MAJAVU Inc.

Head office : Majavu House - 170 Columbine Avenue, Mondeor
P.O. BOX 62241, Marshalltown, 2107
Tel: 011 941 1525, 3279, 2960
Fax: 011 941 3594
Lodgement number: 341, JHB
Website: www.majavuattorneys.co.za
VAT Reg. No : 4500 234 424
Also in Kroonstad (Free State)

Our Ref : Mr Z Majavu/rw
Your Ref : Mr Phiwe Radebe
Date : 18th April 2019
Writer's Direct Fax : 086 689 6914
e-mail : zola@majavuattorneys.co.za

Mr. C Ramaphosa
The Honourable President of the Republic of South Africa
Union Buildings
PRETORIA
0001

CC: Adv T M Masutha
The Honourable President of the Republic of South Africa
Union Buildings
PRETORIA
0001

Attention: Mr. C Ramaphosa

Email: KaMoleme@justice.gov.za

Dear Honourable President

OUR CLIENT: **NOMGCOBO JIBA**

COMPLIANCE WITH THE PRESIDENT'S DIRECTIVE TO MAKE FURTHER WRITTEN REPRESTENTATIONS BASED ON THE REPORT OF MOKGORO ENQUIRY

1. We attach hereto a copy of our client's representations as requested by the President.

2. We also express our client's gratitude for the indulgence granted.

3. Kindly acknowledge receipt hereof.

Yours Faithfully

MAJAVU INC.

Per: Zola Majavu (CD) SA

…/encl

REPRESENTATIONS TO THE PRESIDENT WHETHER TO IMPLEMENT RECOMMENDATIONS MADE BY THE PANEL CHAIRED BY JUSTICE MOKGORO PURSUANT TO SECTION 12(6) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998 (*"THE ENQUIRY"*)

INTRODUCTION

1. I am a Deputy National Director of Public Prosecutions in the office of the National Prosecuting Authority (*"the NPA"*). I was appointed as such in terms of section 11(1) of the National Prosecuting Authority Act 32 of 1998 (*"the NPA Act"*) by the then President as from **22 December 2010**. My tenure is therefore governed by the NPA Act.

2. I am also a duly admitted advocate of the High Court of South Africa and was admitted and enrolled as an advocate by the Eastern Cape High Court, Mthatha, on **3 June 2010**.

3. I am a career prosecutor, having commenced as a prosecutor in **1988** after I was appointed as a prosecutor in the Eastern Cape. I prosecuted in Peddie, Tsolo and Mthatha. I have risen through the ranks to the position of DNDPP that I currently occupy. The details of this are set out in my *curriculum vitae* which is attached. During all my service in the NPA, I have never been found guilty of having committed any act of misconduct in the course and scope of my employment or the execution of my duties. I have never handled any case

corruptly, or acted dishonestly, or in bad faith, or with an improper motive or purpose. Indeed, this is confirmed in the Mokgoro Report.

4. Objectively viewed, of all the DNDPPs that were available for appointment as Acting NDPP in **2011**, I was and still am the most experienced in terms of prosecutorial experience. Moreover, I was the first Black African woman ever to have held the position of NDPP, albeit in an acting capacity. My appointment advanced the government's transformation project, with a view to the empowerment of Black African women, in particular.

5. During my tenure as the ANDPP and the DNDPP in charge of prosecutions I have ensured focus on improving court performance, maintaining and strengthening relations with stakeholders in the criminal justice sector and the judiciary. This collaboration gave birth to the National Efficiency Effective Committee (NEEC) led by the Chief Justice that oversees the courts' performance nationally. I represented the NPA in my capacity as ANDPP from the inception of NEEC and as well as in my capacity as DNDPP in charge of the National Prosecution Service in the NPA. The detail of this is set out in my *curriculum vitae.*

6. Many witnesses at the Enquiry in fact commented positively about my open and inclusive management style, my ability to lead and bring a team together and my administrative capabilities, all characteristics which I submit are crucial for a leadership role in the NPA. The NPA's annual performance reports to

Parliament are proof of the fact that the overall performance of the NPA did not drop during my term as ANDPP. This attests to my competence.

THE INSTITUTION OF THIS ENQUIRY AND THE TERMS OF REFERENCE

7. On **1 August 2018**, the President gave me notice of his intention to suspend me. I was called upon to provide reasons why I should not be suspended. I prepared representations. These evidently did not find favour with the President and on **24 October 2018**, I was issued with a notice of suspension in terms of which the President indicated that he had decided to establish an enquiry in terms of section 12(6) of the NPA Act and to suspend me pending the finalisation of the enquiry.

8. Although at that stage the official terms of reference were still to be formulated, the President made it clear in his notice of suspension that the scope of the enquiry is to be an investigation into whether or not I am "*guilty of misconduct in the manner in which* [I] *dealt with the Mdluli case, especially in relation to* [my] *attitude towards the courts, from* [my] *position as a senior leader in the NPA*". The President further indicated that the enquiry would also consider "*whether or not* [my] *actions in* [the Mdluli] *case evince any form of incompetence or incapacity, and whether seen as a whole* [her] *actions were indeed the proper exercise of prosecutorial discretion*".

9. Therefore, as at **24 October 2018**, when the President informed me of his final decision to institute the enquiry, this could only have been because at that time,

I had been found guilty by the North Gauteng High Court (Legodi *et* Hughes JJs) in an application brought by the GCB to remove me from the Roll of Advocates. That Court dismissed the GCB's complaints in relation to the Spy Tapes and Booysen matters, but upheld the complaint in relation to the Mdluli matter.

10. On **9 November 2018**, the Terms of Reference of the enquiry were promulgated. It is evident from the Terms of Reference that the ambit of the enquiry was greatly expanded when compared to the anticipated scope set out in the President's notice of suspension of **24 October 2018**. The issues to be determined by the enquiry, as they relate to me, were set out in paragraph 3 of the Terms of Reference as follows:

> *"3. The fitness of Advocate Nomgcobo Jiba to hold office as a prosecutor in the prosecutorial services, in particular, in the capacity as a Deputy National Director of Public Prosecutor;*
>
> *3.1 With reference to, and at the discretion of the chairpersons of the enquiry, but not limited to, matters raised in or arising from the following cases:*
>
> *3.1.1 Jiba and Another v General Council of the Bar of South Africa and Another Mrwebi v General Council of the Bar of South Africa [2018] 3 All SA 622 (SCA),*
>
> *3.1.2 Freedom under Law v National Director of Public Prosecutions & others 2018 (1) SACR 436 (GP),*

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

3.1.4 Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP),

3.1.5 National Director of Public Prosecutions and Others v Freedom Under Law 2014 (4) SA 298 (SCA),

3.1.6 Zuma v Democratic Alliance [2014] 4 All SA 35 (SCA),

3.1.7 Booysen v Acting National Director of Public Prosecutions and Others [2014] 2 ALL SA 319 KZD);

Insofar as it relates, directly or indirectly to the conduct of Adv Jiba, and relating to her fitness and propriety to hold office and with due regard to all other relevant information, including but not limited to matters relating to Richard Mdluli and Johan Wessel Booysen;

3.2 Whether, in fulfilling her responsibilities as Deputy National Director of Public Prosecutions:

3.2.1. She 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;

3.2.2. She properly exercised her discretion in relation to:

3.2.2.1 instituting and conducting criminal proceedings on behalf of the State;

3.2.2.2. carrying out any necessary functions incidental to instituting and conducting such criminal proceedings, and

3.2.2.3. discontinuing criminal proceedings;

3.2.3 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;

3.2.4 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;

3.2.5 She acted at all times without fear, favour or prejudice;

3.2.6 She displayed the required competence and capacity required to fulfil her duties; and

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

11. As appears from paragraph 3.1 of the Terms of Reference, my fitness to hold office was to be determined with reference primarily to the matters arising in the cases referred to therein, but in the discretion of the chairperson of the enquiry, not limited to those matters. Paragraph 3.2 then identified certain questions arising out of those cases.

12. Properly construed, the Terms of Reference enjoined the enquiry to determine whether the issues identified therein evince that I no longer have the necessary integrity and conscientiousness to remain in the office of Deputy National Director. This bears more than a passing resemblance to the central question for determination in a striking off application, such as that brought by the General Council of the Bar of South Africa (*"GCB"*) (and which was recently heard before the Constitutional Court) namely whether that person is a person of "*complete honesty, reliability and integrity*".[1]

13. While in theory a person may be fit and proper to remain on the roll of advocates, but nevertheless not meet the requirement of being fit and proper to be appointed as a Deputy National Director, as contemplated by section 9 of the NPA Act, when it comes to honesty and integrity, this is an illusory distinction. There are no degrees of honesty. A person is either honest and has integrity, or he or she does not. The standard set for enrolment as an advocate is in any event "*complete honesty, reliability and integrity*". It is inconceivable that a person who has not been found to lack complete honesty, reliability and integrity (i.e. has not been struck off the roll of advocates) could be found nevertheless to lack some higher level of honesty and integrity necessary for high office in the NPA.

14. The test for whether a person is no longer fit and proper to remain on the roll of advocates and whether a person is no longer fit and proper to hold office as a

---

[1] *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 126.

Deputy National Director, is therefore in essence the same. To that extent, I fundamentally disagree with the Mokgoro Panel.

15. The Mokgoro Report with respect misconstrues this argument in **paragraph 1050** of the report. It is not my case that the test for striking off from the roll of advocates and removal from office in terms of section 12(6) of the NPA Act is the same. I have always accepted that as a matter of law they are separate and parallel enquiries. However, where the subject matter of the enquiry is essentially the same, as I submit it is, based on the Terms of Reference, then as a matter of fact, the enquiries tend to merge. The Mokgoro Report has (I respectfully submit), in this instance, relied on a distinction without a difference, based on the objective facts.

16. This is an important conclusion when one considers the Terms of Reference. Although the Rules for the conduct of the enquiry provide that it is not a disciplinary hearing or a trial, the fact remains that it calls for a decision on whether I am no longer fit and proper to hold the office of Deputy National Director. The potential effect of the outcome of the Enquiry is my removal from the office of DNDPP, i.e. my dismissal from my position as DDNDPP. This is in fact what is disclosed by the findings and recommendations contained in the Mokgoro Report: they recommend my removal and by doing so, they acted as a disciplinary hearing by purporting to find me guilty of misconduct.

17. That, I submit, is tantamount to a disciplinary enquiry which itself must meet certain basic standards of procedural and substantive fairness, one of which is

that the *"accused"* should know, at least, the *"gist"* of the case that he or she has to meet. In a disciplinary context this is usually met by a *"charge sheet"*.

18. By way of comparison, a disciplinary enquiry of junior employees in the NPA and government in general, in terms of the SMS Handbook and Disciplinary Code, has better procedural fairness mechanisms than the process adopted through the institution of this Enquiry in the manner it was done. The standard of procedural fairness of this Enquiry which could lead to the removal from office of Senior NPA officials who are Presidential appointees, should not be lower than those junior officials who are in the NPA or government in general. A section 12(6) enquiry that results in my removal is arguably unconstitutional having regard to the right to fair labour practices prescribed by section 23 of the Constitution. Like any employee, I am entitled to the fair labour practices enshrined in s 23 of the Constitution and in the Labour Relations Act.

19. This presupposes that by my conduct, I am alleged to have breached the obligations I owe which are set out in paragraph 3.2 of the Terms of Reference. In other words, there is certain conduct complained of. That is the conduct in relation to the issues arising out of the cases referred to paragraph 3.1 of the Terms of Reference.

20. The difficulty is that there is no difference between the conduct complained of in the GCB matter and that which was properly the subject matter of the enquiry. There was however no 'charge sheet'. In the absence of a 'charge sheet' or, to state it more neutrally, a list of allegations which the evidence to be led may or

may not prove, the unavoidable conclusion is that the 'charges' in the section 12(6) enquiry resemble the complaints raised by the GCB in its application.

21. The complaints in the GCB matter have however already been found by the majority of the SCA not to warrant the striking off of my name from the roll of advocates. In other words, the majority of the SCA was not prepared to conclude that I am no longer a person who exhibits complete honesty, reliability and integrity. As there is in reality no divergence between the applicable tests for the two enquiries, it follows that the enquiry was bound by the findings of the SCA.

22. Although the Constitutional Court has yet to rule on the GCB's application for leave to appeal to it, I am confident that the application will be dismissed and that the SCA's decision will be the final word on the matter.

23. It is for this reason that the ability of the enquiry to make any findings in regard to my honesty and integrity, as it is impugned in the cases with reference to which this enquiry is to be conducted, is limited. That is however the only basis upon which the enquiry could possibly find that I am no longer fit and proper for a position at the NPA.

24. Further, in the absence of a 'charge sheet' it was impossible for me to know the gist of the case I was expected to meet, beyond that falling within the parameters of the complaints in the GCB matter. As each witness's testimony unfolded, I was forced to consider whether that testimony, or how much of it,

was intended to form part of the conspectus of evidence against me and whether it will be contended that it constitutes evidence of my no longer being fit and proper. This is in the context of literally thousands upon thousands of pages of documents placed on the Dropbox being regarded as admitted into evidence. The vast majority of these documents were never referred to during the oral evidence of the witnesses.

25. There was therefore no context within which to know the case I was expected to meet, or to determine the relevance of much of the evidence.

26. Added to this is the fact that the enquiry into my fitness to hold office was run concurrently with that into Adv Mwrebi's fitness to hold office.

27. The Rules for the conduct and of the enquiry made it clear that there is no onus on any party to discharge. The Report of the Ginwala Enquiry into the fitness to of Adv Vusi Pikoli to hold the office of the NDPP (**November 2008**), is instructive in the manner in which it assessed evidence and the weight to be afforded to it. The following was said in paragraph 41:

> *"I must emphasise that the analysis of the evidence was not done on the basis of any onus. I approached the evidence on whether any aspect relevant to the terms of reference had been established or not without reference to any party bearing the onus to establish any aspect. Where the objective facts supported a particular conclusion relevant to any particular term of reference, I have gone ahead to make that finding. I*

have given due weight to the evidence of the witnesses that elected to provide oral evidence and be cross-examined in relation to a contested assertion made on affidavit by a person who had elected not to testify. I have also accepted where appropriate the uncontested evidence tendered on affidavit relevant to any finding that I made." (emphasis added)

28. The evidence that has been placed before this Enquiry, was circumstantial at best: not all witnesses who deposed to affidavits or sworn statements testified; several deponents were not called to testify or refused to testify, but their affidavits were admitted into evidence notwithstanding that their evidence was contested; uncorroborated media reports were admitted into evidence. Much of the evidence has been of a general and unspecified nature, that the NPA has somehow been captured, the implication presumably being that I am vicariously guilty by association. There has, however, been no evidence of any involvement by me in an abuse of power and in the furtherance of a political agenda.

29. The findings in the Mokgoro Report are however principally centred around my competence. Although questions of competence were open to the Enquiry to consider, as these did not flow from the complaints in the GCB matter – which as I have explained was the essence of the Terms of Reference – there needed to have been a statement setting out the allegations against me from which it was to be concluded that I am not competent to hold the position of DNDPP.

30. Mistakes made in decisions taken (or not taken), or incorrect processes followed, in good faith – and there has been no finding by the enquiry that I ever acted in bad faith - can never be sufficient to find that I am no longer fit and proper, bearing in mind the protected tenure of Deputy National Directors. Without a finding of *mala fides* that impacts on honesty and integrity, it is unjustified to recommend that I be removed from office.

31. Further, there has never been a process of progressive correction or any suggestion that the same mistakes will be made in the future. One cannot conclude with respect, that because a particular decision or course of conduct followed was wrong or set aside in a judicial review, that I am therefore no longer competent for the job. In other words, there can be no justified basis that I do not remain fit and proper to occupy the post.

32. To find otherwise sets the bar too high and is, with respect, a grave intrusion into prosecutorial independence. In many instances the Mokgoro Report has in essence found that I failed by relying on those who report to me, implying that I should have been double checking everything that was placed before me. In effect, the Panel found that I have been incompetent for relying on the undisputed advice of Senior Counsel in the Spy Tapes matter!

33. Our courts have cautioned against overburdening the executive, and in the office of the NDPP, with impractical requirements that would halt its efficient and effective functioning.[2]

34. It is necessary, I submit, to have careful regard to the test for removing a DNDPP from office.

THE APPROPRIATE TEST FOR REMOVAL FROM OFFICE OF A DEPUTY NATIONAL DIRECTOR

35. The enquiry was instituted in terms of section 12(6) of the NPA Act. These provisions are aimed at ensuring the independence of the NPA:

35.1. only the highest-ranking public official (i.e. the President) is empowered to suspend a Deputy National Director and/or to remove him or her from office after such enquiry as the President may deem fit; and

35.2. only Parliament may confirm the removal from office of a Deputy National Director.[3]

---

[2] *S v Chao and others* 2009 (2) SA 595 (C) para 32-33 & 35; *S v De Vries and others* 2008 (4) SA 441 (C) para 27 & 33.

[3] Cf: *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) para 89-91.
Section 12(7) of the NPA Act provides that: "*The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.*"

36. There is therefore an important and fundamental distinction between section 9(1)(b) of the NPA Act, and section 12(6)(a)(iv) of the Act. The former is concerned with the appropriate qualifications for a person to be appointed as a Deputy NDPP, and includes that this person is "*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*". Section 12(6)(a)(iv) on the other hand concerns the grounds upon which the Deputy NDPP may be removed by the President. This includes that the person is "*no longer a fit and proper person to hold the office concerned*". The four (4) grounds for removal contemplated in s 12(6)(a)(iv) are separate, and distinct: (i) misconduct; (ii) ill-health; (iii) incapacity; and (iv) no longer fit and proper.

37. This enquiry is therefore concerned with conduct and events following my appointment as a Deputy NDPP, including during my term as the Acting NDPP. The enquiry was constituted in accordance with the aforementioned provisions. The Terms of Reference were gazetted setting out the scope of the enquiry into my fitness to the office of Deputy National Director of Public Prosecutions. The issues specifically identified in the Terms of Reference for investigation arise only when I was appointed as the Acting National Director of Public Prosecutions for the period between **28 December 2011** to **4 August 2013**, i.e. one (1) year and approximately seven (7) months. There were in fact no specific acts or conduct concerning my conduct in my capacity as Deputy National Director of Public Prosecutions identified in the Terms of Reference for investigation by the enquiry: the Terms of Reference mentions none of the section 12(6)(a)(i)-(iv) grounds other than a reference

to the cases from which the High Court initially found I was not fit and proper (Mdluli), and in respect of which I was cleared by the SCA.

38. Much of the evidence led therefore, appeared not to relate to any issues arising out of the Terms of Reference. In this regard, for instance, the evidence of Adv Glynnis Breytenbach (*"Adv Breytenbach"*) and Mr Willie Hofmeyr (*"Mr Hofmeyr"*) that in their view I was not suitable for the appointment, was entirely irrelevant.

39. The Mokgoro Report also appears to have been heavily influenced by the allegations made against me by Mr Willie Hofmeyr in relation to the Jackie Selebi saga and the arrest of Adv Gerrie Nel. **This occurred in 2007-2008**. Apart from the fact that from a labour law perspective, disciplinary action instituted after such an unreasonable delay would be unfair,[4] the disciplinary steps taken against me were ultimately settled with the then NDPP and Minister of Justice. It is grossly unfair that these allegations should now have been resuscitated in this forum more than a decade later!

40. This is also an example of the invidious result flowing from the absence of a charge sheet, namely that I was forced to speculate as to the nature of the complaints against me, insofar as the evidence ranged wider than the issues directly identified in the Terms of Reference (i.e. issues arising out of the

---

[4] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* (CCT 10/13) [2013] ZACC 49 (18 December 2013); 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) para 44-48. This was in the context of a delay in bringing a review application, however the review sought the setting aside of the promotion of two employees.

GCB matter, and the original complaints in which that matter has its genesis).

41. I have referred above to my extensive experience as a prosecutor in the service of the NPA. My *curriculum vitae* speaks for itself. There can be no doubt that, to the extent necessary (and I submit that it was not strictly necessary for the purposes of this enquiry), I had the necessary experience to be appointed as a Deputy National Director. Indeed, many of the witnesses testified that they found me to be a capable and inclusive manager.[5] Logically, this experience has not simply evaporated, and one can therefore accept that as far as experience is relevant to the requirement of fit and proper, that ought not to have been in issue.

42. That leaves only the question whether my integrity and conscientiousness has changed, such that I am no longer fit and proper to hold the office of Deputy National Director. This has significant implications in terms of the issues identified in the Terms of Reference.

43. The first step in a section 12(6) process is a finding of unfitness and thereafter a removal process based on misconduct, account of continued ill-health, incapacity to carry out the duties of the office efficiently or on account that the person is no longer fit and proper to hold office. The enquiry was constituted to determine the first question – which is whether there is any basis, having regards to the Terms of Reference, to find that I am no longer

[5] For instance, Adv Karen Van Rensburg, Adv Gerhard Nel, and Mr Willie Hofmeyr.

fit and proper to hold office. This enquiry was required, in the course of determining unfitness, to examine whether such unfitness is as a consequence of misconduct, continued ill-health, incapacity to carry out the duties of the office efficiently or that I am no longer fit and proper to hold office. It was therefore important for the enquiry to fashion an appropriate test or standard for the type of misconduct that justifies the removal of the National Director or Deputy National Director. This is so because not all misconduct by the National Director or Deputy National Director justifies the removal from office in light of **prosecutorial immunity** granted in terms of **section 42** of the NPA Act.

44. Similarly, not all instances of continued ill-health may justify the removal of the National Director or Deputy National Director for it is only the type of continued ill-health that has a bearing on the performance or capacity of the National Director or Deputy National Director that may justify a removal decision. Removal from office on the basis of incapacity to perform duties efficiently may be related to health or simply an indicator of incompetence determined by reference to a series of prosecutorial decisions that do not accord with the elementary legislative and policy requirements.

45. Removal from office on the basis that the National Director or Deputy National Director is no longer a fit and proper person to hold the office is broad and may be related to all three factors – misconduct, continued ill-health or incapacity to perform duties efficiently. The enquiry therefore had to first determine the standard of fitness required of the National Director or

Deputy National Director. Thereafter, it had to determine the degree of deviation from the standard of fitness that justifies the removal decision.

46. It is important to not lose sight of the constitutional and legislative framework that is binding on any enquiry into the fitness of the National Director or Deputy National Director.

a) Constitutional and legislative framework applicable to a section 12(6) enquiry

47. The supreme constitutional purpose of an enquiry conducted in terms of section 12(6) of the NPA Act is to promote, advance and protect prosecutorial independence. In other words, an enquiry to determine the fitness of the National Director or Deputy National Director to hold office may not undermine prosecutorial independence. Prosecutorial independence is a sacrosanct constitutional principle underpinning the functions of the NPA. It follows that when the President constitutes a section 12(6) enquiry it must be presumed that the purpose of such a decision is to advance and promote prosecutorial independence rather than weaken it or interfere with the constitutional and legislative functions of the National Director or the Deputy National Director.

48. Allied to this constitutional principle of prosecutorial independence is the principle of prosecutorial immunity which has legislative protection in section 42 of the NPA Act.

49. In terms of the doctrine of prosecutorial immunity prosecutors are not liable for the exercise of prosecutorial discretion done in good faith. The principle has found legislative recognition in section 42 of the NPA Act under heading *"Limitation of Liability"* which states: "*No person shall be liable in respect of anything done in good faith under this Act*". The doctrine of prosecutorial immunity would be undermined if the removal process was triggered to investigate a prosecutorial decision made in good faith or upon a reasonable belief that such decision was justified by the facts and the evidence. Prosecutorial immunity is in conformity with the constitutional principle of the rule of law and constitutionalism. But what is the content of this doctrine?

50. Immunity for prosecutors is qualified – as it requires that actions be made in good faith. A claim of immunity will invariably test whether the conduct impugned was done in good or bad faith. Where the conduct is in bad faith, a prosecutor in South Africa will lose immunity. This approach with respect requires legislative attention to consider whether the requirement of good faith should be removed in favour of absolute immunity. It appears, from the plain reading of section 42 of the NPA Act, that prosecutors enjoy qualified immunity for both prosecutorial and administrative acts. The requirement of good faith in their decision-making power suggests that.

b) Determining unfitness under a section 12(6) enquiry

51. In order to determine the standard for determining unfitness, it is first important to set out the standard for fitness for office. This is important because not all forms of misconduct render the National Director or Deputy National Director unfit for office. The misconduct that is required to render the National Director or Deputy National Director unfit for office must relate to the performance of the constitutional and legislative functions of the National Director or Deputy National Director.

52. I have referred briefly above to the qualifications for appointment of a National Director or Deputy National Director set out in section 9 of the NPA Act. The requirements for fitness to occupy the office of the National Director or the Deputy National Director for purposes of s 12(6) enquiry, are I submit, the following:

i. Independence

53. The first is the inquiry whether the National Director or Deputy National Director performs his or her functions independently and without fear, favour or prejudice, in accordance with the oath of office.[6] Where the National Director or Deputy National Director fails to exercise his or her powers independently, without fear, favour or prejudice, such conduct falls short of the constitutional standard required of the office. A failure to exercise the

[6] Section 32 of the NPA Act.

powers of the National Director or Deputy National Director independently could constitute a form of misconduct, grave enough to justify a removal decision under s 12(6) of the NPA. The National Director or Deputy National Director must fearlessly guard the independence of the NPA to perform its constitutional functions in accordance with the oath of office set out in s 32 of the NPA Act.

54. This means that he or she must not succumb to any extraneous pressure from any source, including undue pressure from members of the executive, legislature or judiciary. Indeed, the National Director or Deputy National Director must resist undue pressure including litigation threats or political campaigns from political parties, NGOs or public interest groups of any nature.

55. There is no evidence that I failed to act independently as required in terms of the Constitution in the execution of her duties. The evidence points to the contrary. Faced with the most vigorous political campaigns by for instance the Democratic Alliance which criticised me from political platforms, I stood my ground with courage and persisted with my duties undeterred by the intensity of political criticisms. I litigated against the DA as well as against FUL or any organisation or individual seeking to challenge the lawfulness of the decisions taken by the NPA or myself in a representative capacity. The fact that I did not cave in to political pressure but ensured that the NPA defended its decisions when they were challenged by political parties or pressure groups, is evidence of my independence.

ii. **Experience**

56. The second fitness requirement is experience to provide intellectual, moral and ethical leadership to the NPA. A National Director or Deputy National Director who fails this requirement raises the fitness question. The intellectual leadership relates to whether the National Director or Deputy National Director is able to provide his or her staff with the resources they require to perform their functions independently and fearlessly. This includes being able to provide research and opportunities for further education to ensure that members of the NPA are fully equipped to intellectually engage with the public on the content of their work as prosecutors. The decisions taken by prosecutors must be sound (not necessarily correct) in law and be capable of justification.

57. There is no evidence that I failed this test of intellectual leadership of the NPA. The evidence is that I took care to ensure that decisions of the NPA were defended on good legal principles. There can be no doubt that the cases which the NPA defended, although lost – broke new legal and constitutional grounds. It is not a lapse in leadership that the NPA lost the cases that it was involved in. What is important is that when the decisions to oppose an application against it were taken, the NPA spared no resources to ensure that the defence was fully motivated on sound principles. Senior Counsel was often involved in giving guidance to the NPA – and the NPA

won some of its cases, or had partial success, for instance in the SCA Mdluli matter.

58. A National Director or Deputy National Director must demonstrate moral and ethical leadership. There should be no controversy around the moral and ethical conduct of the National Director or the Deputy National Director. The nature of moral or ethical lapses must relate to the execution of the duties of the NPA. For instance, a National Director who accepts a bribe to promote a particular prosecutorial decision fails the ethical and moral test. A National Director or Deputy National Director who heeds political pressure or succumbs to political or religious or any form of social pressure fails the ethical or moral test. There is no evidence that I failed this test.

iii. Conscientiousness and integrity

59. The third fitness requirement is conscientious and integrity. Conscientiousness is the personality trait of being thorough, careful, or vigilant. It implies a desire to do a task well. Conscientious people are efficient and organised. Integrity is the quality of being honest and having strong moral principles consistent with the role and status of the National Director or Deputy National Director. The qualities associated with integrity include honesty, uprightness, probity, rectitude and honour.

60. A National Director or Deputy National Director who lacks these attributes fails the test of fitness for office. There was no evidence that I lacked these

attributes. Many of the witnesses were complimentary of my conscientiousness and integrity. They (especially Breytenbach and Hofmeyr) questioned these qualities in only what they referred to as high profile cases, but were otherwise complimentary. Both of them however were unable to support their criticisms on the basis of lack of conscientiousness and integrity. Mr Hofmeyr was highly critical of my integrity but failed dismally to provide any evidence to support his allegations. Hofmeyr himself was intimately involved in the **Spy Tapes** case and took decisions on behalf of the previous ANDPP (Mpshe) [he was heavily rebuked by Navsa DJP in the matter of **Zuma v DA [2017] ZASCA 146 (13 October 2017) paragraphs [63] – [93] in particular, paragraphs [64], [65], [73], [75], [76], [80] – [82] and [84]**, ***"for bringing the NPA into disrepute"***]; **Booysen** is still pending in the Courts after a failed application to have his case struck off the Roll (the matter is back on the Roll for **4 October 2019**); and **Mdluli** appeared in Court and the matter was struck from the Roll in terms of s 342A of the Criminal Procedure Act.

61. The enquiry had to assess my fitness against the standards set out above.

c) The appropriate test

62. The test against which an enquiry under s 12(6) must determine the question of unfitness must be fashioned against the principles of prosecutorial independence, immunity and accountability. In other words, the conduct

justifying the removal decision must be grave. It must be such as to undermine the very constitutional premise on which the NPA is founded.

63. Conduct that makes it impossible for the National Director or Deputy National Director to perform the constitutional functions of the NPA in accordance with the Constitution and the law, is sanctionable by way of removal from office. The test for the removal of the National Director or Deputy National Director must allude to public confidence in the administration of justice, be objective and be based in part on conduct that could reasonably be expected to shock the conscience and shake confidence of the public.

64. This must not be confused with conduct that is unpopular with part of any public. The conduct alleged must be so manifestly and profoundly destructive of the concept of an independent prosecution authority, that public confidence would be sufficiently undermined to render the National Director or Deputy National Director incapable of executing the prosecutorial function. The question is whether public confidence in the official is sufficiently undermined to render him or her incapable of executing the role of the prosecutor in accordance with the requirements of the Constitution. The fitness test must be objective and be informed by the context of the constitutional and legislative framework governing the NPA. The enquiry in determining the fitness of the National Director or Deputy National Director must ensure that it promotes prosecutorial independence and does not violate the immunity that these officials enjoy – for in terms of section 42 "*no person shall be liable in respect of anything done in good faith under this*

Act". This must mean that an enquiry must not hold the National Director liable or Deputy National Director for anything done in good faith under this Act.

65. There was simply no evidence before the enquiry that I acted in bad faith in respect of any of the issues that I had to answer before this enquiry. The enquiry did not in fact find this. The evidence is that decisions taken were all done in good faith, even if such decisions could be criticised. I am therefore not stripped of my immunity in terms of s 42 of the NPA Act.

66. Furthermore, section 32 of the NPA Act is stern and provides that "*no organ of state and no member of or employee of an organ of state or any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member of thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.*"

67. It follows that an enquiry into the fitness of the National Director or Deputy National Director may not assess the issues before it in a manner that violates the independence of the NPA, through its officials, to perform the assigned constitutional and legislative functions. The National Director of Public Prosecutions and any person referred to in section 4 of the NPA Act, must, before commencing to exercise his or her duties in terms of the NPA Act, take an oath or make an affirmation. In essence, just like judges, a member of the NPA is required to swear or solemnly affirm that he or she will "*uphold and protect the Constitution and the fundamental rights entrenched*

therein and enforce the law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the law."

THE APPROACH ADOPTED AND THE FINDINGS IN THE MOKGORO REPORT

68. The Enquiry erred in finding that I am incompetent, and that such incompetence warrants my removal from the office as an DNDPP. None of the evidence led at the enquiry dealt with my conduct in the execution of my duties as a DNDPP, but rather as an Acting NDPP. The criticisms and censure by the courts related to my term as the Acting NDPP.

69. Further, when competence is assessed, this should be done taking into account the overall performance of the employee over a given period of time. The incidents on which the Enquiry bases its findings of incompetence, are isolated incidents that do not reflect my overall performance either as a DNDPP or as the Acting NDPP. (For example, I did not make the decisions in the Spy Tape cases (Mpshe and Hofmeyr did) and the Mdluli case (Mrwebi did). I took the decision to authorise the prosecution of Booysen based on the relevant information. This decision is still pending in the Courts. My overall performance actually reflects that I am highly competent. As I have mentioned, this was the view of several witnesses called to testify at the Enquiry.

70. In any event, to warrant a removal from office based on incompetence, there must be evidence that a corrective measure was adopted by the employer, such as training interventions, to which an employee was non-responsive. There is no allegation, let alone a suggestion, that any such measures were put in place to address the alleged incompetence that the Enquiry bases its finding on. Thus, the proper recommendation that should have been made, if the Enquiry found that I had not competently fulfilled my duties as a DNDPP, was for a training intervention to address that incompetence.

71. Equally, conscientiousness and integrity of an employee must be looked at over the period of 27 years that the employee has been employed as a prosecutor, and against the backdrop of the absence of any allegation of corruption in the handling of any prosecution. These two attributes as qualities of my character cannot be pigeonholed into isolated incidents. That does not take into account the holistic period of my employment as well as the surrounding factual circumstances.

72. Thus, the Enquiry erred in finding that I was not conscientiousness and lacked integrity. Even if this finding was correct, the recommendation that I be removed from office as DNDPP is too harsh and totally disproportionate to, and not commensurate with, the incidents that form the basis for this finding.

73. The Commission made a number of factual errors that form the basis of its findings. It also misdirected itself in numerous respects. It placed reliance

and undue emphasis in some instances on one piece of evidence in complete disregard of the other evidence to the contrary, on which there is no basis for not placing any reliance upon. Had the commission approached the evidence in a more balanced manner and provided reasons for rejecting one piece of evidence over that which it accepts, its findings would have been completely different to those that it arrived at.

74. The evidence mentioned in the reasoning in the Mokgoro Report is largely that which supports the outcome that it arrived at, with sparse reference to the one that negates it. One is left reading the report with a sense that the Enquiry strained to bring its findings within the Terms of Reference.

75. The vast majority of the portions of the Mokgoro Report dealing with the evidence relating to me – being the majority of the report – has been taken verbatim from the submissions of the Evidence Leaders', or where, in the limited instances, the wording differs this is materially the same as the Evidence Leaders' submissions.[7]

76. While this is not problematic *per se* (e.g. the summary of the decisions of the courts which formed the basis of the Enquiry is unobjectionable), it has in some instances affected the Enquiry's objective evaluation of the new evidence presented to it.

---

[7] For instance, in the section dealing with the pardon of my husband and my qualifications initially to have been appointed a DDPP.

77. The findings of the Mokgoro Report also present clear examples of the invidious position I found myself in as a result of there being no 'charge sheet' or summary of the allegations against me. So, for instance, much time and evidence were devoted to the topic of the plane ticket to Durban. Ultimately the Enquiry found that there was insufficient evidence to make a finding on this (paragraph 1090 of the report). However, the nature of the allegation against me was never clearly set out – this had to be deduced, first from the affidavit of Col Roelofse, secondly from his oral testimony at the Enquiry, thirdly from questions put to me by the Evidence Leaders during cross-examination, and lastly in the Evidence Leaders submissions.

78. The Mokgoro Report also contains some basic typographical errors that have been directly transplanted from the Evidence Leaders' submissions (see for instance paragraphs 795.7 and 795.9 of the Mokgoro Report). More concerning though is the apparent failure to address or engage with the submissions filed on my behalf, both prior to the closing oral submissions and in reply to the piecemeal submissions filed by the Evidence Leaders over the period of almost two (2) weeks, well after the Enquiry concluded its hearing. This has had the result that obvious errors in the content of the Evidence Leaders' submissions have simply been adopted in the Mokgoro Report.

79. For instance, in paragraph 388 of the Mokgoro Report the Enquiry finds that I was unable to explain under cross-examination what the relevance of the certain photos of the crime scenes relating to the charges in the Booysen

matter were. This is taken directly from the Evidence Leaders' submissions and was dealt with in my paragraph 73 of my submissions in reply to Parts I – III of the Evidence Leaders' submissions. I understand that the President is in possession of these submissions in reply. The President will see from the transcript of my evidence in chief and under cross-examination that the Panel's finding in this regard is plain wrong.

Another example is the appointment of DDPPs from other jurisdictions to prosecute cases in another jurisdiction. In this regard, I made specific reference to the example of Adv Billy Downer and other prosecutors who handled the case of former President Zuma in the past, as well as those that are currently involved in this case which still include him (Downer). This appears in paragraphs 299 and 300 of the report. I stated in evidence that Adv Downer has never worked for DSO. I went further and stated that even to date, the current prosecution team prosecuting the former President consists of **DDPPs** from **Western Cape**, **Free State** and **Gauteng**, whereas DSO was disbanded years ago. However, Justice Mokgoro and her Panel relied on the submission by the evidence leaders to the contrary – without regard to my evidence which was uncontroverted, and the objective facts. We further provided a comprehensive response on this in section IV para 33 to 58 of our reply to the Evidence Leaders submissions dated **8 March 2019**. This curiously features nowhere in the Report's summary of evidence, evaluation and findings on this issue. This ruling is therefore not factually correct, and is therefore quite irrational.

80. I find this particularly concerning as it demonstrates a less than balanced view was taken of the evidence presented and findings were made where there was no objectively clear basis for doing so. It suggests that the Enquiry simply adopted the Evidence Leaders' submissions without a critical analysis thereof, and without applying their minds independently of the Evidence Leaders resulting in material misdirections in many instances.

81. The Mokgoro Report also gives no reasons for having rejected one piece of evidence and favouring another in instances of material disputes of fact. As pointed out, given that there is no onus, findings should only have been made by the Enquiry where the evidence objectively pointed to that particular conclusion. (See the **Ginwala** approach to evidence).

82. In this regard further, the affidavits of certain witnesses (either prepared specifically for the Enquiry or at some earlier stage) who were not willing to come and testify at the Enquiry on contentious facts and to be cross-examined thereon, were simply accepted as if proven. Worse still, the evidence of Mr Hofmeyr who was a very poor witness and whose credibility could not reasonably have been relied upon by the Enquiry, was cited as confirmation of this affidavit evidence.

83. In paragraph 28 of the Mokgoro Report, it is pointed out that along with Mr Mxolisi Nxasana, Adv Elijah Mamabolo who provided an affidavit was not willing to testify. His evidence related to a so-called Organised Crime Committee on which he had served but alleged that had been excluded from

the decision-making process in respect of the Booysen matter. This hearsay evidence was placed before the Enquiry by Mr Hofmeyr.

84. The Enquiry has however adopted Adv Mamabolo's evidence wholesale as though it was not in dispute and has offered no reasons why my evidence to the contrary was either disregarded, ignored or rejected. My evidence was to the effect that no such a committee existed in the NPA during my tenure as ANDPP; the tenure of Mr Mxolisi Nxasana; the tenure of Mr Shaun Abrahams; and, the tenure ANDPP Dr Silas Ramaite to the date of my suspension by the President in October 2018. Instead applications for racketeering authorisations were dealt with by the Special Projects Unit (*"SPU"*) headed by a DDPP, Adv Mosing. Adv Mamabolo was a Senior State Advocate and a junior to Adv Mosing. Assignments to any project were the prerogative of Adv Mosing as a head of the SPU. Once Adv Mosing and his team had finalised their assessment of the case, and after engaging the relevant prosecution team, they would then submit their motivation for the racketeering authorisations to me. During my tenure as ANDPP, I personally authorised twenty-six (26) such **racketeering prosecutions** from Adv Mosing and his team. None of these have ever been challenged or set aside in a court of law. This aspect appears to have weighed heavily with the Enquiry in coming to their finding (in paragraphs 1071-1072 of the report) that I had deviated from what Mr Hofmeyr and Adv Mamabolo regarded as *"standard protocol"*.

85. Given that the High Court and the SCA, i.e. five (5) Judges, have found that no *mala fides* could be established in the manner in which the prosecution of Mr Booysen was authorised, it is difficult to understand how the Enquiry could come to a conclusion that by not following a disputed and non-existing standard procedure – not required by any law – can demonstrate a lack of competence on my part sufficient to remove me from the office of DNDPP.

86. Further, the Mokgoro Report adopted the incorrect submission that I had excluded him (Mamabolo) from the process (paragraph 384 of the Mokgoro Report). My evidence was that Adv Anthony Mosing was the Head of the Special Projects Division (*"SPD"*), where Adv Mamabolo together with other Senior State Advocates reported to Adv Mosing. It was Adv Mosing's prerogative to decide which matters he delegated to the prosecutors under him. If Adv Mosing deemed it necessary to work with or assign whatever cases to any of the advocates under his control, he would be entitled to do so.

87. The impression is created that I somehow prevailed upon Adv Mosing to specifically exclude Adv Mamabolo. This was unsubstantiated by any evidence. No witness gave any evidence that I had instructed Adv Mosing not to include Adv Mamabolo.

88. This aspect was dealt with in my submissions in reply to Parts I-III of the Evidence Leaders' submissions but appears to have been entirely disregarded by the Enquiry.

89. This issue concerning the process by which decisions are to authorise racketeering offences in terms of POCA are taken, appears materially to have influenced the Enquiry in making the findings they did about my conscientiousness and competence in relation to the Booysen matter. This is a matter that it will be recalled, the SCA and the High Court found that there was no *mala fides* in relation to the manner in which the decision to authorise the charges against Mr Booysen was taken.

90. Other evidence appears completely to have been ignored. In a single paragraph of the Mokgoro Report (paragraph 1079) the Enquiry's evaluation of the evidence concerning the Spy Tapes is dealt with. The Enquiry simply states, without any reason for ignoring the statement placed before the Enquiry by Adv Paul Kennedy SC, that it concurs with the concerns raised by Navsa JA in the that case. Adv Kennedy SC's statement however confirmed that I had followed his considered advice to the NPA to adopt a neutral stance on the release of the transcripts in issue in the Spy Tapes case. Did the Enquiry not believe Kennedy SC? Were they not prepared to give his statement any weight because he had not testified (I point out that it was agreed between all parties that his testimony was not necessary)?

91. A further example of the difficulties caused by the absence of a statement of the allegations against me is the issue concerning my husband's Presidential pardon. The allegations that I had disclosed a perception of bias by not recusing myself from the decision-making process (limited as my role was) in

the Spy Tapes matter, was never articulated. I was forced to imagine where this line of questioning was directed during cross-examination. I am in any event advised that this finding is based on a material error of law.

92. However, even if it were correct that as the Acting NDPP, I ought to have recused myself in order to avoid any perception of bias (when there is no allegation or evidence of actual bias), this could never amount to a basis to remove me from office as an NDPP.

93. The Mokgoro Report also finds that my alleged failure to cooperate with Mr Nxasana is indicative of incompetence and insubordination (paragraph 1091). The Enquiry refers to the fact that I had pointed out the hostile environment at the NPA and my fear that I was being targeted for removal. As mentioned, Mr Nxasana refused to testify before the Enquiry, despite being available. He was never able to be cross-examined on these issues. It is now suggested that I should be removed from the position of DNDPP as a result of what is essentially office politics.

94. The Mokgoro Report has sought to lay the blame for incorrect decisions and the general failings of the NPA pointed out by the courts in the matters giving rise to this Enquiry, solely at my alleged incompetence. This ignores the role played by the LAD and the advice obtained from external counsel in these matters. This approach strikes at the heart of prosecutorial independence. While mistakes may have been made, in the absence of a *mala fides* these do not justify my removal from the position of DNDPP.

CONCLUSION AND FURTHER MITIGATING FACTORS

95. I humbly also wish to incorporate by reference the transcript of the oral closing argument on my behalf at the hearing. This closing address supplemented the written submissions on my behalf. It is annexed marked **"A"**.

96. I am married with three children who are still of school going age that I must maintain and educate. I am responsible for the maintenance of my mother who is over 85 years of age. My removal from office would cause undue hardship to my family. With the high unemployment rate in the country, I should not be made part of that statistics by our government.

97. I am a skilled professional woman with institutional knowledge and memory in the NPA as a career prosecutor which government can ill afford to lay to waste.

98. All these factors militate against my removal from the office as a DNDPP. Nowhere did the commission report reflect on these issues. The decision to remove me from office is too harsh in the circumstances, and totally disproportionate having regard to the objective facts.

99. I humbly submit that the President should not accept and implement the finding and recommendation of the Panel of the Mokgoro Enquiry to remove me from Office as DNDPP for reasons mentioned above.

100. In the circumstances, I submit that the President should decide to reinstate me back to my position as the DNDPP, so that I may continue to assert and strengthen the independence of the NPA as well as to make a meaningful contribution in the fight against crime and corruption as envisaged in our JCPS delivery agreement.

101. In the event that the President is not persuaded to accept this request, I humbly request a transfer within the Public Service to an appropriate post commensurate with my position as DNDPP.

Adv Nomgcobo Jiba
Pretoria
18 April 2019