AM VILAKAZI TAU INC.
ATTORNEYS
ATTORNEYS AT LAW

HEAD OFFICE

Vilakazi Tau Law Chambers
515 Begemann Street
Eloffedal
Pretoria
0084

P.O. Box 11903
The Tramshed
0126
Tel: (012) 335 7500
Fax: (012) 335 1168
E-mail: info@vilakazitauattorneys.com

Branches:

PRETORIA

PERSONAL INJURIES DEPARTMENT
632 Mansfield Avenue
Meyville
Pretoria
0084

P.O Box 1160
The Tramshed
0126
Tel: 087 160 0133 / (012) 786 1667
Fax: 086 622 0248 / (012) 335 0657
Email: info2@vilakazitauattorneys.com

POLOKWANE

Office No: 10 A Ramlin Square
31 Hans Van Ransburg Street
Polokwane
0700

P.O. Box 880
Polokwane
0700
Telefax: (015) 291 1975
Email: info3@vilakazitauattorneys.com

Website: www.vilakazitauattorneys.com

Our ref: AMV/CIV/1093/2015 **Date: 18 April 2019**
Your ref: Presidency

The Honourable President
Mr Cyril Ramaphosa
President of the Republic of South Africa
Union Buildings
Pretoria

Dear Honourable President Cyril Ramaphosa MP

RE: SUBMISSION BY ADVOCATE MRWEBI - REPORT OF ENQUIRY IN TERMS OF SECTION 12(6) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998

1. We act for Advocate Sithembiso Lawrence Mrwebi on whose instructions we are addressing this letter to you.

2. Receive under cover hereof our client's written response to your letter of 04 April 2019, enclosing the report of the Panel Chaired by Justice Y. Mokgoro.

3. Having noted that your letter under reply was copied to the Minister of Justice and Correctional Services, Advocate T.M Masutha, we have also copied this letter (and our client's written submissions attached hereto) to the Honourable Minister Masutha.

4. We trust that this letter adequately responds to your letter under reply. However, should you require to be furnished with any further information to assist in your consideration of the matter, both our client and ourselves stand ready to cooperate with your Office.

Yours Sincerely

Received original hereof on this the _____
day of April 2019 at _____ (time)

_____
Received by: (Initials and Surname)
FOR: STATE PRESIDENT

A M VILAKAZI TAU INC. ATTORNEYS
Per : Amos Vilakazi
Direct email : amosv@vilakazitauattorneys.com

Cc: **Minister of Justice and Correctional Services, Adv. TM Masutha**
SALU Building
316 Thabo Sehume Street
Pretoria

Received copy hereof on this the ____ day
of April 2019 at _____ (time)

_____
Received by: (Initials and Surname)
FOR: **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

Advocate Lawrence Mrwebi
Special Director of Public Prosecutions
National Prosecuting Authority of South Africa
Private Bag X 752
Pretoria
0001
18 April 2019

The Honourable President
Republic of South Africa
Union Buildings
Pretoria

Dear Honourable President

RE: SUBMISSIONS BY ADVOCATE LAWRENCE MRWEBI – REPORT OF ENQUIRY IN TERMS OF SECTION 12(6) OF THE NPA ACT 32 OF 1998

1. I herewith respond to your invitation to make any written submissions that I may have to your offices, as per your letter of 4 April 2019.

2. I do not intend to belabour the point, but wish to express my most sincerest and hard-felt disappointment at the outcome of the Mokgoro Enquiry and the recommendations that were made to yourself in regard to my continuing to hold the position that I currently do.

3. In my view and that of my legal team the Panel failed to meaningfully consider and deal with the evidence that was submitted during the actual hearing portion of the enquiry. I personally gave evidence, much of which was not challenged at

all by the evidence leaders, yet this fact does not appear to have been appreciated and incorporated into the report of the Mokgoro Enquiry.

4. It would further appear that the Mokgoro Enquiry also, and without any evidence in this regard, accepted the narrative that had been played out by the Democratic Alliance and other parties that my actions in deciding to provisionally withdraw the fraud charges as against General Mdluli was part of, it would appear, a larger conspiracy and was done with the intent to benefit General Mdluli and as the narrative goes, to benefit the then President Zuma as well.

5. There was simply not one word of evidence placed before the Panel that supports this narrative. It would appear that if something is said in the press or in the public a sufficient number of times, then it simply becomes the truth notwithstanding the denial thereof by myself and the fact that not one other person who gave evidence had any proof to support this conjecture that was levelled against me.

6. Perhaps the clearest indication that what I did at the time (provisional withdrawal of the charges against Richard Mdluli) was not incorrect, is the fact that to this date, a good 8 years later, General Mdluli has not been prosecuted in respect of the crimes that I provisionally withdrew the charges against him. To this date, the documentation that I believed in 2011 to be required in order to successfully prosecute General Mdluli has not been released in a fashion that it becomes admissible in a Court of law and no prosecution has ensued. I the intervening period, I spent a considerable amount of time off work, either on special leave or suspension, and therefore if there was evidence to pursue the Mdluli charges, this could have been done during my absence from office. There is now a new National Director of Public Prosecutions and even she has not reinstated those charges. To, on the basis of mere conjecture and unsubstantiated narrative, end

my career with the NPA, is simply with the greatest of respect to the Panel and to yourself untenable and not correct.

7. In this regard, I can actually do no better than to refer the Honourable President and his advisers to the Heads of Argument that were filed on my behalf before the Panel by the advocates representing me. It would appear that the Panel did not take into account any of the submissions and arguments that were raised in the Heads of Argument. I attach such Heads of Argument hereto as Annexure **"LSM1"** and request the Honourable President and his advisers to consider same because therein are set out the full arguments and basis upon which I submit today as it was submitted then, that there is simply no basis for a recommendation that I should be removed from my position.

8. On this point I ask the Honourable President to consider carefully the chilling effect, on the body of prosecutors in the country generally and on prosecutorial independence in particular, of a removal of a prosecutor from office primarily because such prosecutor applied their minds to facts that were placed before them at the time, and arrived at a judicious conclusion that such facts were inadequate to press ahead with prosecution. If this is done, then an unfortunate precedent may be set that by mere conjecture a prosecutor can be removed from office, which, I respectfully submit, will not serve the public interest or the effort to fight crime, especially organised crime, in the country.

9. As should be known to you, I have now passed the age of 60 having been served the country as a Prosecutor for my entire professional working life. My last request to your good self is that should my final submissions still not result therein that the President is prepared to keep me in my position and that the President supports the recommendation of the Panel to remove me from my position, that I

then be given an opportunity to retire from my employment with the National Prosecuting Authority, since I have already reached normal and voluntary retirement age, and that the Honourable President allow me the time to wrap up my involvement at the NPA solely for the purposes of officially retiring from the organisation. In that case the Honourable president will determine the period for my final wrapping up.

10. In conclusion, I sincerely trust that the Honourable President will consider my submissions favourably. However, if this is not the case, then I submit that the country will not suffer any prejudice as a result of me being allowed to retire from the NPA without the indignity of being removed from office.

11. I await your response in this regard.

Yours faithfully

L S MRWEBI
SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBMISSIONS ON BEHALF OF SITHEMBISO LAWRENCE MRWEBI

A: INTRODUCTION:

1. In terms of the terms of reference set out in the Government Gazette No: 42029 dated 9 November 2018, the enquiry is tasked to determine the fitness of Advocate Sithembiso Lawrence Mrwebi to hold office as a prosecutor in the prosecutorial services, in particular, in the capacity as Special Director of Public Prosecutions 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:

1.1 JIBA and Another v. General Counsel of the Bar of South Africa [2018] 3 ALL SA 622 (SCA);

1.2 Freedom under Law v. National Director of Public Prosecutions & others 2018 (1) SACR 436 (GP);

1.3 General Council of the Bar of South Africa v. Jiba and others 2017 (2) SA 122 (GP);

1.4 Freedom Under Law v. National Director of Public Prosecutions and Others [2014] (1) SA 254 (GNP); and

1.5 National Director of Public Prosecutions and Others v. Freedom Under Law 2014 (4) SA 298 (SCA), in so far as it relates, directly or indirectly to the conduct of Adv. Mrwebi, and relating to his 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.

2. Further, the question is whether in fulfilling his responsibilities as Special Director of Public Prosecutions, Adv. Mrwebi:

2.1 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 his position and be a member of the prosecution service;

2.2 Properly exercised his discretion in relation to:

2.2.1 Instituting and conducting criminal proceedings on behalf of the State;

2.2.2 Carrying out the necessary functions incidental to instituting and conducting such criminal proceedings; and

2.2.3 Discontinuing criminal proceedings.

2.3 Duly respected court processes and proceedings before the Courts as required by the applicable prescripts and as a Special Director of Public Prosecutions in the National Prosecuting Authority;

2.4 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;

2.5 Acted at all times without fear, favour or prejudice.

3. Accordingly, the issues that the enquiry are tasked to enquire into in determining the fitness of Adv. Mrwebi to hold office are the following:

3.1 Whether, having regard to the aforementioned cases[1], and in the instituting and conducting criminal proceedings on behalf of the State, 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;

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1 And any other information which is in the discretion of the chairpersons relevant

3.2 Whether, having regard to the aforementioned cases, and in carrying out the necessary functions incidental to instituting and conducting such criminal proceedings, 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;

4. RELEVANCE OF EVIDENCE

4.1 It is submitted that the ambit of the enquiry has been specified in the terms of reference. In this regard, we refer to the paragraphs above. It is our contention that the ambit of the enquiry is thus limited to the cases that are specifically mentioned and we would submit, any activities associated with such cases and the time period within which such cases took place.

4.2 It is submitted that it is simply untenable that the ambit of the enquiry can be to look at the entire period that Adv. Mwrebi was employed by the National Prosecuting Authority ("NPA"). As indicated in Adv. Mwrebi's evidence, he has been involved with the prosecutorial services of this country since he assumed his very first employment and was one of the first black people to be incorporated into the NPA when it was established.

Further he has only held the position of the Special Director of Serious Crimes Commercial Unit ("SCCU") since November 2011, which in any event is already more than seven years ago. Prior to that he did not hold the position of a director, but was the head of the DSO (Scorpions) in KwaZulu-Natal. We submit that for purposes of this enquiry any activities prior to November 2011 are not relevant for purposes of this enquiry and would be extremely unfair if a party, whom is already in an unfair manner being exposed at this late stage to a seven year enquiry, would have to be exposed to even a further enquiry where matters were dealt with, settlements and litigation entered into and we would submit matters resolved.

4.3 The aforementioned submissions, we submit, are supported by the fact that it only becomes the purview of the President to order a Section 12(6) of the NPA Act Enquiry in respect of directors and above, since such individuals are appointed by way of presidential appointments through proclamation. Prior to that date any issues surrounding the actions and activities of an employee would have to have been covered by the Disciplinary Code of the NPA, which would have involved the institution of disciplinary proceedings. Such constitutes

a completely different process and procedure that has to be followed and we would submit clearly cannot and does not form part of the ambit of this enquiry. The time period within which such disciplinary process could have been lawfully instituted has also long passed.

4.4 We submit that with respect that it would appear that certain of the witnesses that came forward to give evidence considered this enquiry an opportunity to settle scores with Advocates Mrwebi and Jiba and to throw as much mud at them as possible in respect of any conceivable impression that such witness had of either Adv. Mrwebi or Adv. Jiba acting in a manner that did not find their approval. Much of such evidence was in any case hearsay and based upon what they had heard from other sources.

5. STANDARD OF ENQUIRY

5.1 In the written submissions submitted to the enquiry by Freedom Under Law ("FUL") the following statement is made:-

> *"In any event, the inquiry should apply higher standards of conduct to Ms Jiba and Mr Mrwebi*

than those applied by the GCB and the Courts in relation to their potential striking off from the roll of Advocates. This is because the inquiry's mandate is not to determine whether Ms Jiba and Mr Mrwebi are fit and proper persons to practice as advocates, but rather to enquire into their fitness to hold the public offices of Deputy NDPP and the Special Director of Public Prosecutions respectively."[2]

5.2 We submit that this test which has been formulated by FUL is completely incorrect. We submit that the enquiry into whether the individuals are fit and proper persons to hold the office in accordance with the Act is a completely different test, as has already been verbalized by the panel constituting the enquiry. Although the words *"fit and proper"* are used in relation to the NPA Act, we submit that such fit and proper is different to the enquiry as to whether a person is fit and proper to be an admitted Advocate or Attorney. We would submit that such a test is of a more general nature than the very specific test that is provided for in the admission of the aforementioned legal practitioners.

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2 FUL Submissions, par. 52, p 19

5.3 In fact we submit that unless gross incompetence, irregularities or non-compliance with the duties and obligations of Adv. Mrwebi is shown then he should be accepted to be a fit and proper person. Any other approach would result in such officials becoming paralyzed in their functioning as prosecutors, looking fearfully over the shoulders as to when they might have to explain their actions in an enquiry such as this. Difference of opinion, the slightest human error or any controversial decision would result in such officials being exposed to sanctions. That most certainly cannot be the test to be applied to the relevant officials in the NPA.

6. THE EVIDENCE AND THE NARRATIVE

6.1 It is submitted that what the enquiry respectfully has to do is to separate the actual evidence that has been provided to the enquiry from the narrative, that I shall define hereunder, from one another.

6.2 The narrative, with respect, clouds and obfuscates the real enquiry here, namely that Advocates Jiba and Mrwebi, in collusion and in concert, acted with *mala fide* intent to protect Lieutenant General Mdluli from being prosecuted, and that such *mala fide* actions is what really constitutes

the complaint about the actions of Adv. Mrwebi. This narrative, which has had much play in the press and, which press reports and versions has created, we respectfully submit, a false opinion and public perception as to the activities and intentions of Adv. Mrwebi.

6.3 The suggestion is that Adv. Mrwebi in order to protect Lieutenant General Mdluli and it would appear, as per the narrative, as a favour to the then President Zuma, with the assistance of Adv. Jiba, then the Acting National Director of Public Prosecutions, deliberately and in a nefarious manner set about withdrawing criminal charges against Lieutenant General Mdluli with the sole objective being the achievement of this irregular result.

6.4 We submit that should this narrative be removed from the consideration of events, then all that is left is an action by Adv. Mrwebi, which some parties have criticized and disagreed with, whilst other parties seem to support, that in itself would not justify any interference or finding by the enquiry as against Adv. Mrwebi. We shall deal further with this aspect hereunder.

6.5 The narrative appears to have its origins, or is mentioned for the first time chronologically by Adv. Breytenbach, who

In evidence when challenged on what basis did she infer that there was a *mala fide* intent with the withdrawal of the charges, was that she just felt and knew that was the situation. In her evidence she stated that:-

> *"Adv. Rip: Used words such as nefarious, there were appointments for ulterior motives, inference would be run, etc. etc. Am I correct, just help me if I am wrong, that you had the impression that the Mdluli prosecution would never happen and that someone somewhere would ensure that it would not happen?*
>
> *Adv. Breytenbach: Well, I had a fear that, that was going to happen. I had, I did not have a view that, that is what would happen, I suspected that that is what is being attempted. I was quite determined that the opposite would happen. But there was a case to be answered and that Mr Mdluli would answer the case. If he was convicted so be it, if he was acquitted, so be it.*
>
> ...

Adv. Rip: So the aspect that we are struggling with is, why did you have this feeling? Because we do not know where that feeling comes from.

Adv. Breytenbach: Mr Rip, I have been a prosecutor for 26 years, I am not particularly gifted, but I am also not particularly stupid. You can call it a gut feeling, you can call it evaluating the landscape, you can call it, observing what is happening around you and not be oblivious to it. All of those things. So I cannot say to you one thing, and that is the reason. A variety of things were happening in the NPA, a variety of things were happening elsewhere, it all built up to this feeling, and events have borne it out. I am sure you will agree. Mdluli has not been prosecuted."[3]

No specific evidence was submitted by Adv. Breytenbach in this regard and in support of her "gut feeling".

6.6 When Adv. Ferreira was under cross-examination and the issue of the ulterior motive for the provisional withdrawal of the charges was raised with him, Adv. Ferreira stated that

[3] Transcript of Breytenbach Evidence, pp 124 – 125, 29 January 2019

there was no direct evidence to support their conclusion that the charges were being withdrawn for ulterior purposes and that is why it was not raised in the memorandum that he drew with Adv. Breytenbach and which was submitted in April 2012 to Adv. Jiba for her consideration and the possible review of the decision made by Adv. Mrwebi to provisionally withdraw the charges.

6.7 Mr Willie Hofmeyer also made mention of the narrative, but did not provide any evidence to support the speculation that the narrative constitutes.

6.8 Insofar as the issue of what the public opinion is about the NPA and whether or not it has faith and trust in the NPA to continue its work, it is submitted that this cannot be a basis upon which the enquiry can find that Adv. Mrwebi is not a fit and proper person.

6.9 The first point of departure has to be that whilst Adv. Mrwebi was in his various positions at the NPA there were numerous National Directors of Public Prosecution ("NDPP"), whom had overall control over the organization and whom were themselves involved in numerous court cases and negative findings against themselves resulting

in the undermining of the NPA. It would appear that much of the bad press and publicity that surrounded the NPA came about as a result of the fact that there were simply too many different leaders over a short period of time, whom were involved with the administration or mal-administration of the organization. It would appear that the NPA had become a hot bed for incriminations and back-stabbing between the various senior management officials. We submit that this is probably due largely to the continued change of leadership and the insecurity that it would have created amongst the top management within the organization.

6.10 To then place the blame for a public perception of an organization that is not to be trusted on the shoulders of Adv. Mrwebi and to say that he must be the "*fall guy*" for the entire organization and the perception that the organization has in the public is not only legally untenable, but morally repugnant.

6.11 What cannot be disputed is that on 9 December 2011 there was a definitive agreement between three of the key players in this matter. Adv. Breytenbach, Adv. Mzinyathi and Adv. Mrwebi agreed on that date that there would be a provisional withdrawal of the charges against General

Mdluli, that the matter would be investigated further under the guidance of Adv. Breytenbach and that the matter would be referred to the Inspector General for assistance in regard to documents.

6.12 Whatever the motivation for coming to such an agreement it is clear that as at 9 December 2011 there is no "*withdrawal*" of the fraud and corruption charges as against General Mdluli. It will clearly be a provisional withdrawal, as the evidence was before the enquiry. A withdrawal of a matter before a plea has been made is in any event in terms of Section 6(1) of the Act a provisional withdrawal that can be instituted again at any later stage. There was accordingly no harm done by the provisional withdrawal of the charges on 14 December 2011, as had been agreed to on 9 December 2011.

6.13 The evidence seems to be uncontroverted as stated by Adv. Mrwebi that the investigations are done by the Police who are primarily responsible for such further investigations and the finding of further evidence. It is not the prosecutors role to investigate although they can give guidance in the correct circumstances.

6.14 The entire debate about whether or not Adv. Mrwebi was correct in his viewpoint that the evidence in the docket was in his view not sufficient to justify the continuation of the prosecution at that time, without further investigation, is with respect irrelevant. The reason that we make this submission is that should every prosecutor or for that matter any legal representative, be taken to task in the manner in which Adv. Mrwebi has been in this enquiry, because other legal representatives do not agree with the approach adopted, it would result in chaos and a completely paralyzed legal system.

6.15 As an example, should an advocate give an opinion to a client that another advocate does not agree with, then such advocate could be accused of giving an opinion that was incorrect and then have his decision ventilated to see if he was correct in coming to the conclusion that he did. If all legal issues were as simple as there being a clear and unequivocal right or wrong in every given circumstances, then there would no need for a legal system, nor legal representatives and the Court would be superfluous. The fact that all of this is available and that in every matter there is a difference of opinion as to what is the correct interpretation of the legal principles and/or facts shows that, except in the clearest cases where there

can be no doubt and it can unequivocally be found that a legal representative or in this instance, Adv. Mrwebi was acting with malicious aforethought to achieve an nefarious purpose, the fact that others might not agree with your sentiments cannot ever constitute the basis upon which a person can be found not to be fit and proper to occupy their position.

6.16 In fact all of the witnesses and in particular, Adv. Breytenbach and Ferreira conceded that prosecutors had different opinions on matters. It can only be said that Adv. Mrwebi's decision to provisionally withdraw the charges at that time is blameworthy if the evidence shows unequivocally that it was done in a mala fide manner with ulterior purposes.

6.17 The basis upon which Adv. Mrwebi believed that there were no prospects of a successful prosecution at the time that he made his decision is also justifiable and reasonable in the circumstances. It was stated by some of the witnesses that it was clear that General Mdluli was guilty of corruption in that he had accepted a loan in terms of which there seems to have been some gratification.

6.18 As testified to by Adv. Mrwebi, such a gratification must be an unauthorized gratification and the onus of proving that it was an unauthorized gratification rested upon the State, as the prosecutor. Such onus of proving this also was on the basis of beyond reasonable doubt. The simple situation therefore was that for the State to prove that the gratification was unauthorized it had to have the evidence from the employer to show that on its books the employer, in this instance the Police Intelligence Service, had not authorized the "*gratification*" or loan.

6.19 Further the evidence of Adv. Mrwebi, who indicated that he had studied the content of the docket thoroughly and which fact was never disputed, was that the transactions relating to the purchase of the motor vehicles were transactions done in the name of front companies, which are companies used by the Police Intelligence Services to hide their activities from the general public and we would imagine criminals. Although it appears that some of these documents were in the possession of the investigating officers and in the docket, it was submitted that the documents would have to be de-classified before they could be used in a public forum, such as a criminal trial. If not, then everyone could become aware of what the names were of the front companies employed by the

Police Intelligence Services, which could expose numerous of the Intelligence Services activities.

6.20 Certainly in the case of whether or not General Mdluli had been authorized or not to receive the gratification, such documentation had to come directly from the Intelligence Services to prove the fact. Without such documentation and should General Mdluli simply not give any evidence, then there would be no proof of an unauthorized gratification.

6.21 The further evidence was that when the matter was submitted to trial again in July 2015, the prosecutor still did not have the necessary de-classified documentation in order to continue with the trial and when a further postponement was sought, the Magistrate involved struck the matter from the roll. In fact, the documentation has to date not been de-classified and there was evidence that the Parliamentary Standing Committee in this regard has been approached in an attempt to force the National Commissioner of Police to de-classify the documentation so that the prosecution of General Mdluli could successfully continue. If there was any interference or bad faith in the prosecution of General Mdluli, such would appear to lie within the Police forces themselves, in their

failure to properly get the necessary admissible evidence available to place before the Court.

6.22 There was a suggestion that Adv. Mrwebi had recommended the institution of disciplinary process against Adv. Breytenbach in order to remove Adv. Breytenbach from the scene and so as to prevent her from continuing with the prosecution of the General Mdluli matter.

6.23 There are, however, a number of flaws with this further attempted indictment of Adv. Mrwebi. The first of these is that Adv. Mzinyathi, the Director and direct supervisor of Adv. Breytenbach had referred a complaint that he had received sometime previous to the Mdluli incident commencing and/or Adv. Mrwebi assuming his role as Special Director, to Adv. Mrwebi for his comments on the complaint and what steps could possibly be taken against Adv. Breytenbach.

6.24 Adv. Mrwebi after a consideration of the representations and complaint filed a report in terms of which he stated that there appeared to be evidence of wrongdoing and that it justified further investigation and the taking of necessary steps against Adv. Breytenbach. Such investigation then

took place by the Internal Ethics Department of the NPA and it was them who then instituted the disciplinary proceedings against Adv. Breytenbach. Adv. Mrwebi was not responsible for the institution of such disciplinary process and merely had indicated that there was something to investigate.

6.25 Further the suggestion or narrative that this was done in order to remove Adv. Breytenbach from the scene holds no water, since the prosecution of General Mdluli was under the control of Adv. Smith and Ferreira, not Adv. Breytenbach. Adv. Breytenbach's role had simply been that she had intervened when hearing that there had been a decision by Adv. Mrwebi to provisionally withdraw the matter leading to the 9 December 2011 meeting. She was then instructed to follow up with the Inspector General as to the documentation. The fact that later Adv. Breytenbach was suspended did not stop the prosecutors who were allocated to the case and who remained allocated to the case at the time of Adv. Breytenbach's suspension to continue with their own work and to follow up on the police investigations that were meant to continue at the time.

6.26 Further for this narrative to have any substance, Adv. Mzinyathi must have been part of the "*conspiracy*" to stop the prosecution of General Mdluli, which when one considers the evidence and his opposition to the withdrawal of the charges provisionally and his involvement in organizing the meeting of 9 December 2011 and his actions in this regard, is simply untenable.

6.27 Further in an affidavit supplied by one Jayashree Govender, a legal adviser in the office of the Inspector General of Intelligence, which affidavit was made on 21 February 2018, Ms Govender disputes certain of the evidence of Adv. Mrwebi. She does, however, state the following:-

> "*Further, I vehemently deny that I had indicated that the legislation governing the OIGI was in the process of being amended to exclude the investigations. This would be anomalist as by its very nature the mandate of the Inspector General is to monitor the activities of the Intelligence Services through investigations. This is especially germane to the discharge of the complaints mandate.*"[4]

[4] Affidavit, par. 8, p 2

6.28. It is submitted that this paragraph, in fact confirms the evidence of Adv. Mrwebi. Adv. Mrwebi said that the Inspector General had the authority to investigate complaints against members of the intelligence community, of whom General Mdluli was one. Adv. Mrwebi never suggested that, and denied that, the Inspector General was supposed to do a criminal investigation. A criminal investigation had to be done by the South African Police Services. A complaint, however, could be registered by any person, including an investigating Officer or a complainant in a criminal matter as to the activities of a member of the Intelligence Services in regard to their activities and use of monies flowing from the Intelligence Services. It is submitted that an investigation into such a complaint by the Inspector General was and is mandated by the relevant legislation as confirmed by the paragraph quoted above. The issue would be, how does one obtain the evidence that flows from such an internal investigation, flowing from a complaint against a member of the Intelligence community. This is where the de-classification of documentation becomes germane to the issue.

6.29 We also refer to the letter of 31 May 2012 from the Attorney Szyndralewicz addressed to Adv. Jiba and Adv. Mrwebi. In such letter, the attorney acting on behalf of six named policeman refers to previous representations made to Adv. Mrwebi and then goes on to state that:-

> *"Further to aforementioned, it has become apparent that the investigations by members of the SAPS has not stopped, but has in fact intensified."*

6.30 This documentation and letter are further clear support for the fact that the actions of Adv. Mrwebi in provisionally withdrawing the charges and ordering that further investigation into the matter be done specifically in regard to documentation in the intelligence community had not resulted in any *"escape clause"* for General Mdluli. It was clear that such further investigations were continuing, that the Inspector General had been approached in respect of classified documentation and that as far as the six policeman referred to in the representations and the letter by the attorney of 31 May 2012, it was creating the risk of a security breach and the leak of information that would embarrass South Africa and the security community. We submit that such allegations and statements are not

supportive of the narrative that Adv. Mrwebi was attempting to prevent General Mdluli from being investigated, since the complaint to Adv. Mrwebi and his at that time acting National Director of Prosecutions Adv. Jiba was that notwithstanding the representations in February, Adv. Mrwebi had not stopped the investigations, which were still going on unabated.

B: SUMMARY OF SOME OF THE OTHER EVIDENCE ADDUCED IN THE ENQUIRY

Dr Silas Ramaite:

7. The only relevant evidence adduced by Dr Ramaite concerning the terms of reference was that:

7.1 Public interests play a role in the instituting of criminal proceedings;

7.2 Where there is no good case against an accused person and there is a huge public interest, it is not the responsibility of members of the National Prosecuting Authority to determine the credibility of the witnesses and that the matter ought to be placed on the roll for the court to make a decision;

7.3 At the time when Adv. Mrwebi took a decision to withdraw the fraud and corruption charges against Richard Mdluli, the meaning of "*in consultation with*" as contemplated in section 24 (3) of the National Prosecuting Authority Act was well known.

7.4 On 24 July 2018 a consultation was held for purposes of initiating the review application referred to above[5].

Adv Chris Jordaan:

8. He founded and was the first head of the Special Commercial Crimes Unit and retired in 2011.

9. During his tenure as the Special Director of Public Prosecutions, there was no interference from the Director of Public Prosecutions (the DPP");

10. The DPP neither interfered in his decision to prosecute or declined to prosecute.

Adv. Ferreira:

[5] Page 31 para 70

11. When Adv. Mrwebi took a decision to withdraw the fraud and corruption charges, there was at least a prima facie case even though there was very little police investigation that was required;

12. When Adv. Mrwebi withdrew the charges, the SCCU reported to the DPP and therefore Adv. Mrwebi was not authorized to receive and deal with the representation received from Mdluli's attorneys;

13. Under cross examination, Adv. Ferreira conceded that:

13.1 Authorization document from Crime Intelligence for the purchase of the two BMW's was not in the docket and that if it was in the docket, it would have been declassified first;

13.2 Adv. Mrwebi sought and obtained their input before making his decision to withdraw the charges;

13.3 Prosecutors hold different views all the time and there is no adverse inference to be drawn therefrom;

13.4 Although he had initially stated in his affidavit that Adv Mrwebi did not consider the merits of the case when withdrawing the charges, he eventually conceded but explained that his view was based on the fact that Adv. Mrwebi did not deal specifically with the merits of the case in his consultative note;

13.5 There is no evidence that Adv. Mrwebi withdrew the charges for ulterior motive;

13.6 Although there was further investigation on other allegations, there is no reason why the charges that were withdrawn in 2011 could not be reinstated up to now;

13.7 There are other senior prosecutors who as late as 2014 could not express a view in regard to whether a prima facie case existed against Mdluli on the fraud and corruption charges;

Adv. Macadam:

14. Adv. Macadam's evidence related to the period when he was dealing with the foreign bribery cases. It is submitted that Adv. Macadam's evidence essentially came down to what he perceived as a grievance about the fact that he was removed from controlling such foreign bribery cases during 2014 and that in his view such removal was

uncalled for and would lead to an embarrassment of South Africa at the International Working Group dealing with such matters.

15. The evidence of Adv. Mrwebi in this regard was essentially that the reporting to the International Working Group was a ministerial function which collected reports from the various departments dealing with foreign bribery cases to deliver a report on behalf of South Africa, which report required ministerial approval before such reports were done.

16. It is submitted that the evidence by Adv. Mrwebi is supported by the independent organization's report that as at 2018 South Africa was still a functional and accepted member of the Working Group and that South Africa's position within the organization had not become an embarrassment or led to any of the potential problems that Adv. Macadam speculated would be the result of his removal.

17. In fact, what the independent report showed was that the prosecution and successful conclusion of dealing with foreign bribery cases was a world-wide problem where many recognized first world countries were doing no better than South Africa was. It is submitted to the enquiry that the involvement of Adv. Mrwebi in this part of his duties could not in any manner be seen as not making him a fit and proper person to continue with his position as a Special Director. In fact, the evidence of Adv. Mrwebi was that if it were not for the

abscondment of an accused shortly before the matter went to trial, South Africa's first bribery case would have been already prosecuted. There was also evidence delivered by Adv. Mrwebi that there had been good progress made in the investigations on a number of these matters and that in a further matter charges had already been formulated and one could expect an imminent prosecution to flow therefrom.

Roelofse:

Colonel Roelofse's evidence was essentially the following:-

18.

18.1 That there was a prima facie case against Mdluli when the charges were withdrawn in December 2011;

18.2 That he was not consulted (as it was the practice) when the charges were withdrawn;

18.3 That the reason why the matter is taking too long to be placed on the roll was a discovery of further charges against Mdhuli; and

18.4 That the consequences of the matter being difficult to resolve is ascribable to the conduct of Mrwebi when he withdrew the charges in 2011.

19. Under cross examination, Roelofse conceded that:

19.1 As a police officer, he has no power to place a matter on the roll as it was a matter within the exclusive discretion of the Public Prosecutor;

19.2 Could not explain why the matter could not be placed on the roll many years after Mrwebi has been removed from the matter.

Mr Willie Hofmeyer:

20. The essence of Mr Hofmeyer's testimony is that Adv. Mrwebi:

- The phrase "in consultation with" has been well known within the NPA" and no reasons exist for Adv. Mrwebi to have suggested that he misunderstood what it meant;
- Adv. Mrwebi interfered in the Selebi investigation or assisted Selebi in his application for the permanent stay of prosecution;
- Adv. Mrwebi unlawfully assisted in the arrest of Adv. Gerrie Nel; and
- There were pending charges against Mrwebi for contravening section 32 of the NPA Act.

21. Under cross examination, Mr Hofmeyer did not dispute that he did not have facts upon which he based his allegations and that he was merely drawing inferences.

22. Further, it was conceded under cross examination that:

- the affidavit that Adv. Mrwebi made was deposed to earlier and subsequently used by Selebi without Mrwebi's consent;

- The charges that were levelled against Mrwebi for the alleged contravention of section 32 of the NPA Act were struck off the roll in terms of section 342 of the Criminal Procedure Act;

- There was no real basis for the allegations that Mrwebi assisted in the "unlawful arrest" of Adv. Gerrie Nel. In fact the affidavit made by Adv. Mrwebi that was in the docket of Adv. Gerrie Nel dealt with the normal process that was followed at the time by the DSO and the eventual opinion that, in the view of Adv. Mrwebi, Adv. Nel had not followed the normal processes and that the explanation by Adv. Nel could not be accepted in the circumstances. It would appear that such affidavit was made subsequent to the arrest of Adv. Nel and could not have constituted the basis for Adv. Nel's arrest at the time.

The Selebi matter:

23. It is submitted that the attempts by, in particular Mr Hofmeyer to cast aspersions at Adv. Mrwebi in relation to the Selebi matter are simply without any factual or legal foundation.

24. The affidavit that in some inexcipiable and mysterious fashion, which had been supplied to a special task team, had found its way into an application by Mr Selebi to stay his prosecution cannot be the basis for any finding or fault as against Adv. Mrwebi. In fact, when one considers the content of the affidavit, it is simply a recordal of what had transpired at a meeting during July 2007 and certainly was not an affidavit that had been prepared for and with Mr Selebi in mind.

25. The fact that Adv. Mrwebi had given evidence at Mr Selebi's trial was on the basis that he had been subpoenaed to do so and Adv. Mrwebi had only given evidence after he had cleared such fact with the National Director of Public Prosecutors at the time, whom had indicated to him that it was a lawful subpoena and it would be illegal and unlawful for Adv. Mrwebi not to obey this subpoena. Adv. Mrwebi's evidence also was that he had no dealings with Mr Selebi, never knew him and only met him when he arrived at the trial in accordance with his subpoena. Such subpoena had not been arranged with him previously and it was not done by agreement with him. It was an independent act that had been generated by the legal representatives of Mr Selebi at the time.

26. A further fact is that no one has challenged the correctness of the affidavit, which as we have indicated, was simply supplied to a specially appointed task team. There is no suggestion that Adv. Mrwebi had falsified information or created a false document for any ulterior purpose and it appears that he was simply misused by other forces that had the interests of Mr Selebi at heart. Again, we reiterate that this simply cannot be the basis upon which any negative finding or inference can be made against Adv. Mrwebi for purposes of the terms of reference of the present enquiry.

C: APPLICABLE LEGAL PRINCIPLES

27. Section 179(1) of the Constitution establishes a single national prosecuting authority – the National Prosecuting Authority ("the NPA" or "Prosecuting Authority") as determined by the National Prosecuting Authority Act 32 of 1998 ("the NPA Act") consisting a National Director of Public Prosecutions ("NDPP") as the head of the NPA, so appointed by the President, Directors of Public Prosecutions (DPPs) and prosecutors as determined by the NPA Act.

28. Section 21(1) of the NPA act requires the NDPP to determine prosecution policy and issue prosecution directives "in accordance with 179 (5) (a) and (b) and any other relevant section of the Constitution".

29. The NPA prosecution policy states that "*the NPA is public representative service, which should 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 interest of justice*"[7].

30. The "Prosecuting Authority" established in terms of section 179 of the Constitution as determined in the NPA Act consists of-

30.1 The Office of the NPA, and

30.2 The offices the prosecuting authority at the High Courts.

31. The composition of the NPA comprises:

31.1 The NDPP;

31.2 The DNDPPs;

31.3 The DPPs;

31.4 The DDPPs; and

31.5 The prosecutors.

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D: APPOINTMENT AND POWERS OF SPECIAL DIRECTORS OF PUBLIC PROECUTORS ("Special Director").

32. A "special director is a DPP appointed under section 13(1)(c) of the NPA Act which provides that the President, after consultation with the Minister and the NDPP, may appoint one or more DPPs (also referred to as Special Directors) to exercise certain powers, carry out certain duties or performs other functions conferred or imposed on assigned to him or her by the President by proclamation in the Gazette.

33. A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or by the President, subject to the directions of the NDPP: provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20(1"), they shall exercised, carried out and performed in consultation with DPPs of the area of Jurisdiction concerned.

34. A Special Director may be appointed for fixed term as /the President may determine at the time of such appointment, and the President may from time to time extend such term.

E: WITHDRAWAL OF THE CHARGES

35. It is submitted that any difference of opinion between prosecutors as to whether or not the continued prosecution of an individual at any particular time should continue, is a value judgment exercised by a specific prosecutor, where such prosecutor is exercising his discretion on the basis of the evidence before him. This is illustrated by difference in opinion between Adv Breytenbach/Ferreira and Adv. Mrwebi and other prosecutors who were appointed to handle the Mdhuli matter after Adv. Ferreira was no longer dealing with the matter.

36. We have also shown to the enquiry that the issue at the time when the charges were provisionally withdrawn, meaning that at any future date they could be reinstated when all the required evidence was available, was due to the fact that the documentation that was in the docket and which the Mrwebi considered necessary was not deemed sufficient to continue with the prosecution at that time. This problem has still not been resolved, as is apparent from the fact that to date hereof, no prosecution on these charges against General Mdluli have yet commenced.

37. As such we contend that for the enquiry to find that the withdrawal of the charges themselves to constitute misconduct of a type to justify the enquiry finding that Mrwebi is not fit and proper to continue in his position as SDPP is simply not tenable and legally incorrect. It

simply cannot be the situation that every prosecutor, who is also an admitted advocate, should they exercise their discretion in terms of the Code of Conduct and Prosecutorial Guidelines, make a decision which other prosecutors do not agree with, that such conduct would constitute misconduct justifying such advocate to be no longer fit to be a prosecutor.

38. We submit that there has to be evidence to show that the decision was unquestionably taken in circumstances where they were mala fide or dishonest actions taken with the deliberate intent of achieving a different objective other than that of performing their task as a prosecutor/advocate. In the present instance, there is no such evidence and as indicated above, Advocate Ferreira, who co-authored the memorandum with Advocate Breytenbach, readily conceded that there was no such evidence and that this is why no mention of such ulterior motive was set out in their memorandum of complaint.

39. What we further submit must not be lost from sight is the fact that four days after the putative consultation on 5 December 2011, there was a full blown consultation that took place between Adv. Mrwebi Advocate Mzinyathi and Advocate Breytenbach. At such meeting, Advocate Breytenbach was opposed to the withdrawing of the charges and it was eventually agreed, subject to reservations, that there would be a provisional withdrawal of the charges and that the investigations into the matter would continue. At such time, we

submit, it would have been clear to all of the relevant parties at the meeting that it was not the end of the prosecution.

THE AGRIZZI MATTER

41. At the Zondo Commission in respect of State Capture, Mr Agrizzi gave evidence that BOSASA had received documents from the NPA via a Mr Mti, whom had indicated that such documents emanated from Adv. Jiba, Adv. Mrwebi and a Ms Lepinka. Mr Agrizzi also indicated that Mr Mti had informed him that these documents were received upon the payment of, it would appear, monthly bribes or unlawful gratifications on the basis of R100 000,00 for Adv. Jiba, R20 000,00 for Ms Lepinka and R10 000,00 for Adv. Mrwebi.

42. Mr Agrizzi declined to come and give evidence at the enquiry and therefore could not be cross-examined on the evidence that he delivered at the State Capture Commission. What is apparent, however, from his evidence is that he is simply giving hearsay evidence in respect of what Mr Mti told him and clearly had no

personal knowledge of these allegations or purported facts. As such, it is submitted that they simply cannot be accepted by this enquiry to have any value in the investigation that the enquiry is busy with.

43. Adv. Mrwebi and Adv. Jiba have both pertinently and directly denied any such wrongdoing or the receipt of any unlawful gratifications, as alleged by Mr Agrizzi. In fact, Adv. Mrwebi supplied a substantial bundle of documents to the enquiry which not only showed that Mr Mrwebi had rejected representations from people involved in the BOSASA investigation to be excused from attendance at hearings, but also on a regular basis directed enquiries as to the progress of the BOSASA investigation and regularly requested progress reports, which included questions as to why certain people had not yet been charged and prosecuted. These documents and the evidence of Adv. Mrwebi clearly indicate that at no time can it be said that Adv. Mrwebi had done anything to prevent, delay or interfere with the BOSASA investigation.

44. In fact, the evidence of Adv. Mrwebi shows that Ms Lepinka in her position as an Executive Secretary in the offices of the National Director of Public Prosecutions had access to all of the relevant documentation and that the prosecutor on the BOSASA case had requested that Mr Lepinka be removed from attendance at any of the BOSASA meetings due to the fact that she felt uncomfortable with

the fact that Ms Lepinka was present at such meetings. This related to the previous relationship that Ms Lepinka had with Mr Mti, in that she was employed by Mr Mti at the Department of Correctional Services, during the very relevant time of Mr Mt's purported unlawful activities and unlawful relationship with BOSASA.

45. Further the documentation presented by Mr Agrizzi appears to end in August 2013, which is shortly before Ms Lepinka was removed from further involvement in any of the BOSASA meetings in or about October 2013.

46. We submit that there is simply no evidence to support Mr Agrizzi's hearsay statements that Adv. Mrwebi had done anything unlawful or had received any unlawful gratification and that such allegations should simply be ignored.

CONCLUSION

47. In summary, we submit that nothing has been presented before the enquiry which shows that Adv. Mrwebi is not a fit and proper person to continue in his position as a Special Director and we submit that a finding in such terms should be made by the Enquiry Panel and that the recommendation be made to the President on such basis.

ADV. MERVYN M RIP SC

ADV. R RAMAWELE SC

Counsel for Adv. Mrwebi

27 FEBRUARY 2019