzinyathi and Mrwebi had to be resolved. In the absence of the letter to Mdluli's attorneys, there would have been no grounds upon which to withdraw the matter. In this regard Mzinyathi agreed with her.

559. Breytenbach stated that they had every intention of re-enrolling the matter as soon as the impasse was sorted out and the issues that Mrwebi had about the involvement of the IGI had been sorted out.

560. Mrwebi's version of the meeting was that Mzinyathi indicated that he and Breytenbach did not agree with Mrwebi's decision to withdraw the charges against Mdluli.

561. Mrwebi indicated that the letter he had sent to Mdluli's attorneys was the reason for the debate at the meeting on 9 December 2011, because Breytenbach and Mzinyathi did not agree with his decision and then he *"had come to their view"*.

562. They then *"went to the merits of the matter"*. Mrwebi's view was that they had to be *"sensitive"* to the *"security environment"*. The transactions were conducted in the name of front companies – they did not know how these were recorded. The problem was that Mdluli was not implicated. Mrwebi testified that he thought that at some point they might have to consider using his co-accused against Mdluli.

563. In relation to the unauthorised gratification, Mrwebi said that he had asked Breytenbach and Mzinyathi whether there was evidence that Mdluli had not been given permission or granted an exemption. One could not even formulate an allegation without that information. There were only a limited number of people with access to that information: the IGI and the AG. Breytenbach had suggested asking for a forensic audit report.

564. When giving evidence at Breytenbach's disciplinary enquiry, Mrwebi identified what the matters were that were identified for further investigation as SAPS approaching the IGI either to investigate or to direct SAPS where to investigate. Breytenbach was to approach the police to do the necessary.

565. The provisional withdrawal was a *"retraction"* of Mrwebi's position that he was *functus officio.* Mrwebi said that when a matter is withdrawn, it means that *"should the police*

continue with their investigation and find new evidence that matter could be reinstated at any time." In effect there is no difference in law between the withdrawal on 6 December 2011 and on 9 December 2011 if such is the case.

566. Mzinyathi in his affidavit indicated that arising from the meeting: (1) the matter had to be provisionally withdrawn; (2) Breytenbach was requested to ask SAPS to continue with the investigation with the assistance of the IGI; and (3) once the investigations were finalised Breytenbach could re-enrol the case.

567. The prosecutor provisionally withdrew the charges on 14 December 2011.

568. Mokhatla had been informed by Mrwebi that the Mdluli matter had been provisionally withdrawn and that he had met with Mzinyathi and Breytenbach. She was further told by Mrwebi that Breytenbach had been given 2 weeks to investigate and revert. However, before the expiry of this period, the **FUL** application was served on the NPA. At that point she had not been aware that Mrwebi had already written to Mdluli's attorney withdrawing the matter. This he had already relayed to her. Whist Mrwebi denied this, it was not put to Mokhatla in cross-examination.

569. Roelofse indicated that:

"As far as I am concerned Mrwebi never intended for this matter to be provisionally withdrawn. His actions and memorandums which he authored attest to that. It was only when he realised that his decision is being continuously challenged that he changed his stance and announced that he only intended to withdraw the matter as certain investigation were still outstanding. If one reads his reasons for the withdrawal of the matter that was never mentioned. His changed position became evident in his testimony in the Breytenbach disciplinary hearing."

Further instructions to Breytenbach of 9 December meeting

570. Murphy J concluded that Mrwebi's own interpretation of events bore out the finding that the decision was made without the concurrence of Mzinyathi:

"[56] ….In his answering affidavit, Mrwebi described the purpose of the visit by Breytenbach and Mzinyathi to his office on 9 December 2011 as being "to discuss their concerns that they do not agree with my decision". After discussing the evidentiary issues, according to Mrwebi, they agreed with his position that the case against Mdluli was defective, had been enrolled prematurely and could be reinstated at any time. Breytenbach, he said, agreed to pursue the matter and would come back to him with further evidence. Breytenbach failed to pursue the matter diligently and did not come back to him. He then considered the matter "closed", as he stated in a letter to General Dramat of the Hawks, on 30 March 2012. The court, on the basis of this account, is asked to accept that the reason the prosecution has not been re-instated is that Breytenbach failed in her duty to obtain additional evidence and report back, as she had promised at the meeting of 9 December 2011.

571. Moreover:

"156. Hence, Mrwebi's claim in paragraphs 27-29 of his answering affidavit that Mzinyathi and Breytenbach agreed on 9 December 2011 that the case against Mdluli was defective and should only proceed with the assistance of IGI and the Auditor General is both irrelevant and improbable. It is irrelevant because Mrwebi by that time on his own admission had already taken the decision to withdraw the charges, without obtaining the consent of the DPP, North Gauteng. It is improbable for the same reasons, and also because it is in conflict with the contemporaneous and subsequent documents prepared by Breytenbach and Mzinyathi, with their conduct and with their testimony on the course of events. On the basis of that evidence it is clear that Mrwebi took the decision to withdraw the fraud and

corruption charges without first securing the DPP's consent, which is a jurisdictional prerequisite under the NPA Act. His decision was unlawful for want of jurisdiction and must be set aside for that reason alone in accordance with the principle of legality."

572. Murphy J concluded:

"59. Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in the case. He implied that had she done her job, the charges would have been re-instated."

573. Breytenbach's evidence was that Mrwebi did not give her any instructions on 9 December 2011 to investigate further. He was not in a position to do so as she reported to Mzinyathi and he was also at the meeting. At no stage did Breytenbach relay to Ferreira that further investigations were required by Mrwebi.

574. She testified that had she been charged with tasks at that meeting, she would have done her very best to ensure that they were completed as quickly as possible so that the matter could be enrolled as quickly as possible. It was her view that this was an important matter for a number of reasons. The matter was taken up with the IGI who confirmed that it was not part of their mandate.

575. Breytenbach was asked to comment on the following statement by Mzinyathi, in his confirmatory affidavit in the **FUL SCA** matter had said that *"we agreed that the matter should be provisionally withdrawn so that the investigating officers can work with the office of the inspector general of intelligence to conduct further investigations"*. She said that *"in broad strokes"* they were saying the same thing but that was not how she recalled it.

576. Ferreira submits that the allegation that Breytenbach was instructed by Mrwebi to give further guidance to SAPS after the withdrawal of the Mdluli case and neglected to do so is refuted by the following:

576.1. The consultative note of 4 December 2011 states that **whether there is evidence or not is not important for the decision to withdraw**, the reason for the decision was that the matter was in the exclusive preserve of the IGI;

576.2. The handwritten note of Mrwebi dated 5 December 2011 states that the police had no mandate and was *"Nolle at this stage"*. *"Nolle"* refers to *"Nolle Prosequi"*, which means decline to prosecute as there is no or insufficient evidence that a crime was committed.

576.3. The letter from Mrwebi to Dramat dated 30 March 2012 indicating that the *"decision stands and that this matter is closed"*.

576.4. In the memorandum of 26 April 2012 Mrwebi referred to his response to Breytenbach dated 26 April 2012 to the BF memo and stated at page 3:

"It is my considered view that it will therefore ***not be in the interest of justice for the NPA to be further involved in the matter.*** *I once again emphasised that the Inspector -General is the appropriate functionary to handle the matter."*

577. This approach appeared to be premised on the *"classified and privileged nature of the information"*, allegedly premised on a view that the AG had already considered the transactions.

578. Moreover, an ongoing investigation was not substantiated by any evidence. Breytenbach had been suspended by Jiba on 30 April 2012 and had in her detailed affidavit in the Labour Court proceedings, dated 1 June 2013, made it plain that *"she had been frustrated by Advocate Mrwebi in her endeavour to prosecute General Mdluli."* Further Mrwebi did not name any person who was seized with the investigation or produce any

documentary evidence of anything happening between January to August 2012, other than Breytenbach.

579. According to Mrwebi, this was a high profile matter. Mrwebi did not have an obligation to keep track of progress, he did not get involved, only received reports. He did not view the suspension of the regional head (who was charged with overseeing the investigation) on his recommendation as exceptional circumstances which required him to follow up on the progress.

580. When asked why he took no steps between April and the request to Mokhatla in August, Mrwebi said that he had no reasons to believe that the *"prosecutors or anybody else is not doing anything about this matter".* He only understood this after Dramat so advised.

581. Mrwebi did not feel that Ferreira was owed an explanation why he was taken off the case because he had information that *"they"* were meeting outside parties and giving information which made Mrwebi uncomfortable. He had information which implied that Ferreira was leaking information in the matter, but did not ask him about this. Mrwebi conceded that he could not blame Ferreira and that there was no reason to attribute ulterior motives to him.

The Breytenbach/Ferreira BF memo and Mrwebi response of 26 April 2012

582. Breytenbach/Ferreira opposed the withdrawal of the charges against Mdluli and co-authored a 24-page memorandum dated 13 April 2012 (*"the BF memo"*), addressed to Jiba requesting that she review Mrwebi's decision to withdraw charges against Mdluli. They indicated that what had been a provisional withdrawal had now become a final withdrawal.

583. The BF memo sparked off the letter dated 30 March 2012 from Mrwebi to Dramat wherein he states: "The NPA took a principled and considered decision on this matter

without fear, favour or prejudice, as it is required to do in terms of the law. That decision stands and this matter is closed."

584. Breytenbach understood *"closed"* in Mrwebi's letter of 30 March 2011 to mean precisely that and regarded it to be contrary to what had been agreed on 9 December 2011. The BF memo regarded the decision to withdraw as irrational in that it was based on a mistake of law and despite the IGI confirming its position, Mrwebi remained steadfast. For that reason, Breytenbach was of the view that Mrwebi was protecting Mdluli.

585. In cross examination, it was put to Breytenbach that it was not Mrwebi's intention in his letter of 30 March 2012 to say that prosecution would not continue at all anymore, but that what he had in mind was that the debate about the IGI, and who must investigate, was closed. Breytenbach disputed this, she said that any reasonable person on a reasonable reading of that letter would understand that that was not what Mrwebi had written. Further, the letter was not capable of being read to sustain Mrwebi's version that the reference to investigation was not a police investigation but an investigation of the paper trail in respect of confidential or classified documents.

586. The BF memo was unprecedented. *Ex facie* the BF memo was in addition sent to the other DNDPPs, Mrwebi and Mzinyathi on the assumption that it would be discussed with senior management. This was not so.

587. It was delivered to Mzinyathi, Mrwebi and Jiba. Jiba was not in office and it was left there on either 23 or 24 April 2012. Mrwebi undertook to provide it to the persons on the list but they gave it to Hofmeyr. Mrwebi denied that he gave this undertaking but may have said he would give it to Ramaite. Mokhatla never received it.

588. Jiba discussed the BF memo with no one other than Mrwebi and based on what he told her did nothing further about it. Her evidence was that as she had been told the matter

was provisionally withdrawn no further steps needed to be taken. Other than Mrwebi's memo dated 26 April 2012 there was no other response to the BF memo.

589. The BF memo dealt with the merits of the Mdluli matter comprehensively, inter alia,

589.1. Mrwebi had taken a final decision to withdraw the charges against both Mdluli and Barnard. Mdluli's representations did not deal with the merits and so the decision to withdraw had very little to do with the merits. The representations dealt with the murder charge. There was nothing of importance raised in connection with the fraud and corruption charges. In fact, only two paragraphs dealt with these charges. Further, the charges were withdrawn against both accused, without any representations from Barnard, in respect of whom Mzinyathi was not consulted.

589.2. The two lead prosecutors at the SCCU Pretoria regarded this instruction to be erroneous, illegal and wrong in relation to the evidence in the docket. In particular, that the decision to withdraw was premised on SAPS not having the power to investigate members of the intelligence community, even although this had not been raised in the representations received. Similarly, that there was an alleged breach of security legislation, and that the offences fall within the mandate of the ISO Act. Not only had this also not been raised but it was not correct as confirmed by the IGI.

589.3. Why the representations had been sent to Mwrebi, the SD, and not Mzinyathi, the DPP, North Gauteng, who was seized with the matter.

589.4. Mzinyathi at all material times was of the view that there was a *prima facie* case and Mrwebi did not have the power to take the decision to withdraw the prosecution. As both were at DPP level, and as Mzinyathi had original jurisdiction, Mrwebi could not lawfully withdraw the matter. Moreover, section 24(3) applied where a SD contemplated a prosecution in the area of a DPP and hence it had to be taken *"in consultation with"* the DPP.

589.5. The withdrawal had been provisional (in order to avoid airing the dissent which emerged between Mrwebi and Mzinyathi in public).

589.6. New evidence has surfaced implicating Mdluli in the commission of further offences and the effect of Mrwebi's stance had resulted in the criminal investigation coming to an end.

589.7. The magistrate had issued the warrant of arrest based on evidence in the docket. There was no evidence to substantiate Mrwebi's conclusion that the prosecutor persuaded the magistrate. There was no basis for Mrwebi's conclusion that SAPS had fabricated evidence, nor was there any fabricated evidence.

589.8. Mrwebi should have recused himself based on the allegations of the involvement of Mdluli and Mrwebi in the *"Selebi saga"*.

589.9. The withdrawal did not comply with prosecutorial policy considerations.

589.10. The merits of the case against Mdluli and the evidence in the docket, making it clear that the information relayed was not the only documentation at the disposal of the prosecutors. Moreover that there was a case of unlawful gratification that required answering.

590. Finally, Breytenbach/Ferreira made it clear in the last paragraph that they await a response from the Acting NDPP.

591. Murphy J noted:[238]

"63. The memo is a credible indication that the decisions were indeed brought to the attention of the Acting NDPP for consideration. The NDPP in her answering affidavit, though not dealing directly with the memo, maintained that the decisions to withdraw charges had not come to her office for consideration "in terms of

238 **FUL HC**, para 63.

the regulatory framework". Be that as it may, the memo leaves no doubt that Breytenbach did not consider the case against Mdluli to be "defective"."

592. Mrwebi responded in a memo dated 26 April 2012. He suggested that the NPA was being *"used or abused"* for purposes unconnected to the interest of justice or the rule of law and drew a distinction between what he referred to as acts of maladministration and acts of criminality. He concluded that if they continued to insist that nothing had changed, then they were being *"deliberately ignorant"* because the police had been engaging in *"obvious illegal actions"* by "*accessing classified / privileged information"* and placing it in the public domain. He regarded this to be contrary to applicable laws – though none are identified – and indicates that this makes the state's case *"even more suspicious"*. Mrwebi added that he had been provided with further information on the matter and had been privy to *"other classified, confidential and high-level discussion[s] with police management"*. He expressed concern that the prosecution would justifiably be seen as an abuse of legal process and motivated by ulterior purposes. Mrwebi indicated that he expressed this "view/conclusion" in addition to considerations that the evidence was either inadmissible or that its admissibility had been compromised.

593. Ferreira denied that the police (or prosecutors) were in breach of any security legislation as alleged by Mrwebi. He testified that a police officer investigating the crime, Roelofse, went to another police officer who gave him certain documentation. They were both appointed in terms of the same Act and the document never left the hands of the police. Roelofse had the necessary power to access the documents required. The documents in the docket had been voluntarily handed over from one police department to another. The prosecutors remained steadfast that the case was about acts of criminal corruption and not maladministration.

594. Neither Ferreira nor Breytenbach knew who or what Mrwebi was referring to and they had not been apprised as to the *"other classified and confidential"* information and *"high level discussions with police management"*. Roelofse points out that he was:

"not aware of any senior SAPS management that had discussions with Mrwebi apart from Mdluli and Major General S Lazarus (hereinafter referred to as "Lazarus"), Head: Secret Services Account, Crime Intelligence. Lazarus is currently suspended pending an internal disciplinary hearing to matters related to the abuse of the secret service account (hereinafter referred to as "SSA"). Lazarus is also the subject of a criminal investigation which relates to criminal abuse of the SSA."

595. Mrwebi concludes that it *"will therefore not be in the interests of justice for the NPA to be further involved in this matter"*, and again indicated that the IGI is the appropriate functionary to handle the matter in light of the classified and privileged information and given that the *"AG, JSCI and Parliament have already considered that matter in terms of section 3*" of the ISO Act.

596. It was put to Breytenbach that prosecutors have different opinions and that Mrwebi was convinced that the evidence needed to prove the case would be *"under lock and key as part of the intelligence community"* and that was where the IGI came into it. Breytenbach differed *"very strongly"* with this view.

597. Murphy J held:

"175. As discussed earlier, in his reasons filed pursuant to Rule 53 and in his answering papers, Mrwebi took a different tack. He there claimed that there was insufficient evidence to support a successful prosecution against Mdluli and that he referred the matter to the IGI so that she could investigate or facilitate access to the privileged documentation required. ***The withdrawal of the charges, he said, was merely provisional, to allow for further investigation to take place. This version is at odds with the contemporaneous reasons Mrwebi gave for his decision****, and the evidence of Breytenbach and Mzinyathi in the disciplinary proceedings. Even if the charges were supposedly provisionally withdrawn in court,* ***Mrwebi's pronouncements at the time evinced an unequivocal intention to stop proceedings altogether. He considered the referral to the***

IGI as "dispositive"; and in his letter of 30 March 2012 to General Dramat he referred to the matter as "closed". *In the circumstances, his new version is implausible and probably invented after the fact, in what FUL submits was "a last-ditch attempt to explain his otherwise indefensible approach". But even if the decision was in fact "provisional", its qualification as such does not save it from illegality, irrationality and unreasonableness. A provisional decision which languishes for two years without any noticeable action to alter its status may be inferred to have acquired a more permanent character."*

5.2.2.7. Inspector-General power

Legal framework

598. SAPS are constitutionally mandated to investigate crime and they are empowered under section 205 of the Criminal Procedure Act 51 of 1977 (*"the CPA"*) to subpoena evidence from any person. As a matter of law SAPS should not require the *"go-ahead"* of any other state organ as a precursor to embarking on a criminal investigation. Thus, a criminal investigation being pursued, without the involvement of the IGI, cannot per se be regarded as unlawful.

599. In terms of section 1 of the National Strategic Intelligence Act 39 of 1994 ("the NSI Act") certain information, including *"crime intelligence"* constitutes *"intelligence"* and is exempt from disclosure. The Minimum Information Security Standard (*"MISS"*) refers to *"sensitive information which in the national interest, is held by, is produced in, or is under the control of the State, or which concerns the State and which must by reasons of its sensitive nature, be exempted from disclosure and must enjoy protection against compromise"*.

600. However, clause 3.4 of the MISS, provides that:

"Security measures are not intended and should not be applied to cover up maladministration, corruption, criminal actions, etc, or to protect individuals/ officials involved in such cases."

601. Under section 7 of ISO Act the functions of the IGI are:

"(a) to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;

(b) to review the intelligence and counter-intelligence activities of any Service;

(c) to perform all functions designated to him or her by the President or any Minister responsible for a Service;

(cA) to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member;[239]

(d) to submit the certificates contemplated in subsection (11) (c) to the relevant Ministers;

(e) to submit reports to the Committee pursuant to section 3 (1) (f); and

(f) to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b),

239 Section 7(7)(cA) is the only provision of the ISO Act on which Mrwebi placed any reliance.

(c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President."

Pre-December 2011

602. When asked under cross-examination to identify the provision in the ISO Act that led him to believe that the IGI could actually provide him with such documentation, Mrwebi referred to section 7(7)(cA). He was further asked where in the ISO Act the IGI was permitted to declassify documentation – he said that he had at no stage said that the IGI would declassify the documents, only provide access to documents.

603. Mrwebi accepted that one could only obtain that documentation from the author and the National Commissioner of Police. He said that his approach was that the IGI could *"just go and look"* to say whether it was possible to declassify it and then "*give it to whoever is supposed to do that"*. Mrwebi did not know under which provision the IGI would be authorised to tell SAPS about classified documents, but he mentioned that the IGI could access all the documents, make a determination in respect of a document and give it to the author (SAPS). Mrwebi did not seek any other legal advice either from LAD or externally, because he regarded the law to be clear. Mrwebi accepted this was an inference that he drew from the ISO Act.

604. The i/o had engaged with the IGI during the investigation. A file setting out the allegations was handed to the IGI on 18 August 2011. In response, the IGI had informed Dramat on 20 September 2011 that they would not be attending to a report, and that a report of this nature could only be referred to SAPS. Mrwebi did not dispute this. Copies of search warrants were also given to the IGI.

605. Further, Roelofse reported that Majors General Hankel, De Kok, Jacobs and Brigadier van Graan briefed the IGI of the situation developing at CI relating to the SSA. Also, Breytenbach had on a number of occasions spoken to Govender at the IGI. She

indicated that the IGI office did not have the capacity nor the mandate to do a criminal investigation. This was again confirmed at a meeting held in December 2011. It is that the IGI is not mandated to conduct criminal investigations. The details of this meeting were relayed to Mrwebi at the meeting held with Mzinyathi and Breytenbach on 9 December 2011.

606. A report dated 3 November 2011 advising the IGI of the evidence discovered during the investigation was prepared by Major General Hankel and Major General De Kok. It was given both the IGI as well as to the Commissioner of SAPS, L-G Mkhwanazi.

607. Significantly, Lazarus approached the chairperson of the Joint Standing Committee of Intelligence ("JSCI") trying to persuade him that the investigation compromised national security. Mrwebi denied that this was an attempt to stop the investigation.

608. As already indicated the *"only reason"* by Mrwebi for the decision to withdraw in his consultative note of 4 December 2011 was that the charges against Mdluli *"fall within the **exclusive preserve** of the"* IGI in terms of section 7(7)(cA) of the ISO Act. Mrwebi testified that it was his view that the matter fell squarely within the mandate of the IGI.

609. In the consultative note discussed above, Mrwebi stated that the main issue was the fact that SAPS did not have a mandate in the matter. Ferreira understood Mrwebi's consultative note to state that Mrwebi did not believe that SAPS were entitled to investigate the Mdluli charges and that the IGI should be dealing with the case and not SAPS. This was confirmed for Ferreira in the handwritten note from Mrwebi dated 5 December 2011.

610. After the withdrawal on 14 December 2011 it was decided that the IGI and AG would again be approached. At Court, Roelofse went to the IGI and AG again to try and include them in the investigation, as requested by Mrwebi. At a meeting on 10 January 2012 between Roelofse and Govender he is advised that Mrwebi did not consult with the IGI

prior to the decision to withdraw the charges and a formal request should be made to the IGI regarding assistance. He was told the same at a subsequent meeting.

611. Breytenbach had met with Gen Jacobs and Brig Van Graan (*"Van Graan"*) on 8 December 2011 and it was apparent that Mrwebi had not consulted with SAPS regarding his decision. They had in turn met with Adv Jay Govender (*"Govender"*), the legal advisor to the IGI, who advised that in their view the IGI did not have any mandate to undertake criminal investigations.

612. A letter was then sent from the Acting National Commissioner of Police, Lt-Gen Mkhwanazi, to the IGI, dated 22 February 2012. The IGI responded to Mkhwanazi on 19 March 2012 advising that the reasoning followed by the NPA *"is fundamentally wrong"* and SAPS should refer the matter back to the NPA.

> *"The mandate of the IGI does not extend to criminal investigations which are court driven and neither can the IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the police. As such, we are of the opinion the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that this matter be referred back to the NPA for the institution of the criminal charges."*

613. Mrwebi explained his position, more importantly, that they did not have evidence linking Mdluli to the crime. He took Govender through the matter intensively. Mrwebi said it was clear to him that the information he was giving was new to her.

614. Mrwebi testified that he told Govender that the reason that matter should go to the IGI was because in terms of the ISO Act was *"best suited"* to get the documents. She then jumped to say that *"we do not do criminal investigation."* Mrwebi knew that but said he was referring to the IGI's internal investigation. The IGI did not need a warrant, in terms of section 7(7)(cA) of the ISO Act. Govender told him that there was such a provision, but that the IGI wanted to move away from doing investigations and that in line with

international best practice, they were amending the law accordingly. She conceded that they were currently busy with an investigation.

615. Mrwebi indicated to her that there were problems and it would be easier and quicker for the IGI to investigate for internal purposes and *"give that information to the police or suggest whatever."* Mrwebi got the sense that the IGI wanted to keep the matter on the roll. He indicated that he could not be party to that when he knew there was no case. He regarded it as acting contrary to the law and amounting to an abuse of process which he was not prepared to do. Mrwebi left on that note.

616. It emerged during Mrwebi's cross-examination that he met with Govender on 20 March 2012. That meeting was at the request of Govender. Govender called this meeting to explain the provisions of the ISO Act to Mrwebi and the IGI's mandate. She indicated to him that the mandate of the IGI was to conduct oversight investigations and not criminal investigations; the latter falling within the purview of SAPS. The reason for this explanation was to dispel the flawed interpretation of the oversight mandate by Mrwebi as set out in his consultative note to Mzinyathi, dated 4 December 2011.

617. A dispute of fact arose, in relation to what Mrwebi during cross-examination indicated, transpired at that meeting, resulting in Govender filing an affidavit dated 21 February 2019 before the Enquiry. In this affidavit she denied Mrwebi's account and stated that at no stage did Mrwebi discuss the evidence against Mdluli intensively or otherwise with her as he indicated he had done during his cross-examination. She regarded this to be a *"blatant distortion of the truth*" and moreover that this information would not have been pertinent to the reason for the meeting. Mrwebi had also under cross-examination indicated that Govender had represented to him that the legislation governing the IGI was in the process of being amended to exclude investigations. Govender *"vehemently denied*" that she had said so as this would have been anomalous as by its very nature the mandate of the IGI is to monitor the activities of the Intelligence Service through investigation and it is the manner in which it discharges its complaints mandates. To date

the relevant legislation has not been amended since 2011. Although Mrwebi testified that Govender had disclosed confidentially to him all kinds of other matters which he did not specify, Govender was clear in her affidavit that *"no other matters outside the purpose of the meeting were discussed"*.

618. This was not his evidence during the Breytenbach disciplinary enquiry where he indicated that he was not able to take matters up with the IGI Mrwebi indicated during cross-examination that he disagreed with the view expressed in the IGI. When pressed as to why he had not done so he testified as follows:

ADV TRENGROVE: I see. Did you take it up with them?

ADV MRWEBI: Well Sir, it's unfortunately I could not take I up with them, I did not take it up with them.

ADV TRENGROVE: Why not?

ADV MRWEBI: Because you know, I think I had a difference with the lady, the legal advisor to the IG who apparently drafted and signed, and drafted this letter on behalf of the IG.

ADV TRENGROVE: Mr Mrwebi, that is not an answer.

ADV MRWEBI: Yes.

ADV TRENGROVE: Why did you not take it up with the IGI?

ADV MRWEBI: Sir, you know before this letter was written I had a meeting with that lady.

ADV TRENGROVE: With whom?

ADV MRWEBI: With the legal advisor to the IG where we discussed this matter and agreed to differ, and agreed to differ and unfortunately you know we ended on a very, very, very ... We could not agree you know, there was disagreement

because at a certain point in time she requested me to do certain things in terms of ensuring, at least, I must at least ensure that the case is reinstated, even if ... I also mentioned the problems with her you know, so we could not agree on a number of things. I knew what her view was, so there was no point to take it any further with her you know?

ADV TRENGROVE: Was there anybody else who shared your view? Any lawyer who shared your view?

ADV MRWEBI: I do not know, I do not know because I did not consult with anybody else.

619. On being apprised of IGI's letter of 19 March 2012, which was provided to Jiba under cover of a letter dated 23 March 2012 (and which she indicated she had not received) but which was also delivered to Mrwebi by Breytenbach, Mrwebi responded in a letter dated 30 March 2012 to Dramat as follows: Mrwebi acknowledged that the IGI had no oversight functions and powers of review with regard to prosecutorial decisions in relation to which the NPA had sole prerogative. He expressed umbrage at the fact that his consultative note, dated 4 December 2011, had been provided to the IGI and SAPS as it had only been for NPA consumption and Mrwebi indicated that *"The NPA took a principled and considered decision on this matter without fear, favour or prejudice, as it is required to do in terms of the law. That decision stands and the matter is closed."*

620. We digress for a moment to point out that Mzinyathi under cross-examination before this Enquiry made it clear that the decision taken in relation to the withdrawal of charges was not a principled or considered decision, but an expedient one, given that Mrwebi had already at that junction informed Mdluli's attorneys that the matter would be withdrawn. Breytenbach subsequently advised Mrwebi that she had provided a copy of his consultative note to Moodley, the superior officer of the i/o. Despite threatening disciplinary action against her, Mrwebi took no such steps.

621. Dramat then sent a copy of the IGI letter to the SCCU. Breytenbach took a copy to Mrwebi after running it by Mzinyathi. Rather than dealing with the substance of the letter it appears that Mrwebi reprimanded her for having provided a confidential document to SAPS. She responded that she had given a copy to Moodley, the superior officer to the investigating officer, Roelofse.

622. It was put to Mrwebi that in Govender's version there was no discussion of the merits and that this was inconsistent with Mrwebi's version at the disciplinary enquiry. Mrwebi disputed this. Further there was no discussion of amendments to the legislation. Mrwebi said that that was fair enough, but *"we said all those things"*.

623. On 29 March 2012 the IGI sent a letter to Jiba referring to her letter dated 19 March 2012 to Mkhwanazi, which had been forwarded to Jiba, placing the following on record:

"

- *my statutory mandate is that of the execution of intelligence oversight resulting in findings and recommendations;*
- *as such this precludes me from making decisions on the institution of criminal proceedings which remains the sole mandate of the National Prosecuting Authority;*
- *the letter should not be construed as directing the NPA to institute criminal proceedings against Lt General Mdluli as this would amount to usurping your functions. It was merely a recommendation flowing from the reason advanced by the NPA for the withdrawal of the charges.*

The Intelligence Services Oversight Act, 1994 (Act 40 of 1994) governs the disclosure of information in the possession of the Inspector-General and as such wish to place on record that office bears no knowledge of the media publications regarding the decision concerning Lt-General Mdluli."

624. In cross-examination, Jiba said that she did not recall this *"particular letter"* only the later one that resulted in her meeting with Dramat. There is no indication that any steps were taken pursuant to this letter.

625. Mrwebi testified that he was angry when he got the letter from the IGI dated 19 March viewing it as them giving him instructions. He expected the IGI to continue with investigations as agreed and tell him that the matter is ready. Mrwebi said that when he said the matter was *"closed"*, he was referring to *"the discussion about the Inspector General Issue"*. The decision he was referring to that stood was *"[t]o continue to investigate further and then place the matter on the roll when ready"*.

626. However, at that stage there was no doubt that the IGI was not going to investigate or assist. On Mrwebi's understanding that only the IGI had the mandate to conduct such an investigation and that no investigation could take place without the IGI, in effect it meant that with the IGI's refusal there was no point in keeping the case open.

627. In response to a question whether she considered the merits and agreed that the IGI and/or AG should be approached, Jiba recalled that she had spoken to Commissioner Phiyega about a problem relating to documents in the CI environment, but the explanation that she gave was too long for Jiba's understanding.

5.2.2.8. Auditor-General (AG)

628. In November 2011 the AG's office was briefed. They were requested to form part of the investigation but declined.

629. After receipt of the BF memo, Mrwebi addressed a memo dated 26 April 2012, to Breytenbach, Ferreira and Mzinyathi. He stated that it was a known fact that the AG had examined the information containing the alleged criminal transaction by Mdluli and Barnard and found nothing untoward about the transaction. Breytenbach was not aware of the AG having examined the information or any *"known fact"* of the AG being involved.

630. Further, in relation to Mrwebi's allegation that the AG had examined the information containing the transaction by Mdluli and Barnard, Roelofse testified that he met with Alice Muller (*"Muller"*) and others from the AG's office during May 2012 and showed them a copy of the 26 April 2012 memo. They denied making such a finding as the transaction was never placed before the AG to audit. They also denied that such a report was tabled at the JSCI.

631. On 11 July 2012 Roelofse wrote to Muller referring to the meeting in May 2012 stating:

"At that meeting you were made aware of the contents of an internal memorandum authored by Advocate L. Mrwebi, a Special Director at the Specialised Commercial Crime Unit) on 26 April 2012. You were specifically referred to the second paragraph on page three (3) of the said document.

According to Advocate L Mrwebi "it is a known fact that the Auditor General (AG) examined the information containing the alleged criminal transaction by Mdluli and Barnard, and based on the rules governing the secret services account found nothing untoward with the transaction. The necessary report in this regard was given to the Joint Standing Committee of Intelligence and (JSCI) and as such to parliament". I am attaching the internal memorandum authored by Advocate L Mrwebi dated 26 April 2012.

You indicated at the time that your office did not examine the alleged criminal transaction and by definition did not come to a conclusion that "nothing untoward" has happened.

Would you be so kind as to confirm in writing that the situation set in the preceding paragraph is indeed correct?

I would also want you to indicate, after our meeting, whether your office has been requested to investigate the transaction pertaining to this incident and if so, the outcome of the investigation. If not I hereby wish to refer the matter to your office

for an independent assessment of the transaction which form the basis of the criminal investigation."

632. Roelofse held a follow up meeting on 12 July 2012. Haffajee, the senior manager, again stated that the relevant transaction was never placed before the AG to audit. Roelofse received a written response dated 25 July 2012 confirming the verbal response previously received. This letter stated:

"The purpose of this communication is to inform you that the Auditor-General of South Africa did not examine the alleged criminal transaction, nor reach the relevant conclusion as set out in your letter to us dated 11 July 2012."

633. Mrwebi furnished reasons in the **FUL HC**. The document headed *"Brief reasons for the withdrawal of charges proffered against Lieutenant General Mdluli and another"* (*"FUL Brief reasons"*) indicated that without the report from the AG and without knowing the extent of compliance with CI procedures, a *prima facie* case could not be made out.

634. Ferreira testified that he had attended a meeting at the AG with the prosecutors appointed by Nxasana, and the AG's office informed them that they had never investigated the transaction and never made a finding that there was nothing untoward about the transaction. They had added that, had the transaction been brought to their attention, they would have arranged a management query and raised a red flag. At the time the decision was made by Mrwebi there was nothing in the docket that stated that the AG found anything untoward.

5.2.2.9. Review – Dramat

635. Roelofse reported to Dramat in respect of the **Mdluli** case. Dramat stated that he knew there was a *prima facie* case against Mdluli.

636. After Mrwebi's decision, Roelofse obtained the written clarification from the IGI that her office did not have jurisdiction and the matter fell within the remit of SAPS and the NPA. (This was what Roelofse and Breytenbach assumed would satisfy Mrwebi.

637. On 23 March 2012 Dramat, referred the matter back to the office of Jiba (Acting NDPP) and the SCCU, Pretoria. He attached the correspondence from the IGI dated 19 March 2012 *"for your* [her] *decision"* and copied it to the SCCU for information purposes.

638. Roelofse testified that it was clear from Mrwebi's response that he had not foreseen that SAPS would refer the decision to the IGI, especially because Mrwebi had not consulted with the IGI prior to making his decision to withdraw the charges.

639. Mrwebi testified that after he wrote to Dramat on 30 March 2019, he became *"a bit concerned with"* the strong language in the letter and felt a bit of remorse. He made an appointment to see Dramat, which he did on 1 April 2012. He apologised to Dramat and explained that he had been angered by his prosecutors delivering the letter to him. As an aside Mrwebi explained to the Enquiry that what had angered him was when Breytenbach and Ferreira delivered the letter to him they gave him a *"sort of ultimatum"* about what the backlash from the media would be.

640. Mrwebi testified that he and Dramat discussed the matter generally and during this discussion, Dramat, without "prompting" said "you know Adv Mwrebi, the problem is that the Auditor-General looked into this account and did not find any fault with it, that would be the difficulty in the matter". Mrwebi responded that maybe the AG had not zoomed into that particular transaction. If he did so, maybe he would find something. Dramat testified that he said this, that his "struggle" had always been to get the matter properly investigated and so he would not have said that the matter was found in order by another body. Dramat also denied that he had told Mrwebi that the expenses in the account included the transactions and had been reviewed and audited by the AG and

subsequently considered by the JSCI. Dramat confirmed that he told Justice Yacoob the same when he was interviewed by the Judge in 2015.

641. Mrwebi agreed that the AG's report on the SSA is not in the public domain. In order to get access to the report it would have to be declassified.

642. At Breytenbach's disciplinary enquiry Mrwebi had testified that a senior official from CI gave him the information about the AG report. It was put to Mrwebi that the information had thus not come from Dramat. He denied this and said that he met with CI in April 2012. We deal with this meeting below. It was pointed out that Mrwebi's own evidence was that the information about the AG was given to him in January 2012 by the CI visitors. Mrwebi again said that the CI visitors came in April 2012.

643. Dramat requested that Jiba reviews Mrwebi's decision stating:

"You will recall that I have submitted a request, dated 23 March 2012, with the relevant case docket to you, as addressee A, in your capacity as Acting Director of Public Prosecutions, for your decision. This was following the response from the Inspector General of Intelligence on the initial decision of the Special Director. Mrwebi, to have the charges against Lieutenant General Mdluli and Col Barnard withdrawn.

Thereafter I received a response, again from Advocate Mrwebi that the matter is finalized and that he abides by his decision. In the circumstances I will appreciate a decision on the matter by you, as the ultimate authority in respect of the consideration of a prosecution."

644. On 4 May 2012, the Office of the NDPP responded via a letter signed by J Lepinka (*"Lepinka"*), the Office Manager within the Office of the NDPP indicating that the matter is being dealt with by Mrwebi.

645. On 7 June 2012 Dramat again wrote to Jiba, requesting a decision, referring to the IGI and making no reference to the AG.

646. Dramat referred to his previous letters, indicating:

"[a] review of Advocate Mrwebi's decision is urgently required in the interest of the administration of law, the interest of the South African Police Service and especially in the public interest.

My last correspondence on the matter, in which I also appealed for your decision on the matter, was replied to by the Manager: Executive Support: Ms Lepinka of your office, only informing me that Advocate Mrwebi dealt with the matter.

An urgent appeal if once again made to you to urgently review the decision of Advocate Mrwebi and to give your decision, in your capacity as Acting National Director of Public Prosecutions on the matter."

647. Dramat received no response to his letters from Jiba directly. A meeting with Dramat, Jiba, Mrwebi and Mokhatla occurred on 1 August 2012. Ferreira was not informed of the meeting and no one else involved in the prosecution was there. It was a short meeting at which Dramat was asked whether the case had not been closed. Thereafter Mrwebi instructed that Ferreira be removed and other prosecutors be appointed.

648. Ferreira had remained the prosecutor until he was removed by Mokhatla on Mrwebi's instruction in August 2012. Apart from the letter of 26 April 2012, Mrwebi did not contact him once about the matter. This in circumstances where they had worked together for a long time and knew each other well, and where Mrwebi must have realised the importance of the case, involving the head of CI. It was Ferreira's evidence that:

"Now not once during April to August did he communicate with me or to the head of my unit Advocate Mokhatla at that time and say the people must now start doing

their job, they must act quickly they must do this, they must do that and they must report back to me so that I can make a decision."

649. Jiba testified that she had never seen that letter. She testified that on the documents system in place, Ms Lepinka would just refer the documentation to the unit dealing with the matter.

650. Jiba did not recall receiving either letter of 23 March 2012 or 23 April 2012. Both are however referred to in Dramat's June letter which resulted in the August meeting with Dramat. Jiba did not recall whether she had consulted Motimele about the letter.

651. Jiba said that when she met with Dramat she had told him that they met in many meetings and he should have told her he was experiencing this kind of a problem. It is not clear whether Jiba had realised after receiving the June letter that there was missing correspondence or realised that mail that should have been reaching her, were not.

652. After the meeting, on 2 August 2012, Dramat wrote to Jiba noting that the meeting had *"sufficiently resolved all the concerns raised in"* his letter of 7 June 2012. He confirmed that he had instructed the i/o to obtain instructions or guidance from the prosecutor.

5.2.2.10. Roelofse Confirmatory Affidavit

653. Early in September 2013, Roelofse was asked to sign an affidavit, confirming Mrwebi's supplementary affidavit in the **FUL HC** matter. He testified that he had received an email from Sebelemetsa of the State Attorney's office requiring him to sign a confirmatory affidavit. He refused to sign, as he had not been provided with any affidavit to confirm, and he was not prepared to confirm a draft affidavit. Roelofse asked for the signed version so that he could know what Mrwebi was going to say *"at the end of the day"*.

654. Roelofse also indicated that he had issues with the draft affidavit that was sent to him because he felt that it contained *"inaccuracies"* and that *"the full picture was not placed before the court"*. He stated as follows:

"I have contacted our legal services with regards to this matter. I have informed them of your request. I also informed Brig van Graan from legal services that I am not in a position to confirm the correctness of Adv Mrwebi averments in as much as it pertains to myself.

I can however confirm that this investigation did continue in September 2012 after various requests from SAPS to re-institute a criminal investigation.

I was advised that under the circumstances where I cannot confirm the correctness of Adv Mrwebi's averments accept (sic) to confirm that the investigation into this matter did continue in September 2012 I should not do so.

I have also noticed that in the draft affidavit of Adv Mrwebi that was forwarded to me he also refers to an earlier affidavit by himself. As I do not know what is contained in that affidavit I can likewise not confirm the correctness of that affidavit.

I have furthermore not seen the affidavit to which Adv Mrwebi is responding. It is difficult to judge his comments if I lack the context in which it is made."

655. Mrwebi responded to Sebelemetsa, copied to Roelofse, on 11 September 2013 as follows:

"I thought Colonel Roelofse was being requested only to confirm that the investigations are continuing and nothing more. What is the purpose of everything else he talks about in his response? The reason I am asking is because he seems to be placing inaccurate information in the public domain, for example, about requests to re-institute criminal investigations thus inadvertently contradicting the existing legal and policy framework. I just need to say that we need to exercise

great caution about what we place in the public domain as it might lead to some unintended consequences."

656. Roelofse then replied to Mrwebi:

"I did not want to respond to your email but your accusation that "he seems to be placing inaccurate information in the public domain" cannot be left unanswered. That would be tantamount to agreeing with you.

I am not placing any inaccurate information in the public domain. I making this comment as I presume you are referring to what I was willing to state in my confirmatory affidavit. I believe that all relevant facts be placed before the court."

657. Even though Roelofse never signed the confirmatory affidavit, the affidavit filed by Mrwebi in **FUL HC** reflects that it is accompanied by a confirmatory affidavit from Roelofse and an unsigned confirmatory affidavit in Roelofse's name forms part of the **FUL HC** record. We do not know whether the court was apprised that there is no signed confirmatory and/or Roelofse refused to provide one.

658. Given the dates of the email exchange and Mrwebi's affidavit which was deposed to on 9 September 2013, it is apparent that Mrwebi had referred to Roelofse in paragraphs 57, 58, 78 and 81. In this regard, Mrwebi indicated that premised on Roelofse's assessment of the matter at 2 March 2012 there were still investigations outstanding and thus the matter ought not to have been placed on the roll prematurely is not the position which Roelofse testified to before the Enquiry.

5.2.2.11. Representations which were made but kept secret by Mrwebi

659. Mrwebi testified at Breytenbach's disciplinary enquiry that after withdrawing the charges and before 26 April 2012, he received representations from members of CI. In the context of those representations, he was referred to *"lots of classified information some of which was already in the public domain"* and his attention was drawn to *"certain*

dangers" around the things that were happening". He was also told that a certain prosecutor (Y) was going to front companies and threatening them that if they did not co-operate their businesses would be closed. Further, one of the officials who visited Mrwebi was a senior official from CI who gave him the information about the AG report. Mrwebi then briefed a senior official at the Hawks about this information. When this section of the transcript was put to Mrwebi in cross-examination, he said that it was *"some of the background"*.

660. It was put to Mrwebi that the information regarding the AG had not come from Dramat. He denied this and said that he met with CI in April 2012. Mrwebi's own evidence at the disciplinary hearing was that the information about the AG was given to him in January 2012 by a senior official of the CI (who happened to be *"a chief financial something"*).

661. He said his difficulty was that his *"visitors"* came in mid-April 2012.

662. Mrwebi had not told Mzinyathi or Breytenbach about the visit from senior CI officials. He did not go back to prosecutor Y because he had no way to verify the information. He testified that it was not Breytenbach, Ferreira or Smith. He also did not apprise the NDPP of the allegations that were being made against prosecutor Y.

663. Mrwebi later confirmed that the reference at paragraph 12 in his reasons for the decision in the record of the FUL matter signed in July 2012 pointing to the *"known fact"* that the transactions had been audited by the AG came from his visitors and that he *"verified it from other officials"*. The other officials he referred to might have been the National Commissioner who he met to raise his concerns about being the subject of surveillance.

664. Mrwebi confirmed that he was told what he captured in paragraph 12 of the reasons for decision:

"These representations clearly show that the expenses were incurred and reviewed and audited by the AG which we have already dealt with, that the Crime Intelligence documents were illegally accessed by police investigation. That various members and persons such as suppliers to Crime Intelligence were subjected to threats, intimidation and that they implicate Lieutenant General Mdluli and that Mdluli's allegations of an ulterior motive and abuse find independent verification in these presentations."

665. Mrwebi did not independently verify any of this information. He was referred to representations from Etta Szyndralewicz Attorneys (*"Szyndralewicz"*) dated 31 May 2012 addressed to both him and Jiba, which were delivered by hand. These were made on behalf of Major General Moodley (*"Moodley"*), Major General Lazarus (*"Lazarus"*), Colonel Vanker (*"Vanker"*), Colonel Barnard (*"Barnard"*), Colonel Singh (*"Singh"*) and Lieutenant Shaik (*"Shaik"*). Mrwebi said that he was not sure if these were the representations that he received, but confirmed that the name was familiar. Lazarus was a senior financial official at CI, who has subsequently been dismissed, Barnard was the co-accused in the Mdluli case.

666. The representations refer specifically to "our representations handed to Adv LS Mrwebi during a meeting held at the office of the National Prosecuting Authority during or about February 2012". Mrwebi did not recall a meeting in February, and said the representations were given to him in April. The letter continues that Mrwebi had written a reply dated 8 March 2012. Mrwebi said he did recall receiving representations but kept them in his safe. It was put to Mrwebi by the ELs that the letter from Szyndralewicz attorneys came from his safe. He said that he did not know. The representatives wanted Mrwebi's office to make a "security conscious decision" on matters being pursued by Roelofse, Acting National Commissioner, SAPS together with his investigation team and Adv Gerrie Nel ("Nel") from the NPA. The representators appear to labour under the impression that as a consequence of the February representations and whatever reply they received from

Mrwebi on 8 March 2012 that the investigations by SAPS members would have stopped but on the contrary it had in fact "intensified".

667. Mrwebi did recall having a discussion on the investigations *"encroaching on National Security"* techniques which will ultimately be exposed which in turn will cause an embarrassment to the Republic of South Africa on an International Level. It appears that the seriousness of the matter was explained in detail to Mrwebi in that meeting.

668. Mrwebi was then taken to a document entitled *"Mdluli timelines"*. He confirmed that his handwriting appeared on the document. The Mdluli timelines referred to representations from Szyndralewicz attorneys and Adv Killian on 23 February 2012. This is consistent with what is reflected in the representations. Mrwebi confirmed the name of the attorney and said that he was not so sure of the name of the counsel.

669. Attached to the letter from Szyndralewicz attorneys is Annexure **"GSL1"**, ostensibly the representations made to Mrwebi in February 2012. These representations refer to the representations which had been made on behalf of Mdluli, presumably those that were made in 2011. It states further that *"Despite the fact that instructions were given to withdraw criminal charges"* against Mdluli and Barnard, *"the investigation had continued unabated"*. It is also noted that the purpose of the representations was to protect members from being investigated. Mrwebi agreed that they were making representations to him to prevent CI members from being subjected to investigation.

670. The representations further stated as follows:

> *"That the uninformed, the likes of Colonel Roelofse, are now acting out of control when they discover, what seems to them on the face of it, as a crime, but in truth are necessary methods to successfully execute the mandate held by the Intelligence Services, is clear.*

The danger that this uncontrolled, uninformed investigation is posing, will be divulged to the reader hereof in person, with sensitive information that will not form part of these written representations."

671. At page 35 of Annexure **"GSL1"**, it is stated that:

"The accounting officer therefore being the divisional commissioner has authority over the functioning of the account in terms of policy, (the account being the secret service account) all expenses therefore were undertaken and assessed in terms of the policy in place, reviewed and audited by the Auditor General were produced, discussed and tabled at the joints. There were no negative resolutions from the GSCI and resultantly there is no basis for any investigation to be continued at this point in time".

672. It is further motivated that the intelligence environment is unique and that normal departmental policies and practices could not be applied to the secret service account. Finally, in the conclusion, the reader of the representations (being Mrwebi) was implored to take the necessary and requires steps *"to put the final stop"* to the investigation and request the return of all unlawfully seized documents.

673. Mrwebi testified that what he recalled vividly was that the visitors came to his office in April 2012. His own file with his own notes would remind him. He did not recall if he advised Jiba of the representations, but he had not discussed them with her. He agreed that it was an obvious attempt to influence a decision to prosecute, but said he did not know what the outcome of the representations was.

674. Mrwebi conceded that some of the information in his letter of 26 April 2012 was informed by the information from the secret representations.

675. He denied that he could only have gotten the information about the AG from his "secret visitors" but said that he got it from them *"as well"*. He had accepted that the AG had found nothing untoward in the SSA based on what they had told him.

676. When asked whether it concerned him that people who were the subject of the investigations within CI were coming to him secretly to tell him that these investigations must be stopped, Mwrebi said *"no"*. He added that fortunately he had not given any instruction to back off. He had not discussed the representations with any of the concerned prosecutors or the i/o. He conceded that the *"entire submission"* from the visitors was *"all just allegations"*.

677. Jiba testified that she was not aware of Mrwebi's meeting with members of CI. Although the correspondence dated 31 May 2012 was addressed to her and Mrwebi, she had no recollection of having receiving the correspondence and the substance did not ring a bell. Jiba had only become aware that there were investigations into CI when Viljoen and Bekker had briefed them. Jiba had told them to meet and work together.

678. In cross examination Jiba was asked if the way the Mendelow complaint was handled was appropriate. She agreed that in the case of a formal complaint being made, it was. She was asked if Mrwebi's decision not to inform her about the complaints from senior members of CI about a prosecutor was in order. Her response was that Mrwebi had a right to exercise his own discretion on how he chose to deal with the matter.

5.2.3. The Spy Tapes

5.2.3.1. The pleadings in the application to compel

679. The affidavit on behalf of the NDPP was deposed to by Jiba as the first respondent in the matter. She instructed the State Attorney to send the letter of 12 April 2012. The relevant paragraphs of that letter state as follows:

"4. Other material considered by the Acting NDPP at the time is subject to the confidentiality obligation and therefore cannot be disclosed – unless it may transpire that Mr Zuma's team may at a later stage be willing to consent to a relaxation of the confidentiality in respect of particular documents or particular contents, in which event we will advise you accordingly.

5. There are in addition certain tape recordings which are in the process of being transcribed, but that process has not been completed as yet and will take some additional time. On completion thereof, we are obliged to give an opportunity to Mr Zuma's legal team to consider whether there is any objection to disclosure of such transcripts. On completion of that process, if there is no objection to disclosure, they will be made available as a supplement to the record."

> "I am advised that it was agreed that before any material was to be made available to the applicant's attorneys as part of the reduced record to be produced, the third respondent's team should be given notice prior to such production, to give them an opportunity to consider whether they should raise an objection to such disclosure on the basis of confidentiality."

680. It is explained in her answering affidavit that the reference in Jiba's letter above to providing the opportunity to Zuma's team, prior to disclosure, to object to disclosure was *"pursuant to an arrangement made between counsel for the respective parties during argument in the SCA"*. In this regard, Jiba states the following:

681. The DA's team did not raise any objection to the system in terms of which the documents in paragraph 2 of the letter of 12 April 2012 had first been provided to Zuma's team to consider whether to object, nor to the same approach being adopted in relation to the spy tapes.

682. The process of transcription of the spy tapes took just over a month and they were provided to Zuma's attorney on 25 April 2012. This was done on the specific understanding that

Zuma's team would consider whether or not they would lodge an objection to their disclosure to the DA's team. Jiba indicated in her affidavit that the NPA expected this to be finalised within a brief and reasonable period. However, there had regrettably been a lengthy delay in receiving a clear response from Zuma's legal team in this regard.

683. In this regard, Jiba's affidavit contains a list of all the correspondence exchanged by the parties. In effect, this interchange took approximately 4 months (9 May 2012 to 18 September 2012) when the application was launched.

684. In this regard Jiba states:

"15. The State Attorney and I at the NPA have throughout this period been awaiting further communication and clarification from the third respondent's attorneys in relation to their attitude to disclosure of the transcripts. Although it is indicated in their letter of 9 May 2012 (Annexure "F") that they anticipated a period of two to three weeks being required, a far longer period elapsed.

16. On 3 August 2012 the applicant's attorneys wrote again to the State Attorney (Annexure "I"). They referred, inter alia, to a discussion between the attorneys in which Mr Seleka of the State Attorney (whose confirmatory affidavit is attached) had indicated that the problem was attributable to the delays on the part of the third respondent's attorney. This explanation was correct.

17. It should be pointed out that the NPA, as well as the State Attorney, were placed in the awkward situation in that while we had the intention and commitment to submit the reduced record in time, we were obliged to give an opportunity to the third respondent's legal team to indicate whether they had any objection as canvassed above (and if they did, any dispute would have to be determined by the Court)."

685. Though Jiba notes the DA query in their letter of 3 May 2012 with reference to the basis on which the NPA stated that Zuma's legal representatives were to be given

the opportunity to object to disclosure, and states that this was part of an agreement between the parties reached at the SCA, this is not mentioned in the correspondence to the DA, or at all.

686. The NPA undertook a careful search of their records, with the assistance of Mpshe to ensure that they had furnished all the documents he relied on when taking his decision (other than confidential representations, the recordings and transcripts). The exercise was completed a week before the application to compel was launched. No further material was found.

687. In relation to the intercepted conversations and transcripts thereof, which were dealt with in the memoranda, minutes and notes of meetings by officials of the NPA in the process of internal discussion and consultation, Jiba indicates that those documents arose from the representations by Zuma and are inextricably linked with the recordings or transcripts and so fell to be excluded by the **Spy Tapes 1** order.

688. Jiba denies that she failed to comply with the **Spy Tapes 1** Order (she alleges that she was acting in accordance with that order and the agreement between the parties at the SCA) and further denied that she acted *mala fide*.

689. Finally, in relation to the question whether or not the recordings or transcripts should be made available to the DA, the NPA was of the view that it would abide the decision of the Court if the DA and Zuma could not resolve the issue between themselves.

5.2.3.2. The High Court judgment in the application to compel: DA v ACTING NDPP (Mathopo Judgment) and advices received

690. Zuma did not file an answering affidavit in this matter and chose to rely on Rule 6(d)(iii) to argue a point of law that the material in issue did not form part of the qualified record of proceedings.

691. Mathopo J in the Pretoria High Court considered that there were three issues before the Court:

691.1. First, whether the first respondent (the Acting NDPP) should hand over to the applicant electronic recordings and transcript thereon (transcripts);

691.2. Second, whether the first respondent should be ordered to produce internal NPA memoranda, reports or minutes of meetings dealing with the contents of the recordings and transcripts insofar as these documents do not directly refer to the third respondent's written or oral representations.

691.3. Third, whether the first respondent is in contempt of the SCA order of 20 March 2012.[240]

692. The Court noted the position of the Acting NDPP as having "no view" regarding the spy tapes or transcripts thereof[241] and that "on a proper interpretation of the SCA order, the transcripts formed part and parcel of the order and are protected on the basis of privilege or confidentiality".[242]

693. The DA had alleged in its papers that the transcripts were not protected by confidentiality and Zuma had not submitted any evidence to gainsay the averments. Further, a substantial portion of the transcripts had already been disclosed in the public domain without Zuma claiming confidentiality. The transcripts relied on were declassified and authenticated by the NIA. The third respondent merely gave the NPA access to the recordings and not copies or transcripts (and so they were not submitted as part of the representations). Further, Zuma had shown no prejudice.[243]

694. The Court noted that paragraph 33 of the SCA Order makes it clear that the concerns of the third respondent must be addressed. However, no such concerns had been raised

240 Mathopo Judgment, para 11.
241 Mathopo Judgment, para 13.
242 Mathopo Judgment, para 16.
243 The weaknesses in the third respondent's case as set out at pp. 9 – 11, paras 21 – 25.

by Zuma and, in the absence of such concerns, Zuma has *"no right to independently edit the record [he] must produce everything"*.[244]

695. The Court noted in relation to the Acting NDPP:

"[32] Finally on this point, I need to say something about the conduct of the first respondent with regards to the transcripts. Counsel for the first respondent quite surprisingly, submitted that the first respondent "holds no view" with regard to the transcripts and does not join issue with the applicant and third respondent and will abide the decision by the court. The stance adopted by the first respondent is irresponsible, if regard is had to the fact that it was one of the parties to the proceedings in the High Court and SCA. In terms of the SCA order, it is obliged to file the record. Adopting a neutral position is akin to abdicating its duties and responsibilities. It most certainly misconceived its position".[245] (our emphasis)

696. In relation to the internal documents, the following comment by the Court is relevant:

"Counsel for the first respondent conceded that the transcripts can be severed from the documents forming part of other representations. This concession appears astounding and self-contradictory when regard is had to the submission made by the first respondent in its answering affidavit which read as follows.

> Further the NPA confirms that the contents of the conversations that had been intercepted and were transcribed were indeed dealt with in the memoranda, minutes and notes of meetings etc, by officials of the NPA in the process of internal discussion and consultation leading up to the decision by Adv Mpshe"[246]

697. The contempt of court application against Jiba was dismissed. The Court agreed with the Acting NDPP that affording Zuma an opportunity to raise his concerns was in line

244 Mathopo Judgment, para 29.
245 Mathopo Judgment, para 32.
246 Mathopo Judgment, para 36.

with the SCA order. Thus, the conduct of the NDPP was found not to be deliberate or wilful non-compliance.[247]

698. On 21 August 2013 Macadam provided the NPA with an opinion on the prospects of successfully appealing the Mathopo judgment and whether the issue of confidentiality could successfully be relied upon.

699. Macadam considered whether the SCA in making the **Spy Tapes 1** order contemplated the production of the tape recordings and documentations related thereto. He pointed out that the SCA in **Spy Tapes 1** made several statements which would be indicative of its attitude, including the paragraph at page 18 and 19 which the SCA relied on in **Spy Tapes 2**. Macadam advised that the order of Mathopo J was in line with the judgment and orders of the SCA.

700. Further, the stance taken by the Acting NDPP that she held no view and would abide the decision of the High Court, together with the concession that the transcripts could be severed from the documents forming part of the other representations led Macadam to conclude that it would be impossible to bring a successful application for leave to appeal.

701. In relation to the internal memoranda and whether they were excluded by the SCA order, Macadam pointed out that it was trite that NPA documentation did not fall within the exclusionary provisions. Mpshe had obviously not accepted the word of Zuma's lawyers regarding the spy tapes and had relied on the tapes themselves (from the NIA) and the assessments of his staff in relation thereto. Consequently, one could not argue that memoranda dealing with the content of the recordings were inseparable from the representations themselves.

247 Mathopo Judgment, para 48.

702. Further, the NIA had declassified the spy tapes and thus waived any privilege, and the NPA had made parts of the tapes public, which constituted a waiver of any privilege the NPA could have claimed. The reasoning behind protection of representations is that they normally amount to an admission of guilt by the suspect and public disclosure would expose them to civil litigation or a private prosecution. Representations are thus treated as akin to attorney / client privilege.

703. Macadam noted further that it is trite that not all attorney/client communications are covered by privilege and "[i]f Mr Zuma's representations contained quotations from conversations which were subsequently provided in a declassified form to the NPA and thereafter disclosed by the NPA to the media and general public, there can be no question of claiming any form of privilege in respect of those communications."

704. Finally, Macadam advised that a full record was necessary so that the reasons for the decision could be justified with reference to the facts upon which they were based. The exclusion of key material would ultimately prejudice the NPA's case on the merits.

705. Macadam recommended that the High Court orders be complied with and that the documentation deemed to be confidential be marked and dealt with as per the Court's orders, that any reference to Zuma's representations in the documentation be redacted to the extent of that reference. He noted that Abrahams had perused the opinion and agreed with the contents.

706. The Memorandum from Judge Hurt which deals with the redaction of the confidential documents as ordered by the SCA in **Spy Tapes 2**, dated 8 September 2014, mentions that there were documents referred to in the record which were not delivered. On 19 September 2014 Chita addressed an internal memo to Jiba and Nxasana to update them and to advise that Mpshe should be consulted to give guidance on the documents relied on by as requested by the DA on 17 September 2014.

707. On 29 November 2012 Kennedy sent a memorandum to the State Attorney in relation to the papers in the **Spy Tapes** matter.

708. He expressed his concern that the copy of the answering affidavit sent to him was accompanied by only one confirmatory affidavit by Peter Seleka *("Seleka")*. The other confirmatory affidavits, which he had drafted when preparing the answering affidavit, were not attached and he therefore requested that this be corrected. The outstanding confirmatory affidavits were to be signed by Mpshe, Hofmeyr and Mzinyathi. Kennedy also pointed out various other documents in the litigation which also had not been provided to him.

709. Kennedy notes that the DA, in their relying affidavit has proposed a *"controlled disclosure"* of the internal memoranda and reports which deal with the representations of Zuma. The DA suggested that the document be delivered to the attorneys of the DA and Zuma who may not disclose their contents to any third parties.

710. Kennedy noted that this is consistent with the practice generally followed by the Courts and advised that the NPA should seek to agree to some such mechanism for the limited and confidential disclosure of the internal documents, such as allowing the DA to inspect the documents at the offices of the State Attorney and/or counsel, provided that they are not permitted to make recordings or copies thereof.

711. In her answering affidavit in the **GCB HC** matter Jiba states that she was at all times represented by a team of experienced counsel, Kennedy and Maenetje (*"the Kennedy team"*).

712. Jiba notes that the directive of the SCA was not complied with within the stipulated 14 days as the tape recordings were in the process of being transcribed.

713. She was concerned that as the bulk of the representations, which were to be excluded from the reduced record, concerned the tape recordings, the content of these could potentially breach confidentiality relating to the representations. For that reason, the decision was taken, on the advice of senior counsel representing her, *"to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tape recordings.*"

714. Jiba notes that in the application to compel the production of the record, although the High Court held that confidentiality did not extend to the transcripts, the Court agreed that affording Zuma an opportunity to raise his concerns was in line with the SCA order and she was not found to be in contempt of Court.

715. The SCA, however, criticised Jiba for failing to file a confirmatory affidavit by Mpshe. She notes that this was indeed done and attaches a copy to her affidavit. The affidavit does not have a date stamp but was signed three months prior to the hearing. Jiba notes that it must have been erroneously omitted from the record on appeal. Consequently, the comment by Navsa J regarding the lack of an affidavit was incorrect as was the comment that *"affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent."*

716. Jiba then turns to the criticism of both the High Court and the SCA that she adopted a "supine attitude" and/or a neutral position regarding the transcripts. She states:

> *"I accept that the SCA has criticised me for not taking an "independent view" about confidentiality. I respectfully submit that this was a result of adopting a cautious approach, in order to ensure that I did not unwittingly infringe on the rights of either of the parties · in the Democratic Alliance matter. I respectfully submit that this does not amount to conduct that is less than objective, honest and sincere and does not render me not fit and proper to practice as an advocate."*

717. Further, Jiba explains that the NPA could not take sides in the matter and it was in everyone's interests that the SCA order to clarified:

"The qualification that it made in its order to exclude written representations if production thereof would breach confidentiality attaching to representations is what turned out to be the bone of contention between the parties. It is for this reason that even Mathopo J ruled that this matter should be referred to an independent arbitrator to determine which material this was. This was also the same approach adopted by the SCA in appointing a retired Judge Hurt to arbitrate on this issue.

I respectfully do not agree that the criticisms by the SCA were well founded in light of this. If anything this proves that the advice of the NPA legal team to abide the decision of the court and not be party to their contestation about which material forms part of the representations and which did not was quite sound and correct. I also submit that the order was not simple hence the appointment of Judge Hurt to assist in this matter."

718. The NPA abided the decision of the SCA and was not before the SCA. The decision to abide, she noted, was informed by advice from counsel and was not the case of a lack of interest in being of assistance to the SCA.

719. Jiba disputed the allegation that the NPA took no steps to ensure a response from Zuma's legal team:

"We did so through the office of the State Attorney on several occasions. I do not have copies of that correspondence. We even called one Mr Seleka to attend an EXCO meeting to discuss this matter. He undertook in that meeting to send more correspondence to Mr Zuma's legal representatives."

720. Jiba responded to the allegations in relation to the **Spy Tapes 2** matter in her answering affidavit in the **FUL** application to have the failure to suspend her and institute an enquiry into her fitness to hold office set side along similar lines as in the GCB answering affidavit.

721. Jiba pointed out that the SCA judgment (at para 98) drew a distinction between the *"Acting NDPP"* and *"the office of the NDPP"*. She continues:

> *"In particular the Court criticised the "office of the NDPP" for not taking an independent view about "confidentiality, or otherwise, of documents and other materials with in its possession".*

722. Jiba concluded:

> *"Ultimately the judgment of the SCA in the Zuma/DA matter does not demonstrate that my conduct was less than objective, honest and sincere. It certainly does not support the contention that I should be suspended. The fact that the SCA itself ended up appointing Judge Hurt as an arbitrator to deal with the judgment in determining which documents formed part of the reduced record, shows that the previous directive of the SCA, in respect of which the application for contempt of court was initially heard before Mathopo J, was not a simple one."*

723. In her affidavit before the Enquiry dated 14 January 2019, Van Rensburg notes that Mokhatla stated in an Exco meeting that both Jiba and Hofmeyr bypassed her in decision-making in the **Spy Tapes** case.

724. The stance adopted by Jiba in the **Spy Tapes 2** matter, as indicated by Kennedy, was indeed adopted on his advice.

5.2.4. GCB

725. In this part of the report, Jiba's evidence as set out in her affidavit in both the **GCB** matter and the affidavit to which she deposed in the Breytenbach Labour Court matter is dealt with. As a point of departure, we first:

725.1. summarise some of the basic principles which the Courts have set down in relation to the expectations of officers of the Court; and

725.2 detail the evidence of other witnesses which provides some of the background to the evidence of Jiba.

5.2.4.1. The legal standard

726. In addition to what is required of prosecutors as set out in the legal framework section of this report, officers of the Court are required to act with scrupulous honesty and personal integrity.[248]

727. The SCA in **Geach** held as follows:

> *"… after all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedoms is without parallel. As **officers of our Courts**, lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute **personal integrity and scrupulous honesty are demanded of each of them.** It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the Roll."*[249]

728. The NDPP is not an ordinary litigant – as both an officer of the Court and the head of the NPA, the duty on the NDPP is arguably more stringent. This was clarified by the SCA:

248 Kekana v Society of Advocates of SA 1998 (4) SA 649 (SCA) para 13; Law Society of the Cape of Good Hope v Randell [2015] 4 All SA 173 (ECG) paras 70 to 74.
249 General Council of the Bar of South Africa v Geach & Others 2013 (2) SA 52 (SCA) para 87.

"The NDPP is no ordinary litigant. She is an officer of the court, who is duty-bound to take the court into her confidence and fully explain the facts so that an informed decision can be taken."[250]

729. In taking this approach, the SCA cited its own decision in **Kalil NO v Mangaung Metro Municipality**[251] to the effect that:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance…."

730. This is the standard against which affidavits deposed to by officers of the Court must be assessed.

5.2.4.2. Background evidence of other witnesses

731. The Legal Affairs Division (*"LAD"*) is the internal legal advisory body in the NPA. Both Ramaite and Mokhatla confirmed that not all cases of civil nature are dealt with by LAD. Mokhatla, as head of LAD does not sign off on all advices rendered. Ramaite confirmed that papers would be served either on the NDPP or the State Attorney. Where the NDPP was cited they would usually go to the office of the NDPP, and sometimes to LAD. Not all Court papers reach LAD and where the NDPP is cited, it is up to the NDPP to determine whether advice is needed on how to deal with the case and to what extent a member of LAD would assist. The documents would not be supplied to LAD "*in the ordinary course"*. These were cases driven at the discretion of the NDPP from the office

250 Maharaj and Others v M&G Centre of Investigative Journalism NPC and Others 2018 (1) SA 471 (SCA) para 24. See also: Mulaudzi v Old Mutual Assur Co (SA) Ltd 2017 (6) SA 90 (SCA) para 42.

251 2014 (5) SA 123 (SCA) para 30.

of the NDPP. It was up to the NDPP to decide whether to seek the advice of LAD and who in LAD would assist him or her. This was also substantially corroborated by the evidence of Hofmeyr.

732. Under Jiba's leadership, the mandate and personnel of LAD was reduced substantially with most senior prosecutors being deployed elsewhere with a number of them now reporting to Adv Thoko Majokweni (*"Majokweni"*) in her capacity as the head of the National Prosecuting Services (*"NPS"*). As a result, the LAD component was reduced to one DDPP (Nel), approximately 10 State Advocates and 3 administrative staff, with little experience in law In litigious matters LAD instructs the State Attorney and through the State Attorney, counsel. LAD members would assist with compiling briefs for Counsel, ensuring the timeous filing of Court documents, arranging and attending consultations with Counsel, securing witnesses, requesting and providing evidence and information and tracking Counsel's invoices where necessary. LAD would sometimes choose Counsel who would then be briefed by the State Attorney.

733. Mokhatla met weekly with her staff at LAD to discuss the cases pending and work collectively on difficult issues. LAD staff had to report to Mokhatla weekly. Chitha, was an attorney with civil litigation experience. Mokhatla welcomed his involvement. Chitha was expected to report directly to Mokhatla. Whilst Jiba and Mokhatla identified Chitha as a liaison between them when Mokhatla was not available, Mokhatla explained in cross examination that this did not mean that Chitha would *"stand"* in her place, it was for when *"she cannot reach me she will go to Chitha and say, this is what I need. Chitha will then come to me"*. Mokhatla had limited involvement in **FUL** and no involvement in **Booysen**.

734. Generally, in all high profile cases where the Acting NDPP's attention was required, the Acting NDPP had a greater level of involvement than in other cases, and the matter would be managed from her office. There were also certain matters where the Acting NDPP retained controlled of the matter, to the exclusion of the LAD. She was also kept

abreast of all but the most *"minor"* cases where decisions such as whether to file an exception were required.

735. Jiba would also receive monthly reports on pending cases. Where her input was required, she was consulted, often informally, through her PA. Though there were weekly meetings held with Jiba attended by the DNDPPs, which did not as a norm deal with high profile cases.

736. Mrwebi *qua* client would have had to provide LAD with instructions. When counsel were appointed, they received instructions from the relevant business unit in the NPA, either through LAD or directly. The documentation or witnesses that inform any defence in civil litigation must be provided by the business unit.

737. If the advice of counsel was not in accordance with what the client understood as the issues, he was not bound to follow that advice.

5.2.4.3. Motimele

738. Advocates M Motimele SC, VS Notshe SC and S Phaswane (*"the Motimele team"*) were initially briefed and prepared a short memorandum for the State Attorney in relation to the filing of the Rule 53 record. The date on which the memorandum was prepared is unclear.

739. In the memorandum, the Motimele team state that following their preliminary consultation, they were of the view that the matter was premature and that they could oppose it on that basis without filing further papers. However, they raise concerns that developments regarding Mdluli may make it appear that their actions amount to a *"cover up"*.

740. After explaining that Rule 53(4) renders filing of records for decisions under review mandatory, **precedent is cited to show that failure to file the record forming part**

of the decision may jeopardise the NDPP's case, as the decisions would not be supported by anything.

741. Two options are suggested. The first involves raising a point *in limine* to argue that it is not necessary to file the record at that stage. The worst that could happen, in the Motimele team's view, would be that the officials would be required to file it. However, the memorandum explains that this option is *"fraught with risks and negative publicity"*.

742. The second option, which the memorandum recommends, is to file a truncated record. This truncated record, in their view, need only contain reasons and a summary of the record and would purportedly suffice as the record of proceedings. They recommended that the officials scrutinise the relevant dockets to ensure that the dockets cannot be despatched. The memorandum states *"[i]t will serve no purpose to refuse to despatch the present dockets if no harm will be suffered"*. It is unclear from the memo what the nature of the harm is or how it would be suffered. Presumably what was meant is that the criminal proceedings planned are not jeopardised by disclosing a full docket as part of a Rule 53 record.

743. During an interview which Van Rensburg, acting on Nxasana's instruction, had with Motimele, he explained that he had been made aware that Jiba had called the State Attorney in and had asked why it was taking so long to debrief counsel. As the client, Jiba was not satisfied with Motimele because there was an affidavit but Motimele was refusing to finalise it without a consultation. Jiba was of the view that there was no need for consultation because she and Mrwebi had made written comments and she considered that sufficient. Jiba stated that the best way to proceed would be to appoint another counsel.

744. In Motimele's view, the consultation was needed because as counsel, he had serious concerns about Jiba's comments because some of them included saying *"why say take*

note of this?" or comments to the effect that certain statements in affidavit would be brought up on review.

745. The Motimele team also responded to the withdrawal of their brief by addressing a memorandum to the State Attorney, Pretoria indicating that they had settled the answering affidavit and sent it to the attorney of record for onward transmission to clients. The NDPP was on maternity leave and thereafter supplementary founding papers were filed which required a response from the clients. Hence, they requested a consultation with clients but some dates were confirmed and then cancelled at the last minute. It is not clear from this memo who precisely was responsible for the cancellation of consultations.

5.2.4.4. Motau

746. The Motau team was briefed very late in the matter and instructed to produce an answering affidavit, which was due on 24 June 2013. A draft was produced and circulated on Friday, 21 June 2013 and comments were requested by mid-morning Sunday, 23 June 2013. Motau confirmed in an email dated 26 June 2013 that the requested comments were not received. They did, however, receive an email from the NPA *"to the effect that an affidavit be prepared in the name of Adv Mrwebi which [the Motau team] advised has been incorrect"*.

747. Despite this, Motau, in the same email, requested that comments be provided on the draft he had sent for comment and that a condonation affidavit be furnished to explain the failure to comply with the filing period as set out in the DJP's directives. The matters of splitting the affidavits, privilege and the draft affidavits were to be discussed at a consultation to be scheduled.

748. On 26 June 2013 Motau and Makola discussed with the Acting NDPP and Chauke in an "unplanned consultation". Both indicated that they were *"unaware of the fact that the draft affidavit had been sent, and the concerns about the approach suggested by the NPA"*. After the consultation, the original draft affidavit was sent to them *"with a clear*

understanding that they were going to give their comments and input in the said draft". Lepinka confirmed receipt hereof.

749. The NPA then furnished the Motau team with the split draft answering affidavit on the basis that they were no longer in possession of the original draft. Motau again sent them the original draft affidavit.

750. While waiting for the NPA's input, the Motau team perused the transcript from Breytenbach's disciplinary hearing and noticed contradictions between the evidence given there and the contents of the draft affidavits as split by the NPA. The Motau team wished to add these concerns to the other issues to be discussed at the intended consultation, but before the consultation took place, the State Attorney advised that the NDPP had decided to sign the split affidavit and had instructed the attorneys that it had to be filed.

751. Because of this, as well as the inclusion of a paragraph from the original affidavit that the NPA had acted on the legal advice of its representatives, when in fact they had disregarded the advice rendered by the Motau team, the team withdrew from the brief. It is to be noted that they were on brief for such a short period of time and had not been served with a proper set of papers until very late. It is not apparent that they were given the Mdluli docket or the Rule 53 record. Their instructions did not include advising on the Rule 53 record but to prepare an answering affidavit rather speedily. Their advices and correspondences are silent on the matter.

752. The Motau team brought the following to the attention of the NPA in their memo, which was however rendered belatedly. It must be understood that given the time of this memo it was not available as written advice at the time the litigation ensued:

752.1. that Mzinyathi's evidence indicated that there was no consultative process followed by Mrwebi, the latter having taken a decision without the former;

752.2. Mzinyathi believed there was a *prima facie* case and he did not understand why the matter was being withdrawn. Mrwebi stated that the allegations against Mdluli needed to be investigated by the IGI. Mrwebi also informed Mzinyathi that he had already communicated his decision to Mdluli's attorneys and he could not reverse his decision. Mzinyathi did not want the prosecutor placed in a compromised position and it was agreed that the matter would be withdrawn, and investigations would still be pursued.

752.3. Under cross examination, Mzinyathi stated that when he spoke to Mrwebi on 5 December 2011 he was of the opinion that Mrwebi had no firm view and was still going to investigate the matter. Further Mzinyathi had seen the IGI on 8 December 2011 and been informed that the IGI could not be involved in investigating crimes. Mzinyathi confirmed that Mrwebi said he was *functus officio* on 9 December 2011 as he had already informed the attorneys. Mzinyathi had not known that the letter to the attorneys was sent on the same day as the memo dated 4 December 2011.

753. In relation to Mrwebi they pointed to a number of discrepancies:

753.1 Mrwebi said there was no difference between a provisional withdrawal or otherwise because if new evidence came to light, they would be able to bring the prosecution up again;

753.2 Mrwebi said there were two decisions made: he took the first decision and there was another decision taken to have the matter withdrawn;

753.3. Mrwebi admitted that Mzinyathi did not agree with his decision to withdraw the charges;

753.4. Mrwebi stated that the meeting of 5 December 2011 mainly consisted of him giving Mzinyathi his view with not much response from Mzinyathi;

753.5. Mrwebi testified that on 9 December 2011 he convinced Breytenbach and Mzinyathi of the reasons for his decision. There was no unhappiness about the decision made.

753.6. The Panel asked Mrwebi about his understanding of consultation in the context of the NPA and he stated that there needs to be an agreement broadly on what needs to be done between the parties. Mrwebi however, states that for him, consultation does not mean that there had to be consent. It was deemed a concession with justifications.

754. The Motau memo also refers the reader to the page references of specific passages in the transcript dealing with the cross examination of Mrwebi on the consultative process, the lawfulness of the decision, the involvement of the IGI, the letter in response to the request for a review of the decision by Mrwebi (it is stated that this contradicted his evidence in relation to an agreement being reached on 9 December 2011 and that this indicated that the matter was closed and the NPA would no longer be involved).

755. On the basis of the above, the Motau team concluded as follows:

755.1. Mzinyathi stated that he was never in agreement with the decision to withdraw the charges, the decision was made without his knowledge and in order to save the reputation of the NPA he agreed to withdraw the charges, pending the investigation.

755.2. There is no process for ratification of the decision, nor did it appear that Mzinyathi wanted to do so.

"It is our view that the evidence by Mzinyathi is damning as it indicates that legislative requirements were not followed by Mrwebi when withdrawing the charges against Mdluli. There seemingly was no consultative process. Under cross-examination, there were a number of issues that were raised which could not be undone or clarified in the re-examination. The

discrepancies of the memo regarding the date are the least of the NPA's worries having regard to what was stated by Mzinyathi in respect of the consultative process".

756. Considering the above, the approach taken should be entirely focussed on the remedy.

757. The Motau team never had the opportunity to give this advice.

758. On 3 July 2013 Chitha wrote to Sebelemetsa in relation to the answering papers which were due. He attached Mrwebi's answering affidavit with the confirmatory affidavits of Jiba and Chauke for filing. He confirmed that the *"NPA has prepared its own opposing papers due to the fact that counsel was making demands that could cause further delay in the finalisation of papers."*

759. Chitha lists the demands of counsel:

759.1 Counsel wanted Mrwebi and Jiba's comments on the original affidavit. Comments made by the LAD were based on the instructions received from Jiba and Mrwebi, and were part of the file sent to counsel;

759.2 Counsel wanted copies for the junior advocates which were made with the exception of two copies of transcripts which were in counsel's possession;

759.3 Counsel wanted the LAD to appoint private attorneys to deal with the matter. This would have caused further delay in filing the NPA's affidavits.

760. In addition, we understand counsel wanted to consult before papers were finalised.

761. Chitha further noted that the NPA was 8 days late in complying with the DJP's directives. He stated that "we are in the process of preparing a condonation application and we will thereafter approach the office of the DJD and explain the delay in complying with his directives."

762. He responded to Chitha on 5 July 2013 advising that the answering affidavits had been served and filed. He further advised that he received a call from Counsel that they could no longer assist and would forward a memo setting out the reasons for their withdrawal. On 10 December 2013, the Motau team asserted that they handed a memorandum to the State Attorney. There is no explanation, given Motau's withdrawal, and why it took so long to brief other counsel.

5.2.4.5. Halgryn

763. The Motau team was replaced by the Halgryn team, consisting of Advocates L Halgryn SC, J C Uys and E Mahlangu, briefed to proceed with the matter.

764. On the ELs' request to address certain statements made by Jiba in her **GCB** affidavit, Halgryn submitted a statement to this Enquiry. In it, he explains that after they had accepted the brief in the **FUL HC** matter, they received numerous documents and held a series of meetings between 5 and 8 August 2013. In addition, the Enquiry was also provided with Uys' notes of those consultations.

765. On 5 August 2013, Halgryn sent an email to Chita explaining that the briefs he had received were in a shocking condition. The email contained a list of issues which Halgryn felt had to be addressed. Apart from the questions of law, some of the issues raised included asking: why all the criminal charges against Mdluli were withdrawn even though only the murder charge had been cleared; why the full record of proceedings had not been filed, for example the Colonels' affidavits, and; what had gone wrong with the late filing of the answering affidavits. The last point had to be determined for purposes of preparing an application for condonation.

766. The last consultation, on 8 August 2013, took place in the NPA offices, lasted about 35 minutes, and was attended by Jiba, Sebelemetsa and Chitha. Several points were made during this meeting:

766.1. The record which was filed was *"wholly inadequate"*. A proper and complete record had to be filed. Failure to do so would result in the NPA losing its case.

766.2. At least 2 supplementary affidavits had gone unanswered by Jiba and Mrwebi – resulting in the allegations raised in them being uncontested. Jiba was purportedly shocked to learn this.

766.3. The answering affidavits had been filed late in terms of both the Rules of Court and a specific directive issued by the DJP.

766.4 Continuing with the matter would require placing the full record before the Court, filing supplementary answering affidavits and preparing condonation applications for both as well as for the late filing of the answering affidavits.

767. The Halgryn team expressed the view that Jiba had an obligation to review the relevant decisions (decisions of Mrwebi and Chauke) to come as Acting NDPP and, depending on the content of the dockets, to issue instructions for the prosecution to continue. Furthermore, the Acting NDPP's sole defence of internal remedies not having been exhausted could not stand in law, as the NDPP's constitutional power to review could not be construed as an internal remedy.

768. Jiba was purportedly receptive to the advice she had received from the team and asked that a written memorandum containing the advice be submitted to her.

769. During the consultation, the Halgryn team sought specific instructions from Jiba to enable them to advise whether there was a *prima facie* case and whether any parts of the dockets might be privileged. Jiba purportedly gave that instruction, but asked that the memorandum be provided first, following which she would immediately address this aspect. She also indicated that this was the first time she had been specifically advised on all the pitfalls and deficiencies of the matter and that she appreciated the Halgryn team's candour and straightforward advice.

770. The team prepared and submitted the requested memorandum on 12 August 2013. There was no further consultation with Jiba, and their mandate was terminated a few hours after the memorandum had been submitted.

771. The concluding remarks in the 12 August 2013 memorandum set out the Halgryn team's concerns at the time. It explains that the NDPP found herself in a very awkward position, having acted on legally unsustainable advice. The absence of records was bound to embarrass the NDPP and further:

> "a) The affidavits filed do not make out any defence at all and if anything – smacks of a high-handed approach, discernible by:
>
> b) A clear trend not to do anything timeously or to timeously comply with legal obligations in terms of our law and the Rules of Court, with no applications for condonation;
>
> c) failures to file the full records/dockets timeously or at all with no explanation;
>
> d) complete failures to provide rational and logical reasons – with detailed references to the records / dockets – to justify the decisions to discontinue the prosecutions;
>
> e) failures to respond to two supplementary affidavits by FUL;
>
> f) bland and unsubstantiated (and legally incorrect) contentions that the Court lacks jurisdiction because of the alleged 'internal remedy/ requirement' that the NDPP first of all has to review and set aside the decisions."

Finding that no defence could be raised on the papers as they stood, the Halgryn team strongly advised that their advices be heeded. Reiterating that they were devoted to

protecting the interests of the NDPP's good office and the integrity of the NPA, they expressed that going outside of the ambit of their advice would render them unable to do so.

A memorandum prepared by the State Attorney, Sebelemetsa, on 27 Feb 2015 established that Chita had contacted him on behalf of the respondents (Jiba and Mrwebi in their official capacities) with an instruction for the Halgryn team's mandate to be terminated. Sebelemetsa adds that he does not know why the advice of Motau and Halgryn had been ignored."

772. In her answering affidavit in the **GCB HC** matter, Jiba explains why she and the NPA team could not agree with the advice given by Halgryn's team. She states that the team had made several assumptions:

772.1. that there was a *prima facie* case against Mdluli which had to be enrolled;

772.2 that Chauke's decision not to proceed with the other charges while referring the murder charge to a formal inquest was incorrect, and;

772.3 that Jiba had "stood back and [done] nothing since the withdrawal of the charges". She also states that the filing of a complete Rule 53 record was a "relatively uncertain position of the law at that time".

773. Halgryn disputes these allegations to the extent that they do not strictly accord with the contents of their 12 August 2013 memorandum. He states:

773.1. No assumptions were made. The advice given was based on the facts as they appeared from the evidence and upon proper interpretation of the law;

773.2. It was *"patently obvious"* that a proper record meant that the entire record had to be filed. This was not done. The docket consisted of 3 level arch files, yet the record which was submitted consisted of only 67 pages; and

773.3 During their consultation with Jiba on 8 August 2013, she did not mention anything regarding a meeting or engagement with Mrwebi or Chauke despite averring so in paragraph 112 of her affidavit.

774. The Halgryn team had told Jiba of the need to file the complete Rule 53 record in no uncertain terms, explaining that a review Court *"cannot conceivably review a decision without the full record of the proceedings being provided to it"*. Not doing so can only be either negligent (which is inexcusable) or deliberate, which will amount to deliberate misrepresentation to a Court.

775. A memorandum prepared by a junior on the Halgryn team quoted part of the SCA's order in the **DA v Acting NDPP** case which expressly states that the *"reduced record shall consist of the documents and materials relevant to the review, including the documents before the Acting NDPP when making the decision and documents informing such decision"*.[252]

5.2.4.6. Hodes

776. According to the Hodes team, they were briefed to represent Jiba in her capacity as the Acting NDPP in the Booysen matter. In an affidavit dated 3 February 2015, Hodes sought to explain the contents of Jiba's answering affidavit. This includes explaining the origin of paragraph 17 of the answering affidavit, which came under criticism in Gorven J's judgment.

777. The answering affidavit was drafted by his junior and was based on an internal memorandum dated 4 June 2013, together with the docket. The internal memorandum was the foundation for paragraph 17. Hodes' affidavit draws attention to 4 points made in paragraph 50 of the memorandum:

777.1. Booysen was the *de facto* commander of the Cato Manor Unit;

252 2012 (3) SA 486 (SCA) at para 52.

777.2. The monetary rewards documents showed how Booysen participated and benefitted in the Taxi Violence cases;

777.3. The statements by Ndlondlo, Col. Aiyer and Danikas incriminated Booysen, and;

777.4. Booysen details his knowledge of the Taxi Violence killings in an answering affidavit used in the Mkhize matter.

778. Hodes further explains that, despite Gorven J's judgment mentioning several concessions made by him during the course of proceedings, he only made a single concession relating to the Court's jurisdiction. He disavows the judgment's indication to the contrary and states that the record of proceedings can corroborate his version.

779. Together with his junior, Hodes prepared an application for leave to appeal against Gorven J's judgment and filed it on behalf of the Acting NDPP. However, on 25 March 2014, the newly appointed NDPP (Nxasana) decided not to appeal the judgment. The application was withdrawn.

780. During Nxasana's investigation into Jiba and Mrwebi, and while being interviewed by Van Rensburg, Hodes expressed his views on the Mdluli criminal matters. He said that he believed Mdluli ought to have been prosecuted. In his view, it was an open and shut case. So much so, that Hodes had given an undertaking to the SCA that the NPA would consider charging.

5.2.4.7. Jiba's evidence

Jiba evidence in relation to the FUL matter and the role that LAD plays

781. Jiba's evidence in relation to the Legal Affairs Division (*"LAD"*) is that it was they, rather than her, that handled all matters pertaining to civil litigation. She had been cited as a respondent in her representative capacity only, which meant that she did not personally instruct attorneys and counsel to represent her. The DNDPP responsible for LAD is

Mokhatla. Jiba explains that Mokhatla is supported by a team of DDPPs and Senior State Advocates and Senior Prosecutors.

782. Jiba explains that when the NPA and its officials are joined in proceedings, they behave "as any client" in their representative capacity and rely on the advice of the State Attorney and the advocates that are briefed. She states that she does not personally or alone take part in the litigation on behalf of the NPA. At no point had she "acted on a frolic" of her own.

783. Mokhatla denies this:

783.1 In relation to Jiba's statement that LAD is tasked with dealing with briefing all counsel in all matters and that she does not brief counsel directly, Mokhatla denied that this is correct. LAD was excluded on at least the **FUL** and **Booysen** matters which were high profile. She sets out her explanation of what LAD's responsibilities were and how they operated, in her affidavit before this Enquiry. In her affidavit, Mokhatla details the process which was followed to manage civil cases. In addition, Mokhatla described Chitha's role and how he failed to report back to her on the FUL matter so that she did not supervise the matter, as Jiba alleges she did.

783.2 Jiba's affidavit refers to a confirmatory affidavit by Mokhatla. However, Mokhatla says that although she was initially asked to sign one, she indicated that she had no difficulty signing a confirmatory affidavit and would set out her views at the time, which was that the application was premature as it was for the DPP to decide. Mokhatla was thereafter not approached for a confirmatory affidavit.

783.3 Paragraph 84 also refers to the fact that the matter was under the supervision of LAD. Asked by the Chairperson whether this was correct, Mokhatla responded that although Chitha appeared to have dealt with the **FUL** matter, she, as the

Head of LAD was not aware of or involved in most of the matter until the tail end. She therefore would not agree that it was conducted under LAD's supervision.

Jiba evidence with reference to Motimele

784. Jiba's evidence in relation to Motimele is dealt with in her Answering Affidavit at paragraphs 85 -91. In paragraph 92 of her affidavit, Jiba sets out the attempts made by LAD *"to have the matter attended to"*.

785. Mokhatla was aware that Motimele SC and Notshe SC were briefed on the matter. However, she was not aware of their removal from the brief when it happened, or the reasons for that. Once again, this had been dealt with directly by Chitha without her knowledge.

Jiba in relation to the Rule 53 record

786. Jiba's evidence is that the Motimele's team was advised to prepare a Rule 53 record which they did, based on input from Mrwebi and Jiba. Her evidence in relation to the Rule 53 Record is dealt with her in answering affidavit at paragraphs 86-90.

787. Mokhatla states that she did not render any advice in relation to Rule 53 Record in the FUL matter. Instead, she was shown the Motimele memorandum by the Evidence Leaders in these proceedings, which relates to the Rule 53 Record and does not recall having previously seen it.

788. Mokhatla was only present at a preliminary meeting with Motimele, also attended by Jiba, Chitha and the State Attorney. The meeting was in Jiba's boardroom. Mokhatla does not recall any discussion of the Rule 53 record.

Jiba in relation to Motau

789. Jiba's evidence in relation to Motau is dealt with at paragraphs 100-107 of her affidavit.

790. Mokhatla was not involved in the briefing of Motau but only came to know about his involvement when she was asked to work on the answering affidavit at the last minute. Nor was she aware of the withdrawal of Motau SC and the appointment or subsequent firing of Adv Halgryn.

Jiba in relation to Halgryn

791. After the withdrawal of the Motau team, the Halgryn team was appointed.

792. The Halgryn team produced their memorandum of 12 August 2012 and it was agreed within the NPA team that their mandate would be terminated as the NPA did not accept their advice.

793. Mokhatla was not aware of the appointment or subsequent firing of Adv Halgryn. Mokhatla was also not aware of the Halgryn's opinion to Sebelemetsa, Chitha and Jiba. Once again this had gone directly to Chitha who liaised directly with Jiba.

Jiba on Hodes and Manaka

794. Mokhatla was not involved in the appointment of Hodes and Manaka. She only came to know of their involvement when she was called belatedly to a meeting in the boardroom, referred to above. This was the first time she heard about the existence of the Breytenbach memo, the filing of the unsigned investigator statements in the FUL supplementary papers and contradictions in the testimony of Mrwebi and Mzinyathi in the disciplinary hearing.

5.2.4.8. Ferreira Evidence

795. In relation to the affidavit of Jiba in the GCB matter, Ferreira makes the following statements:

795.1. In the face of a *prima facie* case it is not so that in each and every instance investigations are finalised before charges are preferred. In relation to the initial charges which had been withdrawn by Mrwebi there was no, or very little further investigation required for purposes of the prosecution. The delay in prosecuting is therefore, in his view, as a result of further charges that had arisen and which required declassification of documentation by the National Commissioner of Police, which was not forthcoming.

795.2. Breytenbach, Louw, Smith, Ferreira, the investigating team and Mzinyathi thought that there was a prima facie case and the matter should proceed. Ferreira was not sure whether the LAD team and Jiba considered the April 2012 memorandum and if so, why it was ignored.

795.3. Ferreira disagreed that there was uncertainty regarding what the phrase *"in consultation"* meant – he submits that this was settle law by this juncture. In any event, the decision should have been taken by the DPP and the issue of consultation never arisen. Jiba never decided not to review the decision, she simply did nothing. Ferreira points out that the decision to withdraw was not based on a substantive conclusion that there was no *prima facie* case, but that the police did not have a mandate.

795.4. Ferreira notes that contrary to what is indicated in Jiba's affidavit, the withdrawal was because Mrwebi mistakenly believed that the police had no mandate. Ferreira attaches a note by Mrwebi dated 5 December 2012 to his affidavit as JF1. The note is signed by Mrwebi and the final sentence of the note states as follows:

"Be that as it may, the main issue is fact that police did not have mandate in this matter."

795.5 Ferreira was removed as prosecutor form the Mdluli matter. He states that he had done nothing to warrant such removal nor was he ever informed of reasons for that removal. He notes that serious new possible offences were discovered after December 2011 which had to be investigated, which was the reasons that the case took so long to finalise. Ferreira notes that the matter was derailed by the failure of the SAPS Commissioner to declassify documents.

795.6. Ferreira also submits that this paragraph supports his conclusion that Jiba never never reviewed Mrwebi's decision. He submits that Jiba should, as Acting NDPP, have reviewed the decision when she became aware that it was unlawful and/or not taken in consultation with Mzinyathi.

795.7. He states that the decision could not reasonable have been regarded as provisional from the time it was taken to 26 April 2102. It was evident from the April 2012 memorandum that he and Breytenbach saw the decision as final. Further Mrwebi's memorandum of 26 April 2012 expressly states that:

"It is my considered view that it will therefore not be in the interests of justice for the NPA to be further involved in this matter. I once again emphasise that the Inspector-General is the appropriate functionary to handle the matter".

795.8. He further notes that Jiba does not address the content of the April 2012 memorandum, particularly the view of two senior NPA officials that the decision was unlawful.

795.9. Ferreira was one of the authors of the April 2102 memorandum, and he and Smith were the primary prosecutors in the case yet were removed from any further participation in the case by the appointment of other prosecutors without any reason or excuse. The appointment of new prosecutors would delay the

matter. Further, if Breytenbach had failed to execute her duties in her matter, she should have been reprimanded and/o disciplined.

5.2.4.9. The CEO Position

796. Jiba's evidence in relation to the CEO matter is dealt with at paragraphs 62-68 of her GCB affidavit. She alleges that Van Rensburg was purporting to be the CEO and that the NPA Act makes no provision for a CEO.

797. Van Rensburg disputes this and refers to Nel's affidavit which explains that she was in fact appointed as CEO (with Jiba's knowledge). She admits that she was indeed a DDPP. She again refers to the affidavit of Nel which attaches the relevant documents explaining the creation of the position of CEO.

798. Van Rensburg was employed as the Acting CEO of the NPA from April 2011 (under Simelane) and was appointed as CEO on 1 April 2013. She remained in that post till August 2015, at which stage Abrahams redeployed her to her current position. Her appointment as CEO was pursuant to a recommendation by Jiba to the Minister following an advertisement of the post and an interview process. She retained the rank of DDPP, and was appointed no differently than the previous CEO, Ms Marion Sparg. Annexure **"GN7"** is a memorandum from Jiba to the Minister recommending the appointment of Van Rensburg.

799. Van Rensburg confirms that the Accounting Officer of the NPA is the Director General (DOJCD) and some of her authority to perform tasks was delegated by the Minister and the DG. Van Rensburg, in terms of the NPA Act, was a DDPP who exercised the functions (of CEO) as determined by the NDPP. While Jiba was Acting NDPP, Van Rensburg performed her tasks as CEO, holding the rank of DDPP, under the direction of Jiba. Van Rensburg states that her post was not purely administrative, she was regarded as a member of the Exco. She was part of management of the NPA and carried out instructions from the NDPP.

800. The duties of the CEO did not include prosecutorial functions and she not been involved in prosecutorial decisions or how civil litigation should be conducted.

801. Section 15(1)(c) provides that the Minister may, subject to the laws governing the public service in section 16(4) and after consultation with the National Director",

"In respect of the office of the National Director, appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers and carry out certain duties and perform certain functions, conferred or imposed on or assigned to him or her by the National Director".

802. Van Rensburg was appointed pursuant hereto in the office of the NDPP to perform those specific functions. She suggests that Jiba's allegation that Van Rensburg was not the CEO of the NPA at the time is misleading.

803. Van Rensburg advises that she acted on the instructions of Nxasana when addressing the letter to the GCB. The referral to the GCB was not disciplinary action.

804. Van Rensburg denies that she had no right to provide the GCB with documentation or to waive the privilege of the NPA over same. Van Rensburg was authorised by Nxasana to provide the documentation. Further, it is not correct, as alleged by Jiba, that her signature on memoranda relating to the appointment of counsel meant that Van Rensburg was aware of the manner in which the NPA conducted litigation. Van Rensburg's role was simply to approve the appointment and payment of counsel, she was not involved in the content, merits or litigation strategy. The latter was discussed at other meetings the NDPP had with DNDPPs and not the subject of Exco meetings.

805. In relation to the allegation that her appointment was a political one, Van Rensburg notes that she was not aware of or party to any such attempt, nor were her instructions from Nxasana at any stage based on achieving such objectives. Van Rensburg inferred

that Nxasana was of the view that he had a duty to refer the judgments for further investigation.

806. Van Rensburg's understanding of the appointment of counsel (referred to in paragraphs 72-73 of Jiba's affidavit in the GCB matter) is that the appointment counsel would be approved by a DNPP, after discussing it with the NDPP, or by the NDPP directly. Van Rensburg recalled Mokhatla complaining in an Exco meeting that she was being bypassed in certain cases and had no knowledge of how decisions in those cases were being taken, such as the Spy Tapes case both in relation to Jiba and Hofmeyer.

807. Van Rensburg states that she was instructed to meet with counsel to find out what had happened in their respective briefs and had recorded some of these meetings. Halgryn declined to meet with her.

5.2.4.10. Settlement negotiations

808. In her affidavit in the GCB matter Jiba stated that "after protracted settlement negotiations between Adv Breytenbach's attorneys and the IMU failed, on 23 April I signed a letter of suspension". Breytenbach strongly denies that there were any settlement negotiations. There was no reason to delay her suspension, and she did not avoid being served the suspension letter, it could have been served on her when she was in the office on 23 April 2012.

809. It was put to Breytenbach that the settlement negotiations referred to the process of copying her laptop. Van Rensburg said there was *"haggling"* over the laptop. However, Van Rensburg accepted that she was not party to the negotiations between Breytenbach's attorney and Wasserman (from IMU) regarding the laptop.

5.2.4.11. Jiba's Labour Court affidavit

810. Jiba attested to an affidavit in the Labour Court (Case No: J1389/12) on 20 June 2012 in opposition to Breytenbach's challenge to her suspension.

811. Jiba stated that "the facts deposed to herein, are, unless the context otherwise indicates, within my personal knowledge and are to the best of my knowledge and belief true and correct. Where I have no knowledge of the facts, same is confirmed by confirmatory affidavits hereto attached." It is so that not all the information contained in this affidavit could conceivably have fallen within her personal knowledge. However, there was nevertheless a duty on Jiba to confirm the contents of the affidavit she deposed to. Confirmatory affidavits are attached from Wasserman, Makeke, Xaba and Gloster.

812. At paragraph 124 of Jiba's answering affidavit, she states that confirmatory affidavits from Ramaite and Mzinyathi were attached as AA 11 and AA12. However, neither of these were ever attached.

813. Jiba acknowledged that in urgent applications there is an onerous duty of utmost good faith to make full disclosure of all material facts in order to prevent the Court from being misled. She accused Breytenbach of deliberately omitting material facts, which omissions could only have been made to misrepresent the true state of affairs and manipulate the facts to suit her case.

814. Jiba stated that as the head of the NPA she took the decision to suspend Breytenbach. This was confirmed before the Enquiry. In her affidavit, the reasons given for her decision are that Breytenbach's suspension was unavoidable as a result of Breytenbach obstructing the investigation, refusing to give the NPA access to her laptop and given the potential risk that she would interfere with witnesses.

Reasons for suspension

815. Jiba stated that Breytenbach's conduct during the course of the investigation against her went to the "heart of the prosecutorial independence and the high standards of duty and conduct, which prosecutors must not only adhere to, but must be seen to be adhering to." Breytenbach, in her senior position, should not have been obstructive – yet her conduct from 7 February 2012 to 30 April 2012 was such that she went out of

her way to obstruct the investigation of the ICT complaint. Further, Jiba alleges that, in view of Breytenbach's conduct, there was a material risk that she would interfere with the investigation in other respects.

816. Jiba states that Breytenbach's notice of suspension was only resorted to "when it became apparent that there is no other option available to the NPA but to suspend her ongoing interference with the investigation and tampering with evidential material and data on her laptop and to prevent her from tampering with the NPA's data on its internal computer system".

817. Jiba alleged that Breytenbach's conduct during the course of the investigation into her conduct indicated that what she said about not interfering with witnesses was false. She further alleged that Breytenbach had shown that she could not be trusted not to interfere with potential witnesses. In addition, Jiba alleged that Breytenbach's conduct cast doubt on whether she had continued to play any part in the ICT case.

818. According to Van Rensburg, Breytenbach's behaviour in relation to her laptop was not the impetus for her suspension. It had nothing to do with that, the decision had already been made. Both Van Rensburg and Netangahani, testified that the decision to suspend Breytenbach was taken by Jiba on 1 March 2012. Labour relations had drafted a memo to Jiba on 22 February 2012 requesting Jiba to approve the suspension. Jiba had signed the memo and approved the letter of suspension, but did not sign it.

819. Van Rensburg further stated that the decision to suspend was based on Mrwebi's memo of 12 January 2012. Van Rensburg testified that Jiba had informed her that Mwrebi had studied the matter and recommended that Breytenbach be suspended and that disciplinary and criminal charges be instituted. Jiba did not disclose the Mrwebi memo dated 12 January 2012 in the chronology that she provided to the Labour Court, nor was the memo that she signed on 1 March 2012 disclosed.

820. Further, if there was a material risk that Breytenbach would interfere with the investigation, no explanation is provided as to why there was a delay from Mrwebi's memo until 23 April 2012 before action was taken to remove Breytenbach from the office by suspending her.

821. Breytenbach's allegation that the real reason for her suspension was to remove her from the Mdluli case was viewed by Jiba as *"reckless and false"*. She noted that for a senior prosecutor to make such reckless and false statements were unacceptable and brought the NPA into disrepute.

Alleged refusal to provide access to laptop

822. According to Jiba, Breytenbach's obstructive conduct included *"preventing access to and scrutiny of the data on her NPA laptop."* Jiba alleged that because of Breytenbach's ongoing refusal to allow access to the laptop and her evasive conduct from 7 February 2012 to 2 May 2012, in particular her failure to surrender the laptop to Wasserman for purposes of his investigation, there was every reason to believe that she *"utilised this period to alter or delete emails, files or other data from her computer, in order to thwart proper consideration of all email exchanges between herself, legal representatives of Kumba/Sishen and/or other members of the investigation team."*

823. Jiba stated that Breytenbach continuously prevented Wasserman from having access to her laptop from 1 February 2012 to 30 April 2012.

824. She was first asked for her laptop on 7 February 2012, her attorney advised her not to hand it over until the NPA provided details regarding the nature of the complaint; and undertook not to violate her privacy.

825. Breytenbach's attorney made it clear at the meeting with Wasserman, as early as 7 February 2012, that the laptop would be surrendered to Wasserman upon being furnished with particulars of the complaints being investigated and an undertaking made

that the investigation would be confined to information relating to those complaints. He confirmed this in writing. Wasserman admitted at the disciplinary hearing that Breytenbach had complained about privacy from the outset and that Breytenbach's position was that she was prepared to surrender the laptop but wanted the protection of her private information.

826. By 30 April 2012, after a lengthy exchange of correspondence, there was still no undertaking by the NPA regarding Breytenbach's right to privacy, nor had the annexures to the complaint been received. Xaba, who had delivered the suspension letter, and Breytenbach and her attorney then agreed that Breytenbach would delete her personal information from the laptop – at her own expense.

827. Breytenbach hired an IT expert to come in and make a mirror image of her laptop. The laptop was plugged in and backed up onto the server, a mirror copy made for Breytenbach (the NPA did not need one as they had the server copy). Jiba, in her affidavit does not disclose that the NPA was in possession of the back-up copy from 30 April 2012.

828. Van Rensburg was not informed that, while Breytenbach retained possession of the laptop, there was any reason to believe that she was seeking to thwart the investigation, deleted emails, files, or data on the computer until her IT expert removed the information.

829. Jiba was confident that the allegations made in her affidavit would be shown to be correct at the disciplinary enquiry. In fact, the finding of the presiding officer in the disciplinary investigation, was that Breytenbach acted within her rights in this regard, both in terms of the Constitution and the NPA policy. Wasserman's refusal to identify the charges subject to the investigation and to make an undertaking to confine the search to documents relevant to the investigation and not to access personal communications, resulting in the trawling of Breytenbach's personal emails was also found to constitute a violation of Breytenbach's constitutional rights.

830. One of the allegations Jiba made against Breytenbach was that she gave the NPA laptop to a third party (her attorney) to access and download the information, which was an offence. Breytenbach was criminally charged together with her attorney. They were both acquitted.

831. In relation to the suspension, there are a number of aspects of Jiba's affidavit relating to the procedure that was followed that bear mention.

Procedural aspects

832. Jiba alleged that Breytenbach knew *"all about the ICT complaint"* on 1 February 2012. She also stated that Breytenbach was already aware of the nature and details of the complaint and that the complaint was discussed with her in the meeting of 25 November 2011. Jiba denied that the first time that Breytenbach was provided with the details of the complaint was when Wasserman gave it to her on 18 April 2012.

833. Breytenbach's evidence was that she was not told of the nature of the complaint but assumed it was something to do with the ICT matter (because she had lambasted the police in that matter a few days previously). Van Rensburg confirmed that Breytenbach had not been told the exact nature of the complaint or the identity of the complainant. This was the normal process in disciplinary proceedings – prior to starting an actual enquiry the full details of the complaint are not provided.

834. It is common cause that on 25 November 2011 Mzinyathi and Ramaite were satisfied with Breytenbach remaining at work. Jiba acknowledged that at that time there were no compelling reasons to place Breytenbach on suspension. According to Van Rensburg no decision had been made to take disciplinary action against Breytenbach at that stage.

835. Jiba alleged that the team to investigate the ICT complaint could not be constituted due to the December holidays and other pressing work commitments. However, according to Van Rensburg, Adv Johnson (*"Johnson"*), in Mzinyathi's office, was approached to

conduct an investigation. Mzinyathi indicated to Van Rensburg on 10 January 2012 that Johnson was not available and there was no person of a suitable rank available in his office to conduct the investigation. There could thus have been no impediment of any investigation prior thereto as have had been conducted.

836. According to Van Rensburg, when she was called to see Jiba to discuss the suspension (between 12 January 2012 and 1 February 2012) no investigation had yet been conducted into the charges. It was only after this that the two investigators were appointed.

837. Jiba said that the reasons for the suspension were set out in the notice of intention to suspend yet the notice merely states that the reason for the suspension is the allegation that Breytenbach abused her powers as a senior DDP. No mention is made of concerns regarding possible interference with witnesses or any form of any obstructive behaviour.

838. According to Breytenbach there was still no detail about the nature of the complaint in the notice of intention to suspend, and so there followed protracted correspondence between Breytenbach's attorney and the NPA, in which he sought details of the nature of the complaint.

839. Jiba also alleged that on 1 February 2012, Breytenbach was given an opportunity to respond to the notice of intention to suspend her and that Breytenbach did not avail herself of this opportunity. According to Breytenbach, what followed was an exchange of correspondence with her attorney regarding the confusion about the media reports that she had already been suspended and an unsuccessful attempt to get the NPA to provide the details of the complaint against her, so that she could respond. This she was only given on 18 April 2012 and Wasserman afforded her an opportunity to respond by 25 April 2012. However, no annexures were provided on 18 April 2012.

840. Jiba admitted that Wasserman gave Breytenbach the complaint on 18 April 2012 and that he gave her time to 25 April 2012 to respond. Jiba said that the purpose of this

was not to give Breytenbach an opportunity to show cause why she should not be suspended, but to give her an opportunity to respond to the allegations themselves. She further stated that if the representations were due only on 25 April 2012, Breytenbach never attempted to file representations.

841. Van Rensburg confirmed that no detail of the complaint was contained in the notice, the practice being not to disclose details at that stage.

842. Jiba said that she signed the letter of suspension on 23 April 2012, "when it became clear to me that the applicant was dilly dallying about making written representations to me".

843. Van Rensburg testified that during the period 1 March 2012 until 23 April 2012 they had not known how to proceed regarding the signature of the letter of suspension as none of them wanted to sign it.

844. Then on 23 April 2012 at 10:40 Van Rensburg received an email from Jiba. In the email Jiba stated that questions were raised at the NPA's parliamentary briefing about the disciplinary matter against Breytenbach. The parliamentary briefing had taken place on 16 April 2012. Jiba asked for an update on whether a response had been forwarded to the attorney's request for reasons. If the response had not been forwarded yet, then Van Rensburg was instructed to prepare it so that it could be forwarded immediately.

845. According to Van Rensburg and Netangahani, Jiba's secretary, had called Van Rensburg's secretary requesting the Breytenbach file and Netangahani was told to deliver the file to Jiba's office. Netangahani took the file to Jiba's office and left it with her secretary, who advised him that Jiba was in a meeting and would sign it thereafter. He was told to collect it the following day but when he went there was no one there. Jiba was on leave from 24 April 2012 to 30 April 2012.

846. The letter of suspension was signed on 23 April 2012, two days before the time period for Breytenbach to give reasons why she should not be suspended was to expire (25 April 2012).

847. According to Jiba, the notice of suspension *"got caught up in the logistical quagmire"* and so, while she signed it on 23 April 2012, it was only served on Breytenbach on 30 April 2012. Van Rensburg testified that Mrwebi refused to serve the suspension letter and an alternative arrangement had to be made.

5.3. Other evidence and allegations

5.3.1. Issues and allegations preceding appointment

5.3.1.1. Jiba's husband's presidential pardon

848. Jiba's husband, Sikhumbuzo Booker Nhantsi (*"Nhantsi"*), was convicted for theft of estate money in the amount of R193 000 while practising as an attorney. He was sentenced to five years imprisonment, two of which were suspended. He had been 9 months in prison when his imprisonment was converted to correctional supervision on 27 August 2007.

849. On 3 November 2009 he applied for presidential pardon and attached the testimonials from Adv Ntsebeza (*"Ntsebeza"*) and Prince Mokotedi (*"Mokotedi"*) to his application. The Chief Directorate: Legal Affairs, Department of Justice received Nhantsi's application and sent a memorandum with a recommendation to the Minister, Jeff Radebe on 11 November 2009. The Minister and three other officials signed the memorandum and the recommendation and sent it to the president with a report.

850. When the application was submitted, investigations that normally take place when applications of this nature are dealt with were not completed. This was because the President had requested that the memorandum be submitted to the Presidency on 11 November 2009 only 8 days after the application was made.

851. The report attached to the application for pardon sent to the President from the Minster recommended that the pardon be refused. The reasons for the recommendation were that the nature and seriousness of the offence, the shortness of time that had lapsed since the conviction and that no exceptional circumstance had been shown to exist made it imprudent for pardon to be granted. Under normal circumstances the comment of the NPA would be sought before pardon is granted. The Minister noted that due to the urgency of the matter, the report and recommendation were submitted before Nhantsi's representations could be received. It is not seem like further representations were made or sought.

852. On 8 September 2010, the President granted pardon to Nhantsi. It is unclear as to why pardon was granted more than nine months later yet the Justice Department was asked to give its immediate attention to the matter as early as 11 November 2009.

853. The power to pardon as conferred by the Constitution to the President is a discretionary instrument, subject to the President's control. At around the time that Jiba's husband was granted pardon by the President, the Zuma / spy tapes saga was an ongoing matter. Adv Jiba had just been elevated by the President to the position of DNDPP in December 2010.

854. In light of this Jiba was asked whether she did not deem it a prudent thing to do to refrain from participating in any discussions, making comments or taking part in anything that had to do with the Zuma / Spy Tapes matter to avoid inferences and perceptions of bias. Her response was that she did not think that she should have recused herself from the Zuma / Spy Tapes matter because the decision to withdraw the prosecution had already been taken by Adv Mshe. She pointed the Enquiry to Mr Hofmeyr's affidavit which discussed at length why the prosecution could not stand. She pointed out that her role related only to the "submission of some record" and that she could not see how her participation could have saved the President and how she could be biased.

5.3.1.2. Jiba legal qualifications

855. Jiba's curriculum vitae shows that she was appointed as DDPP in 2001 in the Office for Serious Economic Offenses which later, after various developments, evolved into the Directorate for Special Operations (Scorpions) which was disbanded in 2008.[253]

856. Documents showing that Jiba is an admitted advocate since June 2010 were provided to the Enquiry. Before these documents were provided information from the Legal Practice Council, Western Cape indicated that Jiba had passed the attorney's board exams in 1998 but that she was never admitted as an attorney. Adv Jiba was asked during cross-examination how she got to be appointed as a DDPP since the NPA Act lists the "right to appear in any court in the Republic" as one of the requirements for appointment to the position of DDPP yet she was never admitted as an attorney or an advocate. She did not deny that she was never admitted but said that she was unable to answer the question posed because she is does not know what those who appointed her considered when they appointed her.

857. Evidence leaders pointed out in their written submissions that documentation and representations made by Jiba indicated that by her having passed her board exams she had qualified as an attorney. This could be seen also from a report prepared during her probationary period indicating that she had served articles and *"eventually qualified as an attorney"*.

858. In addition, the evidence leaders in their submissions pointed out that before June 2010, and even after her appointment as DDPP, it was not clear whether in fact she was an attorney or an advocate. Correspondence sent to her indicated that she was addressed as "advocate" and that she in turn represented that she was an advocate in correspondence that she sent to others and other documents that she signed. It is

253 Jiba was appointed as DDPP on 1 February 2002 as apparent from personnel records.

noted from a DSO skills audit, 2002 completed by Jiba, that she identified her *"official job title (e.g. special investigator, prosecutor, etc.)* as *"advocate (DDPP)"*.

859. Jiba's counsel had promised to request from the NPA documents relating to Jiba's appointment as DDPP and at the time the evidence leaders prepared their submissions, these documents had not been furnished.

860. At a later time Jiba's legal team provided the Enquiry with two documents from the NPA signed by Ms Matshidiso Modise, Chief Director: Human Resources Management Development at the NPA ("Modise") confirming the requirements for appointment as DDPP. The documents explained that a person would meet the minimum requirements if they had a right to appear in any court or were, at the least, able to obtain the right of appearance. According to Modise, if a person who does not have the right of appearance is admitted, the newly appointed individual may be afforded an opportunity to obtain the right of appearance.

861. One of the documents bearing the title, "Re: Confirmation of Legal Job Titles in the NPA" explained further the legal job titles within the NPA. It states:

> *"As part of the organisational process of developing a structure, each job once defined will need to be given a proper title. For legal posts, we have for the lower courts retained the position of prosecutor as defined in the Act where we titled the jobs according to the court in which the posts are placed. We have* ***District Court Prosecutors*** *and* ***Regional Court Prosecutors*** *and we then introduced* ***Senior and Chief Prosecutors*** *for management of the lower courts.*
>
> *For the High Court we defined and titled the posts* ***State Advocate*** *and* ***Senior State Advocate*** *and then moving to the* ***Deputy Director of Public Prosecutions*** *as titled in the Act. The positions are named State Advocate deliberately to separate the position from a practising advocate who will require admission as an advocate. . . . [O]ur requirement is just the right of appearance and the person can only be*

a state advocate whilst working for the state and should he or she terminate to practise privately, the person will have to pursue the process of admission."

862. Jiba did not deny that at the time of her appointment she had not been admitted as an advocate or attorney but said that she did not know what those who had appointed her considered when she was appointed.

5.3.1.3. Mrwebi's track record as Regional Head of DSO and allegations of disciplinary steps against him

863. Adv Gerhard Nel (Nel) attested to an affidavit to the Enquiry and also gave oral evidence. He stated that in 2005, when Mrwebi was the regional head of the DSO in KZN, he (Nel) was approached by the then head of the DSO Adv Leonard McCarthy to draft a memorandum to the then Minister of Justice, Brigitte Mabandla, informing her about Mrwebi's poor performance and a request for his transfer to another office. Nel attached a copy of the draft of the memo which, according to him, was given to the Minister who recommended that a disciplinary hearing be held to deal with the problem.

864. The information in the Memo, according to Nel was provided to him by the DSO. The memo contained information from an evaluation report by Adv Ramaite and a follow up assessment into Mrwebi's office. Ramaite's report recommended that it would be in the best interest of both the DSO and the NPA to transfer Mrwebi to another office within the NPA. The reasons that informed this recommendation included, among other things, that Mrwebi's office had finalised only 92 criminal cases in the space of four years, which according to the report, was less than satisfactory; his office was embroiled in allegations of impropriety, theft of money, irregular exhibit management and misconduct; Mrebi did not prepare for conferences / meetings and made inputs that were below par and had difficulty with dealing with criticism.

865. The report noted further concerns that his behaviour during meetings when his office was brought under spotlight was inappropriate and that there was a reason to worry about

civil claims being brought against the state as a result of his irresponsible conduct. It was stated in the report that the reason why a transfer was recommended was because there was an irreparable breakdown of trust relationship between management and Mrwebi and that Mrwebi would serve the NPA better at another capacity.

866. Mrwebi explained that this was a long story. He had been assessed on his performance in April 2004 and scored 67% which was unsatisfactory. He accepted the score, however.

867. According to Mrwebi, the DSO had confidential funds, like the SSA (C-funds), used to pay informants.

868. His office was directed to pay informants who had not been paid for their services. They were instructed to effect these payments before the end of the financial year in March 2004. Further, the NPA head office indicated that there was a particular informant by the name of Patel who needed to be paid. In response to this instruction Mrwebi indicated that he only was aware of one informant who did not get paid. That informant according to him was committing the crimes that he was reporting and was afterwards convicted and imprisoned for those crimes and the NPA was not going to pay him. He stated that he did not have knowledge of another (or other) informant(s) that needed to be paid.

869. Mrwebi stated that he was then instructed to prepare a document. In the process of his investigations he discovered that a person who did not have anything to do with the investigation had been paid. This implicated people at the head office in irregularities relating to informants and the fund. He asserts that his troubles at the NPA began when he filed a report alerting the NDPP of his findings about the irregularities. It was then, according to him, that he was suddenly accused of non-performance and became a target of “all sorts of victimisation”. He alleges that there were instructions given that he was going to be removed from his office for poor management. He claims that the allegations came from his direct supervisor at the time and from the then acting NDPP but that no disciplinary processes were instituted against him for poor work performance.

870. Following this Advocate Malala Ledwaba (*"Ledwaba"*) was charged with multiple counts of fraud in relation to the DSO funds. It was alleged that Ledwaba was unlawfully taking money for himself from these fund. Mrwebi testified against Ledwaba in a criminal trial in respect of R150 000 which was paid to an unknown informer.

871. Mrwebi admitted that there was tension between him and Ledwaba.

872. The judgment of the High Court states in this regards that:

"[T]he appellant [Ledwaba] requested Mrwebi to compile a memorandum for payment of a fee to Patel. Mrwebi initially claimed that the appellant was the one who decided on an amount of R150 000-00 which was to be paid to Patel but later conceded that he was the one who decided on the amount. According to Mrwebi he had used the principle of value for money when he decided on the amount

Mrwebi in taking this decision could not have done so without having been briefed by the appellant about the nature of the information supplied by Patel. Mrwebi's evidence was filled with contradictions and inconsistencies, and was premised on an attack of the character of the appellant. It was put to Mrwebi during cross-examination that during the trial of the late Police Commissioner, Mr Selebi, he had already alleged that the appellant stole from the NPA. Mrwebi blamed the appellant for all his problems. It was never Mrwebi's evidence either in chief or cross examination that the appellant tried to convince him to drop the investigations against him. The impression Mrwebi gave during his evidence is that the appellant had a personal vendetta against him. There were obvious issues in the office of Mrwebi for example the incident in the Drakensberg. Mrwebi, however conceded that no disciplinary charges were proffered against him by the appellant. It was put to Mrwebi in cross examination that he "lied" and he conceded that he had "lied". As to the memorandum, he ultimately conceded under cross-examination-that he could not dispute the version of the appellant and the truth of what the appellant had told him when he was requested to compile the memorandum in question

when he decided on the amount. It was further never disputed that Mrwebi was to accompany the appellant when payment to Patel was to be made. The court a quo acknowledged this, in its judgment. This is a crucial admission by Mrwebi."

873. At the Selebi's criminal trial, Mrwebi had testified that in 2004, he discovered that a senior member of the DSO stole money from the C-Fund and he wanted him (Mrwebi) to cover up, but Mrwebi refused to do so. At the Ledwaba criminal trial, Mrwebi admitted that the senior member he had referred to was Ledwaba and conceded that he should have used different language. He, however, denied that he had identified the senior official that stole from the C-Fund or that he used Ledwaba's name at the Selebi trial. When the transcript of his evidence was brought to his attention, he again conceded that he had said so.

874. When asked why he had not given certain important evidence in chief, he testified that he did not want to go into the painful history of his life and left it out deliberately.

875. During the oral hearing before this Enquiry, Mrwebi questioned the accuracy of the Transcript provided and stated that he would attempt to verify its authenticity and accuracy. He thereafter filed a statement before the Enquiry indicating as follows:

875.1. He objected to the production of the Ledwaba evidence.

875.2. During or about 2004 and 2005, he made allegations of theft of C-Fund against Ledwaba, which led to Ledwaba's prosecution.

875.3. Mrwebi subsequently testified about these allegations in the Selebi trial in the South Gauteng High Court. During that testimony, Mrwebi used words such as "theft", "stole" and "stealing" in relation to Ledwaba's conduct. Those words were used to accuse Mrwebi of lying during the Ledwaba trial. Mrwebi denies that he lied or conceded to lying.

875.4. During 2015, Mrwebi gave evidence in the criminal prosecution of Ledwaba and was subjected to lengthy cross-examination. During cross-examination, Ledwaba took him to task about saying that he "stole" funds, more so that he was not there to defend himself when Mrwebi made such statements. Mrwebi conceded that his use of terminology was too general and that he should have said "alleged theft" in describing the conduct.

875.5. Mrwebi indicated that he never conceded to having lied in giving evidence.

875.6. He further denied agreeing with Ledwaba about paying an informer any amount of money. He also states that he did not know what information the informer had provided.

875.7. Mrwebi denies that the transcript is accurate as it does not include "certain aspects of his debate with Ledwaba."

875.8. Finally, he denies that he made any concession that he lied, and he disputes:

875.8.1. The correctness of the record filed; and

875.8.2. The findings of the Court of Appeal with specific reference to paragraph 30 of the judgment.

876. He therefore submits that the Enquiry ought to take no further cognisance of the judgment. Mrwebi disputed before this Enquiry that the court transcript was correct. The transcript as put before this Enquiry is an official transcript of Court proceedings as well as a High Court judgment of two judges confirming the transcript and proceedings.

877. The judgment was brought to the attention of the Evidence Leaders by Ledwaba after the first day of Mrwebi's evidence before the Enquiry. Mrwebi had mentioned him in his evidence and was taking issue with his testimony. The ELs were able to obtain the full transcript of the evidence, independent of Ledwaba, and this was provided to the parties.

5.3.1.4. Breytenbach & Hofmeyr – concerns over Jiba's experience to Act as NDPP

878. Jiba could not understand why Hofmeyr and Breytenbach felt that her promotion to Acting NDPP was not justified. She had 17 years' experience before she was promoted and had served the NPA for 27 years.

879. As already mentioned her career as a prosecutor, according to her CV started in the Eastern Cape, Peddie, Tsolo and Umtata. She was appointed as a senior state advocate with the Investigative Directorate for Serious Economic Offences, in 1999/2000 and then as a DDPP in 2001 to 2010 with the DSO. She had a team of senior advocates, working with special investigators, that were ensuring that cases authorised in terms of section 28(13) or 28(1) of the NPA Act went to Court. She handled the Sun Multisave case, which was a *"ponzi scheme"* case. In essence she had the experience before her elevation.

880. In 2010, Jiba was appointed as a DNDPP. It had been a little more than a year after she had returned from her suspension – which itself had continued for approximately 18-22 months – when she was appointed as DNDPP. During that year the evidence was that she worked in the SCCU, reporting to Breytenbach. At the time of her appointment as a DNDPP she had only been an admitted advocate for six months. Her admission as an advocate was a necessary precursor to being appointed as DNDPP. In her portfolio as head of NPS, Jiba was responsible for the performance of the prosecution service in all regions. She did this by putting performance indicators in place, and she was proud to say that the judiciary had taken some of these on board. In order to obtain buy-in the National Efficiency Effective Committee (*"NEEC"*) was formed, where everybody who had something to do with Court performance was represented.

881. As an Acting NDPP she was rewarded for her performance. When Nxasana was appointed as NDPP on 1 October 2013, Jiba had held the Acting NDPP position for approximately 22 months.

882. While Jiba was acting NDPP, Mrwebi, as Special Director in the national office, reported to the DNDPP.

883. During her acting period, Jiba made changes that reverted back to the structure before Simelane she wanted a structure that would be easy. Jiba testified that during her period she did consult before taking decisions. That was the whole purpose of the meeting of 24 January 2012 - and that this meeting was a consultation is apparent from the minutes.

884. In Breytenbach's view to be an NDPP required a lot of administrative expertise, experience in a huge organisation, being able to delegate effectively, pulling a team together, being inclusive and have a lot of life experience. One need not be a "hotshot" prosecutor but needed the above qualities and life experience to provide leadership. One also needed to understand prosecutions in both the lower and higher Courts, and have strong grasp of ethics and unquestionable integrity.

885. Breytenbach was surprised that Jiba was promoted from DDPP to DNDPP because *"that does not happen in a public service, certainly not in the NPA"*. Breytenbach believed that there were other people who were more qualified to be appointed as a DNDPP, including the DPPs, who were more qualified, held a higher rank, and had experience of running divisions. She identified both Mzinyathi and Ramaite and testified that if the President wanted to appoint a black woman, there were women more experienced, identifying Thoko Majokweni. It bears mentioning that when a comparison is made with other NDPP appointments, given that no transparent process is followed, one is not able to readily ascertain any discernible criteria. The NDPP and DNDPP appointments remain the prerogative of the President.

886. Breytenbach was of the view that Jiba lacked requisite experience and she also had misgivings about Jiba's integrity. Jiba lacked life experience and had never done

anything in the NPA that justified the elevation above people that were more competent, experienced or better qualified.

887. Breytenbach conceded, in cross-examination, that Jiba met the formal requirements in section 9 of the NPA Act. It was her view that Jiba was not a fit and proper person due to her lack of integrity, and that the appointment could not have been based on skill and ability when there were other black candidates who were better qualified and more experienced.

888. Breytenbach commended Jiba's experience as an administrator in the context of a regional office where she managed seven or eight prosecutors but pointed out that was different from managing thousands of advocates.

889. Hofmeyr alleges that Jiba is guilty of some *"serious ethical issues"* and whilst he makes clear that the two have had serious differences over the years he says they mainly had a good relationship and that she was a good administrator and manager. His difficulty with Jiba relate mainly to the management of controversial high profile cases – where she failed to brief DNDPPs and excluded him and others from those matters. Under Jiba, there was a lack of consultation, engagement and collective leadership on high profile cases. Hofmeyr was clear in his position that he did not think that Jiba ought to have been appointed.

890. Van Rensburg stated that at the time she served as Acting CEO and as a CEO she generally had a good working relationship with Jiba. She commented that in respect of her capability, Jiba was generally a good manager. She referred to strategic management, performance management and financial management and oversight of these aspects as these pertained to her areas of responsibility. She indicated that she rarely gave written instructions and normally would have face to face interaction and give verbal instructions.

891. Before Simelane, the NDPP would meet with the deputies once a week, when Jiba became the Acting NDPP, they met fairly regularly. The focus of these meetings was not generally cases, but issues of governance, finance and management.

892. Simelane had been appointed as NDPP on 25 November 2009 and it was not long thereafter that the Court application was launched seeking to have him removed. In fact, the matter was heard from 13 September 2010 and the Pretoria High Court handed down judgment on 10 November 2010, dismissing the application. The matter was then only heard in the SCA on 31 October 2011 and that judgment was handed down on 1 December 2011.

5.3.2 Selebi Saga

5.3.2.1. Jiba's Disciplinary

893. On 10 January 2008 Jiba was suspended from her position as senior DDPP for alleged misconduct and disciplinary measures were taken against her. The basis for the suspension and the disciplinary proceedings included: dishonesty, an attempt to defeat the course of justice, unprofessional conduct, contravening the public servants' code of conduct and conduct bringing the NPA into disrepute.

894. It all began in September 2007 when Prince Mokotedi (*"Mokotedi"*) of the NPA's Integrity Management Unit (*"IMU"*) requested Jiba to assist the police with regard to a criminal investigation involving Gerrie Nel (Nel). The police had received information relating to criminal activities perpetrated by senior members of the NPA from Captain Mano (*"Mano"*) and Director Mabula (*"Mabula"*) who were authorised to conduct the investigation.

895. As subsequently reported by Mzinyathi, Mano had apparently been briefed by a source on 18 September 2007 of illegal activities by senior members of the DSO, including Nel. Mano was informed that evidence of the illegal activities was apparent from the

judgment handed down in the Tshavhungwa matter. It is substantially this judgment that informed the belief that criminal activities were being committed.

896. Mdluli, who was Deputy Provincial Commissioner at the time and exercised oversight responsibility over the investigation, approached Jiba and had a private meeting with her to brief her on the investigations. According to Mdluli they contacted Jiba on several occasions during the investigation to clarify what they required to advance the investigations against Nel and that they wished to obtain a statement from her.

897. Jiba provided them with an affidavit some weeks after the investigation had already been ongoing. It reflected that Jiba had been provided with the judgment in the Tshavhungwa matter and indicated that she had been asked to explain the manner in which the DSO functioned and its structure. In her affidavit she provided them with knowledge on how the Gauteng Regional Office operated; the staffing of that office; the methodology adopted in investigations at this office and how authorisations were granted for investigations.

898. The statement or affidavit that Jiba provided to the police did not relate to Nel, nor did it raise any impropriety. It is not clear on what basis it could be defined as a protected disclosure.

899. Over the course of time a warrant of arrest was sought and Jiba seemed to be assisting the officials seeking the warrant. The docket used to secure Nel's warrant of arrest was scant. Around the time when this was happening Nel happened to be the lead prosecutor in the Selebi matter. Coincidentally, after Nel's arrest Selebi brought an application for a permanent stay of the proceedings.

900. Hofmeyr believed that Nel had been arrested so that he would be unable to help defend Selebi's urgent application. He also indicated that Jiba had not brought it to the attention of the NDPP or invoked the internal integrity mechanisms.

901. MacAdam reasoned on this basis that if the source of the police complaint was said to be a senior member of the DSO and Jiba's presence in assisting the Investigating Officers, then on a balance of probabilities, Jiba had more to do with the securing of the warrant of arrest of Nel than simply making an affidavit, as she describes. MacAdam also draws the conclusion that she was the source of the police investigation into Nel. On the basis of the Nemaorani affidavit the motive attributed to her for doing this being that Nel had a role to play in her husband's criminal conviction.

902. These were the events that led to the suspension and institution of disciplinary action against Jiba. Her conduct and alleged role as described above formed the basis of the charges relating to misconduct that were levelled against her.

903. But a week before the disciplinary hearings began, Jiba sent a letter indicating that she would be lodging a referral of an unfair labour practice alleging that she had made a protected disclosure. She described her suspension and disciplinary action taken against her as an occupational detriment in terms of the PDA. In her PDA application she sought to have the decision to bring disciplinary proceedings against her reviewed and set aside.

904. She proceeded to lodge an urgent application at the Labour Court asking the court to interdict the disciplinary proceedings until her PDA – occupational detriment application was finalised. Her application was successful. The court issued a ruling ordering the parties to wait and not continue with the disciplinary hearings until the PDA application was finalised.

905. Jiba stated in her founding affidavit in the PDA application, in the Labour Court that:

906. She was charged for misconduct in order to further a criminal conspiracy involving senior officials in management positions in the Office of the NDPP. The charges were

false and meant to protect Gerrie Nel (*"Nel"*) who was being investigated for alleged criminal conduct.

907. Jiba admitted that she had assisted the police SAPS in their investigations against him and had given a statement. As such, she *"had been a State witness in the criminal case against him"*.

908. Mdluli came out in support of Jiba, and deposed to an affidavit. He stated in that affidavit that Nel lied under oath in order to influence the outcome of a criminal case to favour Tshavhungwa, who had been employed at the DSO. Mdluli attached to his supporting affidavit, intercepted communications which he purported indicated unlawful activities by senior members of the NPA.

909. Mdluli claimed further that the suspension of Jiba and the proposed disciplinary action were meant to advance a conspiracy contrived by McCarthy, Mzinyathi and Mngwengwe to sabotage the investigations and subsequent prosecution of Nel. He accused the NPA top management of acting like a *"gang of criminals in a mafia style operation"* designed to protect one of their own.

5.3.2.2. Mrwebi's disciplinary

910. On 4 June 2007 senior members of the NPA were called to a meeting with then NDPP Pikoli. At that meeting Pikoli advised that the origin of the Browse Mole report, alleged to have been produced by the DSO, would be investigated by a task team from the National Security Council (*"the NSC"*). All the Regional and Divisional Heads of the NPA were instructed to co-operate with the investigation.

911. After it was resolved that the Scorpions would be disbanded, on 25 July 2007 senior members of the Scorpions attended a management meeting at the NPA head office chaired by McCarthy. Mrwebi was also in attendance. This meeting did not relate to the

Browse Mole report. It discussed the decisions of the ANC policy conference, including four pending cases: Zuma, Maharaj, Ramatlodi and the *"Bad Guys Project"*.

912. In about August / September 2007 Mrwebi received a call from the investigation team mentioned by Pikoli. In September he met with representatives from the NIA, CI and the Presidency and was told that the Browse Mole report emanated from his office. He gave them a report in September 2007 indicating that that was not true.

913. They returned to enquire this time about the meeting of 25 July 2007. They gave him some explanation as to how this fit into their mandate and requested that he depose to an affidavit. They said this was a top secret investigation and nobody would ever know about it. He deposed to an affidavit as asked and described in detail all that had transpired at the meeting of 25 July 2007. He alleges that when he deposed to that affidavit he was complying with the instructions of the NDPP, for he had been approached by the Task Team who was also investigating the Browse Mole report.

914. Before this Enquiry and in cross-examination, Mrwebi was asked what the connection was between the Browse Mole report and the meeting of 25 July 2007. He said that he also did not get the connection. However, he had been told that the investigation on the Browse Mole was "broad" and it was in relation to the intentions of the DSO acting within its mandate. He was therefore convinced by the end of the meeting that there was a connection. He could not recall specifically what convinced him – but it was about the NPA acting beyond its mandate and *"trying to achieve political objectives"*.

915. Later on, the affidavit that Mrwebi had deposed to was declassified and provided to Selebi. Mrwebi was subpoenaed to give evidence at the Selebi trial in 2010, and on advice, did so. He did not know Selebi or anyone close to him and never discussed the application with him.

916. Back in the NPA in January 2008, he was asked to provide an explanation to his supervisor, Adv Mngwengwe (*"Mngwengwe"*) in relation to the affidavit in the Selebi case. Mrwebi explained how it came about.

917. Mrwebi was put on special leave and was informed that disciplinary measures would be taken against him. He was then charged with various counts of misconduct, including, misrepresentation of the facts and gross dishonesty, perjury, failure to comply with the NPA provisions for leaking confidential information pertaining to the DSO, failure to comply with the policies and procedures of the DSO, as well as the provisions of the SMS Handbook and conduct that brought the NPA into disrepute.

918. When asked why he did not mention this to his supervisors or obtain consent to depose to an affidavit, Mrwebi said that he did not know whether he would be accused of attempting to defeat the investigation. He had understood Pikoli's instruction for the NPA to cooperate with the investigations into the Browse Mole report to include giving a statement when called upon to do so. Moreover, it was a top secret investigation and if he told people, it would have put him in a difficult position. He said that the information provided was not secret.

919. Mrwebi conceded that the affidavit did not show a criminal offence, but he thought that it did show that the DSO was acting outside its mandate. He agreed that when he made the statement he had not expected it to be disclosed. In his view it was an *"ex post facto"* protected disclosure.

920. Mrwebi said that he gave the information in confidence but "if it happened to be disclosed obviously it must be covered by protected disclosure".

921. Mrwebi's reliance on the provisions of the PDA was attacked on the basis that it contained untruthful statements about what really transpired at the management meeting of 25

July 2007. It was further alleged that the contents of the affidavit could not be linked to the Browse Mole report investigations.

922. Like Jiba, Mrwebi lodged a referral to the Labour Court alleging that he had made a protected disclosure in term of the PDA and now he was being subjected to an occupational detriment. He later brought an urgent application to the Labour Court to have the proceedings of the disciplinary hearing stayed until his PDA application was finalised the Labour Court considered whether Mrwebi would find protection in the PDA. It proceeded to grant an interim interdict stopping the disciplinary action from proceeding pending the outcome of the referral.

923. Cele J concluded that Mrwebi was entitled to the protection afforded by the PDA, even though the charges against him lay not in the communication of the information but, rather, in the communication of misleading information and communicating information without authority.

924. It is not disputed that Mrwebi conveyed information about the employer to a third party; nor was there any dispute about precisely what was conveyed as the terms were set out in the affidavit deposed to by Mrwebi on 27 September 2007.

925. The Court concluded that when Mrwebi was approached by the Task Team, he must at that stage have had reason to believe that the information concerned the commission of a criminal offence, failure to comply with a legal obligation or a miscarriage of justice occurring or likely to occur and for that reason the disclosure fell within the ambit of the PDA and entitled him to protection under the PDA. The Court confirmed that protection under the PDA is not automatic[254] and on a consideration of the requirements in the PDA concluded that a proper examination of the affidavit reveals that on the face of it that:

254 Para 25 of the judgment.

"There is no allegation or suggestion that the applicant had reason to believe that any of the following had or was likely to occur:

a criminal offence had been committed;

anyone had failed to comply with a legal obligation;

a miscarriage of justice had occurred;

There is no suggestion and/or implication that the Affidavit represents a complaint about anyone's conduct;

It does not appear that the information therein was intended to be a disclosure, as contemplated in the PDA;

There is no link between what is set out in the Affidavit about the meeting and the Browse Mole report."

926. The Court recognised that in order to bring himself within the ambit of the protection afforded by the PDA, Mrwebi had to show that there was a link between the investigation and the Browse Mole report, and the meeting of 25 July 2007. This link being that both show that the DSO was acting outside its mandate, which constituted impropriety.

927. In Mrwebi's case the disclosure was therefore about improprieties of the DSO. However, on his own version he had not appreciated the link at the time he gave the statement. The Court concluded that there simply was no link. This was submitted as an afterthought designed to bring the matter within the ambit of the PDA and at the time he made the affidavit he could not have bona fide believed there was a link between the investigation and the meeting.

928. Accordingly, his affidavit did not constitute a disclosure under the PDA and he could not rely on the protection afforded by the PDA.

929. However, the Court granted the interdict, concluding that Mrwebi had shown an entitlement of this Court to intervene in his favour as to the applicability of the PDA and the Court concluded that he had some prospects of success as this was an exceptional matter of high importance. It is not apparent from the judgment that Cele J concluded that it was in fact a protected disclosure.

930. In addition, Mrwebi also provided an affidavit in pursuance of the prosecution of Nel. He had provided Mabula with a statement also explaining the process or procedure of instituting investigations in the DSO. It appears to be exactly what Jiba had been asked to provide. Though he goes further and says that Nel's version is outrageous and hard to believe.

931. Mrwebi did not know why a police officer from Gauteng came to him in KZN for an affidavit on how the DSO operates. He had asked but could not recall the answer. He had also not obtained consent in terms of section 42(6) of the NPA Act. He said that the information was not secret. When it was put to him that section 42(6) did not require that the information be secret, Mrwebi answered that he had already clarified this.

5.3.3. OECD and MacAdam

932. The OECD is an intergovernmental initiative to stimulate economic growth. Because corruption has a negative impact on economic growth, the OECD seeks to ensure compliance with the Convention on Combating Bribery of Foreign Public Officials and International Business Transactions (*"the OECD Convention"*). The OECD Convention was adopted by South Africa on 21 November 1997 and was ratified in 2007.

933. Every year each States Party is required to register with the OECD its investigations into any breach of the OECD Convention that it has identified. State parties are also expected to give a detailed breakdown of the progress made with their investigations. In addition, the OECD monitors implementation of the Convention by each State Party.

5.3.3.1. Allegations concerning Jiba

934. In relation to Jiba, Macadam's evidence was limited to his communications with her around his continued work on the OECD and the PCLU. MacAdams gave evidence that at a meeting between Jiba, Johnson and himself, Jiba asked for a briefing on the work Macadam was doing. He explained that he was focused on OECD work but that he was required increasingly to be doing PCLU work too. He explained further that he had discussions with the NDPP regarding whether he should be continuing with the OECD portfolio or whether it would be re-assigned. Jiba indicated that she would discuss this with the NDPP. Johnson strongly urged Jiba to remove Macadam from the OECD cases, suggesting that Nxasana had acted wrongly against Mrwebi by removing those matters from the SCCU in the first place.

935. On 7 September 2015, Macadam provided Johnson with a report to be submitted to the NDPP (Nxasana) and Jiba. He requested clarification in the report as to whether the foreign bribery cases would still remain with him, indicating that there were a number of developments around the cases and the ACTT and pointing out that he was now increasingly being involved in non-bribery PCLU matters.

936. On 1 October 2015, Johnson informed Macadam that Jiba had decided that the foreign bribery cases had to be transferred to the SCCU with immediate effect. Johnson further instructed Macadam to compile a status report for her which she said would be given to the NDPP and Mrwebi. Macadam informed Brigadier Moodley, the SAPS investigator dealing with the cases, of the decision and he returned all foreign bribery files to the ACTT. **"RCM11"** to Macadam's Affidavit is the report which was directed to Johnson, Jiba and Abrahams.[255]

255 Although the report is not addressed to Abrahams and Jiba, it was understood that Johnson was to provide it to Abrahams and Jiba – and this is referred to in the body of the report

5.3.3.2. Mrwebi's evidence in relation to OECD

937. When asked about Macadam's evidence in relation to the OECD and the threat to South Africa resulting from his conduct, Mrwebi said that South Africa is a member of the OECD Working Group on foreign bribery, on which Mrwebi sits.

938. The Transparency International Report titled "Exporting Corruption" 2018 showed that South Africa had not suffered since Macadam had been removed from dealing with the OECD matters – in fact:

> *"since the 2015 report 12 countries have moved to different bans, eight accounting for 7.1 percent of world exports having proved, while four account for 6.7 percent of all exports have deteriorated.*
>
> *The two biggest improvers are Israel from little or no enforcement to active enforcement and Brazil from little or no enforcement to moderate enforcement."*

939. By 2015, South Africa was in the category of *"no-enforcement / limited enforcement"*. Mrwebi presented his report in October 2018 in Paris to the OECD and South Africa was facing 3-bis status. The difficulty with South Africa's record in the OECD was that it was criticised for not moving beyond preliminary phases of investigations in cases. But by the time he reported to the OECD in October 2018, South Africa had a number of active cases that had progressed beyond the preliminary stage. South Africa had 12 investigations that were active full investigations at that point. Mrwebi saw that as a commendable success.

940. He also indicated that there was at least one other case which was close to getting to Court. According to Mrwebi, Macadam was wrong – and South Africa was *"not doing bad."*

941. In cross-examination, Mrwebi was pointed to a section of the Transparency International Report which showed that since 2015 South Africa did not have a single new case on foreign bribery. He accepted that this was correct but explained that this was because of the difficulty with investigating and prosecuting these sorts of cases. This could be an indication that since MacAdam's nothing has been added.

942. In December 2015 MacAdam attended a meeting of the OECD as directed by the NDPP. At that meeting South Africa was required to provide the OECD with a written progress report dealing with the investigations. Shortly before Macadam's departure, he was contacted by the DPSA convener, Dr Salomon Hoogenraad-Vermaak (Hoogenraad-Vermaak), who informed him that a major problem had been identified. He gave Macadam a copy of a report which had been prepared by Macadam in Novemeber 2014 dealing with the status of the investigations at that stage. Hoogenraad-Vermaak indicated to Macadam that Mrwebi had simply taken the 2014 report and added certain comments in red.

943. Macadam considered the amended report and realised that it would be an embarrassment should South Africa submit such an incomplete report. Moreover, it had his name on it, rather than Mrwebi's. The report was more than a year out of date. The comments in red reflected either that nothing of any significance was being done to further investigate the matters or that the police had no investigations at all on them. Mrwebi never discussed the report with Macadam or asked for his input. Had Hoogenraad-Vermaak not shown the report to Macadam, he would not have known of its existence.

944. Macadam therefore submitted another report to Pretorius on 4 December 2015 asking him to urgently bring this matter to the NDPP's attention. He pointed out all the inaccuracies in the comments inserted in red by Mrwebi and provided proof that the police were in fact aware of the cases in question.[256]

256 277Macadam Affidavit, para 43. For a detailed explanation of the many inaccuracies or misrepresentations in the amended report, see Macadam Transcript, Day 2, pp. 22 – 32. 88

945. Due to the importance of the December meeting Mr Kenny Govender (Govender), the Deputy Director-General of the DPSA, decided to attend. In the presence of Hoogenraad-Vermaak he confronted Mrwebi and Mahlangu (representing the ACTT) with the altered report. He informed both of them that it would be highly embarrassing to place it before the OECD.

946. Both of them advised him that he should inform the OECD that no progress had been made on the cases since Macadam's last report. He informed both of them that this was also unacceptable. He therefore proposed that Macadam give an oral report at the meeting on the progress that had been made up to the end of the September 2015 when Macadam had still dealt with the cases. They agreed and Macadam did so.

947. Under cross-examination much was made of the fact that Mrwebi never intended for his revised / amended report to be a final report. However, it was clear that if that is what Mrwebi in fact intended, he never communicated this to anyone.

948. In January 2016 Macadam received a request from Mrwebi to provide him with a report on what had taken place at the December OECD meeting. Macadam mentioned the issue of the lack of progress that had been made with the cases since the files had all been removed from him. On 6 January 2016 Macadam received an email in response from Mrwebi disputing the statement that no progress had been made after Macadam's removal – a statement which Macadam regarded as another untrue claim by Mrwebi. The email also stated that foreign bribery cases are the responsibility of the SCCU.

949. The implication of this, Macadam testified was to create a level of confusion because Mrwebi claimed to be dealing with the foreign bribery cases but the NDPP had instructed Macadam to continue to act as designated prosecutor on those cases and no withdrawal of that delegation had been received from the NDPP.

950. On 7 January 2016 Macadam provided Pretorius with a report responding to Mrwebi's allegations. He had been informed that the NDPP was planning to convene a meeting on OECD matters. Macadam indicated that since he had been cut off from the cases, he intended to no longer have anything to do with the OECD cases. Yet again, no response to this report was received from Pretorius and no member of the SCCU approached Macadam to ask for an update or advice on the OECD cases.

951. Hoogenraad-Vermaak nevertheless provided Macadam with a preliminary analysis by the OECD of a report given by South Africa in March 2016. This report raised serious concerns about a lack of active enforcement and limited progress. It indicated that only eleven investigations were being conducted out of seventeen allegations and that few investigative tools were being used in the majority of cases.

952. Macadam also referred to a letter dated 13 April 2016 from the DG of the DPSA to the NDPP indicating that the main concern with the OECD was a lack of active enforcement and that feedback was required in March 2017. It was further indicated that the OECD was considering holding a 3bis evaluation if significant progress was not shown. The letter further indicated that a number of recommendations had either not been or partially been implemented. The DG of the DPSA did however, indicate that under Macadam's watch there had been full compliance with the OECD's recommendations.

953. Hoogenraad-Vermaak has confirmed Macadam's affidavit in so far as the contents related to the OECD, the reports and his involvement.284 He describes himself as the Director of Ethics and Code of Conduct management in the DPSA and the South African Co-Ordinator of the OECD.

954. Macadam's evidence relates largely to Mrwebi's actions in attempting to consolidate SCCU control over foreign bribery cases, notwithstanding a clear delegation from the NDPP that Macadam should deal with such cases. One of the focuses of the OECD Convention is to identify cases where foreign bribery of government officials has resulted

in lucrative contracts. The impact of removing Macadam and distributing foreign bribery cases throughout the SCCU offices to other prosecutors, was to undermine the hard-earned successes in the OECD during Macadam's tenure. It also had the effect of threatening the progress that had been made in staving off a *3 bis visit*.

955. Mr Rip, on behalf of Mrwebi argued that Macadam was simply a disgruntled employee who was upset that the OECD cases had been removed from him. When this was put to Macadam in cross-examination, Macadam denied this. Instead, he said he was disappointed at the manner in which he was removed but that he accepted the decision. This, he said was proved by his email to the NDPP asking for confirmation of his termination from involvement in OECD matters. As a senior manager with a difficult portfolio, he simply expected that a conversation would have been had with him, explaining why he had been removed. Instead, he was given a day to do a handover report without any explanation.

5.3.3.3. Statistics

956. Hofmeyr testified that there were 81 Anti-Corruption Task Team (*"ACTT"*) cases that had not been prosecuted but he was not able to provide information relating to these cases. He referred to cases that were reported to Parliament. It was alleged that the NPA had not properly prosecuted corruption matters in recent years. His evidence was that in the early days of the ACTT, some serious cases were done and prosecuted but, after a period, that stopped and most cases ended in plea bargains with non-custodial sentences.

957. Under cross-examination Mrwebi confirmed that the ACTT cases are being prosecuted by the SCCU.

958. The Transparency International report provided to the Enquiry by Mrwebi indicated that it had been reported to the Parliamentary Standing Committee on Public Accounts

(*"SCOPA"*) that 41 of the 42 ACTT corruption cases that had been finalised ended with plea bargains and reduced sentences.

959. Mrwebi also relied on statistics of criminal prosecutions of commercial cases which he identified as the information provided for the SCCU reports. This information was tabulated spanning the financial periods 2012 – 2019.

960. Reliance was placed on these statistics as being a reflection of the number of cases completed countrywide by the SCCU. Mrwebi expressed surprise at Hofmeyr's allegations that during 2012/2013 financial year, the NPA did not prosecute any serious crimes relating to corruption - those prosecuted were not serious because plea bargains were offered and sentences that could be imposed for those offences were non-custodial. Mrwebi's testimony was thus:

"if you look at our cases from 2012 up to at least 2016 we recorded a number of convictions with custodial sentences and just recently, if one reads the press, one of the cases we recorded a conviction of 24 years, and in the cases 2014, 2015, I know that there were custodial cases of up to 20 years in our cases. So there is, it is just that maybe Mr Hofmeyr is not aware of those matters."

961. The table provided indicated the names of the accused, the number of persons charged, the charges, the sentence, the amount involved and a brief description of the case. As to the authenticity of the document containing the information, Mrwebi testified that it was information complied which formed the subject matter of reports which eventually found their way into the NPA's annual report.

962. Unless the underlying assumptions are properly delineated, statistics have limited value. It was also not clear whether, in light of the number of SCCU units countrywide, whether the statistics provided meant that the statistics reflected that the number of successful

prosecutions was high or low. This information was tendered in light of the evidence given by Hofmeyr as to the absence of custodial sentences.

963. Under cross-examination Mrwebi agreed that statistics alone are not an indicator that one is making an impact or is doing well since one's performance is evaluated based on production.

964. As to foreign bribery cases it appears that no foreign bribery cases have to date been prosecuted in South Africa. It is so also that it takes years for these cases to reach the point that they can be so prosecuted.

5.3.4. State Capture

965. Both Agrizzi and Muofhe were invited to give evidence to this Enquiry after their evidence at the State Capture Commission implicated Jiba and Mrwebi. Based on legal advice received, Agrizzi indicated to the Enquiry that he would not be available to give evidence. His affidavit and the transcript of the evidence given before the State Capture Commission is nonetheless in the Dropbox and constitutes evidence before the Enquiry. Likewise, Muofhe's statement and transcript of his evidence to the State Capture Commission is in the Dropbox and before this Enquiry.

966. Muofhe responded to the invitation to give evidence indicating that in order to do so he would require the Enquiry to pay for an attorney and Counsel to advise him. The Enquiry did not cover the legal costs of any of the witnesses that appeared and given the nature of the Enquiry it was unable to cover his legal costs. Muofhe chose not to give evidence.

5.3.4.1. Evidence of Angelo Agrizzi

967. In short, Agrizzi, the former COO of Bosasa, alleges that payments were made to Jiba, Mrwebi and Lepinka through Mti of Correctional Services in order that they provide

information, as well as interfere with and prevent the investigation and prosecution of Bosasa.

968. Mti was aware of the investigation and he suggested that Watson, the CEO of Bosasa, needed to pay certain individuals within the NPA so that they could curry favour and assist in telling him (Bosasa) where and when to send lawyers letters and on what basis to send them.

969. Mti indicated to Watson that a secretary, Jackie Lepinka, who had previously worked for him and who at the time was working for Jiba and Mrwebi, would facilitate the exchange of money and information between Bosasa, Jiba and Mrwebi, who were handling the investigation at the NPA.

970. According to Agrizzi, the three people from the NPA would assist with the Hawks investigation and not the SIU investigation.

971. Mti told them that he met weekly with the persons to whom he gave code names so that they would not be compromised. He referred to Jiba as “Snake” and to Mrwebi as “Snail”.

972. It is alleged that in exchange they would provide Mti with detailed information on the investigation and the prosecution into Bosasa. In return, he would pay them the cash on a monthly basis. His evidence was that Jiba received R100 000.00, Lepinka got R20 000.00 and Mrwebi got R10 000.00.

973. Agrizzi was never present at the delivery of the money to them and had no personal contact with them.

974. Agrizzi’s statement goes into further detail of the money and information exchanged. However, considering his refusal to give evidence, and the fact that both Jiba and

Mrwebi have denied the contents of his affidavit, there is no further evidence in relation to this matter before the Enquiry.

5.3.4.2. Evidence of Mahlodi Muofhe

975. Muofhe's evidence as contained in his statement to the State Capture Commission was essentially that Zuma offered him the job of NDPP indicating that he would remove Nxasana. Zuma assured him that he would respect prosecutorial independence but also indicated that Nxasana was being removed because of his decision to prosecute Jiba. Muofhe refused on the basis that he did not believe that he would be allowed to be independent and that he believed Jiba would be the de facto NDPP.

976. This evidence could not be taken any further.

5.3.5. Plane Ticket

977. Pursuant to a declassification application, it was confirmed to the Enquiry that Jiba was / is not a secret agent and was / is not secret agent

978. The issue remained whether she was the recipient of a plane ticket for return flight between Johannesburg and Durban on 9 September 2010 that was paid for from the secret service account (*"SSA"*). Jiba testified that she had never been on any flight paid for out of SSA. She pointed out there was nothing in the bundle of documents presented by Roelofse to the Enquiry that suggested that she was the person on the flight. There was no identity document, no boarding pass.

979. She had also been asked about this by the IGI and had cooperated with the IGI's inquiries. In effect she had indicated that she knew nothing about this. Jiba was also aware that the police were investigating, but she did not want to engage of the matter. She had given her response to Jay Govender (*"Govender"*) of the IGI's office and that was where it ended.

980. Jiba was asked if the flight on 9 September 2010 was related to the pardon granted to her husband on 8 September 2010. She said that she did not know on which date her husband was granted a pardon. She agreed that she was appointed as DNDPP three months later.

981. In summary, Roelofse's evidence in relation to this issue was as follows:

981.1. A confidential informant indicated to him that someone from the NPA – a high ranking official – was on a flight to Durban with Mdluli. Roelofse couldn't remember whether the informant told him this directly but he states that it was through this conversations with the informant that he discovered this information.

981.2. Roelofse investigated this information and looked at the passenger manifest of the flight in question. He discovered that there was a Mr N. Jiba on the flight in economy class. Mdluli was on the flight in business class.

981.2.1. Documentation obtained from the travel agent identified the passenger as *"Mr"* with first name as *"Nomqobo"* and/or *"Nomgobo"*. SAA did not have the identity numbers of passengers.

981.2.2. Enquiries at Home Affairs which indicated that there were only 2 Nomgcobo Jiba's in the country (both female) – one who was born in 1974 and Jiba. There were no others persons (male or female) with the name *"Nomqobo"* or *"Nomgobo"* on the population register.

981.2.3. He had obtained Jiba's voyager number from SAA but it had been issued after September 2010. Roelofse was presented under cross-examination with Jiba's voyager number which differed by one digit to the voyager number reflected in his affidavit. He accepted that he could have made a mistake on the voyager number. The actual flight documentation including details of the boarding pass was in the docket – which is missing.

982. Jiba denied that she was on the flight in question and that she was an intelligence agent.

983. Jiba has co-operated with the IGI and it can hence be assumed that the IGI had already investigated the matter. Further information, if any, may be in the possession of the IGI, who in all likelihood put a report before the JSCI.

984. The President would be able to access such report – if one exists.

5.3.6. NPA under Nxasana

5.3.6.1. Yacoob fact finding

985. The *"Yacoob Fact Finding Committee report"*[257] was commissioned on 31 July 2014 at the instance of the CEO of the NPA at the time, Karen van Rensburg. She, in turn, was instructed to do so by the NDPP, Nxasana. The Committee was comprised of retired Constitutional Court Justice ZM Yacoob and Mr TK Manyage, a member of the Johannesburg Bar. Their task was to investigate allegations regarding leaking of information by NPA employees to the media and other interested parties, as well as to look into allegations of unethical and unprofessional conduct on the part of NPA employees.

986. The report was delivered to the NDPP on 27 February 2015, who then relayed the information to the Minister. Despite the ambit of the investigation extending to any member of the NPA, what came out of the report was entirely focused on Jiba, Mrwebi and Mzinyathi.

987. The Committee lamented the fact that certain persons who had been the subject of concerning comments made by the Courts did not come forward to explain their position and respond in person to the comments made about them. By implication Jiba and Mrwebi both fell within that category of "certain persons".

257 Folder F, Item 1, Item 1,2 "Report of the committee appointed by Mrs Karen van Rensburg, the Chief Executive Officer of the National Prosecuting Authority, to investigate and gather evidence on certain aspects of the functioning of the National Prosecuting Authority" (Yacoob Fact Finding Committee report)

988. Explaining that the report was not conclusive, due to the Committee's inability to compel witnesses, they made three recommendations to the NDPP:

988.1. that the NDPP issue certain directives regarding: section 24(3) of the NPA Act; SDPP proclamations; and the process for withdrawal of charges, particularly in high profile or sensitive cases;

988.2 that criminal charges already instituted against certain senior members of the NPA should continue, and;

988.3 that a judicial commission of inquiry be established to look into the NPA, since a sufficient degree of impropriety had been observed.

989. With reference to Mrwebi's evidence at Breytenbach's disciplinary hearing, particularly concerning the issue of "in consultation with", the Committee found that Mrwebi had varied his statements *"in an obvious effort to avoid the inevitable conclusion that complete consensus was required"*. He had stated that the Act required "substantial agreement", "50-50 agreement" or no agreement, and veered between these three possibilities "with some instability" while giving evidence under oath.

990. The adverse comments made about him in the report in relation to the disciplinary hearing can be seen below:

"[W]e must say immediately that [Mrwebi's] evidence under oath at the disciplinary hearing left a great deal to be desired. He displayed much arrogance, contradicted himself repeatedly and in material respects, and demonstrated a considerable lack of understanding of the law and of legal processes. In our view, his evidence was certainly not becoming of a person holding the position of Senior Director. He certainly did not come across as a man of credibility or integrity. There is serious doubt as to whether he can be trusted with the job of a Special Director."

991. Nxasana had asked Mrwebi to respond to the criticisms levelled against him by the Courts and to report on the manner in which he had handled the Mdluli matter. In respect hereof the Committee made the following observations about Mrwebi:

"He made unacceptable and dubious statements about all six judges involved, quite improperly and without any justification at all, accusing them of having made false and unjustifiable assumptions and having been blinded by these assumptions. These comments, in our respectful view, border on contempt and should not be tolerated under any circumstances."

992. The Committee found that not only were his criticisms of section 24(3) of the NPA Act in his report, wholly unjustified and borderline contemptuous but also incomprehensible. Mrwebi was found to be self-opinionated, believing that no one but himself as right.

993. The Committee looked into the dockets and were of the view that "there was at the very least a prima facie case against Major-General Mdluli on the fraud, and corruption, as well as the murder and related charges". It was gravely concerning to the Committee that the charges were all withdrawn and that the murder and related charges were not immediately reinstated after the completion of the inquest.

994. On the strength of these findings, the Committee went so far as to recommend that disciplinary procedures within the organisation, or even in terms of prevailing legislation, be instituted against Mrwebi. In the Committee's view, withdrawing cases where there is a *prima facie* case, and in circumstances that do not comply with the prosecution policy, ought to be grounds for dismissal.

995. In respect of criminal charges that had been instituted against senior officials within the NPA, the Committee confirmed that there was a *prima facie* case in all of them. Implicit to this finding were the perjury and fraud charges against Jiba.

996. The Committee reached conclusions in relation to Jiba and Mrwebi.

997. With regards to Mrwebi it stated:

"The Special Director (SCCU) has got a great deal to answer for. The criticisms made of him have been already fully set out in this memorandum. Over and above those criticisms' courts have accused him with justification, of not telling the truth, not being fully frank with the court, not providing the court with the full record of proceedings and filing papers late. This is not how officers of court should behave.

We would submit that there must be concern about the impact of the conduct like that of Mr Mrwebi on the prosecutions service. To summarise Mr Mrwebi:

a) withdrew a prosecution against Major-General Mdluli irrationally, not in consultation with Mr Mzinyathi, without consulting interested parties and on ground that were wholly tenuous; and

b) there is reason to believe he lied under oath and did not respect the court."

998. In respect of Jiba:

"Ms Jiba is the Deputy National Director of Public Prosecutions and was the Acting National Director at the time of the withdrawal of prosecutions against Major-General Mdluli. She said in the High Court that she knew nothing about the withdrawal of these cases and the court found it difficult to believe her. We agree with the High Court on the basis suggested by Murphy J. We find it quite incredible that she did not know about these cases, involving as they did, a high ranking Major-General. The Supreme Court of Appeal rightly criticised her in the Mdluli case for doing nothing about Ms Breytenbach's representations to her. She must have known about them. Finally, in the Democratic Alliance case in the Supreme Court of Appeal she was again criticised, with justification, in our view, for adopting a supine approach to court order to deliver certain material to the applicants.

There are other decisions of the National Prosecuting Authority of which the National Director is aware in relation to which we cannot motivate further than saying that the information available concerning why charges were brought or withdrawn fill us with considerable unease."

5.3.6.2. Handover

Request to Jiba to account

999. Under cover an email dated 1 July 2014 Nxasana addressed a letter to Jiba thanking her for the period she had acted as the NDPP and indicating that since he had taken office (1 October 2013) he had not been privy to an official handover report. He found himself in the invidious position of not having the background to inform decisions with specific regard to a number of high profile cases. He requested that she prepare a handover report to be provided to him by 15 July 2014, stating that *"you have mentioned in the past that you were working on such a report so I believe the time frames to be reasonable"*.

1000. In addition to a general report, he requested separate reports relating to the FUL matter requesting details of the processes followed; the reasoning adopted; the reasons for the change of counsel; and requesting in particular her views on the findings specifically as they relate to her, Mzinyathi and Mrwebi as well as any recommendations she would like to make in respect of how the NPA should take the matter forward. In particular Nxasana sought her comment on what informed her decision not to intervene in the ***Mdluli*** matter, subsequent to a report having been submitted to her requesting her intervention in terms of section 22(2) of the NPA Act, the latter we understand to be a reference to the BF memo.

1001. As to the ***Booysen*** matter, Nxasana sought a report indicating the legal grounds for instituting the prosecution given that Jiba had indicated in an Exco meeting that she had

not been privy to the full docket. He sought her views on the judgment as it pertained to her actions and the recommendations on how to deal with the matter.

1002. As to the ***Bosasa*** matter he enquired as to whether representations were received on the matter and what the outcome thereof was and the legal basis for the decision. He enquired as to the reason and purpose for Ms Lepinka's attendance at a briefing meeting at which the prosecutor was required to brief Jiba on the matter.

1003. In the ***Amigos*** case, he asked for Jiba's comments specifically on whether Noko acted within her powers when she reviewed the decision of Mlothswa; whether Jiba had been informed of her decision to review the decision and Jiba's views on the matter. He further enquired as to Jiba's views in respect of the findings of the Court, specifically as they relate to Jiba; as well as to the powers of the DPP to withdraw a matter in which s/he had no delegation to make the original decision. Nxasana sought the detailed reports by 20 July 2014.

1004. Nxasana also asked Jiba for the keys to the safe, including the safe in the armoury of the NPA which she had in her possession as the Acting NDPP in which the details of former informers of the Scorpions were kept. She was requested to hand over the keys and provide the inventory of the safe as of the date of handover as required in terms of the NPA Key Control Policy 2013, as well as to details the current inventory. She was asked to indicate whether she had access to these safes and if so, whether any items were removed or taken by her or anyone else. This report was sought by the end of business on 4 July 2014.

1005. In a letter to Jiba dated 4 July 2014, Nxasana indicated that the Auditor-General had raised queries relating to the prerequisites to performing functions in terms of the NPA Act and that her name did not appear on the list of admitted advocates. He pointed out that he was convinced that this was a mere oversight and kindly requested that she

provide him with a copy of her Right to Appear in the High Court by 11 July 2014. By 9 September 2014, he had still not received a response.

1006. There is no documentation reflecting that she had responded to this request and in fact, a further letter under cover of an email was sent on 5 August 2014 which, according to the read receipt, was received by Jiba on 7 August 2014. She was reminded to respond and copies of the aforementioned were again provided.

1007. In a letter dated 24 August 2014 Nxasana requested from Jiba a copy of her secretary's diaries from 1 November 2011 to 30 April 2012. There again appears to be no response to this request.

1008. In a letter dated 9 September 2014, Nxasana detailed that he had met with Jiba at his office and orally requested the information and that she had given an undertaking to provide him with it but that at the date of this letter (which appears from the stamp to have been hand delivered and received by the LAD division on 10 September 2014) she had neglected to do so. This letter again called upon her to furnish him with the information with extreme urgency. He also requested her to furnish him with all the files and documents relating to the matter of the *State v Mendelow* and requested these by no later than the close of business on 11September 2014. He also noted that she had not answered the letter sent to her on behalf of the fact-finding committee chaired by Justice Yacoob and enquired whether she intended to reply as the Judge was waiting for one.

1009. In addition, in a letter dated 24 October 2014, Nxasana enquired from Jiba as to her comment in respect of the criticism of Navsa ADP in relation to the comments made in *Spy Tapes* handed down on 28 August 2014.

1010. We have not seen any response from Jiba to the aforegoing and we understand from her response that she did not respond.

Request to Mrwebi

1011. A similar request dated 1 July 2014 was made to Mrwebi to which Mokhatla was included. Again, Nxasana advised that since taking office on 1 October 2013 he had not been privy to an official handover report and required information in relation to high profile cases he was seized with. He sought a report in respect of the **FUL** matter relating to the background to the matter within his personal knowledge; Mrwebi's views on the interpretation of *"in consultation with"* as set out in section 24(3) of the NPA Act; the findings specifically as they relate to him as well as the recommendations he would like to make on how the NPA should go forward and he sought these details before 15 July 2014.

1012. Mrwebi responded in a memo dated 14 July 2014, and commented on the findings insofar as they related to him and made certain recommendations as sought by Nxasana. He did not provide any annexures to the Report.

1013. In a letter dated 22 August 2014, Nxasana requested Mrwebi to provide information pursuant to a request received from the Yacoob Committee for such information.

1014. In this regard, Mrwebi was asked to provide: his secretary's diaries from 1 November 2011 to 30 April 2012; the letter / memorandum to Mzinyathi between 4 – 8 December 2011, including the acknowledgement of receipt from Mzinyathi's office; the letter / memorandum to Mdluli between 4 – 6 December 2011 together with the acknowledgement of receipt from Mdluli's office and information relating to the method used to deliver the letter / memorandum.

1015. On 27 August 2014, Nxasana noted Mrwebi's response to his request for information dated 25 August 2014 and his response to the CEO dated 27 August 2014. Nxasana pointed out that Mrwebi's responses were unacceptable; more particularly, that Nxasana had not threatened him and that the Committee appointed did not request any information

from him; nor was he required by Nxasana to cooperate with the committee. Nxasana pointed out that the information sought was the property of the NPA, not Mrwebi's personal information, and as such he was entitled to request it from him. He advised that as the SD he fell under the auspices of the NDPP and was subject to the control of the NDPP. Mrwebi was instructed to comply with the instruction by the following day.

1016. In a letter dated 29 August 2014 Nxasana informed Van Rensburg that Mrwebi had indicated that he was not prepared to cooperate with the Committee and refused to provide the information requested to Nxasana, despite having been advised that the information sought belongs to the NPA. He was again requested on 28 August 2014 to indicate the reasons he deemed the Yacoob Committee to be unlawful, as alleged. He responded by referring Nxasana to his letter of 25 August 2014. As a result, Van Rensburg was instructed to enter Mrwebi's office and to remove all electronic material and documentation that is the property of the NPA and to provide them to the NDPP. An inventory of the material removed had to be made.

Request to Mzinyathi

1017. Nxasana requested information from Mzinyathi in a letter dated 1 July 2014. Mzinyathi furnished a report dated 14 July 2014 indicating that his involvement in the **FUL** matter only related to the fraud and corruption charges. Mzinyathi furnished Nxasana with the BF memo with supporting documents, indicating that this memo *"put the matter in its proper perspective"*. He advised that he had been a witness in the Breytenbach disciplinary inquiry and referred to the **FUL HC** and **FUL SC** decisions briefly.

Request to Noko

1018. Nxasana also sought a report from Noko in respect of the **Amigos** matter and **Booysen matters** in a letter dated 1 July 2014. She was asked specifically to address the **Booysen** matter, in particular the legal grounds for instituting the prosecution; her views on the judgment, particularly as they pertained to her actions; her recommendations on how

to deal with the matter. In relation to the **Amigos** matter, whether she acted within her powers to review the decision of; whether she informed Jiba of her decision to review it and what Jiba's views were on the matter; and what her views were in respect of the findings of the Court, specifically as they relate to the powers of the DPP to withdraw a matter in which he had no delegation to make the original decision.

1019. She responded in a memorandum dated 14 July 2014 and also provided him with a copy of her affidavit deposed to in the matter of **DA v Acting DPP, KZN**,143 in which she explained that in relation to the representations received from the MEC, Nkonyeni, that had been sent to her by Jiba, she had withdrawn the charges in relation to nine of the accused. She also made it clear that the representations had been sent to the Minister because the representor had not wanted to send it to either Simelane or Mlotshwa as both of them had been involved in her prosecution.

1020. Noko indicated that she had not only withdrawn charges against the two MECs but also against eight others acting in her capacity as an Acting DPP. As she regarded the decision to be wrongly taken, she informed her supervisors of her decision based on rationale that it was her decision to make. This Jiba accepted.

1021. As to the **Booysen** matter she dealt with it briefly indicating that Maema had on 26 June 2014 provided Nxasana with a file containing the witness statements that linked **Booysen** to the offence charged with, and which indicated the legal grounds for instituting the prosecution. He was also then given Noko's application for a section 2 POCA racketeering charge. She indicated that the prosecution memo was being amended and would further elaborate on legal basis for charging Booysen.

1022. Noko indicated that she did not know what judgment he was referring to. None mentioned her actions as she had only recently been given this matter to deal with.

1023. Van Rensburg testified that that Nxasana indicated on several occasions that Jiba was undermining him by not providing him with relevant correspondence and information.

1024. Hofmeyr accused Jiba of failing to provide the reports on cases that caused public controversy, as requested by Nxasana and for the Yacoob Committee. Jiba testified that cooperation with the Yacoob Committee was voluntary. Moreover, that whilst they were told that the purpose of the Yacoob Committee was to investigate media leaks, it later emerged that its purpose was to investigate her conduct.

1025. In response to Hofmeyr's accusations and the request from Nxasana, that Jiba was insubordinate because she refused to cooperate with Nxasana's requests for reports, Jiba said that the reports were not ordinary requests, but an attempt to get her out of the NPA. She testified that she sought legal advice and was told not to respond.

1026. Jiba was referred to the aforementioned letters of 4 July 2014 and 9 September 2014, as well as his request, that she respond to the Yacoob Committee.

1027. Jiba denied that she had not provided a handover report. Her evidence was that she had briefed Nxasana on structures that he should attend, she explained the roles of the DNDPPs, she explained that there were cases he might have to be briefed on and who should brief him. Further, that soon after his appointment Jiba had spent the better part of the day sitting in his office briefing him. She testified that the atmosphere was one where she feared that something was set up to happen to her. At the time that she was requested to provide reports she had heard what was actually happening, took legal advice and did not respond to these requests. No details in relation hereto were furnished to the Enquiry.

1028. Jiba indicated that after the ***Booysen*** judgment, she had requested the prosecutors to prepare a report for the NDPP. She had also asked Mrwebi to prepare a report on the ***Mdluli*** case.

1029. It was put to Jiba that the letter asking her to respond to Nxasana's request to provide comments on the judicial criticism was serious. She answered that she was wary of giving a response that would land her in trouble without obtaining legal advice. Jiba testified that Nxasana had received briefings in all the cases, including *Booysen*. Reports had been submitted by *"those who knew even better than I did"*. The only issue was the key for the safe, which they later found by accident and then gave to the Security and Risk person or to Abrahams.

1030. Jiba agreed that Nxasana had sent letters to Mrwebi, Mzinyathi and Noko letters asking for reports. These appear all to have been sent in July 2014.

1031. Jiba agreed that there was not much an NDPP could do when an NDPP did not cooperate other than to pursue an enquiry pursuant to section 12(6).158

Report on the Booysen matter to Nxasana

1032. The evidence was that at Exco level Nxasana requested that Jiba provide a report of the *Booysen* matter. Jiba indicated that Chauke would provide such report. This remained an item not actioned on the Exco Minutes for some time and to the knowledge of Hofmeyr and Mokhatla, was never provided.

1033. With reference to Jiba's GCB affidavit, Hofmeyr testified that there were no minutes of an Exco meeting on 21 May 2014 which Jiba had indicated the last briefing on the *Booysen* case had taken place. Jiba responded that she would probably find the minutes if she had access, and that the prosecution team was adamant that they had a strong case. Also that in some briefings, the members of Exco were not present, the implication being that Hofmeyr would not know thereof.

5.3.6.3. Affidavit of Terence Joubert

1034. Hofmeyr deposed to an affidavit in *DA v President and Others*. Annexed to this was an affidavit by one Terrence Joubert. It was alleged during cross-examination that Joubert's

affidavit was fraudulent. Hofmeyr disputed this because he was in a meeting with Mr Molele (*"Molele"*) from the AFU when Joubert phoned him. Hofmeyr heard the discussion and it accorded with Joubert's affidavit. Joubert apparently subsequently disavowed any knowledge of this affidavit. Hofmeyr denied knowing that Joubert had denied the veracity of the affidavit attached to Hofmeyr's affidavit.

1035. This was reported in a City Press Report and was put to Hofmeyr by Counsel for Jiba. The article reported that:

"The state security agency is investigating an alleged plot to oust prosecutions boss Mxolisi Nxasana but an affidavit it is used using a probe may be a fake, the document forms part, forms the basis of an investigation that the SSA is conducting into the existence of the plot. City Press understands that Nxasana himself gave the agency a copy of the affidavit, a bitter feud in the NPA with Nxasana in one corner and former acting head Nomgcobo Jiba and the other took a new turn last week the affidavit obtained by City Press was allegedly deposed to by senior NPA official Terence Joubert and signed on 25 November last year. The document was sent to Nxasana's private an NPA email address from Joubert's official NPA address on the same day. Nxasana had only been on the job since August 2013. Joubert however claims this email part must have been forged it only reached the SSA earlier this week months after the deposition. Late on Friday Joubert the head of NPA security and risk management in KZN told City Press that the affidavit was a fake and that he did not depose to it. The affidavit states that Jiba asked a Hawks Colonel to wage a dirty tricks war and pain against Nxasana, it also says Jiba wanted to embarrass him, force his resignation and be reappointed to lead the NPA.

Joubert said that nobody had contacted him about the document and said it was strange that Nxasana did not contact him to verify its veracity. Nxasana declined to comment yesterday".

1036. In Joubert's second affidavit deposed to on 1 February 2016 he acknowledges that the signature of the first signature closely resembles his; he indicates that he does not recognise the information contained therein and does not associate himself with that affidavit. He indicated that he had not compiled the affidavit and he had no knowledge of writing anything contained therein. He alleged that his computer could have been accessed and information was used to compile this document without his knowledge. He pointed out that an investigation had been instituted to establish the authenticity of the said disputed affidavit, but that he had not been informed of the outcome of such investigation. This was in February 2016. He disavowed having received an instruction, as alleged, from Jiba contending that the allegations contained in the affidavit are all fabricated. He declined to be part of what was referred to as the personal battles in the NPA.

1037. Under cross-examination, Hofmeyr disputed that the authenticity of the second affidavit is questionable and suggested that a handwriting expert be called to verify Joubert's signature.

1038. There are clearly two contradictory affidavits, purportedly deposed to by Terence Joubert, before the Enquiry. The first, which is an annexure to the affidavit of Hofmeyr, dated 25 November 2013 purports to implicate Jiba and attempts to find ways in which Nxasana can be removed from the office of NDPP. The other, disavowing that that affidavit is in fact authentic. There were attempts made to contact Knorx Molele –the person who Hofmeyr indicated could corroborate his evidence, those attempts were, however, unsuccessful.

5.3.7. Third parties

1039. On 23 November 2018, the Enquiry issued a call for submissions to any interested person including juristic persons, entities, institutions and organs of state with special interest and/or relevant knowledge, to make written submissions and/or provide evidence to the

Enquiry in relation to all or any specific items of the Terms of Reference, gazetted on 9 November 2018.

1040. Affidavits were received from Kathleen Pawson (*"Pawson"*) and Mzukisi Ndara (*"Ndara"*). In addition, written and oral submissions were received from FUL and CASAC. As FUL and CASAC made submissions of a legal nature, their submissions are not summarised below but rather have been used as sources for legal analysis throughout the report.

5.3.7.1. Kathleen Pawson

1041. Ms Pawson has had numerous cases reported at various offices of the SAPS, some of which arose from domestic disputes. She alleges foul play at the hands of the police and attempts to bury the cases.

1042. It is not clear how her cases were escalated to the office of the NDPP. According to her, all of the NDPPs failed to help her except Jiba, who according to Pawson, was trying to combat corrupt activities, trace dockets, puzzle together pieces of alleged corruption that was being suppressed to protect police and the theft of their motor vehicles and slush funds.

5.3.7.2. Mzukisi Ndara

1043. Mr Ndara was a complainant in a matter that was investigated by the SCCU under the leadership of Mrwebi. The case related to a sale of vehicle where he was financed for a "new" vehicle even though he had bought a used vehicle. He was also charged fees for extras which, according to him, were non-existent.

1044. He felt hugely disappointed in the manner in which Mrwebi dealt with his complaint and representations made to his office.

1045. In November 2015, he received a decision from Adv Naicker (*"Naicker"*) who declined to prosecute his case but advised him that he could appeal the decision to Mrwebi.

A meeting was arranged with Mrwebi who advised him to first report to Adv Goosen (*"Goosen"*) who was the immediate supervisor of Naicker. Goosen also declined to prosecute.

1046. He thereafter made submissions to Mrwebi's office. Mrwebi allegedly did not respond and did not take his calls either. Once Mrwebi took the call and advised him to direct representations to the office of the NDPP. He later learnt that Mrwebi had indeed taken a decision, but this was not communicated to him. He also finds the purported decision suspicious as it was not signed by Mrwebi. He concludes by saying that he does not believe Mrwebi conducted himself in a manner befitting of his office.

6. AN EVALUATION OF THE EVIDENCE

1047. This section of the report considers the body of evidence that was set out in Part 5. We evaluate that evidence against the standards that are expected of senior officials within the NPA. The first part will focus on Jiba. The second part will consider the evidence relating to Mrwebi

1048. As we have stated a number of times in this report and do so here once more, we do not review the findings of the Courts in the cases referred to in the ToR. This Enquiry is an executive-mandated process and to use it to usurp the role of a court of law would be contrary to the doctrine of separation of powers. That said, attention is drawn to the fact that none of the Courts in those cases were seized with the question of the fitness of Jiba as DNDPP and Mrwebi as SD.

1049. We first consider the criticisms and findings in the cases as grounds for considering fitness and propriety in and of themselves. We then evaluate separately the other evidence tendered in the enquiry.

1050. It is pertinent that we express some preliminary views on the GCB cases as they reveal the difference between the question determined by the Courts and that which this Enquiry must respond to. Jiba's legal representatives asked that this Enquiry accept that the fit and proper test as it relates the two remaining on the roll of advocates, was determined in the GCB SCA case, is the same test that applies to the fit and proper evaluation in terms of the NPA Act. However, that view is incorrect. Both the SCA and the High Court in the GCB matters established as much. This position was further bolstered by FUL 2018 where the Court explained the difference clearly and at great length.[258]

1051. In sum, while an official may be removed or found to be not fit and proper to remain in the NPA, they may still remain fit and proper to remain on the roll of advocates. However,

258 **GCB SCA**, para 18; **GCB HC**, paras 19-23; **FUL 2018**, paras 96-99.

the converse is not true. Should an individual be struck from the roll of advocates they will, by operation of the law, also cease to be fit and proper to hold office in terms of the NPA Act.[259]

1052. It is worth reiterating the SCA in *Kalil NO* where it was stated that:

> *". . . where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."*[260]

6.1. Jiba

6.1.1. FUL HC and FUL SCA

1053. The criticisms levelled against Jiba in these judgments are fully set out in part 5 above. For purposes of our evaluation, we hone in on the findings that: she had been lackadaisical in complying with court processes; that her submissions lacked transparency; her defences for shortcomings in her conduct were technical and hidden behind formalities, and; her submissions reflected a failure to appreciate judicial powers of review and could be seen asdirected at shielding illegal and irrational decisions from judicial scrutiny.

1054. With these preliminary comments made, we proceed to evaluate the remarks made in the ToR cases insofar as they relate to both Jiba and Mrwebi.

1055. One does not need to be overly investigative to come to the conclusion that these observations by the Court reflect Jiba's conduct as unbecoming of an official occupying the highest office in the NPA at the time and falls far short of the standard expected of an official who performs her functions competently and diligently – which in turn impacts

259 Id.

260 **Kalil NO v Manguang Metro Municipality** 2014 (5) SA 123 (SCA), para 30.

the assessment of her conscientiousness, which in the context of section 9 of the NPA Act, has been defined in the following terms:

"The notion of integrity is one that does not attract much debate in this case. The notion relates to the character of a person – honesty, reliability, truthfulness and uprightness. Conscientiousness, on the other hand, addresses something related but different. It relates to the manner of application to one's task or duty – thoroughness, care, meticulousness, diligence and assiduousness." (Emphasis added)[261]

1056. Section 195 of the Constitution obliges all public officials to be accountable and transparent in accordance with the democratic values enshrined in the Constitution. Section 165(4) of the Constitution obliges organs of state to assist and protect the courts to ensure, amongst others, effectiveness. The prosecuting authority is no exception to these constitutional imperatives. Jiba, in her capacity as the Acting NDPP at the time, was required to perform her duties and functions assiduously and forthright – anything short of that standard would reflect an incapacity and / or unwillingness to carry out the duties of office as efficiently as required by section 22(4) of the NPA Act.[262]

1057. As an officer of the Court, she failed in her duty to assist the Court in establishing the truth. By the Court's own account, Jiba had neither sought to fully explain the facts, nor had she taken the Court into her confidence. This speaks to the principle stated in *Khalil NO* above.

6.1.2. Spy Tapes 2

1058. FUL SCA had already criticised her for being less than candid and forthcoming – she did very little in this matter to allay the concerns, providing an opposing affidavit in "generalised, hearsay and almost meaningless terms". The Court decried the fact that the office of the NDPP had opted to take an independent isolated view about the

261 Para 71 of the Ginwala Enquiry Report.

262 This section provides that the National Director must adhere to the duties imposed by, *inter alia*, the provisions of the Constitution.

confidentiality of documents in its possession in the face of a court order. By so doing the NPA had displayed a "lack of interest in being of assistance" to any of the courts in the litigation as they should have. Nor did the NDPP's office take steps to assert themselves and put Zuma's representatives on terms. Its conduct was found to be unworthy of the office of the NDPP, undermining its esteem in the face of the citizenry of the country whom they serve.

1059. This criticism of the NDPP's office leads to the inescapable conclusion that it is just as much a criticism of Jiba herself who was at the helm of the office at the time as the Acting NDPP. A leader's choice to lead or to be led still amounts to a choice made by that leader and is one for which the leader is accountable. The criticism is exacerbated by the fact that she herself deposed to the affidavit but seemed oblivious to the implications of the order and what was expected of her office.

1060. The SCA avers that the office of the NDPP, under Jiba's command, had certainly damaged its reputation in the eyes of the public. The public's perception of the NPA and its independence, through the office of the NDPP, had been tarnished. In Glenister, the Constitutional Court held:

> *"'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."*[263]

6.1.3. GCB HC and SCA

1061. The GCB decisions present themselves with particular nuances that ought to be considered. In the first instance the High Court had unanimously found that both Jiba and Mrwebi should be struck off the roll of advocates. On appeal the SCA found that Jiba's explanation for what had transpired behind the scenes in the various reviews

263 **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC), para 207.

absolved her from the allegations of misconduct. However, questions relating to her competence were left open.[264] As matters currently stand, the appeal against the SCA judgment has just recently been ventilated in Constitutional Court. Quite importantly, the decisions that flow from that appeal will be responding to questions which do not concern the fitness and propriety of Jiba and Mrwebi to hold their NPA positions. This is a question which is central to this Enquiry. The question of the removal from the roll of advocates is distinct from the question of fitness and propriety to hold office in the NPA.

1062. Jiba's counsel quite correctly pointed out that in the SCA's assessment of the facts, no case of misconduct could be established against her. The Court supported the GCB HC's finding that no *mala fides* or ulterior motive could be shown in Jiba's authorisation as contemplated in POCA. In relation to the delays in the FUL matter, the Court explained that Jiba may have been a trained lawyer, but her opinion would have been secondary to that of her counsel and of LAD. Differences of opinion in relation to the Halgyn memo which could not be said to have established that Jiba was not fit and proper to remain on the roll of advocates, simply because she had been advised otherwise. This of course must be distinguished from the fit and proper evaluation as it applies to NPA officials. The SCA acknowledged as much, explaining that an inference regarding her incompetence with regards to her duties as DNDPP may be inferred, which would then be a ground for her to be removed from her position of DNDPP.

6.1.4. General comments on the cases relating to Jiba

1063. We ought to be circumspect in the factual value that the GCB HC, GCB SCA and the FUL 2018 decisions can have in our evaluation of Jiba's conduct in relation to the FUL HC, FUL SCA, Spy Tapes 2 or Booysen judgments. The reason was spelled out by the Court itself in FUL 2018. None of the three subsequent decisions constituted appeals against the Spy Tapes 2, Booysen or FUL cases. The SCA in GCB had premised its

264 **GCB SCA**, para 18 where the Court explains that: "Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates";

interference with the factual findings of GCB HC on the strength of the fact that the latter had relied on information that had rendered it unable to bring an unbiased view to bear.

1064. This is not to say that due regard cannot be had to the comments made by the Courts in the GCB matters or FUL 2018 in relation to Jiba, but they cannot be regarded as superseding the findings of the decisions which had not been appealed.

1065. As a general view, the Courts' observations of Jiba's attitude and conduct throughout the course of the various reviews was characterised by non-responsiveness and irreverence towards the Courts. Furthermore, Jiba lacked accountability and sought to shift responsibility when she was expected to act under an order. The conduct she exhibited in her official capacity may be seen as subversive to the symbiotic relationship that ought to be enjoyed between the NPA and the judiciary. As a critical cog in the administration of justice it is incumbent for the NPA, an institution that is established under the very same constitutional chapter, to operate harmoniously with the courts. For that reason it is not a mere coincidence that members of the NPA as advocates are officers of Court and must assist the Courts to be effective in upholding the rule of law and dispensing justice. The NPA plays a critical role in that regard.

1066. Institutional independence means that the NPA's fidelity should be to the rule of law. But this does not mean that the NPA can be a law unto themselves. The Courts are vested with the responsibility of upholding the rule of law and the NPA is constitutionally duty-bound to assist them in doing so.

1067. As a senior leader of that institution, Jiba has a responsibility to diligently and competently manage that relationship and take all steps to set the record straight and assist the court when called upon to do so. When this is not done, it has an impact on her competence, which the courts have to have been found wanting in all the relevant judgments.

6.1.5. Evidence related to the cases

6.1.5.1. The Booysen prosecution

1068. Multiple evidentiary issues arise out of Jiba's handling of the Booysen prosecution that warrant evaluation and closer examination. First, it must be pointed out that the scope of information presented before this Enquiry is significantly broader than what had been placed before the Courts in the Booysen and the FUL 2018 judgments. While we evaluate Jiba's propriety and conduct in light of this broader scope of information, it should in no way be seen as undermining the findings of the Courts. Nor should it in any way be seen to suggest that the Courts would have come to a different conclusion had this information been presented before them.

1069. The evidence establishes that Jiba did not understand how her authority operates in respect of assigning prosecutors from outside of a particular DPP's jurisdiction to prosecute crimes within that jurisdiction. In her defence, she sought to rely on an interpretation of section 20(4) of the NPA Act to suggest that she could, through written authorisation, make those assignments. Furthermore, she relied on the Shabir Shaik and Zuma prosecutions as examples of instances where it had been done before.

1070. On a reading of section 20(4) of the NPA Act, together with Nel's legal opinion which was solicited by Mokhatla and its interpretation supported by Hofmeyr, Jiba's view does not appear to be correct. This is a simple matter of statutory interpretation where the word "and" rather than the word "or" is used. Jiba's examples of Downer being used in the Shabir Shaik prosecution and outside prosecutors being brought in for the Zuma prosecution are not relevant as they appear to relate to the now defunct DSO unit. Needless to say, there is also a paucity of evidence to support her averment.

1071. The evidence suggests that something unusual transpired in the process of authorising the racketeering charges against Booysen. More specifically, that the authorisation and

prosecution of Booysen took place outside of the ordinary procedures that were in place at the NPA.

1072. Mamabolo explained that there was a dedicated team that dealt with the vetting of racketeering charges. He also detailed the process. The existence of which was supported by Hofmeyr, although he called it a "committee". Mosing also acknowledged that there was a team dedicated to dealing with racketeering charges which he decided to exclude on the basis that Booysen had worked closely with the team in various cases.

1073. It is clear that the prosecution of the Cato Manor unit was not initiated from the KZN office. This is so because Mlotshwa received a call from Jiba of her intention to prosecute the matter.

1074. The facts establish that Jiba had been directly approached by members of IPID to deal with the prosecution of certain matters, this much she conceded when questioned in cross-examination. It is important to note that her concession directly contradicts her signed written submissions to the President. The question is whether she was the first point of contact. On the evidence, her meeting with the IPID members must have predated the establishment of a prosecution team. In light of the fact that in her evidence she refers to the visit of IPID which prompted her to constitute a national team of prosecutors. Mosing explains that he was first approached by IPID on 8 March 2012 with six dockets which he was instructed to consider and make a decision on by the next day. Within a day, on 9 March 2012, an entire team of prosecutors had been brought in from various parts of the country to be briefed by on the prosecutions by IPID.

1075. The explanation given to Mosing by IPID was that prosecutors had to be roped in because what was promised by Mlotshwa was not materialising. Jiba conceded calling Mlotshwa. There is no evidence of Mlotshwa being contacted by IPID. It was Jiba who had set up the special team of prosecutors.

1076. The IPID members put a significant amount of pressure on the prosecutors to decide on the dockets and to report back within a day.

1077. Jiba had appointed Mosing to head the SPD division, who then exclusively dealt with the Booysen charge, to the exclusion of Mamabolo and Kruger, in a manner which was at odds with the examination process that would ordinarily be followed. Mosing had received the racketeering authorisation application on 15 August 2012, drafted the recommendation to Jiba on 16 August 2012 – without examining the docket –[265] and Jiba had approved it on 17 August 2012.

1078. Gorven J had later found these authorisations to have been irrational.

6.1.5.2. The Spy Tapes 2 SCA order

1079. Jiba explained that she was simply acting on advice that had been obtained from the Kennedy team. In her affidavits she states that her conduct does not render her unfit or improper to practice as an advocate. The Court's findings in this respect are set out in 5.1.4. above. Having heard Jiba's explanations, we concur with the Court on the concerns it had raised about her.

6.1.5.3. The FUL litigation

1080. The evidence establishes that Jiba played an active role in managing and steering the litigation process. Four different sets of counsel had been deployed to attend to the matter. Where counsel had raised concerns in relation to a particular course of action, they were either removed or withdrew themselves from the brief. In a meeting that was attended by Jiba, among others, Halgryn had forewarned that the litigation was bound to fail. As the findings in the FUL judgments show, the decisions were set aside in both Courts.[266]

---

265 This is established in his own affidavit.

266 Jiba's counsel submitted that the litigation was a success since the SCA in the FUL matter indicated that the review was only possible through the principle of legality rather than under PAJA and further that it amended the order of the High Court compelling the NPA to reinstitute charges against Mdluli, opting rather to revert the matter to the decision maker. However, this was done due to separation of powers concerns. It did not change the outcome.

1081. Needless to say, what has been adduced is particularly concerning. It shows that Jiba had not been frank about the depth of her involvement in accepting or following advice – both in her GCB affidavit and before the Enquiry. She overrode the advice of counsel on more than one occasion if one has regard to the memorandums from counsel. She misled the Courts and failed to make full and frank disclosure in her affidavits. Her integrity is compromised and this serves as a clear basis for a finding that she is not fit nor proper to hold office.

6.1.6. Other evidence

6.1.6.1. Qualifications:

1082. The evidence establishes that at the time that she was appointed to the post of DDPP she was neither an admitted attorney nor an admitted advocate. Section 15(2) of the NPA Act would suggest that one of the prerequisites for the post is to have the right of appearance as contemplated in the Right of Appearance in Courts Act.[267] During the course of the hearings, reference was made to section 25(2) of the Act which provides that notwithstanding the provisions of the Right of Appearance in Courts Act, a prosecutor obtains the right to appear in all courts once he/she has obtained at least three years' experience as a prosecutor of a magistrates' court of a regional division.

1083. However, as a matter of statutory interpretation, a distinction should be drawn between obtaining the rights to appearance under the NPA Act by virtue of section 25(2) and obtaining the right through the legislation specifically referred to in section 15(2). A sensible interpretation would suggest that the right as it arises under the Act would be a pragmatic measure to empower prosecutors to carry out their prosecutorial functions in the Courts. The right to appear in terms of specific legislation as required by section 15(2) on the other hand, would suggest that the purpose would be to have either an admitted attorney or admitted advocate occupy a more senior role within the NPA, since

267 Act 62 of 1995.

an admitted professional has additional legal and ethical obligations and would thus also have professional accountability.

1084. In response to the EL's written submissions, Jiba objected to any possible suggestion that she had misrepresented her qualifications when she had applied for the post of DDPP. Stating that she was not aware of the criterion used by those who had appointed her, she attached letters from Ms Mathsidiso Modise, who identifies herself as the Chief Director: Human Resources Management and Development at the NPA, which sought to explain the process for appointing DDPPs. According to the letters, advertised DDPP posts require right to appearance but provide that it may arise either through the Rights of Appearance Act or by virtue of section 25(2) of the NPA Act. The NPA's approach to appointing DDPPs may be tenuous, but we are satisfied that the clarification establishes that there was no wrongdoing on Jiba's part. Even if the appointment was invalid in law, *Oudekraal* establishes that it remains valid in fact until such time that it is taken on review and set aside.[268]

1085. On why she then chose to refer to herself as "advocate" in various correspondences, Jiba's counsel explain that it was in reference to her title as "State Advocate", a formal position within the NPA rather than a practising advocate who is admitted on the roll as such. This explanation does not address why the "advocate" references continue even after she is appointed to the post of DDPP. Even so, in a practical social setting, it could simply amount to nothing more than the title becoming a customary moniker. Consequently, no adverse findings can be made on the strength of this evidence.

6.1.6.2. The presidential pardon

1086. Nhantsi's application for presidential pardon was granted by Zuma, despite sensible apprehensions being raised by the ministerial recommendation – specifically around the short period of time that had lapsed since the conviction and the bearing that this

268 **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA), para 27.

had on certain exclusions for individuals convicted of theft. That said, it was and is the President's prerogative to pardon whomever he deems fit.

1087. In light of the fact that a pardon is an act of generosity from the President, Jiba's proximity to her husband and her involvement in subsequent Zuma-related cases raises concern. While it may be that she had limited participation in **Spy Tapes 2** and did not feel that she would be bias in her role, she was the Acting NDPP, the most senior official within the NPA and she deposed to an affidavit in the matter. Whether or not there was actual bias, our Courts have recognised that the perception of bias plays an equally important role when it comes to assessing impartiality for judicial officers.[269] This principle is equally apposite when it comes to officials within the NPA, given the pivotal role that they play in the administration of justice and the fact that both the Courts and the NPA are constitutionally obliged to be independent institutions.

1088. In the circumstances, and given the course of action that the NPA chose to follow in **Spy Tapes 2**, Jiba had a duty to safeguard the image of the NPA as an institution and to mitigate negative perceptions relating to its independence. These perceptions are indeed established in the judgment itself which points to the fact that, through its conduct in the course of litigation, the office of the NDPP had damaged its esteem in the eyes of the citizenry. Her deposing to an affidavit in the matter rather than recusing herself, whether or not the decision had already been made by other officials, has a bearing on her integrity.

6.1.6.3. SSA plane ticket

1089. The evidence put forward by Roelofse suggests that Jiba, one day after her husband was pardoned by the President and three months before being appointed as DNDPP, had been on a flight with Mdluli which was paid for out of the secret service account. Jiba denied that this had ever taken place. Roelofse admitted to certain discrepancies in

269 **S v Jaipal** 2005 (4) SA 581 (CC), para 41: where the Court explains that the test is objective and that it involves determining whether there is an apprehension of bias rather than a suspicion.

the evidence, such as references to title, misspelling of the first name in the passenger manifest and a single digit discrepancy in the voyager number.

1090. The information that was placed before the Enquiry, is insufficient for purposes of evaluation. We believe that this matter must be investigated further as it may relate to live matters involving Mdluli.

6.1.6.4. Accountability, handover reports and cooperation with the Yacoob Fact Finding Commission

1091. When Nxasana took up the mantle of NDPP, he had made no fewer than 6 written requests to Jiba between 1 July 2014 and 24 October 2014 to provide him with an account on various matters that he was looking into. She did not provide a written response to any of those requests. Nor did she reply to a request from Justice Yacoob to come forward and provide information. On the face of it, the evidence would be indicative of incompetence and insubordination. In her oral evidence before the Enquiry, and when asked about the first letter, Jiba indicated that she had gone in to speak to Nxasana and had informed him that he had already received reports from individuals who were better informed in those respective cases. She also bemoaned the prevailing environment of hostility at the NPA, suggesting that there was a plot to oust her and that her silence was prompted by legal advice she had received.

1092. Jiba's acknowledging the shortcomings of the Office of the NDPP, including her own, is laudable. However, it does not absolve her in the course of the fitness and propriety assessment. It demonstrates that there were serious problems permeating throughout the institutional culture of the NPA but also shows that she was just as much a part of the problem. Whatever her fears may have been regarding a potential ouster, she failed to distinguish her personal interests from her responsibilities as the DNDPP. The latter is duty bound to account and to provide information to ensure that the organisation can function the way in which it is meant to.

6.2. Mrwebi

6.2.1. FUL HC, FUL SCA, GCB HC and GCB SCA

1093. The sequence of events together conflicting versions put forward by Mrwebi in various fora should be considered in light of the adverse findings that have been made against him by the Courts. On 26 October 2011, a Presidential Minute is signed appointing Mrwebi as SD. That same day, the NDPP receives representations from Mdluli's attorneys. Mrwebi explains that he received his appointment letter on 1 November 2011. His official appointment, however only takes effect on 25 November 2011, the date that his appointment is published in the Government Gazette. Before knowledge of Mrwebi's appointment was been made public through the Gazette, Mrwebi personally received representations from Mdluli's lawyers on 17 November 2011 for the charges to be withdrawn. Four days later, on 21 November 2011, Mrwebi forwards those representations to Breytenbach and requests that she submit a full report by 25 November 2011. He receives the report on 24 November 2011 explaining that Mdluli's representations are unsubstantiated.

1094. On the 28th of November, Mrwebi sends a letter to Breytenbach and Ferreira requesting the docket and evidence analysis in the Mdluli matter. On 4 December 2011 Mrwebi sends a consultative note to Breytenbach and Mzinyathi explaining that the charges against Barnard and Mdluli should be withdrawn.[270] That very same day, 4 December 2011, he sends a letter to Mdluli's attorneys stating that the charges have been withdrawn.

1095. Mrwebi stated that the date on the consultative note was made in error. He offered two conflicting reasons for the error. The first was that it was a Sunday and he could not have possibly sent it on that day because he does not work on Sundays. The second was that the date must have been copied over with a previous letterhead by accident. The contradiction is self-evident. He cannot claim that he does not work on Sundays yet have a pre-existing letterhead with a date that falls on a Sunday. However, both

270 Mzinyathi claims that he only received the note on 6 or 8 December 2011.

explanations are untrue, as the 4 December 2011 date appears several times in the consultative note.

1096. On 5 December 2011, Mrwebi met with Mzinyathi and aired some of his concerns regarding declassification but stated that he would have to investigate further. Mzinyathi subsequently learnt that Mrwebi had already taken the decision. On 8 December 2011, Mzinyathi wrote a letter to Mrwebi to voice his disagreement regarding charges being withdrawn. On 9 December 2011, Mzinyathi and Breytenbach met with Mrwebi and disagreed with his decision to withdraw the charges. Mrwebi explained that he had already sent the letter and was *functus officio*.

1097. Mrwebi's various explanations, regarding compliance with the "in consultation" requirement, are set out in the cases. The concessions he made in the Breytenbach disciplinary while being cross-examined directly contradicted the averments he had made before the Court under oath. In his consultative note, he explained that whether or not there was evidence in the Mdluli prosecution was irrelevant because the investigation fell within the remit of the IGI. Yet, before the Enquiry, he sought to suggest that it was the absence of evidence at the time which prompted the withdrawal. The upshot of Mrwebi's conduct is that he had been dishonest and he persisted with his dishonesty before the Enquiry.

1098. The issues which were raised in the cases and the criticisms levelled against Mrwebi are fully set out in part 5 above. In short, **FUL HC** took issue with his conduct in respecting court processes. More importantly, it found that he had been dishonest regarding his compliance with the "in consultation" requirement which was a prerequisite for the prosecution being withdrawn. **FUL SCA** did not meddle with **FUL HC's** finding and **GCB HC** as well as **GCB SCA** both found that the misconduct was well-founded based on Mrwebi's conduct in the **FUL HC** matter.

1099. Among the documents that were not included in the record, was the consultative note sent by Mrwebi to Mzinyathi setting out Mrwebi's decision to withdraw the prosecution of Mdluli and his reasons for doing so. This shall be discussed in more detail below.

1100. It was alleged that Mrwebi was determined to withdraw the fraud and corruption charges against Mdluli and prepared a memorandum and a "consultative note" setting out his reasons. The consultative note was dated 4 December 2011. The real issue as it became apparent in the GCB-HC regarding the 4 / 5 December 2011 dispute is whether the memo was prepared before Mzinyathi was consulted or whether Mrwebi did in fact consult with Mzinyathi in accordance with section 24(3) of the NPA Act, before taking the decision to withdraw the prosecution against Mdluli. The GCB-HC was of the view that Mrwebi had already drafted the document reflecting his decision to withdraw the prosecution when he met with Mzinyathi on 5 December 2011.

1101. Mrwebi's answer was that he made a mistake when he put 4 December 2011 as the date on which he had prepared the consultative document that and that he should have put 5 December 2011 as the correct date since it was on that date that the consultation with Mzinyathi happened. Before the Enquiry, Mrwebi further advanced that he could not have worked on the documents on 4 December 2011 because it was a Sunday and no documents are prepared on Sunday, he does not work on Sunday and was not at work that particular Sunday.

1102. Mrwebi knew that in terms of the law, he had to consult Mzinyathi. Whether he knew what the consultation entailed is unclear.

1103. That he was not being truthful when he said before this Enquiry that the date 4 December 2011 as reflected on the documents was a mistake can be seen from a handover report that he prepared to Nxasana on the Mdluli matter. In that report he said that, "during the week of 28 November 2011, I worked on the matter up to and including the weekend of 4 December 2011."

1104. Mrwebi's explanation that he used a pre-existing document to draft the memo since he did not have the letter head and that he simply forgot to change dates cannot be true as that would mean that the document that he used as a template was dated 4 December 2011. He could not have had a pre-existing document dated 4 December 2011 since according to his evidence before the Enquiry he was not at work that Sunday and did not prepare documents that day.

1105. At paragraph 1 of the consultative note Mrwebi stated that "[a]s required by section 24(3) of the NPA Act I have consulted with" Mzinyathi, "with the purpose of conveying my views on the matter", summarising as follows:

> *"Essentially my views* ***related to the process that was followed in dealing*** *with the matter particularly in view of the fact that the* ***matter fell squarely within*** *the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is* ***authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigations can never be complete without access to such documents and information.*** *In my view the process followed is* ***possibly illegal*** *as being in contravention of the said provisions of the Intelligence Services Oversight Act, 40 of 1994."* (our emphasis)

1106. This perpetuated the position adopted by Mdluli in his submissions to SAPS and the disciplinary proceedings held on 21 November 2011 that any investigation without the IGI's involvement would be unlawful. As a matter of law, Mrwebi is incorrect in relation to the mandate of the IGI, who can access classified documents and that the ISO Act had been contravened in the process followed. Not having had any discussions with any member of SAPS involved in the process, it is astonishing that Mrwebi reached that conclusion.

1107. In the Breytenbach disciplinary hearing and while under-cross examination, Mrwebi conceded that he took the decision to withdraw charges before seeing Mzinyathi on 5 December 2011. Furthermore, he conceded that he had prepared the documents before ascertaining what Mzinyathi's views were. The Court in **FUL HC** explains it fully in its judgment. Mzinyathi stated that on 5 December 2011 Mrwebi merely informed him that he was dealing with representations from Mdluli and that he was going to conduct research on the Intelligence Services Oversight Act.

1108. Mrwebi's conduct is inconsistent with the obligation imposed by the Prosecution Policy Directives which requires prosecutors to act in a balanced and honest manner. The code of conduct for members of the prosecuting authority requires that prosecutors be individuals of integrity whose conduct is objective, honest and sincere.

1109. Additionally, the 2004 practical guide to the ethical code of conduct for members of the NPA calls upon prosecutors to be honest. It provides in relevant parts that "prosecutors shall at all times exercise the highest standard of integrity and care, [they] must be and perceived to be honest sincere and truthful". The need for integrity is absolute, prosecutors must be scrupulously honest in providing information.

1110. The failure to comply with this obligation by one holding such a high and respectable leadership office within the NPA is objectionable and severely damages the institution's reputation. It infringes on the integrity and conscientiousness obligations imposed on prosecutors by the NPA Act, Prosecuting Policy and other instruments that govern the NPA.

1111. Both the SCA and the HC in the GCB matter were satisfied that misconduct on the part of Mrwebi had been established.

6.2.2. Evidence related to other matters

6.2.2.1. Representations which were made but kept secret by Mrwebi

1112. What is concerning about these representations is that neither Mzinyathi nor Breytenbach had been told about visits from senior Crime Intelligence officials not to mention representations and requests for investigations to be stopped. When Mrwebi was asked whether he did not find it worrying that implicated individuals from Crime Intelligence made representations to him and asked that investigations be stopped, he replied in the negative and added that he had not told the investigating officer to halt the investigations.

1113. That Mrwebi does not find it concerning that suspects were sending representations to him and requesting him to order that investigations be stopped presents a serious problem. The problem is compounded by the fact he kept all this to himself and did not communicate it to Mzinyathi, Breytenbach or Roelofse who were also involved in the case. Mrwebi's response to the memorandum presented by Breytenbach and Ferreira was dated 26 April 2012. In it he cites non-compliance with security legislation. It is these very same concerns that he raised in that response that form the substance of the representations which he failed to disclose.

1114. This shows that Mrwebi's independence has been compromised and therefore he cannot be trusted to carry out his duties as SDDP without fear, favour or prejudice.

6.2.3. Other evidence

6.2.3.1. Ledwaba

1115. It emerged during Mrwebi's testimony that the NPA proposed to take disciplinary steps against Mrwebi for, among other things, poor performance of his office, unprofessional conduct and unbecoming and inappropriate behaviour on the part of Mrwebi. In an attempt to answer to this allegation, Mrwebi told a story about how he became subject

of victimisation in the NPA because he had uncovered some improprieties on the part of those who were in senior management positions. These individuals included Adv Ledwaba who was later charged with multiple counts of fraud in relation to the DSO C-Funds.

1116. The Appeal Court noted that at the Ledwaba trial Mrwebi was found to have lied and contradicted himself numerous times. The Court states that Mrwebi's evidence before that Court was premised on an attack of the character of Ledwaba. Part of Mrwebi's evidence was that Ledwaba had told Mrwebi to pay an informer that was unknown to Mrwebi and that he did not believe should have been paid. It also emerged during the Ledwaba trial that Mrwebi had earlier in the Selebi trial accused Ledwaba of stealing funds from the C-Fund account of the DSO for his personal benefit.

1117. Before this Enquiry, Mrwebi questioned the accuracy of the transcript in the Ledwaba trial and asked for audio transcripts of the proceedings in that matter and objected to the production of the Ledwaba evidence altogether. His legal team undertook to find the audio recordings of the proceedings in the Ledwaba matter but such audio recordings were never provided to the Enquiry. The Evidence Leaders managed, however, to obtain a full transcript which was then made available to the legal representatives of the parties.

1118. Since no evidence has been provided to the enquiry to prove that the transcripts were inaccurate, we find no reason to exclude the Ledwaba evidence. We therefore accept the Court's finding that Mrwebi lied under oath.

7. FINDINGS AND RECOMMENDATIONS

1119. In view of the totality of evidence, and in light of the evaluation in part 6, we find that both Jiba and Mrwebi are not fit and proper to hold their respective offices.

1120. Central to the question of whether a person is fit and proper to practice as an advocate, is whether that person is a person of *"complete honesty, reliability and integrity"*.[271] This quality must be present throughout a person's practice as an advocate.[272]

1121. It is the function of the Court to determine what is or is not improper conduct for an advocate. The Court will take cognisance of the rules of conduct laid down by the society of advocates of a particular division and by the General Council of the Bar ("GCB").[273] The Court may prohibit conduct which, though not in itself immoral or fraudulent may in its opinion be inconsistent with the proper conduct of a legal practitioner and calculated, if allowed, to lead to abuses in the future.[274]

1122. The Court must take account of all the circumstances of the case with due regard to the demands of the proper administration of justice, and the interests of the profession and the public.[275]

1123. The application involves a three-stage enquiry:[276]

1123.1 First, the Court will decide whether the alleged offending conduct is established on a balance of probabilities.[277]

271 Geach supra para 126.

272 Ibid para 127.

273 *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 605G.

274 *De Freitas* supra at 763, per Cameron JA at para 8.

275 Ibid.

276 *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51. See also: *Geach* supra paras 50 – 51; *Cape Bar Council v Noordien* (14514/2012) [2013] ZAWCHC 138 (30 August 2013) para 17.

277 *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654C-E.

1123.2 Only once this is established, will the Court decide whether, objectively, the advocate is a fit and proper person to continue practising as such.[278]

1123.3 Finally, if the Court concludes that the person is not fit and proper to practice as an advocate, then it has a discretion either to grant an order striking the person's name off the roll of advocates or to suspend the person from practice.[279]

1124. In fact, it has now been definitively established that the *"fit and proper"* test as it applies to legal practitioners is distinct from the *"fit and proper"* test which is applied to NPA officials under section 9 of the NPA Act. While there is a direct relationship, the standards which are applied are idiosyncratic. For example, it is possible for a senior NPA official who is found not to be fit and proper under the NPA Act to nevertheless remain fit and proper as a legal practitioner. The converse is of course not possible in that a legal practitioner who is struck off their respective roll will, by operation of law, cease to be fit and proper under the NPA Act.[280]

1125. In *Jiba v General Council of the Bar, Mrwebi v General Council of the Bar*[281] the SCA overturned the High Court's ruling that Jiba & Mrwebi were unfit to practise as advocates.

1126. The Court in doing so, distinguished between the fitness to practise as an advocate and fitness to hold public office. The Court held that:

"Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates".

278 Ibid.

279 *Ibid; Jasat supra at 51G-I: "Whether a Court will adopt the one course or the other will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession (Incorporated Law Society, Transvaal v Mandela 1954 (3) SA 102 (T) at 108D - E), the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree."*

280 *GCB HC* at paras 19-23; *FUL 2018* at para 97.

281 2018 JDR 1035 (SCA).

7.1. Jiba:

1127. In considering whether, in her capacity as Deputy National Director of Public Prosecutions / Acting National Director of Public Prosecutions, she had complied with the Constitution, the National Prosecuting Authority Act and any other relevant laws in her position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service:

1127.1. The evidence shows that she had not been frank when engaging under oath with the Court in **FUL HC**. Further evidence led before the Enquiry showed that she had not been frank in her affidavit before the Courts in the **GCB HC** and **GCB SCA** matters either, making general propositions regarding the functioning of the NPA knowing full well that that process had not been followed in the specific matters which she was called upon to account for. Furthermore, failing to explain the exact process that had been followed in the FUL and Booysen prosecutions. Her approach to the litigation was misleading and in following that approach, she compromised her integrity and consequently cannot be entrusted with the responsibilities of the office that she holds. In addition, and as will be canvassed in the findings below, her conduct in multiple instances indicates a lack of conscientiousness. Her actions do not accord with the requirements set out under section 9(1) of the NPA Act.

1127.2. With regards to the Booysen prosecution, the evidence establishes that she allowed, and in fact enabled, the independence of the NPA to be compromised.

1127.3. Furthermore, in the Booysen matter, despite initiating the prosecution, she did not consult with the DPP whose approval was required. And, when a dispute ensued between Mlotshwa and Chauke, she refused to get involved and assist in resolving the issue. This reflects a lack of leadership.

1127.4. As an official in the public service, her actions in the course of her dealings with the Courts, as specifically explained by Murphy J in the **FUL HC** judgment,

have undermined the principles espoused in section 195 of the Constitution with regards to maintaining a high standard of professional ethics, accountability and transparency. This has had the further effect of undermining the injunction in section 165(4) of the Constitution to assist the Courts to ensure their effectiveness.

1128. With regard to whether she properly exercised her discretion in relation to instituting and conducting criminal proceedings on behalf of the State; carrying out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinuing criminal proceedings:

1128.1. Her refusal/failure to consider the extensive memorandum presented to her when charges against Mdluli were withdrawn, as an Acting NDPP function in the discontinuation of criminal proceedings, demonstrated a failure to properly exercise her discretion. The GCB SCA observed that she was not bound to follow the advice contained in the memorandum and that no misconduct could be established on that basis. This cannot be disputed. As far as properly exercising her discretion is concerned, however, as the Acting NDPP, she was required to have a rational explanation as to why she opted not to consider the memorandum at all.

1128.2. The procedure followed in authorising the prosecution against Booysen, considering that she had herself initiated the prosecution process, was found to have been irrational and was set aside. In her capacity as Acting NDPP, she failed to properly exercise her discretion in authorising the proceedings. We make this finding without any suggestion as to the guilt or innocence of Booysen.

1129. Whether she duly respected Court processes and proceedings before the Courts as required by applicable prescripts and as a senior member of the National Prosecuting Authority:

1129.1. In her capacity as Acting NDPP, she failed to comply with Court processes within the stipulated time frames and drew strong criticism for displaying a lack of candour in her submissions and for failing to take the Court into her confidence.

1129.2. She has been labled “supine” in several judgments for failing to act in instances where she had been expected to do so.

1129.3. We find that as a senior member of the NPA, Jiba has displayed irreverence to the Courts and indifference to their processes, resulting in adverse comments being made about her.

1130. Whether she exercised her powers and performed her duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act:

1130.1 The policy explains that prosecutors are given discretionary powers by the law in performing their functions, exercising their powers and carrying out their duties. The discretion must, however, be exercised according to the law and within the spirit of the Constitution. With specific regard to the principles of accountability and transparency which undergird the constitutional ethos of all state institutions, Jiba’s conduct is found wanting. She was not forthcoming with the Courts and did not take them into her confidence.

1130.2. The policy obliges all its members to serve impartially and to exercise, carry out and perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. In compromising the independence of the NPA, we find that Jiba dishonoured this obligation.

1130.3 The adverse remarks made against Jiba in the various decisions, including legal submissions which lacked a constitutional basis (**FUL HC**) which she made in her official capacity which drew scathing criticisms from the Court, together with her involvement in the series of decisions which were all set aside on review for irrationality, were unbecoming for any official, let alone an official of her seniority. We find that Jiba's conduct had the effect of seriously damaging public confidence in the NPA.

1131. With regard to whether she acted at all times without fear, favour or prejudice:

1131.1. The visit by IPID to herself and Mosing, the pressure exerted on Mosing to review six dockets and make a decision within a day and Jiba's reasons in her affidavits, the representations to the President and before this Enquiry indicate that:

1131.1.1. She allowed pressure to influence the manner in which the NPA dealt with this matter.

1131.2. The inconsistencies in the reasons she gave for establishing a national prosecuting team indicates that she acted with favour and with prejudice to the NPA.

1132. In relation to whether she displayed the required competence and capacity required to fulfil her duties:

1132.1. Jiba failed to attend to review as requested, the decision taken by Mrwebi to withdraw the charges against Mdluli;

1132.2. She failed to competently apply the prescripts of POCA, the NPA prosecution policies and the law in the Booysen prosecution;

1132.3 Once she had initiated the process, she failed to manage the dispute between Mlotshwa whose jurisdiction the matter fell and Chauke on a critical procedural aspect, relating to the indictment;

1132.4. Jiba also failed to competently and timeously comply with court orders, time frames and directives as set by the courts.

1132.5. Having regard to the above, Jiba failed to display the required competence and capacity required to fulfil her duties.

1133. On the question of whether she in any way brought the National Prosecuting Authority into disrepute by any of her actions or omissions:

1133.1 The series of Jiba's decisions taken in her capacity as ANDPP, which were all set aside on review, the comments and criticisms levelled against her by the courts have brought the NPA into disrepute

7.2. Mrwebi:

1134. Whether, in fulfilling his responsibilities as Special Director of Public Prosecutions, he complied with the Constitution, the National Prosecuting Authority Act and any other relevant laws in his position as a senior leader in the National Prosecuting Authority and is fit and proper to hold this position and be a member of the prosecutorial service:

1134.1. The Constitution is the supreme law of the Republic and conduct inconsistent with it is invalid. It calls on all organs of state to among other things, assist and protect the courts through various means in order to safeguard their dignity, independence, accessibility and effectiveness. The NPA is bound by this obligation as an organ of state.

1134.2. The Courts have expressed their displeasure at the manner in which Mrwebi has discharged the duties of his office and conducted himself towards the Courts.

Mrwebi's conduct was openly at variance with what is expected of a person in his position.

1134.3. In taking the decision to withdraw the prosecution of Mdluli without consulting with Mzinyathi, Mrwebi acted contrary to the provisions of the NPA Act.

1134.4. Mrwebi did not act with integrity as required under section 9 of the NPA Act. This is evident in his attempt to justify his conduct where he inadvertently referred to a judgment which directly established his dishonesty under oath. This was evident from his representations regarding Ledwaba.

1135. In considering whether he properly exercised his discretion in instituting and conducting criminal proceedings on behalf of the State; carrying out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinuing criminal proceedings:

1135.1. In light of the adverse findings by the Courts about the manner in which Mrwebi exercised his discretion to discontinue the prosecution of Mdluli we are of the view that Mrwebi did not properly exercise his discretion.

1135.2. Mrwebi gave contradictory versions when seeking to explain what was meant by the phrase "in consultation with", Mrwebi showed himself to lack an understanding of the law and the legal process.

1135.3. Furthermore, Mrwebi's lack of appreciation regarding his behaviour in keeping secret the representations from criminal suspects implicated in the investigation carried out by the NPA into alleged improprieties perpetrated by officials of Crime Intelligence and his admission that he took those representations into account without verifying the truthfulness of their contents, confirms that his decision to withdraw the prosecution of Mdluli was irrational and unlawful.

1135.4. Mrwebi therefore did not properly carry out his functions incidental to instituting and conduction such criminal proceedings and discontinuing criminal proceedings.

1136. Whether he duly respected court processes and proceedings before the Courts as required by applicable prescripts and as a Special Director of Public Prosecutions in the National Prosecuting Authority:

1136.1. By filing court papers out of time without a proper explanation or application for condonation and showing disregard and indifference to directives issued by the Judge President in FUL HC, Mrwebi showed that he did not consider it a obligatory and serious matter to obey court directives and to comply with court deadlines. His attitude shows that he did not respect court processes and proceedings as expected from a SD.

1137. In relation to whether he exercised his powers and performed his duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act:

1137.1. Mrwebi's conduct in withdrawing the prosecution of Mdluli when there was a prima facie case and his flawed reasoning for withdrawing that prosecution were inconsistent with the provisions of the Prosecution Policy Directives.

1137.2. The Policy Directives require that extensive police investigations be shown to have been carried out before a prosecution is withdrawn on the ground that there is no reasonable prospect of a successful prosecution. As established by the evidence, Mrwebi cared little about the merits of the Mdluli case or whether a successful prosecution was reasonably possible, he simply decided that the matter fell within the jurisdiction of the IG and that it should be withdrawn and given to the IG.

1138. Whether he acted at all times without fear, favour or prejudice:

1138.1. The circumstances surrounding the withdrawal of the prosecution of Mdluli show that:

1138.1.1 he took office on 01 November 2011 (proclamation indicates that the appointment was with effect from 25 November 2011), received representations on 17 November 2011, immediately called for the docket and memoranda and took a decision on 4 or 5 December 2011 without reference to his colleagues and police and without consultation with Mzinyathi.

1138.2. It is therefore evident that he failed to act without favour and to the prejudice of the NPA

1139. In determining whether he displayed the required competence and capacity required to fulfil his duties:

1139.1. His lack of understanding of the law and legal processes surrounding the Mdluli prosecution, show that he did not display the required competence and capacity required to fulfil his duties.

1140. Whether he in any way brought the National Prosecuting Authority into disrepute by any of his actions or omissions:

1140.1. Mrwebi's decisions taken in his capacity as Special Director of Public Prosecutions, which was set aside on review, the comments and criticisms levelled against him by the courts have brought the NPA into disrepute.

1140.2. The lie he told under oath in the Ledwaba matter which he further perpetuated before this enquiry, all point to Mrwebi bringing the NPA into disrepute.

7.3. Recommendations

1141. Jiba and Mrwebi have been involved in litigation in both their personal and official capacities over the years. They have, however, failed to introspect and reflect on the issues which have beset the NPA with their involvement, as reflected in this report.

1142. In the result, we recommend that:

1142.1. the President remove Nomgcobo Jiba from office as DNDPP and

1142.2. the President remove Lawrence Sithembiso Mrwebi from office as SDPP.

8. CONCLUDING REMARKS

8.1. Implications for the NPA

1143. Over the years, the NPA has been beleaguered by allegations of malfeasance and political interference. A chorus of Court decisions, civil society, media and NPA members themselves have attested to the fact that there have been serious concerns of impropriety within the institution. This is particularly troubling, given the critical role that the NPA plays in ensuring that the rule of law, the very foundation of our constitutional democracy, is both respected and safeguarded.

1144. In the face of South Africa's painful history and its continuing struggle with inequality, it is the rule of law that holds every individual to the same standard and, in so doing, recognises the inherent dignity within every individual. Whether one wields power or is of the most vulnerable, the rule of law guarantees equal treatment. Without it, the vision of a constitutional democracy is dead in the water. Appreciating that the NPA plays a critical role in upholding the rule of law, it is crucial that it is seen to be free from all external pressures which might threaten prosecutorial independence.

1145. NPA officials are required to be completely devoted to the rule of law without fail. Our country depends on it. As the sole entity constitutionally mandated to prosecute on behalf of the State, in the face of the scourge of crime, the confidence that the public enjoys in the NPA is what prevents individuals from taking the law into their own hands. This confidence underpins the social contract. It lies in the belief that the State can offer protection where laws are not respected.

1146. The NPA's Code of Conduct ensures that there is public confidence in the integrity of the criminal justice process and that the NPA maintains its legitimacy. The code holds individuals within the NPA to a high standard – to uphold justice, human dignity and fundamental rights, as well as to be consistent, independent and impartial. When dealing with the Courts, prosecutors are personally accountable for their cases, may not

mislead the Court or suppress evidence and should assist the Court in arriving at a just verdict – refraining from violating the decorum of the Court.

1147. Citizens are right to expect this of the NPA and its members. In turn, the NPA must ensure that it communicates effectively with the public – for it is the public interest which the NPA must act in the name of. This must not be understood to mean that members of the NPA should play to the whims of popular opinion, but rather that they have a duty to perform their work with integrity, conscientiousness and accountability. Clandestine decision-making and impunity characterised the pre-democratic period, but has absolutely no place rearing its ugly head in this constitutional democracy.

1148. The NPA must execute its mandate diligently and without fear, favour or prejudice. It must be independent and be seen to be independent. It has been stated before, but bears repeating here:

> *"'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."*[282]

1149. Where officials are mired in controversy and are consistently being taken on review for irrational decision-making, and being found wanting by the Courts, it damages the public confidence. The NPA must instil a strong sense of constitutional values and belief in the rule of law. When these values are internalised and fought for vociferously from within the NPA, only then will the institution enjoy the confidence of the citizenry and become the prosecuting authority that South Africans deserve.

---

282 **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC), para 207.

8.2. Avoiding a recurrence

1150. Towards the close of her evidence before the Enquiry, Jiba expressed her concerns on the independence of the prosecutors. She implored the panel to suggest ways in which prosecutorial independence may be strengthened and urged that it would be well if the same independence that is afforded to members of the judiciary can be afforded to members of the NPA. She also expressed her concerns about the risk that Enquiries of this nature and other disciplinary mechanisms may be abused to intimidate prosecutors from exercising their prosecutorial discretion.

1151. The recent history of the NPA demonstrates that the NPA may be vulnerable to executive and political interferences. The Constitution, the NPA Act and other instruments provide for some measures that seek to safeguard the independence of the NPA. It is worth noting however that neither the Constitution nor the NPA Act expressly use the word "independence" in relation to the NPA. The non-use of the word "independence" by the Constitution is significant when one considers that that word is expressly used in reference to the judiciary and chapter 9 institutions. Those institutions are expected to exercise their functions "independently" and "without fear, favour or prejudice", however, the NPA is to exercise its functions only "without fear favour or prejudice."[283]

1152. There are various means provided for in the NPA that safeguard the independence of the NPA. Those means include the provisions of section 12(6)(a) which require that an Enquiry such as this one be instituted in order to determine the fitness and propriety of the NDPP or a DNDPP to hold office before they are removed. Section 12(6)(a) - (7) provide that within 14 days after the decision to suspend has been taken by the President, the National Assembly must be notified accordingly. Upon receipt of this message, the National Assembly must within 30 days say whether person suspended be restored to their position or removed. If the National Assembly resolves that they must be removed the President must remove them, yet if the National Assembly says that they must be

283 Selabe *The independence of the National Prosecuting Authority of South Africa: fact or fiction?* (M Phil Thesis, University of the Western Cape, 2015)

restored, the President must restore. It would appear therefore according to this section that the President is not on the whole free to remove or suspend as he deems fit, his decision is subject to confirmation by the National Assembly.

1153. The NPA has demonstrated also that it has the capacity to address some of its challenges through other means such as instituting fact-finding enquiries as it did when the Yacoob fact finding committee was set up.

1154. The NPA Act provides that it is a crime to interfere with the workings of the NPA. Serious measures must be taken against politician and members of the executive and other private persons / entities who seek to influence unduly the NPA in the performance of its functions. "Institutions and office bearers must work within the law and must be accountable" because, "ours is a government of laws and not of men or women."[284]

1155. The Constitution and the NPA Act provide that the Minister of Justice exercises final responsibility over the NPA. However, his role is only limited to the determination of the prosecution policy.

"The Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the he or she is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority."[285]

8.3. Presidential timelines

1156. In August of last year, the Constitutional Court handed down judgment in: Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

284 Id.

285 *National Prosecuting Authority v Zuma* 2009 2 SA 277 (SCA) para 32.

1157. In the judgment, the Court considered the constitutional validity of section 12 the NPA Act – particularly certain subsections that effectively gave the President the power to suspend the NDPP or a DNDPP for an indefinite period of time, and, further allowed him to determine, at his own discretion, questions regarding remuneration during the full period of suspension. The Court raised concerns regarding the section being potentially used as a tool by the Executive to undermine the independence and integrity of the NPA.

1158. The relevant passages are quoted below:

"[45] Coming to section 12(6), two aspects that make the President's power to suspend particularly egregious are the facts that she or he may suspend with or without pay and for an indefinite period. Of importance, suspending without pay is the default position: the section says that for the duration of the suspension, an NDPP or Deputy NDPP "shall receive no salary or such salary as may be determined by the President". There is no guidance whatsoever on how and on what bases the President may exercise the discretion to (a) allow receipt of a salary and (b) determine its quantum. This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself.

. . .

[48] . . . There is enough to invalidate section 12(6) based on the above reasoning. In that regard, I conclude that section 12(6) is constitutionally invalid for empowering the President to suspend an NDPP and Deputy NDPP without pay and for an indefinite duration.

. . .

Order

[94] The following order is made:

. . .

9. The declaration by the High Court that section 12(6) of the National Prosecuting Authority Act is constitutionally invalid is confirmed only to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay.

10. The declaration of constitutional invalidity contained in paragraph 9 is suspended for 18 months to afford Parliament an opportunity to correct the constitutional defect.

11. During the period of suspension—

(a) section 12(6)(aA) will be inserted after section 12(6)(a) and it will read:

"The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months."

(b) section 12(6)(e) will read (with insertions and deletions reflected within square brackets):

"The National Director or Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, [no salary or such salary as may be determined by the President] [her or his full salary]."

12. Should Parliament fail to correct the defect referred to in paragraph 9 within the period of suspension, the interim relief contained in paragraph 11 will become final."

1159. As it stands, we have not yet received any information regarding legislative amendments made by Parliament. Consequently, the reading-in of section 12(6)(aA) into the NPA Act still stands. As alluded to above, this judgment has a direct impact on the timelines within which this Enquiry had to operate. The President suspended both officials on 26 October 2018. He is obliged to make a decision regarding whether or not to remove them within 6 months. In the ordinary course of events, this means that 26 April 2019 is the deadline for his decision.

1160. In order to afford him an opportunity to make an informed decision and to apply his mind to this report and its plethora of accompanying documents, we sought to conclude this report as swiftly as possible.

1161. While the report has required a great deal of priority shifting, fairness to the parties could not be sacrificed on the altar of expediency. Our goal throughout the Enquiry was to ensure that both reasonableness and fairness pervaded throughout the process and that the parties were given a fair opportunity to test the evidence with their versions. At the end of the hearings, the representatives made a statement to the Enquiry confirming that the process had been fair.

Justice Yvonne Mokgoro Chairperson	Advocate Kgomotso Moroka SC Panelist	Ms Thenjiwe Vilakazi Panelist

1 April 2019

8.4. Acknowledgements

1162. Acknowledgements are first and foremost extended to the parties themselves for their maturity, subjecting themselves to the process of the enquiry with utmost cooperation. They have not for one moment found the processes wanting. The Panel commends them without any reservation.

1163. In my capacity as chairperson of the panel, I extend my gratitude to my two co-panelists Advocate Kgomotso Moroka SC and Ms Thenjiwe Vilakazi. The expertise, depth of experience and commitment which they brought to every stage of the process stood the Enquiry in good stead.

1164. Acknowledgements are extended to the evidence leaders for the competence with which they executed their Herculean task collecting voluminous amounts of information and securing witnesses for submission of evidence on affidavit and orally. Legal counsel of the parties for their role in leading their clients for their cooperation in every aspect of the process throughout.

1165. The work of the research team constituting of only two young lawyers whose experience as law clerks at the Constitutional Court stood them in good stead at every turn of their work, assisting the Panel in the compilation of the draft report, sifting through the minefield of voluminous evidentiary documents contained in the Dropbox of the Enquiry was, to say the least, phenomenal. Although good health was not a criterion for appointment to the Enquiry, we are grateful that they are imbued with it so that they did not cave in to the strain of the volume and speed with which they had to execute their role and functions.

1166. While we cannot make up for the pressure and strain through which we put them we can certainly fairly trust that the experience that they have gained working with the Enquiry

under such trying conditions will have great meaning for wherever they find themselves in their future legal careers. And we wish them well.

1167. Of course, the secretariat including our spokesperson, led by Ms Nditsheni Maanda has provided the enquiry with excellent service, knowledge and information of government rules and regulations that had to be absolutely adhered to.

1168. We are forever grateful for their guidance, ensuring in particular, that the dictates of the Public Finance Management Act are strictly complied with at all times.

1169. The South African Law Reform Commission is greatly acknowledged for their willingness to share their humble premises in Centurion with us throughout the process. Although we have inconvenienced them highly, taking over their most spacious rooms for our hearings, they endured it with humility and we are indebted to them.

1170. The security outfit at the Enquiry extended their service to the Enquiry with unusual efficiency. We are grateful for an incident-free service. Needless to say, the media presence inside the venue of the Enquiry played their role, keeping the public fully informed with great efficiency and doing so in a way that caused minimal disruption to the proceedings.

ANNEXURE: CHRONOLOGY OF EVENTS

DATE AND CASE	DETAIL	DROPBOX REFERENCE
23 December 1998	Jiba's application to be admitted as an attorney struck from the roll	J125
6 August 2000	Jiba appointed as DDPP	
29 April 2004	Minister Mabandla is appointed as Minister of Justice and Constitutional Development	
1 February 2005	Vusi Pikoli is appointed as NDPP	
25 July 2007	Members of the DSO attend a management meeting at the NPA headquarters	J178.2
18 September 2007	Minister Mabandla asks Pikoli not to proceed with charges against Jackie Selebi until she is satisfied that it's in the public interest – he tells her she is not entitled to issue such an instruction	B11 (obtained from judgment)
23 September 2007	Minister Mabandla asks Pikoli to resign. He refuses and the president informs him that if he fails to resign, that he will be suspended. He is suspended later that day from office as NDPP	B11 (obtained from judgment) – also in article in M&G
27 September 2007	Mrwebi deposes to affidavit regarding a meeting that was held on 25 July 2005 regarding the DSO and its movement to SAPS	J178.2
29 September 2007	Mpshe is appointed as ANDPP	B5 (obtained from judgment)
3 October 2007	President Mbeki appoints commission to enquire into Pikoli's fitness to hold office	B11 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
October 2007	Mrwebi – affidavit to outline policies and procedure of the DSO in the investigation of Gerrie Nel **(unsigned and undated) – provided by Mrwebi to the Enquiry – similar to one Jiba provided to SAPS**	J178.7
18 October 2007	Jiba deposes to an affidavit re: DSO in the investigation of Gerrie Nel after being requested by Prince Mokotedi to assist SAPS in investigation in September 2007 which is against Gerrie Nel – Mdluli heads up this investigation	G1.3 p. 10 (electronic page)
29 November 2007	Decision to prosecute Zuma is taken by Mpshe & McCarthy	B5 (obtained from judgment)
12 December 2007	Jiba suspended from NPA	G1.3 p. 3 (electronic page)
18 December 2007	Mrwebi applies for dispute referral, indicating that he has been victimised	J178.6
28 December 2007	Indictment is served on Zuma	B5 (obtained from judgment)
9 January 2008 18 January 2008 11 February 2008	Correspondence between Mpshe & Mdluli to outsource prosecution of Gerrie Nel. Mpshe refuses	
27 January 2008	Mrwebi placed on Special leave by Mpshe	
June 2008	Zuma launches application to review and set aside the decision to prosecute him	B5 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
12 September 2008	Nicholson J hands down judgment in favour of Zuma	B5 (obtained from judgment)
8 December 2008	Pikoli is relieved of his duties	News 24 article
12 January 2009	SCA overturns Nicholson J's decision to review the decision to prosecute Zuma	B5 (obtained from judgment)
10 February 2009	Mpshe SC writes to MP Surty, requesting the suspension of Dawood Adam	J141
10 February 2009	Zuma's legal representatives provide representations to NPA	B5 (obtained from judgment)
20 February 2009	Zuma's legal representatives makes further oral representations to NPA	B5 (obtained from judgment)
3 March 2009	Prosecution team considered Zuma's representations	B5 (obtained from judgment)
6 – 16 March 2009	Zuma's legal representatives allow Mzinyathi and Hofmeyr to listen to tape recordings of intercepted conversations between McCarthy, Ngcuka & Minister Mabandla	B5 (obtained from judgment)
30 March 2009	Mpshe addresses a letter to McCarthy, informing him of the recordings and calling for representations	B5 (obtained from judgment)
31 March 2009	McCarthy replies to Mpshe, requesting more information	B5 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
1 April 2009	Mpshe takes the decision to discontinue Zuma's prosecution	B5 (obtained from judgment)
6 April 2009	Decision to discontinue Zuma's prosecution is publicized	B5 (obtained from judgment)
7 April 2009	DA launches application to review and set aside the decision to not prosecute Zuma	B5 (obtained from judgment)
May 2009	Dramat is appointed as head of the Hawks	Exact date unconfirmed
28 May 2009	Mpshe writes to Inspector-General of Intelligence (IGI) indicating that the transcripts attached to Mdluli's affidavit in the Jiba LAC matter can possibly not be used in another matter	K – 2009 (2)
10 June 2009	Pather provided Jiba with the details of her disciplinary hearing	K – 2009
11 June 2009	Jiba refers suspension to labour court invoking the Protected Disclosures Act JS/530/09	G1.3 pp. 1-16 (electronic page)
1 July 2009	Mdluli is appointed the head of the Intelligence Division of SAPS.	B15 (obtained from judgment)
15 July 2009	Pikoli is informed of decision to appoint a new NDPP	B11 (obtained from judgment)
31 July 2009	Bheki Cele is appointed as National Commissioner of SAPS	29/07/09 – M&G article
6 August 2009	Pikoli v President case argued in court	B27

DATE AND CASE	DETAIL	DROPBOX REFERENCE
4 September 2009 8 September 2009	Mrwebi & Jiba sign settlement agreements with NPA	J123
9 September 2009	Jiba & Mrwebi return to NPA from suspension as anticipated in aforementioned agreements	
11 August 2009	Judgment in **Pikoli v President** handed down, granting an interdict in favour of Pikoli against the appointment of a new NDPP	B27
28 August 2009	Judgment in **Tshavhungwa & others v NDPP** and others is handed down	B31
11 October 2009	President Zuma announces appointment of Simelane as DNDPP	B11 (obtained from judgment)
30 October 2009	Adv Ntsebeza SC and Prince Mokotedi write testimonials on behalf of Nhantsi in favour of a pardon	J118
2 November 2009	Judgment is handed down in **NDPP & McCarthy v Tshavhungwa**	B29
11 November 2009	Chief Directorate: Legal services sends memo to Minister Radebe re request for pardon iro Nhantsi and recommends that the request not be granted – the Deputy Minister notes this on 8 December 2009	J12 & J118
20 November 2009	Mpshe writes to Jiba re settlement agreement, indicating that the NPA will recover the costs of legal expenses from Jiba - no indication that any recovery occurred	J123 (page 11 – 12)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
21 November 2009	Settlement agreement is reached between the President & Pikoli	B11 (obtained from judgment)
25 November 2009	Simelane is appointed as NDPP	B11
2 December 2009	Mrwebi writes to Simelane re representations re compensation for occupational detriment and related expenses	J123
2 December 2009	Jiba provides written representations to Simelane re settlement agreement iro legal fees indicating, inter alia, that SAPS had uncovered evidence of an alleged criminal conspiracy by senior NPA officials leading to the withdrawal of the case against Gerrie Nel, that she had made representations to the Justice Minister who directed Mpshe to uplift her suspension and withdraw the disciplinary action which he duly did and that Mpshe had been summoned to ameeting with the Justice Minister, Minister of Police and Divisional Commissioner of Crime Intelligence at which meeting a decision was taken that he must withdraw the disciplinary action and reinstate Jiba.	J123 – pages 4- 10
11 December 2009	DA launches application in **DA v President & others** re: Simelane appointment Founding affidavit signed on 10 Dec	
15 February 2010	Simelane writes to Mzinyathi, to advise on the procedure to be followed in the centralization of matters in one jurisdiction	J180

DATE AND CASE	DETAIL	DROPBOX REFERENCE
1 March 2010	Booysen is appointed as Provincial head of the DPCI	B1 (obtained from judgment)
3 June 2010	Jiba is admitted as an advocate	J124
17 June 2010	Mrwebi writes to NDPP making representations re. compensation iro legal costs incurred	K – 2010 (3)
22 June 2010	Jiba writes to Simelane making representations re. compensation iro legal costs incurred	K – 2010 (4)
5 July 2010	Simelane forwards the requests by Jiba and Mrwebi for compensation to the DG and advise Jiba & Mrwebi accordingly - no indication of any payment made to Mrwebi or Jiba	K – 2010 (2)
5 July 2010	Judgment in **S v Selebi** is handed down	B32
8 September 2010	Signed pardon for Nhantsi sent from the Presidency to Labuschagne	J118
9 September 2010	A passenger, N Jiba flew economy class on South African Airways flight SA563 from Johannesburg to Durban and returned on the same day. The flight was paid for out of the secret service account and was approved by the chief financial officer of crime intelligence, Major-General Solly Lazarus. On that flight the passenger manifesto indicated that there was also a passenger, Richard Mdluli flying business class.	
13 – 15 September 2010	**DA v President & others** is heard in court – re appointment of Simelane as NDPP (Van der Byl AJ)	B7

DATE AND CASE	DETAIL	DROPBOX REFERENCE
10 November 2010	Pretoria High Court hands down judgment in **DA v President & others** re appointment of Simelane as NDPP, dismissing the application	B7
11 November 2010	Mdluli sends letter to President and others re victimisation and abuse of state resources, requesting an intervention	K – 2010 (1)
3 December 2010	Simelane writes to Ramoorthy (ANDPP) regarding the restructuring of the NPA	J155.9
17 December 2010	Justice Minister writes to President recommending the appointment of Jiba and Mokhatla as DNDPP	K -2010 (6)
22 December 2010	Jiba and Mokhatla appointed DNDPP President's Minute No. 467, dated 22 December 2010 after consultation with the Minister of Justice and Constitutional Development and Simelane	K -2010 (6) I7 pages 23 – 25
22 February 2011	Pretoria High court hands down judgment in **DA v ANDPP** matter to review and setting aside the decision to discontinue the prosecution against president Zuma and dismissing the application by the DA for a reduced record	B12
31 March 2011	Criminal charges of murder, intimidation, kidnapping, assault with intent to do grievous bodily harm and defeating the ends of justice were brought against Mdluli.	B24 (obtained from judgment)
7 April 2011	Bail application is heard in **S v Mdluli & others** – released on bail until 24 June 2011	F2.2 (2.2.2)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
14 April 2011	The investigations against Mdluli into the matter commenced on 14 April 2011 based on the information provided by members of crime intelligence.	
10 May 2011	Simelane informs Sindane that Mrwebi's request for ex gratia payments have been forwarded to van Rensburg	K- 2011 (6)
31 May 2011	Simelane forwards Mrwebi's request for ex gratia payment to Van Rensburg	K – 2011 (6)
8 May 2011	Mdluli is suspended because of the serious charges against him	B24 (obtained from judgment)
1 August 2011	Smith of the SCCU, Pretoria applied for a warrant for the arrest of the Mdluli on the charges of fraud/theft.	
17 September 2011	Minister Radebe writes to the president requesting Mrwebi to be appointed as Special Director of SCCU	J127 (p17 – 20)
6 September 2011	The application for a warrant for the arrest of the Mdluli was authorised by the Magistrate.	
20 September 2011	Further criminal charges of fraud, corruption, theft and money laundering were instituted against Mdluli.	

DATE AND CASE	DETAIL	DROPBOX REFERENCE
20 September 2011	Mdluli arrested and brought before the Specialised Commercial Crimes Court, Pretoria under case no. CAS 11/137/11. He was granted bail and the case was postponed to 14 December 2011. Decision to prosecute Mdluli had been taken as envisaged in section 179 of the Constitution read with section 20 of the NPA Act.	
24 October 2011	Bheki Cele is suspended after SIU investigation	News 24
25 October 2011	Mkhwanazi is appointed as acting Police Commissioner	News24
25 October 2011	D Naidoo (from Crime Intelligence) deposes to affidavit , stating irregularities at SSA, using SSA funds, leased premises and vehicles for personal use (Mdluli, Barnard & Lazarus)	F2.1 (A1)
26 October 2011	Representations from Mr Motlaung of Maluleke Seriti Makume Matlala obo Mr Mdluli to the NDPP	K – 2009(1) pages 3 -10
26 October 2011	The President decides to appoint Mrwebi as Special Director of Public Prosecutions to head the Specialised Commercial Crime Unit in the Office of the NDPP under section 13(1) l of the NPA after consultation with the Minister of Justice and Constitutional Development and the then NDPP under President's Minute No. 280, co-signed by the Minister of Justice on 26 October 2011. The appointment was proclaimed under Government Notice 63 of 2011 with effect from 25 November 2011	F5 (5.1) & J127

DATE AND CASE	DETAIL	DROPBOX REFERENCE
31 October 2011	Ronald Mendelow lays complaint against Breytenbach with the NDPP re civil dispute between ICT, Kumba Iron Ore, Sishen Iron Ore & Arcelor Mittal	B3 (obtained from judgment)
31 October 2011	SCA hears **DA v President & others** matter re the review and set aside of decision to appoint Simelane as NDPP	B11
3 November 2011	Mdluli writes to the President, minister and police commissioner indicating that the charges against him are false and based on a conspiracy. He also indicates that he will help the president be successful in the following year's elections	B18 (obtained from judgment)
4 November 2011	M Hankel (Head of Intelligence analysis, co-ordination & surveillance) provides a report to Major – general de Kock – Acting Divisional Commissioner of Crime Intelligence re. the internal investigation into the use of SSA fund for personal trips, the promotion of family and related members and the use of SSA vehicles	K- 2011 (pages 52 – 69
9 November 2011	D Naidoo (from Crime Intelligence) deposes to a further affidavit, indicating payment made for a personal trip for Mdluli & wife to China	F2.1 (A2)
17 November 2011	Mdluli's legal representatives make legal representations to Mrwebi, seeking withdrawal of the fraud & corruption charges against Mdluli	B24 & B3 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
21 November 2011	Mrwebi forwards representations made by Mdluli's legal representatives to Breytenbach, asking for a full report by 25 November 2011	B3 (obtained from judgment)
22 November 2011	Smith prepares report under the instruction of Breytenbach and in response to Mrwebi's request to provide a report on Mdluli matter after receipt representations	B3 (obtained from judgment) & K -2011 (5 – pages 11 – 15)
24 November 2011	Breytenbach sends Smith's report to NDPP (Mzinyathi) & Mrwebi, pointing out that the Mdluli's allegations are unsubstantiated - **(this letter is not in the dropbox, but is apparently dated 21 November 2011)**	K – 2011(1) & B3 & J109
25 November 2011	The President appointed Mrwebi as Special Director – head of SCCU (Government Gazette No. 34767, 25 November 2011).	
25 November 2011	Breytenbach is called to a meeting with Van Rensburg, Ramaite & Mzinyathi and advised of a complaint against her. It is recommended that she transfers from SCCU – she refuses	B3 (obtained from judgment)
28 November 2011	Mrwebi sends letter to Regional Head SCCU (Breytenbach) – requesting docket and evidence analysis in charges against Mdluli	K – 2011(2) & B3
29 November 2011	Hofmeyr removed as head of SIU	Gov news article
29 November 2011	Heath appointed as head of SIU	Presidency press release

DATE AND CASE	DETAIL	DROPBOX REFERENCE
30 November 2011	Breytenbach responds to Mrwebi and provides a summary of the docket contents and evidence analysis and provide an electronic copy of the docket (prepared by Smith) in response to 28/11 request	K – 2011 (5) pages 1- 8 & B3
1 December 2011	SCA hands down judgment in **DA v President & others**, reviewing and setting aside Simelane's appointment as NDPP	B11
2 December 2011	Simelane writes to Mzinyathi enquiring whether a prosecutor has been appointed in the Breytenbach matter – Mzinyathi replies the next day, indicating that Mrwebi asked for the matter to be transferred to his office.	K-2011 (12)
2 December 2011	Wasserman is appointed to head investigation in complaints against Breytenbach	B3 (obtained from judgment)
4 December 2011	Mrwebi sends a memo to Mzinyathi and Breytenbach informing her that the charges against Barnard and Mdluli should be withdrawn in accordance with the consultative notice attached thereto sent to DPP	K- 2011 (3) K-2011 (4) & J94
4 December 2011	When asked about the memo dated 4 December 2011, Mzinyathi stated that he received that memo either 6 or 8 December 2011. (See: page 3088, line 18)	
4 December 2011	Mrwebi letter dated as such informing Mdluli's attorneys of the withdrawal of charges	K – 2011 (7)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
5 December 2011	Mrwebi says aforementioned letter sent on 5 December to the legal representatives of Mdluli, advising them of his decision that the charges against Mdluli be withdrawn.	B24 (obtained from judgment)
5 December 2011	Mzinyathi meets with Mrwebi. (See: page 3091, line J 3). It subsequently became clear to Mzinyathi that Mrwebi had already taken a decision.	
8 December 2011	Mzinyathi writes to Mrwebi to inform him that he disagrees with his view to withdraw charges against Mdluli and that Mrwebi cannot instruct prosecutors in Mzinyathi's area of jurisdiction	B18 (obtained from judgment)
9 December 2011	Breytenbach and Mzinyathi meet with Mrwebi disagreeing with Mrwebi decision to withdraw, Mrwebi says he is functus officio, they told letter sent, can't have conflicting instructions, Mzinyathi then informed Mrwebi that prima facie, ii case was made out against Mdluli and Barnard and that he didn't understand why the matter is being withdrawn. (See: page 3098, lines 14·21)	B21 (obtained from judgment)
12 December 2011	Simelane wrote to Jiba, appointing her as acting NDPP and she accepts Until 30 August 2013	K-2011 (11)
14 December 2011	Charges against Mdluli are withdrawn. Reason provided is that IGI has the sole authority to investigate	B3 (obtained from judgment)
15 December 2011	Heath resigns as head of SIU and Mokhatla is appointed as head of SIU	Politics web – by Heath

DATE AND CASE	DETAIL	DROPBOX REFERENCE
20 December 2011	President signs the minute placing Simelane on special leave Radebe writes to Simelane advising him of special leave and Jiba's appointment as acting NDPP	K – 2011 (8 & 9)
Undated & unsigned	Information note to Chauke from Van Zyl SC et al advising that there is a prima facie case against Mdluli and that the trial should proceed	K-2011 (5 – pages 16 – 20)
12 January 2012	Mrwebi writes to Jiba recommending Breytenbach's suspension and giving a background for the request **(the memo is dated 12/1/12, but the signature is dated 12/1/11)**	J142
24- 25 January 2012	Exco meeting takes place "in consultation with" discussed	J131 & J173
1 February 2012	Chauke sends letter to Mdluli attorney, Motloung advising of decision that the criminal charges of murder, kidnapping, intimidation and assault with intent to cause grievous bodily harm and defeating the ends of justice under case number CAS 340/02/99 were withdrawn.	K – 2012 (1) page 1
1 February 2012	Proceedings to initiate suspension of Breytenbach is commenced – Notice of intention to suspend is issued and the news reports about the suspension	B3 (obtained from judgment)
2 February 2012	Notice of intention to suspend is served on Breytenbach	B3 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
6 February 2012	Breytenbach's attorney writes to Van Rensburg to enquire whether the decision to suspend has already been taken	B3 (obtained from judgment)
8 February 2012	Breytenbach addressed allegations against her in an affidavit re. the ICT/Kumba Iron matter	B3 (obtained from judgment)
9 February 2012	Legal opinion – G Nel to Van Rensburg re. delegation of ministerial powers	J121
13 February 2012	Van Rensburg writes to Radebe with a request for Breytenbach's precautionary suspension (unsigned)	J135
14 February 2012	Breytenbach's attorney writes to van Rensburg, requesting a copy of the complaints against Breytenbach	B3 (obtained from judgment)
15 February 2012	**DA & others v ANDPP & others** matter heard in SCA re decision to stop prosecution of president Zuma	B10
17 February 2012	Breytenbach's attorney writes again to van Rensburg, requesting a copy of the complaints against Breytenbach – none forthcoming	B3 (obtained from judgment)
29 February 2012	Van Rensburg writes to Radebe with a request for Breytenbach's precautionary suspension and Jiba approves such suspension in a memo on 2 March 2012 but refuses then to sign letter to Breytenbach – latter according to van Rensburg evidence before Enquiry	J157 (same as J135, but this one is signed
29 February 2012	Disciplinary proceedings against Mdluli is withdrawn by the acting Commissioner of Police	B24 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
2 March 2012	Roelofse provides a factual report to the commander of the anti-corruption task team, providing a timeline of events and indicating that the IGI cannot get involved in criminal investigations being conducted by the police.	J103
8 March 2012	Jiba authorises Maema and Mathenjwa to act on behalf of state in Booysen matter	5.3.7 pages 3-4
13 March 2012	From Smit to Jiba indicating that Maema advised that he was gong to be part of the Cato manor team Maema role was still unclear and that he would only be required to attend the initial planning sessions to help in putting together a plan of action and to help in ensuring that all the agencies appreciate and understand their role in the operation; and provide guidance and advice from time to time regarding the investigations and prosecution. Nd not be required to read the dockets and prepare the indictments; and to do the prosecution.	J161
19 March 2012	Lepinka writes to Adv. Smith (DPP- North West) obo Jiba re Cato Manor matter indicating that it is a national matter and requires everyone's cooperation. Maema role will be determined as matter unfold and that travel and accommodation would be borne by the North West office	J156

DATE AND CASE	DETAIL	DROPBOX REFERENCE
19 March 2012	IGI sends letter to the acting national commissioner: SAPS providing an opinion on the decision of the withdrawal of charges against Mdluli – advising that the reasons provided by the NPA for the withdrawal are legally flawed and inaccurate	K – 2012(1) page 8 - 9
20 March 2012	SCA hands down judgment in **DA v NDPP**, directing the NDPP to provide the record of its decision making in the decision not to prosecute Zuma, within 14 days	B10 & B18 (obtained from judgment)
20 March 2012	Mrwebi visits Adv Jay Govender at IGI office	J164
23 March 2012	IGI provides letter from General Dramat, indicating that the Mdluli matter fell outside its scope and recommends that the matter be referred back to the NPA	B3 (obtained from judgment)
26 March 2012	Adv Breytenbach in company of Adv Ferreira visited Mrwebi office at SCCU Head office in Silverton bringing correspondence from General Dramat, to which correspondence was attached from the office of the IGI.	
27 March 2012	Mrwebi sends memo to Breytenbach, requesting her to explain why she disclosed his consultative note to IGI and General Dramat	J143
29 March 2012	IGI (adv. Radebe) writes to Jiba and Mrwebi, indicating that the decision to prosecute Mdluli lies with the NPA	J162

DATE AND CASE	DETAIL	DROPBOX REFERENCE
30 March 2012	Mrwebi writes to Dramat & Breytenbach informing them, inter alia, that the opinion provided by IGI has no effect and that IGI has no powers to provide an opinion, that the matter is thus closed, i.e. the withdrawal of charges stands.	K – 2012(1) page 12 – 13
31 March 2012	Mdluli was reinstated and resumed office as the head of Crime Intelligence given the withdrawal of the criminal charges against Mdluli, disciplinary charges against him were similarly withdrawn and the disciplinary proceedings immediately terminated.	B24 (obtained from judgment)
31 March 2012	Mrwebi writes reasons for the decision to withdraw charges against Mdluli – **filed in July 2012 – date amended to 5 July 2012**	J10 and see J10 (page 45) & J111
13 April 2012	Breytenbach & Ferreira finalised memorandum for Jiba to persuade her to re-institute the Mdluli charges for circulation (only delivered later)	B3 (obtained from judgment)
18 April 2012	Breytenbach is provided with a copy of the letter of complaint against her and inform her of the decision to suspend her	B3 (obtained from judgment)
18 April 2012	Danikas' statement is provided to general Mabula of the Hawks (led investigation against Booysen)	B18 (obtained from judgment)
21 April 2012	Jiba applies for leave of absence	J40
23 April 2012	Jiba signs notice of suspension iro Breytenbach	B25 (dates taken from arbitration award)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
24 April 2012	Memorandum prepared by Breytenbach & Ferreira, encouraging the re-institution of charges against Mdluli, is delivered to Jiba	B3 (obtained from judgment)
23-24 April 2012	Jiba and Van Rensburg exchange emails regarding Breytenbach's suspension. Jiba asks whether reasons were provided to Breytenbach, to which Van Rensburg indicates that she was and that Jiba ought to be aware of it as it was forwarded to Jiba	J161 (scan 11)
25 April 2012	Van Rensburg writes to Jiba, indicating that the authorisation to suspend Breytenbach only reached her on 25 April 2012, but was dated 23 April 2012 and that there were other instances in which this occurred	J161 (scan1)
26 April 2012	Mrwebi writes to Breytenbach advising that the NPA should no longer be involved in the Mdluli matter and that IGI is the appropriate entity to deal with the matter	J93
30 April 2012	Breytenbach is informed that she is suspended by Jiba	B26 (dates according to arbitration award)
2 – 3 May 2012	Breytenbach's attorney address a letter requesting reasons for the suspension	B3 (obtained from judgment)
4 May 2012	Jiba writes to Breytenbach's attorneys advising that the suspension was required due to serious allegations and providing copies of the relevant disciplinary codes	K – 2012(1) page 14 – 15

DATE AND CASE	DETAIL	DROPBOX REFERENCE
9 May 2012	State attorney writes to DA in **DA v NDPP** matter indicating that it is awaiting instructions from the president's legal representatives regarding the release of the tape transcripts	B18 (obtained from judgment)
15 May 2012	FUL launches the application to review and set aside Mrwebi's decision to withdraw charges against Mdluli	B24 (obtained from judgment)
23 May 2012	The DPP – Cato Manor task team sends memo to Adv Chauke confirming its confidence that there are available evidence in 10 dockets that may lead to successful prosecution and providing the details of the relevant accused per docket. It also requests that security be provided upon arrests.	5.3.4 & J92
31 May 2012	Attorneys for Lazarus, Barnard and others write to Jiba and Mrwebi, providing representations and requesting the ceasing of prosecution and the return of unlawfully obtained documents - secret representations made to Mrwebi not disclosed	K-2012 (5)
June 2012	Danikas statement is provided to prosecution team including the NDPP	B18 (obtained from judgment)
1 June 2012	Breytenbach launches application to review and set aside the decision to suspend her	B3 (obtained from judgment)
1 June 2012	Phiyega is appointed as National Police Commissioner	Exact date unconfirmed, but definitely in June 2012 -News 24

DATE AND CASE	DETAIL	DROPBOX REFERENCE
6 June 2012	Interim order interdicting Mdluli from acting in his professional capacity is granted	B21 (obtained from judgment)
6 June 2012	Despatch of the record to the registrar ito rule 53 in **FUL v NDPP** matter. They fail to do so	B18 (obtained from judgment)
7 June 2012	Dramat writes to Jiba requesting her to urgently review Mrwebi's decision to withdraw the charges against Mdluli. He indicates that this is the third time that he has requested her to do so.	K – 2012(1) page 16 – 17
11 June 2012	Breytenbach is served with a notice informing her to attend a disciplinary hearing	B3 (obtained from judgment)
11 June 2012	Jiba & Mrwebi consults with Adv Motau SC in re **FUL v NDPP**	B18 (obtained from judgment)
12 June 2012	Mlotshwa writes to Chauke requesting the prosecutor's memo or report in the Cato manor matter Chauke writes back, indicating his concern about Mlotshwa's involvement and request and that the matter was supposed to be handled by someone "from outside"	J90 (page 4)
13 June 2012	Chauke & Mlotshwa exchange -mails regarding the request for the prosecutor's memo.	J90 page (pages 5-11)
15 June 2012	The state attorney (Pretoria) writes to CDH requesting a copy of Breytenbach's affidavit in the matter FUL v NDPP	K – 2012(1) page 18 – 19

DATE AND CASE	DETAIL	DROPBOX REFERENCE
18 June 2012	NPA serves amended charge sheet on Breytenbach, indicating inter alia charges of misconduct, disobedience, insubordination	B25 (dates obtained from arbitration award)
19 June 2012	Disciplinary enquiry into charges against Breytenbach commences	B3 & B25 (dates obtained from arbitration award)
19 June 2012	Exco meeting takes place and delegations and authorisations are discussed	J132
25 June 2012	Urgent application regarding the court's jurisdiction in matter between Breytenbach & NPA is heard	B25 (dates obtained from arbitration award)
26 June 2012	Jiba writes to Minister Radebe, requesting Noko's appointment when Mlotshwa period of Acting DPP comes to end on 9 July 2012	K-2012 (7)
27 June 2012	Confirmation that Noko would attend a meeting in Pretoria on that day	K- 2012 (6)
29 June 2012	Schmidt writes to Mokhatla requesting recommendations on process of delegations and authorisations of prosecutors	K-2012 (4)
2 July 2012	Noko is appointed as ADPP for KZN Provincial High Court Division	K- 2012 (7)
5 July 2012	Mrwebi signs his brief reasons for withdrawal of Mdluli charges	J120
10 July 2012	Chauke submits application for authorisation ito section 2(4) of POCA iro Booysen to Jiba	J75

DATE AND CASE	DETAIL	DROPBOX REFERENCE
11 July 2012	Maema asks General Mabula to leave the Danikas' statement unsigned in order to comply with the provisions of sections 2 & 3 of the International Cooperation in Criminal Matters Act	B18 (obtained from judgment)
18 July 2012	Judgment is handed down in urgent matter between Breytenbach and NPA. The court held that it had no jurisdiction and that the matter should go to the Bargaining Council	B3 & B25 (dates obtained from arbitration award)
23 – 27 July 2012	Disciplinary enquiry into Breytenbach charges takes place	B25 (dates obtained from arbitration award)
24 July 2012	Nel provides legal opinion to Mokhatla regarding delegations and authorisations to prosecute	J150
25 July 2012	FUL requests the full record ito rule 53, regarding the decision to withdraw the Mdluli charges	B21 (obtained from judgment)
25 July 2013	Roelofse deposes to affidavit re Mrwebi – unsigned	M4
1 August 2012	A meeting held was held at the office of the Acting NDPP with General Dramat where a briefing on the status of the above matter was given particularly about the meeting of 9 December 2011 referred to above and where an agreement about the direction of the case was discussed.	
3 August 2012	Aiyer makes first statement against Booysen	B18 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
6 August 2012	Mrwebi directed correspondence to the Acting regional Head of the SCCU in terms of which he requested his office to give the investigator/s in the matter the necessary assistance and guidance as may be required to ensure that the matter is properly handled and also suggested that a new prosecutor, must be appointed to guide and take decisions in the matter.	J153 & J155.8 (p1-2)
6 August 2012	DDPP (Nel) provides DNDPP (Mokhatla) with a legal opinion on the powers of prosecutors and iro POCA and authorisations	J78
7 August 2012	Memo to Jiba re authorization ito section 2(4) of POCA, together with a recommendation – under name of Noko but signed by Chauke	5.3.18
14 – 17 August	Disciplinary enquiry into Breytenbach charges continues	B25 (dates obtained from arbitration award)
15 August 2012	Noko sends memo to Jiba containing the application for authorization ito section 2(4) of POCA, together with a recommendation signed by Chauke	5.3.5 & J161 (scan 26)
15 August 2012	E-mails are exchanged between Mosing & Maema, preparing the request for authorisation to prosecute in Cato Manor matter	J92 (pages 59 – 60)
17 August 2012	Authorization in terms of section 2(4) of POCA issued	5.3.7 & J161 (scan 26)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
22 August 2012	Booysen is arrested	B1 (obtained from judgment)
31 August 2012	Aiyer makes supplementary statement against Booysen	B18 (obtained from judgment)
4 September 2012	A request is sent that Jiba would like to meet and be briefed on the status of the Savoi matter	J161 (scan)
13 September 2012	Lepinka writes to Nkabinde (Public Protector), acknowledging receipt of her queries into the Mdluli investigations and Breytenbach's suspension	J161 (scan 21)
17 September 2012	Mokgatlhe writes to Ferreira, indicating his decision to allocate the Mdluli matter to Becker and Mashamaite jointly. He also writes to Becker et al advising same.	J155.8 (p3-4)
25 September 2012	Chauke writes to Mabuda & Angus, requesting a further consultation with Aiyer	J92 (page 46)
27 September 2012	Nel provides Jiba with a legal opinion on the NDPP's power to intervene or review a decision by a DPP ito s 179(5) of the constitution and s 22(2) of the NPA act	GN5 to Gerhard's affidavit
27 September 2012	President's Zuma's legal representatives writes to the state attorney indicating that he does not consent or waive confidentiality iro the representations made	B8 (obtained from judgment)
29 October 2012	Becker writes to Mokgatlhe, providing an update in the **S v Mdluli** matter (fraud)	J155.8 (p5-6)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
14 November 2012	Thoshan Panday deposes to affidavit regarding unlawful surveillance by Gnl Deena Moodley	J161 (scan 27)
21 November 2012	Becker & Mashamaite writes to Mokgatlhe providing an update on the status of the Mdluli matter **(Note: this is incomplete)**	J155.3
21 November 2012	Mokgatlhe writes to Mrwebi, providing progress reports on the Mdluli and Bosasa matters	J179 (93 – 99)
21 November 2012	De Kock writes to Mrwebi to provide an update in the Bosasa matter.	J179 (93 – 99)
27 November 2012	Mashamaite writes to Mokgatlhe providing an update in S v Mdluli (fraud) matter, indicating that the investigation was not completed yet.	J155.6
29 November 2012	Kennedy SC provides legal opinion to the state attorney regarding disclosure of confidential inform**ation, pro**posing a tight mechanism to protect the confidential information in the **DA v Zuma** case	I11
10 December 2012	Bargaining council ruling in Breytenbach v NPA is handed down, dismissing the application that the NDPP does not have the authority to suspend her	B26
11 January 2013	E-mails exchanged, De Kock provides an update in Bosasa investigation	J179 (101 -102)
January 2013 – April 2013	Jiba on maternity leave	B6 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
14 January 2013	E-mails exchanged re. Bosasa report- report is forwarded by Mrwebi to Lepinka on 14 January 2013 and it is then forwarded to Mosing on 16 May 2013	J161 (scan 15 – 16
14 January 2013	De Kock provides a report on Bosasa matter (unsigned)	J179 (103 -106)
14 – 15 January 2013	Disciplinary enquiry into Breytenbach charges continues	B25 (dates obtained from arbitration award)
21 January 2013	Breytenbach writes to Mrwebi indicating that an effort was made to comply with Mrwebi's instruction to withdraw the Mdluli charges	K-2013 (9)
22 January 2013	Mrwebi testified in disciplinary proceedings instituted against Ms Breytenbach, after her suspension from office during April 2012. He concedes under cross examination that he took the decision to withdraw charges against Mdluli alone	B18 (obtained from judgment)
23 January 2013	Mzinyathi is cross examined in Breytenbach matter	B18 (obtained from judgment)
12 February 2013	De Kock provides a report on Bosasa matter (unsigned)	J179)107 -108)
25 March 2013	Arbitration award is handed down in Breytenbach v NPA matter, indicating that Breytenbach's suspension was substantively and procedurally unfair	B25

DATE AND CASE	DETAIL	DROPBOX REFERENCE
25 March 2013	De Kock provides a report on Bosasa matter	J179 (109 – 110)
28 March 2013	Mashamaite writes to Mokgatlhe providing an update in **S v Mdluli** (fraud) matter	J155.7
4 April 2013	Jiba writes to Minister Radebe requesting the retention and assignment of Van Rensburg to perform the duties and responsibilities of the CEO of NPA	J82 & J6 & J59 & J82
9 April 2013	Min. Radebe approves Jiba's request	J82 & J6
22 May 2013	Mashamaite writes to Mokgatlhe providing an update in S v Mdluli (fraud) matter	J155.5
22 May 2013	Mokgatlhe writes to Mrwebi to provide an update on the Bosasa and Mdluli matters	J179 (142)
27 May 2013	Breytenbach is acquitted of charges against her	B4 (obtained from judgment)
29 May 2013	NPA indicates that it was contemplating filing a review of the decision in Breytenbach's matter	B4 (obtained from judgment)
4 June 2013	Consultation with Adv Hodes SC – present: Manaka. Ntlakaza, Moleko, Futshane, Mosing Chauke Cato Manor prosecution team provides feedback to Adv Hodes SC regarding replying affidavit in **NDPP v Booysen**	5.3.1 5.3.20
4 June 2013	Mosing writes memo to Jiba to advise of the outcome of the consult with counsel	J92 (pages 27 -29)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
5 June 2013	Breytenbach meets with NPA officials regarding her return to work. They indicate they would like her to go on special leave pending a review or alternatively, that they will decide where she works and when she can return. Later the same day a letter is sent to Breytenbach by Van Rensburg advising her to return to work on 10 June 2013	B4 (obtained from judgment)
6 June 2013	E-mail to Jiba, attaching a founding affidavit for her to sign, appears to be in NPA v Breytenbach matter	J161 (scan 9)
10 June 2013	Meeting between Breytenbach & Jiba (Breytenbach is informed that she will not come back into her previous position)	B4 (obtained from judgment)
10 June 2013	Mr JR Sebelemetsa only took over the FUL matter on the week of 10 June 2013 from Mr John Ngoetjana after client and the acting head of state attorney met and decided that Mr Ngoetjana must be removed as the attorney of record for ANDPP.	
12 June 2013	NPA files a review of the decision to acquit Breytenbach	B4 (obtained from judgment)
21 June 2013	E-mail is sent from Adv Motau SC to state attorney attaching the draft affidavit in FUL v NDPP matter, calling for comments	B18 (obtained from judgment)
21 June 2013	E-mail from Advocate T Motau – not including Jiba in email but Mrwebi, Chita and re: draft affidavit in FUL (GCB record 104 (p. 127)).	

DATE AND CASE	DETAIL	DROPBOX REFERENCE
24 June 2013	This is the date that the NDPP was supposed to file answering papers in FUL v NDPP according to directions issued by the DJP	B21 (obtained from judgment)
25 June 2013	Some respondents file answering papers a day late in FUL v NDPP & others matter	B21 (obtained from judgment)
25 June 2013	State attorney responds to adv Motau SC indicating that a decision was made to file separate affidavits for Jiba & Mrwebi in FUL v NDPP matter	B18 (obtained from judgment)
26 June 2013	Jiba has unscheduled meeting with adv Motau SC re the FUL v NDPP matter, preceded by an e-mail from Chitha to Motau apologising for the meeting	B18 (obtained from judgment) & F2.2 (2.2.5)
28 June 2013	Adv Motau SC writes to Chitha, Chauke & Mokhatla, advising that there is improper document management and partial briefs have been delivered. He suggests that the services of a private firm be obtained to assist A draft affidavit with Mrwebi's comments is sent to Motau SC, whereafter he also requests them to provide comments on his previous draft affidavit and theirs.	F2.2 (2.2.5)
30 June 2013	Chitha writes to Motau SC and advise that copies will be made for the other counsel attending on the matter and the appointment of private attorneys will be considered at a later stage. He also writes to inform Motau SC that the draft affidavit as per his request has been forwarded to Jiba, Mrwebi & Chauke for comment	F2.2 (2.2.5)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
2 July 2013	Breytenbach v NPA & others (review and set aside the decision to redeploy Breytenbach to another area) is heard in court	B4 (obtained from judgment)
2 / 3July 2013	Mrwebi & Jiba depose to separate affidavits in FUL v NDPP matter	B18 (obtained from judgment)
3 July 2013	Chitha writes to Sebelemetsa advising that NPA has prepared its own affidavits due to counsel's demands	K – 2013(1)
4 July 2013	NDPP files its answering papers 9 court days late in **FUL v NDPP** & others matter	B21 (obtained from judgment)
5 July 2013	Sebelametsa writes to Chitha advising that counsel on brief is withdrawing	K – 2013(2)
16 July 2013	Jiba writes to de Kock and Mrwebi, indicating that De kock must supply a prosecution memorandum on the Bosasa matter	J179 (144 – 146)
16 – 17 July 2013	Emails exchanged regarding the request for access to witness statements in Bosasa matter and De Kock's non – compliance	J179 (147 -153)
17 July 2013	E-mails exchanged between Gerrie Nel and Mzinyathi regarding report on Mdluli and Lazarus matters	J161 (scan 17 – 20)
19 July 2013	Judgment is handed down in **Breytenbach v NPA & others** (review and set aside the decision to redeploy Breytenbach to another area) – application is dismissed	B4 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
30 July 2013	Chitha writes to K van Rensburg to request permission to appoint Halgryn SC – approved the same day	J9
1 August 2013	Chitha writes to Tshivase (SA), instructing him to appoint Halgryn SC & Adv Uys in FUL v NDPP	K- 2013 (8) pages 7-8
2 August 2013	Adv Halgryn SC is briefed on behalf of NDPP in FUL v NDPP	B18 (obtained from judgment) & K-2013 (8)
4 August 2013	First consultation with Adv Halgryn SC takes place	B18 (obtained from judgment)
5 August 2013	Mosing writes to Chauke, Maema and points out that a supplementary affidavit needs to be filed	J92 (pg 47)
5 August 2013	Halgryn writes to Chitha informing him that he was provided with incomplete briefs and requesting it to be supplemented	K – 2013(4)
5, 7 & 8 August 2013	Halgryn SC, Uys, Sebelemetsa & Chitha consults & Jiba present on 8 August 2013 Johan Uys provides memo on the consultations held between 5 – 8 August 2013	J77 & J6 (pages 9 -14) & J47, J48, J49, J50 J154
8 August 2013	De Kock provides the prosecution memo on the Bosasa matter	J179 (162 -243)
12 August 2013	Halgryn SC provides legal opinion to NDPP re. the Booysen matter, indicating that she acted prematurely	I10
12 August 2013	Heads of argument for NDPP & Mrwebi, in FUL v NDPP & others is due to be filed on direction of DJP – filed a month later	B21 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
13 August 2013	Chitha obo ANDPP instructs Tshivase (SA) letter to appoint Hodes SC	K – 2013(5)
13 August 2013	Chauke writes to Maema, Mosing and others requesting a meeting to discuss the Cato Manor matter	J92 (page 77)
14 August 2013	Cato Manor prosecution team meets to prepare a response to issues raised in Booysens' papers	5.3.8 & B18 (obtained from judgment)
13 August 2013	Johan Uys writes to Sebelematsa confirming that his brief for the FUL v NDPP matter has been terminated	K-2013 (10)
15 August 2013	Cato Manor prosecution team provides feedback to adv Hodes SC regarding replying affidavit in **NDPP v Booysen**	5.3.21
16 August 2013	Pretoria High court hands down judgment in **DA v ANDPP** – application to provide record in decision making to discontinue prosecution	B8
21 August 2013	Macadam provides his legal opinion to Jiba regarding the matter **DA v acting NDPP** & others	J87 & J52
26 August 2013	Viljoen writes to Mokgatlhe providing an update in the Mduli investigation	J155.11
30 August 2013	Noko is appointed as DPP of the Kwazulu Natal Division	K-2012 (7)
9 September 2013	NDPP & Mrwebi file their Heads of argument a month late	B18

DATE AND CASE	DETAIL	DROPBOX REFERENCE
9 September 2013	Mrwebi files supplementary affidavit in order to address criticisms against him by retired judge Kriegler.	B18 (obtained from judgment)
10 September 2013	Roelofse writes to Sebelemetsa confirming that the investigation continued in September 2012	K – 2013(6)
11 September 2013	Mrwebi writes to Sebelemetsa in response to Roelofse's e-mail, alleging that it contained inaccurate information	K – 2013(6)
11 September 2013	**FUL v NDPP** matter is heard in court before Murphy J	B18 (obtained from judgment)
12 September 2013	Roelofse writes to Mrwebi addressing allegation of inaccurate information	K – 2013(6)
17 September 2013	De Kock provides a written memorandum setting it her reasons for refusing to discuss the Bosasa matter and attend a meeting with Lepinka. She indicates that Lepinka was acquainted with Mti and Gillingham and that there was thus a risk to the NPA if Lepinka was exposed to the Bosasa investigation continuously	J179 (244 – 291) p 27 -31
18 September 2013	Mokgatlhe requests an investigation into De Kock's conduct	J179)244 -291)
20 September 2013	Mokotedi writes to Breytenbach putting a list of questions regarding her financial disclosure, failure to submit declaration forms, remunerative work outside NPA, etc.	F5 (3.3)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
23 September 2013	**FUL v NDPP** judgment is handed down, this is one of the judgments in which Jiba is criticised by Murphy J	B22 (obtained from judgment)
1 October 2013	Nxasana is appointed to the position of NDPP	B20 (obtained from judgment) - politicsweb article
8 October 2013	Routledge Modise writes to Jiba and Mrwebi requesting a response to its client's (Bosasa's) representations	J179 (292)
31 October 2013	Ramaite writes to NDPP requesting approval to engage outside counsel to prosecute Bosasa matter	J179 (293 -300)
6 November 2013	Mrwebi writes to Ramaite, applying for approval to engage outside counsel to prosecute in Bosasa matter (unsigned)	J179 (293 -300) p3-4
6 November 2013	Nxasana writes to Minister Radebe applying for approval to engage outside counsel to prosecute in Bosasa matter (unsigned)	J179 (293 -300) p4-8
25 November 2013	Mrwebi and Gerhard Nel exchange e-mails regarding the OECD working group on bribery – preliminary report	J170.12
10 December 2013	Advocate T Motau, dated 10 December 2013 – memo of reasons for withdrawal	I9 & F 2.2 (2.2.1)
24 January 2014	Breytenbach informs Nxasana of her resignation	J72
7 February 2014	Booysen matter appear in court before Gorven J- transcript	5.3.2 & B1

DATE AND CASE	DETAIL	DROPBOX REFERENCE
11 February 2014	E-mails exchanged regarding a media query as to the progress of the Bosasa investigation	J161 (scan 34)
17 February 2014	Chauke writes to Nxasana regarding cases against O'Sullivan & Mrwebi, recommending that Mrwebi just be admonished and that no prejudice occurred	J145
17 February 2014	Jiba writes e-mail to Nxasana indicating that Noko was advised that she is not allowed to attend Cabinet Lekgotla by the Minister of justice an she asks Nxasana whether Noko should attend in any event	J11 (page 6)
17 February 2014	Nxasana responds to Jiba's e-mail indicating that he did not advise or instruct Noko to attend and that he doesn't understand why Noko distorted what transpired. He also says that the minister's wishes must be respected and Jiba's request is misplaced and does not deserve a response.	J11 (page 7)
17 February 2014	Jiba writes to Nxasana indicting that she could not find any wrong doing by Noko and that she disagrees that Noko should be subjected to mentoring and coaching as this will make it appear that she is being judged.	J161 (scan 22)
25 February 2014	Jiba writes to Nxasana regarding SAPS forensic services evaluation committee, indicating that she is not happy with Bradley Smith participating as he takes part in most I and she would like others to get an opportunity	J11 (page 9)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
26 February 2014	Nxasana responds to Jiba, implying that she is trying to undermine him and indicating that he does not owe her any explanations. He does however proceed to explain how it came about that Bradley Smith was placed on the committee. Jiba responds on the same day that it is clear that an intervention is required between them and that she is not trying to undermine him	J11 (page 8 – 9)
26 February 2014	Gorven J hands down judgment in **Booysen v NDPP** matter.	B1
27 February 2014	Breytenbach & NPA enters into settlement agreement	J69 & K – 2014(27)
28 February 2014	McBride is appointed as Head of IPID	News 24
3 March 2014	Nxasana sends circular re. change of heads of business, indicating that Jiba has been moved to head LAD and Ramaite has been moved to take her place as head of NPS and Mokhatla has been moved to head NSSD (where Ramaite was)	J11 page 10 -11 & J46
4 March 2014	Jiba writes to Minister, requesting his intervention in unfairness of aforementioned restructuring and other complaints against Nxasana	J60 & J11 & J115
5 March 2014	Exco meeting is held – point 9 – deals with Booysen judgment and a long discussion about the process was followed. Chauke to provide a memo regarding developments in the matter	J176

DATE AND CASE	DETAIL	DROPBOX REFERENCE
5 March 2014	Cato manor prosecution team writes to Chauke re judgment in the Booysen v NDPP matter and its intended course of action including no appeal	J73 (also 5.3.19)
7 – 10 March 2014	E-mails are exchanged between Chauke, Noko and Mosing regarding the memo to be presented to the NDPP on the Cato manor matter	J92 (pg 55 -56)
10 March 2014	A complaint was lodged on 10 March 2014 by Jiba with the D-G Sindane and Radebe against Nxasana in regards to unfair assignment of jobs tantamount to a constructive dismissal Requested the Minister's intervention in relation to the restructuring of the NPA, indicating that the Minister's approval of the NPA structure was required as he was the Cabinet Minister responsible for the NPA. She points out that neither the President nor the Minister is authorised by law to authorise a National Deputy Director or National Director to exercise or perform any powers, duties or functions (para 5.5) and doing so would be against section 179 of the Constitution. It is not for the President to specify powers, duties or functions.	
10 March 2014	Memo from Sindane to Min. Radebe re complaint by Jiba against Nxasana	J27 page 2 & K-2014 (27)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
1 April 2014	Jiba & Mosing exchanges e-mails, wherein he indicates that he cannot furnish reasons for the withdrawal of the application for leave to appeal the Booysens matter as Nxasana made the decision. She then indicates that was not what she wanted to know- she wanted him to advise her as to why the evidence they had was an issue	J92 (pg 54) & J161 (scan 5)
20 March 2014	Judgment in **Savoi v NDPP** is handed down	B34
25 March 2014	Report by Letsholo to Vimbani indicating the reasons for declining to prosecute Toshan Panday	J161 (scan 27)
26 March 2014	Chauke informs the state attorney to withdraw the application for leave to appeal the Booysen judgment as the NDPP decided not to do so on 25 March 2014	J92 page 53
1 April 2014	SCA hears appeal in **NDPP & others v FUL**	B15
2 April 2014	Exco meeting takes place- point 18 of the minutes points out that a report is required regarding the Booysen matter and judgment.	J171
14 April 2014	Prince Mokotedi provides report on improper conduct, maladministration and victimisation – NDPP & CEO NPA, to Prof Levine & Sindane	K – 2014 (1) & J119
15 April 2014	Sindane responds to Mokotedi's letter and allegations of improper conduct	K – 2014 (2)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
17 April 2014	SCA appeal in **Mdluli (FUL v NDPP)** matter is handed down and court criticizes Jiba. Court found that decision to withdraw charges is set aside	B15 & B22 (obtained from judgment)
6 May 2014	Action log in respect of exco meeting, indicating that the NDPP must be provided with a report on the Booysen matter – point 13	J175
9 May 2014	Mrwebi writes to Nxasana and Mokhatla to provide an update on the Mdluli prosecution and recommending that the NPA declines to prosecute	J155.2
21 May 2014	Meeting between Min. Radebe, Nxasana & Sindane re. Nxasana's ability to obtain top security clearance – concerns raised by state security	J66 & K – 2014 (27) & J44 & J66
21 May 2014	E-mails exchanged Macadam, Hoogenraad-vermaak, et al re. OECD report and awareness	J170.3
30 May 2014	Nxasana writes to Mrwebi regarding his failure to provide info and advising him that he has no alternative but to comply	K – 2014 (2a)
30 May 2014	Ramawele writes interim opinion on Nxasana (not addressed to anyone)	J3 (pages 1 – 12) & J29 (pages 1 – 12)
5 June 2014	CDH (FUL's attorneys) writes to the state attorney to enquire whether charges will be reinstated against Mdluli	F2.2 (2.2.4)
6 June 2014	The state attorney forwards the CDH letter to Nxasana	F2.2 (2.2.4)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
8 June 2014	In a newspaper article, Nxasana accused Jiba of being part of a cabal that was colluding with State security agents and police officials to tarnish his name. He included Mrwebi and security head, Tshilidze Ramahani, in this. In the same article there was an allegation of a security guard having been fired for spying on Nxasana by Jiba and removing files relating to high profile cases. Nxasana also accused Jiba of being obstructive when asked to hand over major case files which included cases against Mdluli; the so-called "Amigos" case against prominent KZN politicians; the Cato manor; death squad and the Spy Tapes case used to withdraw corruption charges against Zuma.	*Times Live* 8 June 2014
11 June 2014	Chauke provides a report to Nxasana on Mdluli case, setting out the outcome of the Inquest and further evidence implicating Mdluli and making a recommendation for the reinstatement of some of the charges	F2.2 (2.2.4)
12 June 2014	Jiba forwards an article to Mrwebi, indicating that judge Kriegler is not honest with the public. The article deals with the NPA and its handling of the FUL matter	J161 (scan 38)
17 June 2014	Nxasana writes to CDH (FUL's attorneys) to advise that the charges against Mdluli will be re-instated	F2.2 (2.2.4)
20 June 2014	Ramaite SC writes to Nxasana, providing representations in order to review the decision against Mrwebi	J144

DATE AND CASE	DETAIL	DROPBOX REFERENCE
23 June 2014	Hofmeyr writes to Mrwebi, calling on him to make representations for his decision in Mdluli matter	J178.4
24 June 2014	Nxasana writes to Chauke, instructing him to cause summons to be issued against Mdluli	F2.2 (2.2.4)
27 June 2014	Viljoen writes to Mokgatlhe, providing an update on the Barnard and Mdluli investigations	J178.8
July 2014	Dispute between Nxasana and Zuma commences	B20 (obtained from judgment)
1 July 2014 (2)	Nxasana writes to Jiba re handover report and requirements	J101
1 July 2014	Nxasana writes to Noko requesting a handover report in Amigos and Booysens matter by 15 July 2014	F2.2 (2.2.15)
2 July 2014	Action log in respect of exco meeting held, includes the LAD's mandate and functioning	J174
4 July 2014	Nxasana writes to Jiba requesting a copy of her right of appearance as advocate	K – 2014(3)
4 July 2014	Nxasana writes to Mrwebi and requests a report on the FUL matter by 15 July 2014	F2.2 (2.2.12)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
7 July 2014	Ellis SC provides a legal opinion to the state attorney regarding disciplinary procedures available to NPA iro senior personnel. Recommends suspension ito section 12(6)(a) of the NPA act and that a perjury case be pursued, as well as a complaint laid with the GCB. He obtained a brief from Mr JM Matladi and he consulted with Ms CH Van Rensburg (the CEO).	I7
14 July 2014	Mrwebi reports to Nxasana on FUL application and indicates that there is no evidence to justify the prosecution of Mdluli	K – 2014 (4) & F2.2 (2.2.9) & F3.2 (3.2.7) & J29 (pages 13 – 43) & J155.1
14 July 2014	Noko writes to Nxasana to report the withdrawal of charges in the Amigos matter and her decision making in the Booysen matter	F2.2 (2.2.11)
14 July 2014	Mzinyathi writes to Nxasana to report on FUL application – annexes a copy if the memorandum setting out the details as prepared by Ferreira and Breytenbach	F2.2 (2.2.13)
18 July 2014	Van Rensburg writes to Justice Yacoob, informing of his appointment on Fact Finding commission	K – 2014(5)
18 July 2014	Hofmeyr, while in an acting capacity, writes memo to Minister requesting Jiba's suspension	J56
24 July 2014	Hofmeyr writes to Mrwebi, Mncube & Mzinyathi informing them of the view that there is a prima facie case against Mrwebi	J144 (p12 – 14)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
24 July 2014	Hofmeyr informs Mrwebi of the decision to institute prosecution against him	J178.5
31 July 2014	Van Rensburg writes to Masutha to inform the Minister of the Fact-Finding commission's appointment Van Rensburg writes to Sindane to inform of the Fact-Finding commission's appointment	J62 & F1.2 & J54 J63 & J61 & J62 & J108 & J117
31 July 2014	Masutha writes to Hofmeyr requesting clarity on the details of his appointment as acting NDPP	J89
1 August 2014	Nxasana provides the minister and president with representations as to why he should not be suspended	B20 (obtained from judgment)
1 August 2014	Bokaba SC provides a memorandum of opinion to Minister: development re the lawfulness of the Fact-finding committee's appointment. It indicates that the appointment was unlawful	I4
1 August 2014	Leeuwschut deposes to affidavit indicating that in terms of the NPA code of conduct, the NPA is obliged to report the findings of the court against Jiba, Mrwebi & Mzinyathi to the Minister, the president and the police	J128
4 Aug 2014	Hofmeyr responds to Minister re his appointment and the request for Jiba's suspension	J58 & J4 & J57
4 August 2014	Nxasana gives authority Leeuwschut to lay charges against Mokotedi	K – 2014 (31)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
5 August 2014	Van Rensburg writes to Gericke (PTA Bar) informing of the misconduct and matter against Jiba and others	K – 2014(6)
6 August 2014	Sindane writes to Van Rensburg, requesting grounds and procedure followed for appointment of Fact-Finding Commission	K – 2014 (7)
8 August 2014	Masutha writes to Nxasana asking whether van Rensburg acted on Nxasana's instruction when appointing the Fact-Finding Commission	K – 2014 (8) & J10
8 August 2014	Van Rensburg writes to Sindane requesting an extension to respond to its letter re relationship between DG & NDPP	K – 2014(9)
8 August 2014	Minister Masutha writes to Nxasana re request to recommend suspension of Jiba and others, asking whether any internal steps were taken to address the allegations in the various judgments	J64
11 August 2014	Nxasana requests a meeting with Minister Masutha in response to his request whether any internal steps were taken to address the issues with Jiba	K – 2014(10)
11 August 2014	Hofmeyr writes to Van Rensburg & Nxasana asking why Mrwebi is communicating directly with the presidency	
12 August 2014	Nxasana, supported by Adv Karen van Rensburg, addressed a memo on 8 August 2014 indicating that the NPA had laid criminal charges of perjury against Jiba, Mrwebi and Mzinyathi. The memo was given to the Minister for noting.	

DATE AND CASE	DETAIL	DROPBOX REFERENCE
12 August 2014	Nxasana writes to all the DPP's and unit heads regarding the procedure and guidelines to be implemented in the investigation of bribery and corruption matters. He also authorises Macadam and Ramaite to prosecute.	J166
12 August 2014	Masutha responds to Nxasana's meeting request, indicating that he will still require a response to whether the internal steps were taken to address the allegations against Jiba in the various judgments	K – 2014 (27) page 41
13 August 2014	Van Rensburg writes to Sindane in response to his letter of 6 August providing grounds and procedure followed in appointment of Fact Finding Commission	K – 2014(11)
15 August 2014	A legal opinion dated 15 August 2014 by T Bokaba SC and N Makoti, at para 25, informed the Minister of Justice that he could not ignore the adverse credibility findings made against senior NPA officials and that as the final authority within the NPA had to take action. This action involved informing the President about the adverse findings against officials and to recommend him to take appropriate action. The President was to take steps pursuant section 12(6) of the NPA Act.	
15 August 2014	SCA hears appeal in **Zuma v DA & others** re production of record in taking the decision to not prosecute	B13

DATE AND CASE	DETAIL	DROPBOX REFERENCE
22 August 2014	Nxasana writes to Ms. Diko (PA:SCCU) requesting a copy of her diary	K – 2014 (12) & F5 (5.2)
22 August 2014	Nxasana writes to Jiba requesting copies of diaries (Jiba & PA) for Fact Finding Commission	K – 2014 (13)
22 August 2014	Nxasana writes to Mrwebi requesting copies of his and his PA's diaries, as well as memos exchanged with Mdluli and Mzinyathi	K – 2014 (14) & F5 (5.3) & J102
22 August 2014	Nxasana writes to Baleki (PA – Jiba), asking for a copy of her diary	
25 August 2014	Mrwebi responds to Nxasana, indicating his refusal to provide information	K – 2014 (15) & F5 (5.3) & J95
26 August 2014	Van Rensburg writes to Mrwebi, indicating that it is not personal information that is required	K – 2014 (16)
26 August 2014	Van Rensburg writes to Sindane providing the information on the appointment of Fact Finding Commission	K – 2014(17)
26 August 2014	Bokaba SC provides a supplementary memorandum of opinion to the Minister re the lawfulness of the Fact finding committee's appointment and the letters to be sent to the fact finding committee	I5
27 August 2014	Mrwebi writes to Van Rensburg confirming his refusal to cooperate with Fact Finding Commission	K – 2014(19) & J96
27 August 2014	Nxasana writes to Mrwebi re. his refusal to provide information and requesting him to provide legal grounds for his refusal	K – 2014(20) & J99 K – 2014(21)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
28 August 2014	**Zuma v DA** SCA judgment is handed down	B22 (obtained from judgment)
29 August 2014	Nxasana writes to Van Rensburg authorising access and removal of NPA property from Mrwebi's office	K – 2014(22) 7 J136
Undated and unsigned	Hofmeyr writes to Nxasana, indicating that he was authorised to review the decision taken by Chauke re Mrwebi and that he is of the opinion that there is a prima facie case against Mrwebi, thus recommending that charges be brought against Mrwebi	J144 (p9-11)
2 September 2014	Summons against Mrwebi is issued	J129
3 September 2014	Nxasana writes to Masutha in order to respond to his enquiry whether internal steps were undertaken with regards to the judgments against Jiba and Mrwebi (unsigned)	J137
4 September 2014	Sindane writes to Van Rensburg requesting Van Rensburg's appointment letter in order to establish authority to appoint Fact Finding Commission	K – 2014 (23)
5 September 2014	Nxasana writes to Mrwebi advising of his intention to apply for Mrwebi to be placed on special leave	K – 2014 (24)
8 September 2014	Judge Hurt (arbitrator) provides arbitration memo in **Zuma v DA** matter, indicating the portions of the transcripts which he erased in accordance with the court order.	J152

DATE AND CASE	DETAIL	DROPBOX REFERENCE
9 September 2014	Nxasana writes to Jiba indicating that he requested on 1 July for a handover report and asking that she responds to his request. He also indicates that she has not yet responded to a request for information from the Yacoob commission and asks her to advise whether she intend to respond or not	J101 (page 3 -4)
Undated & unsigned	Memo from Masutha to Mrwebi requesting his views on the perjury charges against him and the recommendation made by the judiciary to investigate hi fitness – This is undated, but require Mrwebi to respond by 15 September 2014	I4 (pages 24 – 26)
16 September 2014	Nazeer Cassim SC provides the findings in the disciplinary hearings of SAPS and Booysen, indicating that the SAPS has not discharged its onus to demonstrate wrongdoing on the part of Booysen	5.3.9
17 September 2014	Nxasana writes to Halgryn requesting copy of the memo he previously prepared for NPA	K – 2014 (25)
5 – 17 September 2014	E-mails are exchanged between Downer, Hofmeyr, Jiba and Nxasana, where Downer expresses his concerns that no all relevant memos were handed to judge Hurt and that he was not consulted in the process	J161 (scan 25)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
17 September 2014	There is a memo from the D-G Sindane to Minister Masuthu, dated 17 September 2014 in which para 3 indicates that the Department of Justice had obtained a legal opinion from Adv Bokaba SC. This related to the submissions from the NPA. A legal opinion dated 15 August 2014 by T Bokaba SC and N Makoti, at para 25, informed the Minister of Justice that he could not ignore the adverse credibility findings made against senior NPA officials and that as the final authority within the NPA had to take action. This action involved informing the President about the adverse findings against officials and to recommend him to take appropriate action. The President was to take steps pursuant section 12(6) of the NPA Act.	
18 September 2014	Nxasana writes to the president and the minister, recommending the suspension of Jiba, Mzinyathi and Mrwebi	J145 & K-2014 (32)
19 September 2014	Chitha writes memo to Nxasana & Jiba, to brief the NDPP on further developments after filing the Rule 53 record in **DA v ANDPP**. He indicates that Mpshe should advise what documents were before him when making his decision	J147
23 September 2014	Ramaite writes to Nxasana re Mrwebi matter's postponement	J130

DATE AND CASE	DETAIL	DROPBOX REFERENCE
20 October 2014	Nxasana to Jiba requesting her comments on the criticism against her by Navsa ADP in Zuma v NDPP	J100 & J8 & J65
23 Oct 2014	Affidavit of Leeuwschut regarding Jiba's role in Booysen matter	J45 & J5 & J45
23 November 2014	Ferreira writes to Sebelemetsa requesting FUL litigation file and affidavit	K – 2014 (26)
10 December 2014	Nxasana writes to Zuma, indicating that he does not want to vacate office, but is willing to consider it for full compensation for the remainder of his contract term	B20 (obtained from judgment)
24 December 2014	Dramat is suspended as head of the Hawks by Nhleko	M&G article
Undated	Memorandum to NDPP (unclear from whom – but could be from Divisional Commissioner of Detective services - it relates to the perjury charges against Jiba and recommends that the NDPP must decide on the matter	J13
2014 – undated	Memo by Jan Ferreira, detailing the history of the matter	5.3.3
2014 – undated	Yacoob commission provides a preliminary report	F1 (1.1)
2014 – undated	Yacoob commission provides a final report, recommending the appointment of a judicial commission into the fitness of Jiba & Mrwebi & Mzinyathi to hold office	F1 (1.2)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
Undated	Prosecution memorandum from adv. Maema recommending that Booysen and others be prosecuted	5.3.6 & J73
Undated and unsigned	Letter from Justice Yacoob to Nxasana – re role of Fact Finding commission and Mrwebi's unwillingness to cooperate -	K – 2014 (28) & J83
Undated and unsigned	Masutha writes to Jiba – requesting her input on allegations against her	K – 2014 (29)
Undated	Masutha writes report/memo to the president requesting the provisional suspension of Jiba, Mrwebi and Mzinyathi to hold an investigation into their fitness	J2
Undated	Memo advising the president to provisionally suspend Nxasana pending an investigation into his fitness	J33
Undated	Provisional charge sheet – Jiba	J37 & J43
Undated	Charge sheet – Jiba	J44
January 2015	Undated letter from Koos de Klerk informing Mrwebi that he required a warning statement from him and informing him of the complaints against him	J113
15 January 2015	State attorney writes to Jiba advising that the Answering affidavit in the **DA v NDPP** matter will be available by 20 January 2015	K- 2015 (29)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
16 January 2015	Maema deposes to affidavit re Hodes concessions and indicating that inaccuracies in affidavit were prepared by counsel without input of prosecution team	J88
19 January 2015	Chitha writes to Kennedy SC re **DA v ANDPP**, requesting dates for consultation	K – 2015 (33)
20 January 2015	Seleka writes to Chitha indicating that the deadline for filing an Answering affidavit (**DA v ANDPP**) is on 26 January 2015 and asking that it be provided in order to file it.	K 2015 (34)
21 January 2015	Shadrack Sibya (head of the Gauteng Hawks) is suspended by Nhleko	Confirmed M&G article
22 January 2015	Dlamini is appointed in Sibya's place	M&G article
22 January 2015	Chitha writes to Nxasana to provide a report on the **DA v ANDPP** matter. **Note: (this is incomplete- one page only)**	J148
28 January 2015	Ntesang Maletswa depose to affidavit regarding commissioning an affidavit for Jiba	J98
3 February 2015	Hodes SC makes affidavit re judgment of Gorven J	J80
4 February 2015	Knight makes affidavit confirming the unsigned statement of Aris Danikas was upon his instructions	J84

DATE AND CASE	DETAIL	DROPBOX REFERENCE
13 February 2015	Botha & Noko exchanges e-mails regarding the Jiba perjury case. He tries to arrange meeting to discuss and she asks him for a list of his questions	J71
16 February 2015	Ferreira writes to Nxasana providing report on complaints against Jiba and others	J18
19 February 2015	Col. Botha writes to Noko requesting a statement and asking questions in Jiba investigation	J71
23 February 2015	Louw et al writes to Nxasana to provide a report on the FUL application, setting out the charges which is envisaged to be brought against Mdluli	J158
25 February 2015	Ferreira writes to Moonoo asking why Col. Botha was removed from the investigation against Jiba	K- 2014 (27) page 99
25 February 2015	Moonoo writes to Ferreira re appointment of Taioe & Botha to remain as part of investigation team	K – 2015(1)
26 February 2015	Ferreira SCCU writes memo to Nxasana reporting on investigation against Jiba and others	J1 & J19 & J22 & J41
27 February 2015	Van Rensburg provides Masutha with a progress report on investigation and prosecution against Jiba, Mrwebi & Mzinyathi	K – 2015(2) & J 53
27 February 2015	Sebelemetsa writes to Chitha, reporting on progress in **FUL v NPA and Others**	K – 2015(3) & J14
2 March 2015	Exco meeting takes place. Point 6.5 indicates that so far, no evidence could be obtained against Booysen	J172

DATE AND CASE	DETAIL	DROPBOX REFERENCE
3 March 2015	Visagie appointed to act as head of SIU	News 24
5 Mar 2015	Sebelemetsa writes memo to acting head state attorney to provide history and progress of FUL matter	J15 & J23
9 March 2015	Nxasana writes to Moyane informing him of the Mdluli matter and that if SARS wanted to act in terms of POCA, it must do so quickly.	K -2015 (28)
13 March 2015	Masutha writes to Sindane re request for suspension of Deputy Director NDPP	K – 2015(4)
19 March 2015	Ferreira writes memo to Nxasana to provide report to minister on progress of perjury and fraud charges against Jiba	J20
23 March 2015	Jiba summons is issued	J36
24 March 2015	McBride is suspended as head of IPID	News 24 – 12 March 2015
25 March 2015	Nxasana writes to Jiba and Mrwebi informing them that special leave has been granted with effect from 26 March 2015	K- 2015(26 & 27)
27 March 2015	Breytenbach addresses 2 questions to the president via the minister as to the failure to suspend Jiba	B6 (obtained from judgment)
31 March 2015	Noko makes affidavit re signing of covering letter to prosecution team - she has indicated it is not the one referred to above that was in fact signed by Chauke	J97

DATE AND CASE	DETAIL	DROPBOX REFERENCE
1 April 2015	GCB launches application to determine Jiba & Mrwebi's fitness as advocates	B22 (obtained from judgment)
14 April 2015	E-mails exchanged (Macadam, Govender) regarding OECD and prosecutorial involvement in foreign bribery cases	J170.5
16 April 2015	E-mails exchanged re. OECD- foreign bribery cases, indicating that Macadam's functions must be tabled with the Head of SCCU: Mrwebi	J170.8
20 – 21 April 2015	Dramat resigns as Head of the Hawks	M&G article
21 April 2015	According to the charge sheet & summons, the perjury case against Jiba is due to appear in court	K – 2015 (22) pages 11 – 19 & J42
4 May 2015	Ferreira writes report to Nxasana regarding role of Col. Botha (investigator) in charges against Jiba	J21
5 May 2015	Mosing makes affidavit re history, correspondence and progress of Cato Manor matter	J92
9 May 2015	Nxasana signs settlement agreement with president	B20 (obtained from judgment)
11 May 2015	Commission to enquire into Nxasana's fitness to hold office was due to commence enquiry	B20 (obtained from judgment)
12 May 2015	Mhlotshwa makes affidavit stating that Jiba advised him that he could sign delegation to prosecutors	J90
14 May 2015	President and minister signs settlement agreement with Nxasana	B20 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
29 May 2015	The president responds to a question regarding the failure to suspend Jiba, indicating that he is awaiting facts and circumstances from the NDPP in order to consider Jiba's suspension	B6 (obtained from judgment)
31 May 2015	Nxasana resigns as NDPP	EWN
5 June 2015	Adv Modisa provides a memo ostensibly to Adv Gauntlett SC that the correspondence from Mrwebi to Mdluli attorneys conveying that the charges against Mdluli and Barnard were to be wtihdrawn is protected by attorney/client privilege	GN3 to Gerhard's affidavit
1 June 2015	FUL writes to the President requesting that a decision be made whether or not to institute disciplinary proceedings against Jiba	B23 (obtained from judgment)
18 June 2015	Zuma appoints Abrahams as NDPP	B6 (obtained from judgment)
19 June 2015	Mokgathle writes report to Abrahams on the Jiba matter recommending that senior counsel be appointed to review the decisions to prosecute Jiba and to look at remedial action	J22 & J114
18 June 2015	Correspondence is exchanged indicating receipt of legal correspondence after a settlement was reached with Nxasana	J161 (scan 7)
22 June 2015	Macadam writes to SCCU prosecutor re. the way forward on a foreign bribery case (PetroSA)	J170.4
28 June 2015	Ferreira writes to Tsepo Tongoane, providing additional information to be given to adv. Modisa in order to supplement his opinion	GN4 to Gerhard's affidavit

DATE AND CASE	DETAIL	DROPBOX REFERENCE
29 June 2015	E-mails exchanged re. training in foreign bribery cases	J170.9
7 July 2015	Ferreira writes to Hofmeyr & Nel, providing the memo drafted by adv Modisa (and purportedly sent to Adv Gauntlett SC) indicating that he disagrees with the opinion provided and providing a copy of his own	GN4 to Gerhard's affidavit & K-2015 (30)
11 July 2015	Majavu writes to Abrahams requesting his views on the case against Jiba	K – 2015(6)
17 June 2015 – 21 July 2015	E-mails exchanged regarding training in foreign bribery cases	J170.7
21 July 2015	Nel provides memo to Abrahams, pointing out problems that's been experienced with Mrwebi	GN1 to Gerhard's affidavit
21 July 2015	Nel writes to Jiba in reply to her query why he is involved in the opinion on professional privilege. He also writes to Abrahams advising him of Jiba's query and that Jiba does not realise the implications of her involvement	K -2015 (32)
22 July 2015	Louw et al writes to Abrahams in order to advise NDPP of history and process of Mdluli matter	J85 & J23 (first file)
22 July 2015	Abrahams has briefing session with NPA officials, removing Hofmeyr from oversight of prosecution against Jiba and replace him with Mokgathle	B22 (obtained from judgment)
23 July 2015	Majavu writes to Abrahams requesting a response to his previous letter	K – 2015(7)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
23 July 2015	Webber Wentzel writes to NPA , requesting written reasons for decision not to proceed against Mdluli	K – 2015(8 & 9)
25 Jul 2015	Senior state advocate Broughton & Montlanga writes report to Abrahams on history of **S v Mdluli** matter	J23
25 July 2015	President responds to FUL, indicating that he did not appoint the Yacoob commission and that he is currently considering the merits of disciplinary proceedings against Jiba	B23 (obtained from judgment)
2 August 2015	Abrahams to Majavu – letter advising inability to provide his views on Jiba	K – 2015(11)
5 August 2015	Abrahams to Mokhatla, requesting opinion provided by Mokgathle and which he had previously requested	K – 2015 (12)
5 August 2015	Ferreira (SCCU) provides legal opinion on charges against Jiba to Abrahams, recommending that she be prosecuted	J25 & J79
7 August 2015	Van Rensburg and Abrahams exchange e-mails regarding the replying affidavit that is required in the GCB v Jiba & another matter	K -2015 (31)
11 August 2015	SABC reports that the new NDPP is set to withdraw charges against Jiba	B22 (obtained from judgment)
11 August 2015	Mokgatlhe writes to Mokhatla re legal opinion of Ferreira on Jiba charge and his view that a review should be taken	J26

DATE AND CASE	DETAIL	DROPBOX REFERENCE
11 August 2015	Notice served on Booysen calling for him to make representations as to why he should not to be suspended	B2 (obtained from judgment)
13 August 2015	Abrahams writes to Mokgatlhe, requesting his opinion on Jiba matter	K- 2015 (13)
17 August 2015	Abrahams removes Hofmeyr from his position as Head: AFU	– not exact date, but Aug 2015
17 August 2015	Mokgatlhe (DNDPP) informs Abrahams of decision not to prosecute Jiba	J24 & J91
17 August 2015	Mokgatlhe provides legal opinion to Abrahams re Jiba charges and decision to prosecute	J27
17 August 2015	Ferreira and Mokgatlhe exchanges e-mails regarding Jiba decision – Mokgathle indicates that he is still waiting on NDPP for decision	J79 (page 24)
17 August 2015	Booysen responds to NHDPCI, providing representations as to why he should not be suspended	B2 (obtained from judgment)
18 August 2015	A decision taken by Abrahams to decline to prosecute Jib and withdraw charges of perjury and fraud	
19 August 2015 (2)	Webber Wentzel writes to Abrahams requesting written confirmation of withdrawal of Jiba charges	K – 2015(14)
19 August 2015	Docket indicates that the charges have been withdrawn	J107 page 2

DATE AND CASE	DETAIL	DROPBOX REFERENCE
21 August 2015	Abrahams responds to Webber Wentzel confirming the decision to decline to prosecute Jiba	K – 2015 (15)
1 September 2015	President responds to DA's call for suspension of Jiba, indicating that there are no merits	B6 (obtained from judgment)
4 September 2015	De Kock provides a briefing report on progress of Bosasa matter	J179 (318 – 347)
4 September 2015	Sibiya (head of Gauteng Hawks) is dismissed	News 24
11 September 2015	De Kock provides a supplementary briefing report on Bosasa matter to Mokgatlhe (unsigned)	J179 (318 -347) p24 – 30
14 September 2015	Notice in terms whereof Booysen is suspended is issued by National head of DPCI	B2 (obtained from judgment)
14 September 2015	DA launches application to review the president's failure to take a decision to institute enquiries iro Jiba and Mrwebi's fitness	B22 (obtained from judgment)
16 September 2015	Abrahams writes to Masutha, requesting that Mrwebi, Macadam and Mgiba attend the OECD working group meetings	J168
17 September 2015	Booysen launches application to review and set aside Jiba's decision to authorise and prosecute ito POCA	B2 (obtained from judgment)
21 September 2015	Booysen v National head of the DPCI application to set aside suspension notice appears in court and is postponed by agreement for opposed argument	B2 (obtained from judgment)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
8 October 2015	Baloyi and Macadams exchange e-mails re OECD group working meetings	J170.1 & J170.2
9 October 2015	Letsholo writes to Noko, providing an update in the Panday matter	J161 (scan 27)
14 October 2015	Phiyega is suspended by Minister Cele and Phalane is appointed in her place as acting Commissioner of Police	M&G
27 October 2015	Booysen v NDPCI matter is argued in court before Van Zyl J and judgment is reserved	B2 (obtained from judgment)
28 October 2015	Mokhari SC provides legal opinion to the state attorney regarding funding of litigation in GCB v Jiba & Mrwebi	I12 & J161 (scan 30)
29 October 25	Noko writes to Abrahams indicating her agreement with the prosecutors to decline to prosecute Toshan Panday	J161 9scan 27)
3 November 2015	Chitha writes to Abrahams requesting permission to appoint counsel and enclosing legal opinion on whether GCB & NPA may enter agreement to fund legal representatives	J28 & J55 & J76
6 November 2015	FUL launches the application to review certain decisions and to enquire into Jiba & Mrwebi's fitness to hold office	B23 (obtained from judgment)
9 November 2015	Abrahams writes to Nhlahisi (head of SA) requesting appointment of Majavu & Vilakazi Attorneys and for FUL interdict application	K – 2015 (16)

DATE AND CASE	DETAIL	DROPBOX REFERENCE
10 November 2015	Presidency writes to state attorney requesting appointment of counsel to act on behalf of president	K – 2015 (17)
10 November 2015	David Montshosi (office of chief litigation officer) writes to state attorney to brief the same legal team representing the President for the Minister	K – 2015 (18)
17 November 2015	**FUL v NDPP** & others is argued on an urgent basis	B22 (obtained from judgment)
18 November 2015	Judgment in **Booysen v NHDPCI** is handed down, setting aside his suspension	B2 (obtained from judgment)
19 November 2015	Judgment in matter **FUL v NDPP & others** is handed down, striking the matter off the roll for lack of urgency and non- compliance with the rules of court.	B23
25 November 2015	Mrwebi writes to Jiba and Abrahams regarding the OECD meeting which took place in October 2015 and preparation for the OECD work group meeting to be held in December 2015	J167
1 December 2015	E-mails exchanged regarding OECD working group	J170.13
2 December 2015	Adv Mabuda writes to state attorney informing of FUL docket contents and attaching same	K – 2015 (20)
Undated	Note on contradictions of Mzinyathi and Mrwebi	J112
12 January 2016	Mrwebi writes to Jiba and Abrahams providing a report on the OECD working group on bribery meeting held in Paris in December 2015	J165

DATE AND CASE	DETAIL	DROPBOX REFERENCE
5 February 2016	Webber Wentzel writes to state attorney, requesting full record ito rule 53 in FUL matter	K – 2016(1)
10 – 12 February 2016	**DA v the President** & others matter is heard in court re. application to review and set aside the decision to not suspend Jiba and to enquire into fitness to hold office	B6 (obtained from judgment)
1 – 3 March 2016	**DA v ANDPP** & others are heard in court (Pretoria) – review application to review and set aside decision to discontinue prosecution of the president	B5 (obtained from judgment)
7 April 2016	Abrahams writes to Jiba and Mrwebi, indicating that he has reassigned the Bosasa matter to other prosecutors, including Anthony Mosing as lead prosecutor	J179 (348 -349)
26 April 2016	Adv. Mabuda writes to state attorney requesting transcript of the proceedings in Booysen matter	K – 2016(3)
29 April 2016	Judgment in **DA v ANDPP** is handed down, review and setting aside the decision to not prosecute the president	B5
23 May 2016	The application brought by the DA, to review and set aside the president's decision not to invoke section12 of the NPA act is dismissed	B6
30 May 2016 – 1 June 2016	**GCB v Jiba & Mrwebi** matter heard in Pretoria High Court	B18
3 June 2016	Epstein SC provides memo to the NPA regarding items to be followed up with relation to Booysen matter	I3

DATE AND CASE	DETAIL	DROPBOX REFERENCE
24 June 2016	Pretoria High court hands down judgment in **ANDPP & others v DA & others** in leave to appeal – review & set aside prosecution of President Zuma – leave to appeal is refused	B14
28 June 2016	Mrwebi is provided with a report on the Bosasa matter including the status of the investigation	J179 (358 -359)
18 July 2016	Mrwebi is provided with minutes of a meeting that was held on 15 July 2016 relating to the Bosasa matter	J179 (360 – 362)
15 September 2016	**GCB v Jiba & Mrwebi** judgment handed down in Pretoria high court striking them from the roll of advocates	B18 (obtained from judgment)
25 October 2016	Mrwebi writes letter to President in response to the notice of suspension	J31
1 December 2016	Hayward makes affidavit re Jiba's leave during April 2012	J39
19 January 2017	Abrahams requests Acting National Commissioner: SAPS to declassify the documents in the Mduli matter	K – 2017 page 5
17 March 2017	High court hands down judgment in Nthlemeza matter regarding the removal as head of the Hawks	B22 (obtained from judgment)
17 May 2017	Acting National Commissioner: SAPS responds to Abrahams' request to declassify the documents in the Mduli matter	K – 2017 page 6
23 May 2017	Abrahams responds to Acting National Commissioner: SAPS	K – 2017 page 7

DATE AND CASE	DETAIL	DROPBOX REFERENCE
1 June 2017	Lesetja Mothiba is appointed as new acting National Police Commissioner	News 24
12 June 2017	Abrahams writes to Mzinyathi informing him of the declassification of the documents	K – 2017 page 3
14 June 2017	Abrahams writes to Lt. Gen Mothiba (Acting National Police Commissioner) attaching a self-explanatory note annexing the note to Mzinyathi on the declassification of docs	K- 2017 page 1 & J32
14 September 2017	SCA hears appeal in **Zuma v DA; ANDPP v DA** regarding the decision to discontinue prosecution – whether rational and in line with Constitution	B9
13 October 2017	SCA grants leave to appeal and dismiss the appeal in **Zuma v DA; ANDPP v DA**	B9
30 – 31 October 2017	**FUL v NDPP & others** appear in court (Pretoria) re. review of decision to withdraw charges of perjury against Jiba	B22 (obtained from judgment)
16 November 2017	Booysen applies for nolle prosequi	J134
22 November 2017	Khehla Sithole – appointed as National Police Commissioner	ENCA
21 December 2017	Judgment is handed down in **FUL v NDPP & others**, directing that the President convenes an enquiry into Jiba & Mrwebi's fitness	B22
8 January 2018	Judgment in **Ledwaba v S** is handed down	B33

DATE AND CASE	DETAIL	DROPBOX REFERENCE
28 February 2018	**Corruption Watch v President of SA** is heard in court – matter to determines whether Abrahams' appointment was lawful	B20 (obtained from judgment)
26 April 2018	Epstein SC provides legal opinion to the state attorney indicating good prospects of success on appeal in **FUL v NDPP** matter	I2
21 June 2018	Webber Wentzel writes to Abrahams & Deputy NDPP re Jiba's presence at NPA premises in contravention of court order	K – 2018(1)
30 June 2018	Webber Wentzel writes to the state attorney requesting an undertaking that Jiba would refrain from entering the NPA premises and explaining the misunderstanding of the law insofar as it pertains to the order preventing Jiba from entering the premises	K – 2018 (1) pages 4 -6
2 July 2018	Majavu writes to Webber Wentzel in response to the 21 June letter to Abrahams, providing reasons for Jiba's presence at the NPA offices and indicating that this was not in contravention of the court order	K – 2018 (1) pages 7 – 9
3 July 2018	Majavu responds to Webber Wentzel, re Jiba's presence at NPA premises	K – 2018(2)
1 August 2018	Presidential letter to Advocate Jiba informing her of intention to suspend	C1
1 August 2018	Presidential letter to Advocate Mrwebi informing of intention to suspend	C2
10 August 2018	Mrwebi responds to president	D1

DATE AND CASE	DETAIL	DROPBOX REFERENCE
10 August 2018	Jiba responds to president	D2
10 August 2018	Abrahams is removed as NDPP by a court order	Times live
10 August 2018	Ramaite is appointed as ANDPP	Business live
13 August 2018	Decision to declare Abrahams' appointment unlawful is made	B20 (obtained from judgment)
22 August 2018	Agrizzi announces his intention to provide details of Bosasa's activities.	J179 (385 – 386)
27 August 2018	Smit SC writes to Acting NDPP regarding his decision to not prosecute Jiba and provides reasons	J106, J104 & J105 (these are different documents dealing with the same issue)
12 September 2018	Serunye provides a report on current status of Bosasa investigations to Mrwebi, Jiba and Mokgatlhe	J179 (387 – 401)
9 November 2018	Jiba's attorney writes to inform who her counsel are: Advs N Arendse SC, T Masuku SC & S Fergus	D4.1
11 November 2018	Mrwebi's attorney writes to inform who his counsel are: Advs. M Rip SC & R Ramawele SC	D3.1
11 December 2018	Majavu attorneys writes to confirm that notices to make submission were received by 30 November 2018 and to clarify the contents of some of the drop box folders	D4.2
20 December 2018	Majavu attorneys write to provide testimonials (see below) on behalf of Jiba as well as her CV	D5.1

DATE AND CASE	DETAIL	DROPBOX REFERENCE
13 December 2018	D Adam & M Thenga provides a testimonial on behalf of Jiba	D5.1
17 December 2018	M Potgieter provides a testimonial on behalf of Jiba	D5.1
19 December 2018	P Smith writes testimonial in favour of Jiba, saying that she displayed the utmost professional, ethic and integrity conduct in her dealings with him	D5.1
20 December 2018	B Madolo provides a testimonial on behalf of Jiba	D5.2
8 January 2019	Legal Practice Council provides letter to Jiba indicating that she has passed the attorneys admission exams in 1998	D4.4
23 January 2019	Majavu writes to Ramaite asking whether a decision has been made to prosecute Jiba for the perjury	K – 2019 (1)
21 February 2019	Jiba deposes to affidavit for Commission	D5.3
27 February 2019	Mrwebi provides statement to enquiry regarding late handing in of evidence	D6.7

NOTES

NOTES