IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 17782/15

In the matter between:

DEMOCRATIC ALLIANCE	**Applicant**
And	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Third Respondent**
NOMGCOBO JIBA	**Fourth Respondent**
GENERAL COUNCIL OF THE BAR	**Fifth Respondent**

Date of hearing: 10 – 12 February 2016

Date of judgment: 23 May 2016

JUDGMENT

DOLAMO, J

INTRODUCTION

[1] This is an application by the Democratic Alliance (the "DA"), the official opposition party in the Parliament of the Republic of South Africa, seeking to review and to set aside the decision of the State President not to invoke the provisions of section 12 (6) (a) of the National Prosecuting Authority Act[1] (the "NPA Act") to suspend the Deputy National Director of Public Prosecution ("DNDPP"), Advocate Jiba, and to institute an enquiry into her alleged misconduct so as to determine her fitness to hold office. The DA is also seeking an order substituting the decision of the President with one suspending Adv Jiba pending an enquiry into her fitness to hold office to be conducted in terms of section 12 (6) (a) of the NPA Act.

[2] In terms of section 12 (6)(a) of the NPA Act, the President may suspend a National Director or Deputy National Director of Public Prosecution from office pending such enquiry into his/her fitness to hold office on the ground, *inter alia,* of alleged misconduct. At first blush this appears to be a straight forward review application into the failure to exercise, alternatively, the unlawful exercise by the President of the powers vested upon him. Beneath this, however, are layers of intrigue involving allegations of career sabotage, power struggles and political interference in the National Prosecuting Authority (the "NPA"), an institution supposed to be independent and which is mandated by the Constitution of the Republic of South Africa to prosecute without fear favour or prejudice, in the protection and advancement of our democracy.

[3] I shall, however, steer clear of any enquiry into these allegations of political power plays and struggles and instead charter a course which would provide answers

[1] Act 32 of 1998.

to the questions whether the President, in deciding not to suspend Adv Jiba and hold an inquiry into her fitness to hold office, was motivated by ulterior political motives, as alleged by the DA, or whether he had properly applied his mind and concluded that it was best to await the outcome of the application to Court by the General Council of the Bar (the "GCB application") to have Adv Jiba struck off the roll of Advocates.

THE PARTIES

[4] As already stated *supra* the applicant is the DA a duly registered political party which enjoys representation at National, Provincial, and local levels of government. In terms of its federal constitution the DA was established as a body corporate with perpetual succession and capable of suing and being sued in its own name. The DA avers that it has a constitutional duty to challenge the alleged unlawful and unconstitutional decision by the President and that, in doing so, it is not only acting in its own interest as a political party but also in the interest of its members and the public.

[5] The first respondent is the President of the Republic of South Africa (the "President") who is cited in his official capacity and as the member of the executive with the power in terms of section 12 of the NPA Act to suspend and enquire into the fitness to hold such office by the DNDPP. The second respondent is the Minister of Justice and Correctional Services (the "Minister") who is also cited in his official capacity as the member of the executive responsible for the NPA in terms of section 179 (6) of the Constitution.

[6] The third respondent is the National Director of Public Prosecution (the "NDPP"). He is the head of the NPA, and though no relief is sought against him, he is cited herein for any interest which he may have in this matter. At present the incumbent NDPP is Adv Shaun Abrahams ("Abrahams"). He was appointed by the President on 18 June 2015 to replace the former NDPP, Mr Nxasane, who resigned on 1 June 2015, before an enquiry into his fitness to hold office could be held, after it came to light that he did not disclose his previous criminal record. Prior to the appointment of Adv Abrahams or Mr Nxasana, the fourth respondent, Adv Jiba, served as an Acting National Director of Public Prosecutions. It was while she was acting in that capacity that the incidences which gave rise to this application took place. She is currently head of the National Prosecuting Services (the "NPS"). Although directly affected in her position as the applicant seeks her suspension and an enquiry into her fitness to hold office, no relief is sought against her. Unless the context indicates the contrary I shall refer to the President, the Minister and Adv Abrahams collectively as the respondents.

[7] The fifth respondent is the General Council of the Bar ("GCB"), another party against whom the applicant is seeking no relief. It is averred by the applicants that the GCB is cited herein because of its potential interest in the matter considering that its pending application to have Adv Jiba removed from the roll of Advocates was the sole reason the President had advanced for not suspending her.

[8] Before dealing with the vexed question of whether the President acted irrationally or unlawfully I shall first attend to and dispose of two points *in limine* raised by the respondents which, in my view, should not be a bar to a full enquiry into the

merits of the application[2]. In the enquiry into the merits I shall outline the Constitutional provisions and the imperative national legislation which was promulgated to provide for an independent prosecuting authority; the qualification required to hold office as a National or Deputy National Director of Public Prosecution and the circumstances under which a NDPP or DNDPP may be removed from office. I shall thereafter deal with the circumstances which preceeded and led to the present application and the DA's call for the President to suspend Adv Jiba. With reference to the applicable legal principles I shall pay particular attention to the argument by the DA that the President's decision not to suspend Adv Jiba, pending an enquiry into her fitness to hold office, was irrational and unlawful. I shall thereafter deal with the response to the DA's case by the President, the Minister and Adv Abrahams. I shall also deal with Adv Jiba's response to the allegations and her position regarding this application, in so far as a call for her suspension is concerned.

LACK OF JURISDICTION

[9] I now deal with the first point *in limine* raised by the respondents, namely, that this Court has no jurisdiction to deal with this matter since it involved the obligations of the President under the Constitution, such jurisdiction being exclusively reserved for the Constitutional Court in terms of section 167 (4) (c) of the Constitution. Section 167(4) (e) provides that:

> *" (4) Only the Constitutional Court may-*
>
> *(a) …*
>
> *(e) decide that Parliament or the President has failed to fulfil a constitutional obligation…"*

[2] The two points *in limine* are lack of jurisdiction and *lis alibi pendens*.

[10] The question *in casu* is whether the alleged failure by the President to employ the provision of section 12 (6)(a) of the NPA Act can properly be characterised as a failure to discharge a constitutional obligation.

[11] In the interpretation of section 167 (4)(e) our Courts have held that this phrase "*fulfil a constitutional obligation*" must be given a "*narrow*" meaning. In *Doctors for Life International v Speaker of the National Assembly and Others*[3] the applicant approached the Constitutional Court directly alleging that it was the only Court that has jurisdiction over the dispute because it concerned the question whether Parliament has fulfilled its Constitutional obligations as conferred by section 167 (4)(e) of the Constitution. In determining the question whether the Court has exclusive jurisdiction, the Court focused on the proper meaning of the phrase "*constitutional obligation*" in section 167 (4)(e), which it found to be difficult to resolve. The Court, per Ngcobo J (as he then was), however, held that what all of this points to was that the phrase "*a constitutional obligation*" in section 167 (4)(e) should be given a narrow meaning to avoid it being in conflict with the powers of the Supreme Court of Appeal and the High Courts to make orders concerning the validity of Acts of Parliament, which are made in pursued of constitutional obligations.[4]

[12] A similar view was expressed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("*SARFU*").[5] In *Van Abo v President of the Republic of South Africa*[6] Moseneke DCJ held that it remains a

[3] 2006 (6) SA 416 (CC).
[4] *Doctors for Life* n 3 at para 17.
[5] 2000 (1) SA 1 (CC).
[6] 2009 (5) SA 345 (CC) at para 37.

complex question whether a specific power exercised by the President under the Constitution or any other law amounts to a Constitutional obligation which only the Constitutional Court may decide. The Deputy Chief Justice was of the view, however, that it was neither prudent nor pressing to describe what amounts to a constitutional obligation under section 167 (4)(e) of the Constitution but that ready examples of constitutional obligations specifically entrusted to the President may be found in section 84 (2) of the Constitution,[7] which rest in him as the Head of State and the Head of the National Executive.

[13] The Constitution clearly does not confer on the President an obligation to suspend or enquire into the fitness of a DNDPP to hold office. The Constitution only requires that a national legislation be promulgated which must ensure that the prosecuting authority exercised its function without fear or favour. It is in the NPA Act, which was promulgated pursuant to the mandate given by the Constitution, where the President is granted the powers to suspend and enquire into a DNDPP's fitness to hold office. Since this matter involves the question whether the President has exercised his powers, acquired through the provisions of section 12 (6)(a) of the NPA Act, rationally and lawfully (and not with whether he has obligations in terms of the

[7] Section 84(2) of the Constitution provides: *"(2) The President is responsible for- (a) assenting to and signing Bills; (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality; (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality; (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business; (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive; (f) appointing commissions of inquiry;(g) calling a national referendum in terms of an Act of Parliament; (h) receiving and recognising foreign diplomatic and consular representatives; (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and (k) conferring honours."*

Constitution to enquire into the fitness of the NDPP to hold office), this Court will have the necessary jurisdiction. That a High Court will have jurisdiction in a matter which involves the exercise of powers conferred by Statute on the President was confirmed by the Constitutional Court in *Daniel v President of the Republic of South Africa and Another*[8] *w*here it was held that section 84(2)(f) of the Constitution, which provides that the President is responsible for appointing Commissions of Inquiry, does not impose a duty but confers a power which he may exercise at his discretion, and accordingly that the President's failure to appoint a Commission of Inquiry does not amount to a failure to fulfil a constitutional obligation. It follows therefore that the failure to appoint the Commission of Inquiry did not constitute an issue that falls within the exclusive jurisdiction of the Constitutional Court.

[14] Similarly section 12 (6)(a) does not impose a duty on the President but confers a power which he may exercise at his discretion. I am accordingly satisfied that there is no constitutional impediment to this Court enquiring into the question whether the President duly exercised his powers in term of section 12(6)(a) of the NPA Act. I accordingly move to deal with the second point *in limine* raised by the respondents.

LIS ALIBI PENDENS

[15] This point *in limine*, pertains to three other matters which are pending before the Courts, all concerned with the conduct of Adv Jiba. The first one is the GCB application in which an order for the removal of the name of Adv Jiba from the roll of Advocates is sought; the second one is the application by Freedom Under Law (FUL)

[8] 2013 (11) BCLR 1241 at paras 12 and 14.

seeking the review and setting aside of the decision of the President not to invoke the provisions of section 12 (6)(a) of the NPA Act to suspend and hold an enquiry against Adv Jiba. FUL also sought an order for the reinstatement of the criminal charges which were brought against Adv Jiba but withdrawn by Adv Abrahams upon his appointment as the NDPP. Part A of the application, in which FUL sought on an urgent basis, an order preventing Adv Jiba from exercising any of her powers was dismissed for lack of urgency by the North Gauteng High Court.[9] The third one being in the matter of *Council for the Advancement of the South African Constitution v President of the Republic of South Africa*, where relief is sought to declared section 12 of the NPA Act unconstitutional and invalid. However, no further details were furnished about this case. Then there is this present application in which an order is also sought for the review and setting aside of the President's decision not to act against Adv Jiba.

[16] The respondents submitted that this application should be stayed pending the disposal of the other two applications pending in the High Court in Pretoria, where issues which overlap significantly with issues fundamental to this application fall to be disposed of. They argued that the striking off in the GCB application, where the allegations against Adv Jiba and her responses thereto were exhaustively canvassed in the papers, would be the appropriate case to deal with the questions of her fitness to hold office.

[17] In motivating for a stay pending the outcome of the GCB application, in particular, the respondents further submitted that the DA had not alleged that an

[9] *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* (89849/2015) [2015] ZAGPPHC 759 (19 November 2015) as per Prinsloo J. Part B is pending

enquiry, under section 12(6)(a) of the NPA Act will constitute a "*Commission of Enquiry*" in terms of the Commissions Act[10] and that such an enquiry, in any event does not fall under the President's powers to appoint Commissions of Enquiry in terms of section 84(2)(f) of the Constitution. The respondents accordingly argued that an enquiry in terms of section 12(6)(a) would be a toothless internal body lacking in coercive powers, which would merely serve to advise the President. They argued that the GCB application by contrast, will entail a *quasi* – inquisitorial procedure allowing for a credible fact-finding exercise going beyond what is likely to be achieved by a section 12(6)(a) enquiry.

[18] As compelling as this argument may be, I deem it unnecessary to resolve the question whether a section 12(6)(a) enquiry would have or not have coercive powers of a Commission of Enquiry nor whether the GCB application would yield better results in the circumstances. This is for the simple reason that this application is not concerned with the efficacy of the section 12(6)(a) procedure but with whether the President properly exercised his powers under the section. I shall, however, deal with the other string of their argument being to enquire whether the requirements for *lis alibi pendens* have been met.

[19] There are three requirements for the successful reliance on a plea of *lis alibi pendens*. These are that the litigation must be between the same parties; that the cause of action must be the same; and that the same relief must be sought in both matters.[11] The respondents are alive to the fact that not all the requirements of *lis alibi*

[10] Act 8 of 1947.
[11] See LTC Harms *Amlers Precedents of Pleadings* (7th ed, 2009) at pp 263-264 and the authorities

pendens doctrine have been satisfied but argued that Courts in general have a discretion to stay matters before them, notwithstanding that not all of the traditional elements of the defence were met. They, submitted that the underlying rationale of this doctrine is to avoid the undesirable situation in which Courts pronounce differently upon same issues of law and fact.[12]

[20] I am not persuaded that in the present matter the underlying rationale of the doctrine of *lis alibi pendens* would be applicable. I doubt that this doctrine can be triggered by the consideration that there are other matters pending in other Courts where one or the other kind of relief relating to the future of Adv Jiba to hold office is concerned. The parties are not the same in the three applications referred to. Although the relief sought in the present application may be similar with the one in Part B of the FUL matter before Prinsloo J, the applicant in this matter is the DA whereas in the matter pending in Gauteng is FUL.[13] In the GCB application, another different party, is seeking a completely different remedy than that sought by the DA and FUL. As a result one of the cardinal requirements for a successful plea, of *lis alibi pendens* namely that it must be between the same parties is obviously not met. I find that both the *in limine* defences are unsustainable and are accordingly dismissed. In the circumstances, I move to deal with the application on its merits.

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quoted.

[12] The respondents found support for this proposition in the SCA judgment of Nugent AJA (as he then was) in *Nestlé (South Africa) Pty Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at par 16 when he held that*: "The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally."*

[13] *Freedom Under Law n 10 above.*

THE LEGAL FRAMEWORK WITHIN WHICH THE NPA REPOSE

[21] As a starting point it is apposite to take a look at the salient provisions of the NPA Act, as well as the Code of Conduct governing the conduct of prosecutors in the NPA. I do so because the standard by which a NDPP's conduct is to be measured is to be found in the Act and the code. The Constitution provides in section 179 (1) that there shall be a single National Prosecuting Authority structured in terms of an Act of Parliament which shall have the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings. The section requires that a National legislation be promulgated which shall ensure that the NPA exercised it functions without fear, favour or prejudice. This legislation is the NPA Act. Section 9 (1) thereof provides for the qualification required for any person to serve as a National Director or Deputy National Director of Public Prosecution. This section provides that:

> "…*any person to be appointed as a National Director; Deputy National Director or Director must;*
>
> *(a) possess legal qualifications that will entitled him or her to practice in all courts in the Republic; and*
>
> *(b) be a fit and proper person with due regard to his or her experience conscientiousness and integrity to be entrusted with the responsibilities of the office concerned"*.

[22] In terms of section 11 (1) of the NPA Act the President may after consultation with the Minister and the National Director of Public Prosecutions appoint up to four Deputy National Directors of Public Prosecutions. The NDPP and the

DNDPP shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8) of section 12 of the NPA Act. Section 12 (6) (a) of the NPA Act provides that:

> *"(6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-*
>
> *(i) for misconduct;*
>
> *(ii) on account of continued ill-health;*
>
> *(iii) on account of incapacity to carry out his or her duties of office efficiently; or*
>
> *(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."*

The President may decide whether or not a suspended official may receive a salary while on suspension.

[23] If the President resolves to remove the NDPP or the DNDPP from office he must forward the findings and his reasons to Parliament within fourteen (14) days. Parliament must thereafter either uphold or reject his decision within thirty (30) days and that decision will be binding on the President. In terms of section 12 (7) the President shall remove the NDPP or DNDPP from office if on an address from each of the respective Houses of Parliament in the same session pray for such removal on the same grounds as in section 12 (6)(a). The President may also allow a NDPP or

DNDPP at his or her request to vacate his or her office on account of continued ill-health or for any reason which the President deem sufficient.

[24] Section 22 (6)(a) of the NPA Act provides for a Code of Conduct which shall be complied with by all members of the prosecuting authority. This code expect prosecutors to be individuals of integrity whose conduct is objective, honest and sincere who must respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution. They must also strive to be seen to be consistent, independent and impartial. To achieve this, amongst other things, the prosecutorial discretion to institute and stop criminal proceedings must be exercised independently, in accordance with the Prosecution Policy and Policy Directives and be free from political, public and judicial interference. In order to ensure the fairness and effectiveness of the prosecution process prosecutors are expected to co-operate with the police, the Courts, the legal profession, defence counsel and any relevant government agencies.

BACKGROUND

[25] Having set out the legal framework within which the NDPP discharges his or her duties, I now proceed to deal with the background to this application, the seed of which was planted in the matters relating to the legal challenges to the withdrawal of charges against Mr Zuma, the current President, and the role Adv Jiba played as the then acting head of the NPA. This has since germinated to include her role in other related and unrelated court actions. In April 2009 the then ANDPP, Adv Mphse, took a decision to withdraw criminal charges against Mr Zuma. This decision precipitated and set in motion a number of applications by, *inter alia,* the DA, FUL, and the Helen

Suzman Foundation ("HSF") to have Adv. Mphse's decision reviewed and set aside. These legal battles are still continuing in the Courts to this day.

[26] The NPA, being the body implicated, had its hands full dealing with these applications. The institution of these applications also coincided with the period when Adv Jiba was the ANDPP, after the appointment of Adv Simelane as the NDPP was set aside by the Constitutional Court. She as such had to deal with them. It was in the context of some of these proceedings that adverse judicial comments were made against her. Since the DA relied mainly on these adverse judicial comments as the basis for calling upon the President to act against Adv Jiba in terms of section 12 (6)(a) of the NPA Act, a brief rendition of these comments will accordingly be appropriate.

[27] In *Freedom Under Law v National Director of Public Prosecutions and Others*[14] *("Mdluli matter")*, a matter in which FUL challenged the withdrawal by the NPA of criminal charges against Mdluli and sought a mandatory interdict directing the NPA to reinstate the murder, fraud and corruption charges against him. This matter came before Murphy J in Pretoria. Not only did Murphy J grant in full the relief sought by FUL but also criticized the respondents, and in particular Adv Jiba, for the manner in which they delayed the conduct of the litigation. In this respect he had the following to say:

> *"[24] The reasons for the various delays, and late filing, are sparse and mostly unconvincing. However, in the interests of justice I was persuaded that the matter should proceed without further delay and condoned the non-compliance*

[14] Reported as 2014 (1) SA 254 (GNP).

with the rules and directives of the DJP. Suffice it to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service, and especially worrying in the case of the NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold."

[28] I pause to mention that one Adv Breitenbach, who was in the employ of the NPA at the time, opposed the decision to drop charges against Mdluli. She articulated her reasons in a memorandum addressed to Adv Jiba asking her to exercise her powers in terms of section 179 (5)(d) of the Constitution and review the decision not to prosecute. Adv Jiba did not respond to this memorandum and subsequently explained her reasons for not responding on the basis that one memorandum was not in terms of the regulatory framework.[15] This explanation, however, did not find favour with Murphy J who criticised her for this stance in the following terms:

"[196] The dispute that forms the subject-matter of this application has been ongoing for more than 18 months, since February 2012. Given its high-profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by s 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions mero motu; yet, despite the public outcry, she remained supine and would have us accept that her stance was

[15] Her full explanation is set out infra where I deal with her response to the GCB application.

justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach, made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by s 195 of the Constitution to be responsive, accountable and transparent.

[29] Murphy J concluded that there would have been no point in FUL seeking to have Adv Jiba review the decision to withdraw the charges against Mdluli before approaching the Court because her conduct demonstrated that her decision was a foregone conclusion. Murphy J held that:

"[199] … the duty to exhaust internal remedies, if one exists, will seldom be enforced where the complaint is one of illegality, or, I would add, one of irrationality, or in cases where the remedy would be illusory. It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted before now to assess them, explain her perception, and, if so inclined, to correct them.

And further held that:

[237] Counsel for the NDPP has argued in relation to the criminal charges that they should be referred back to the NDPP for a fresh decision instead of the court ordering a prosecution. There may be polycentric issues around the prosecution in relation to the evidence and possible defences, so he contended,

which will make the prosecution difficult… The NDPP and the DPPs have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of what has gone before, will be a foregone conclusion, and further delay will cause unjustifiable prejudice to the complainant and will not be in the public interest. The sooner the job is done, the better for all concerned. Further prevarication will lead only to public disquiet and suspicion that those entrusted with the constitutional duty to prosecute are not equal to the task."

[30] The NPA appealed against the judgment of Murphy J. The NPA was partly successfully in the SCA in that the order of substitution made by Murphy J was set aside and the matter was remitted back to the NPA for its decision. In setting aside the order of substitution made by Murphy J, the SCA agreed with the submission by the NDPP that mandatory interdicts were inappropriate transgressions of the separation-of-powers doctrine. Brand JA held that the doctrine precludes the Courts from impermissibly assuming the functions that fall within the domain of the executive, and that the Court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. He, however, could not find any compelling reasons in that case why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way.[16]

[16] See *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) at para 51.

[31] In *Democratic Alliance v Acting National Director of Public Prosecutions*[17] the DA brought an application to review and set aside the decision of Adv Mphse to drop corruption charges against, Mr Zuma. Mr Zuma and the NDPP raised objections to the application mainly in the form of points *in limine.* One of the issues raised was whether the NDPP was required to furnish the record of the decision to drop the charges against Mr Zuma. The SCA held that it was obliged to do so and ordered the NDPP to produce and lodge with the Registrar of the High Court the records of the decision. These records were to exclude Mr Zuma's confidential representations to the NPA but include all documents and materials relevant to the review.

[32] As a result of this SCA judgment Adv Jiba, in her capacity as the ANDPP and through the State Attorney, informed the DA that there were transcripts of recordings, referred to as the "*Spy Tapes*", which Adv Mphse had relied on when he decided to drop the charges against Mr Zuma and that these would only be provided to the DA if Mr Zuma's legal team had no objections. The DA, on the other hand, held the view that the transcripts, as well as any internal memorandum prepared in response, could not be excluded from the record in terms of the SCA's order and demanded the production of such documents.

[33] This difference in opinion resulted in an *empasse* which led to the DA bringing an interlocutory application to compel the NPA to provide the documents and to hold the ADNPP in contempt of court of the SCA order. The matter went up to the

[17] *Democratic Alliance and Others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA).

SCA. In the judgment of the SCA,[18] Navsa JA held that the ADNPP's answering affidavit resorted to a metaphorical shrugging of the shoulders by placing the reason for its non-compliance with the order of the Court in the first appeal at the door of Mr Zuma's legal representative. As regards the conduct of Adv Jiba, Navsa JA did not mince his words in criticising her conduct. He held that:

> *"[41] One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA) criticised the office of the NDPP for being less than candid and forthcoming. In the present case, the then ANDPP, Ms Jiba, provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Furthermore, it is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definitive response by the latter or a decision by the NPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country."*

[18] *Zuma v Democratic Alliance and Others* [2014] 4 ALL SA 35 (SCA).

[34] The third matter in which Adv Jiba's conduct was criticised was in *Booysen v Acting National Director of Public Prosecutions and Others.*[19] In that matter Adv Jiba issued authorisations to charge Booysen, a General in the South African Police Services ("SAPS") and head of the Serious Crime Unit in KwaZulu Natal (KZN), with contraventions of the Prevention of Organised Crime Act (POCA)[20] relating to racketeering. Booysen responded by bringing an application to review and set aside those authorisations on the grounds that they were irrational. He submitted that the material before Adv Jiba, when she took a decision to authorise the charges, did not include any evidence that he had contravened the relevant provisions of POCA. The application was opposed by the NPA. In her answering affidavit Adv Jiba submitted that, in addition to the contents of several dockets, she relied on what she described as statements made under oath which she attached to her affidavit.

[35] In reply Booysen pointed out that one of the documents was dated two weeks after she took her decision, another was not a sworn statement as it was neither signed nor dated, and that not one of the two documents implicated him in the alleged contravention of POCA. Booysen dared Adv Jiba to file an answering affidavit to his submission that she was mendacious in her assertions that she had considered these statements when she issued the authorisation to charge him. Adv Jiba, however, did not file any further affidavits and Gorven J had the following to say about her conduct:[21]

> *"[34] …the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it*

[19] 2014 (9) SACR 556 (KZD).
[20] 121 of 1998.
[21] *Booysen* n 19 at para 34.

is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP."

[36] As a result of the criticism against Adv Jiba in the *Booysen* matter, the NPA commissioned an opinion from senior counsel on what action it should take against her. The NPA was advised to institute criminal charges of perjury against Adv Jiba; to request the GCB to seek her removal from the roll of Advocates; and to request the President to investigate her in terms of section 12 (6)(a) of the NPA Act. Subsequently charges of fraud and perjury were instituted against Adv Jiba for her conduct in the Booysen matter. The prosecutors who were assigned to pursue Adv Jiba wrote in a memorandum laying out in detail why on the evidence available Adv Jiba should be prosecuted. Upon his appointment as the NDPP, Adv Abrahams however, decided to withdraw these charges against her. The DA argues that Adv Abrahams not only failed to provide any substantive reasons to dispute the conclusion that Adv Jiba should be prosecuted but also failed to disclose this memorandum to the President or to the Court in this proceedings.

[37] According to the DA the adverse judicial comments were not the only factors and circumstances which should have prompted the President to take action against Adv Jiba, as he was enjoined by section 12 (6)(a) to do, but other corollary

developments added to the call for action. These were further instances where Adv Jiba's conduct was scrutinized and action against her recommended. A committee established by the NPA and headed by retired Constitutional Court Judge, Yacoob J, concluded that there was a *prima facie* case for prosecuting her. Between June 2014 and May 2015, Mr Nxasana made repeated requests to the Minister and the President to take action against Adv Jiba, to no avail. The President and Minister were asked in Parliament several times about the action they proposed to take against Adv Jiba and if so, when.

[38] The NPA also requested the GCB, through one Adv Karen Van Rensburg,[22] to apply for Adv Jiba's removal from the roll of Advocates. In its application to have Adv Jiba struck off the roll of Advocates, the GCB stated that Adv Jiba appears to be entirely indifferent to the demands of the Advocates' profession and the high standard required of her as an Officer of the Court; and that she had fallen well short of her duty to the Court which requires absolute honesty and integrity. For this conclusion the GCB also relied on the 3 judgments referred to *supra* and argued that the conduct of Adv Jiba evidenced a persistent pattern of behaviour which is inimical to the conduct expected and required of an Advocate.

[39] For these reasons, the DA requested the President to act in terms of section 12 (6)(a) of the NPA Act to suspend and hold an enquiry against Adv Jiba. Because of the centrality of the correspondence that was exchanged between the

[22] In dealing with the authority of Van Rensburg to establish the Yacoob Committee, Adv Jiba stated that Adv Van Rensburg occupied the position of a Deputy Director of Public Prosecution, appointed in terms of the NPA Act, to exercise such functions as may be determined by the NDPP and was not the Chief Executive Officer (CEO) though she had designated herself as such. She also submitted that Adv Van Rensburg lacked the authority to establish any committee to investigate her.

DA's legal representative and the Office of the President, I quote extensively from this correspondence. The letter by the DA's legal representative read in part as follows:

> *"…Three separate courts, including the Supreme Court of Appeal, and a committee headed by a retired judge, have found that Adv Jiba has acted dishonestly in her conduct before the courts. Criminal charges have been brought against her for fraud and perjury and the General Council of the Bar has sought to have her struck from the roll of advocates.*
>
> *In the NPA's Annual Report issued in May 2015, the NPA decries your failure to act against Adv Jiba;*
>
> *On 27 March 2015, Adv Breytenbach, a member of Parliament, submitted two parliamentary questions to the Minister asking why he had not made a recommendation to you to suspend, amongst others, Adv Jiba, who continued to bring the NPA into disrepute...*
>
> *Mr James Selfe submitted a parliamentary question to you asking whther the NDPP had requested that you provisionally suspend any Deputy NDPP. You replied on 29 May 2015 that you had called on the NDPP to provide you with "the facts and circumstances requisite for such consideration"….*
>
> *Instead, since you appointed Mr S Abrahams as the NDPP, criminal charges against Adv Jiba have been withdrawn and she has been promoted to head of the National Prosecuting Services, the mist senior position in the NPA after the NDPP himself…*
>
> *Section 12 of the National Prosecuting Autority Act affords you alone the power to suspend Adv Jiba and to institute an inquiry to determine her fitness for office…*

We emphasise that the ongoing application by the General Council of the Bar to have Adv Jiba removed from the roll of advocates does not absolve you of that duty. …

We are therefore instructed to demand that you take a decision whether or not to suspend Adv Jiba pending an inquiry into her fitness to hold office by 1 September 2015."

[40] On 01 September 2015 the President's office responded as follows:

"*Advocate Jiba has held a senior position within the National Prosecuting Authority ("the NPA") for a considerable period of time.*

Upon becoming aware of the allegations of misconduct, the President directed the Minister of Justice and Correctional Services to both appraise him of the matter, coupled with a request that the Minister engage with the National Director of Public Prosecutions ("the NDPP") with a view to ascertain whether these fact and circumstances measured in light of Advocate Jiba's continued employment, warranted her suspension.

The President was subsequently been apprised of the matter by the Minister and has asked me to draw your attention to the following:

That he is of the view that none of the jurisprudential grounds exists which warrant the suspension of Advocate Jiba;

That the process initiated by the General Council of the Bar of South Africa ("the GCB") will result in a definitive outcome expressed in a court judgment and ruling, as opposed to the hosting of a inquiry which culminates in a recommendation to the President which then requires further processes to be implemented before a definitive decision;

That the GCB in its wisdom has not sought the suspension of Advocate Jiba in its application, pending the final determination of the matter. Whilst this approach is not resolutive on the question of suspension, it indeed gives a particular insight from a professional body charged with the duty of upholding the conduct of advocates in general;

The President is equally of the view that the judgments of the Supreme Court of Appeal are replete with instances where the court has expressed its approval with the nature of the proceedings as well as the test to be applied in examining the conduct of legal professional;

It must follow that the investigative acumen and processes of the GCB, matched with the judicial process provides a better guarantee for ensuring the constitutional safeguards of all concerned.

In the circumstances, whilst the President remains concerned by the seriousness of the allegations, he cannot accede to your request at this time. Lastly, the President as Head of the Executive has always resisted the invitation to comment on decisions taken by the NDPP where these are either unhelpful or unwise…"

[41] Not satisfied with the President's response, the DA launched the present application to have his decision reviewed and set aside. The DA's case is that in light of all the serious and repeated judicial criticism of Advocate Jiba, the decision by the President not to suspend her but instead undertake to await the outcome of the GCB's application to strike her from the roll of Advocates was unlawful, irrational and ought to be reviewed and set aside. The DA argued that the case against Adv Jiba is ultimately about the independence and integrity of the NPA. The DA argued further that the

reason Adv Jiba should be suspended and investigated is because her continued occupation of her position will undermine public faith in the National Prosecuting Authority, if the allegations against her are proven to be true and will encroach upon the actual independence of the NPA.

[42] The DA admitted that while the risk of suspension is a threat to the independence of the NPA the failure to suspend officials who have demonstrated that they lacked the requisite attributes for the office was an equal threat to the independence of the institution. Relying on the judgment of Yacoob in *Democratic Alliance v President of the Republic of South Africa and Others*[23] *(Simelane case)* where it was held that a construction that renders the determination of the qualification criteria of a NDPP to the President's subjective opinion was not in keeping with the Constitutional guarantee of prosecutorial independence, argued that to fail to suspend and investigate a NDPP, where there are objective grounds to exercise the power to do so, will undermine the independence of the NPA.

[43] The DA further submitted that appearance or perception of independence plays an independent role in evaluating whether independence in fact exists. For this submission the DA relied on the judgment of the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*[24] where it was held that:

> *"[207] …public confidence in mechanisms that are designed to secure independence is indispensable … [and] if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be*

[23] 2013 (1) SA 248 (CC).
[24] 2011 (3) SA 347 (CC) at para 207.

independent, it has failed to meet one of the objective benchmarks for independence..."

[44] The President, the Minister and Adv Abrahams are opposing this application and have each filed answering affidavits. Adv Jiba, on the other hand only opposed the DA's call for her suspension pending an investigation but welcomed the call for an enquiry in terms of section 12 (6)(a) of the NPA Act while the GCB elected not to enter the fray but to abide with the outcome. The general tenor of the respondents' opposition of the relief sought is that the adverse judicial comments against Adv Jiba do not warrant a suspension; that if the DA was indeed serious about the suspension and removal of Adv Jiba it did not have to come to Court but could have utilised the provisions of section 12 (7) of the NPA Act which provides for Parliament to initiate the removal of a senior NPA official on the same ground as provided for in section 12 (6)(a) of the NPA Act; that the allegation that the President failed to take steps against Adv Jiba for ulterior political motives was not sustainable; and that the matter should be held in abeyance pending the disposal of applications which are pending before other Courts,[25] as suggested by the President, which would be a fair and equitable approach in the circumstances.

[45] In his opposing affidavit Adv Abrahams, for his part, though acknowledging that two Courts have found that Adv Jiba had failed to do a full and proper disclosure and that her conduct had lowered the NPA in the esteem of the public, was nevertheless satisfied that there were insufficient grounds for the President to invoke section 12 (6)(a) of the NPA Act and that he had accordingly conveyed this sentiments

[25] The GCB application and FUL application as mentioned *supra*.

to the Minister. He stated that he came to this conclusion after careful consideration of the text of the adverse judgments, Adv Jiba's responses thereto, and a variety of other factors such as the fact that she was not personally responsible for the filing of documents but that this was the task of counsel who acted on her behalf; her prosecutorial experience; and that calls for her removal were from within the NPA by people who have long been at logger heads with Adv Jiba.

[46] The Minister, on his part, submitted that after the appointment of Adv Abrahams he instructed him to investigate and report to him on the circumstances surrounding the criticism against Adv Jiba. On receipt of Adv Abrahams' report and after meeting with him several times he apprised the President of the salient facts, as well as the views of Adv Abrahams, that Adv Jiba's conduct had not been such as to call for her suspension.

[47] The President deposed to an answering affidavit in which he stated that following the parliamentary questions by the DA requesting clarification on the steps he contemplated taking against Adv Jiba, he requested the Minister to ascertain the relevant facts and circumstances regarding the matter to enable him to accord proper consideration to the question whether he should exercise his powers in terms of section 12 (6)(a) of the NPA Act. He took the decision not to invoke section 12 (6)(a) based upon the comprehensive oral information and recommendations given to him by the Minister. He submitted that the decision to apply section 12 (6)(a) of the NPA Act would have had significant impact on the functioning of the NPA. As such he averred that it was a decision which required serious consideration, in the light of what he referred to as the disfunctionality of the NPA prior to Adv Abrahams' appointment. He

stated further that at the time when he answered Mr Selfe on 30 May 2015, Mr Nxasana was still the NDPP. He however resigned with effect from 1 June 2015 and was replaced with Adv Abrahams who was appointed on 18 June 2015.

[48] The DA argued that the President's decision was both procedurally and substantively irrational. The respondents however hold a different view. According to the respondents, the question is not whether the decision not to take steps against Adv Jiba was correct, desirable or even reasonable but whether the decision was so flawed as to vitiate the purpose for which the power is vested. The argument advanced by the respondents that there are considerations of separation of powers which should render a Court hesitant to interfere in an area where the President is entrusted with an important discretion.

[49] The DA also argued that the decision of the President lacked rationality because he failed to take into consideration relevant factors. These relevant factors which the President allegedly ignored, according to the DA, were the judgments in which Adv Jiba's conduct was criticised; the findings of the Yacoob Committee; the request by Mr Nxasana, the NDPP at the time, that the President act against Adv Jiba; the application by the GCB; the opinion by Senior Counsel that she must be prosecuted and the views of the prosecutors who were assigned to prosecute Adv Jiba on the charges of perjury and fraud against her.

[50] The question therefore is whether the President's decision is unlawful and irrational and thus open to be reviewed as procedurally and substantively irrational or whether this is a case which is pre-imminently within the domain of the executive,

requiring the Court to be sensitive to and respect the separation of powers. In seeking answers to this question I shall first outline the law on rationality before considering whether the President's action was procedurally and substantively irrational, and, if so, whether it is open to review. Before dealing with the various parties' submissions, I however deem it appropriate at this point, to set out Adv Jiba's response to the application by the GCB.

[51] In addition to denying that she was not a fit and proper person to be admitted and practice as an Advocate of the High Court, Adv Jiba argued that the application was premature, had been brought in violation of her right to a fair hearing and the relief sought would amount to an infringement of the separation of powers doctrine. She also averred that the application was based entirely on hearsay evidence. Contrary to the President's position, though she opposed the call for her suspension, Adv Jiba submitted that she would welcome an enquiry into her fitness to hold office to be held.

[52] In respect of her argument that the application was premature, Adv Jiba submitted that the GCB application raised an important constitutional issue involving the interpretation of the NPA Act, in particular, the inter-relationship between section 7 of the Admission of Advocates Act[26] and section 12 of the NPA Act. She questioned the appropriateness of the GCB in bringing an application to strike off a DNDPP. She also argued further that the application was not preceded by an internal disciplinary hearing where evidence could have been led and where she would have had the right to cross-examine witnesses. She alleged that in violation of her right to a fair hearing,

[26] 74 of 1964.

the GCB opted to roll the two processes into one through an application based on an affidavit replete with hearsay and innuendo which was prejudicial to her. This prejudice, according to her, could have been eliminated if the normal process in such cases, of conducting an investigation followed by a hearing to determine the truthfulness of the allegations, was followed.

[53] As pointed out *supra,* Adv Jiba also submitted that a fair hearing could also have been achieved through the process of section 12 (6)(a) of the NPA Act. According to her an enquiry envisaged by section 12 (6)(a) would be in the form of a disciplinary hearing involving, amongst other things, the leading of oral-evidence and cross examination of witnesses whereas a possible order by the court in the GCB application would undermine the process dedicated for the removal of a DNDPP from office in section 12 (6), (7) and (8) of the NPA Act. Here she differed with the President who is of the view that the best approach is to await the outcome of the GCB application which would have allowed for a full enquiry. She also saw no need to rush with the application as the GCB had received the complaint from the Office of the NPA in August 2014 and only brought the application in April 2015. She accordingly sought a stay of that application pending the outcome of any steps taken in terms of the NPA Act to remove her from office.

[54] As regards the criticism against her in the Mdluli matter, Adv Jiba stated that the review application was not against her personally but was against her in her official capacity as the then ANDPP. She went on to point out that, as with any application of this nature, it was attended to by a Senior State Advocate in the Legal Affairs Division (“LAD”) Unit of the NPA and where an external Senior Counsel (the

"first Senior Counsel") was also briefed. The Senior Counsel originally instructed in the matter was briefed to peruse and study the review application; to file a notice to oppose; to consult with all the officials dealing with the two criminal matters and to study documents relating thereto; to draft opposing papers; to advise on the preparation of the Rule 53 record; and to appear in Court and argue the matter on her behalf as well as the second respondent in that matter. She pointed out that the advice on what should be contained in the record was given by that Senior Counsel and was accepted as correct. This was at a time when the reviewability of prosecutorial decisions was still uncertain and had not been definitively pronounced upon by the Courts; and that the applicants in the Mdluli matter obtained an order compelling the SAPS, and not her, to file the requested record.

[55] She also submitted that she was not personally responsible for the filing of papers in the Mdluli matter, this role being that of the LAD, the State Attorney and the first Senior Counsel. In addition she went on maternity leave from January 2013 to April 2013, a period which fell within the time alleged to have constituted the inordinate delay. When she returned from maternity leave she found that opposing papers had not been filed. When it proved difficult to secure a consultation with the first Senior Counsel, and being concerned with the failure to file within the time periods required by the Rules, a decision was taken to terminate the services of the first Senior Counsel as he had failed to act in accordance with their instructions and not because she did not agree with the advice he had given.

[56] A second team, led by another Senior Counsel ("second Senior Counsel") was appointed to draft the answering affidavits; to consult with members of the NPA;

to apply for condonation for the late filing; to prepare heads of argument; and eventually to argue the matter. She submitted that she had never personally handled the answering affidavit resulting from these instructions, which was drafted with her as the deponent. Members of the LAD unit were of the view, however, that it was best that the answering affidavit should be deposed to by the people who took the impugned decisions which were the subject of the review application. This difference in opinion led to a disagreement with the second Senior Counsel as he was of the view that the ultimate responsibility lay with Adv Jiba as the Head of the NPA. She eventually deposed to the answering affidavit. Supplementary affidavit were also prepared but were not accepted by Murphy J as they were filed out of time.

[57] After the filing of the answering affidavit the second Senior Counsel and his team withdrew from the matter and undertook to furnish a memorandum. The memorandum by the second Senior Counsel only came almost three months after the judgment of Murphy J was handed down. Adv Jiba alleged that the advice by the second Senior Counsel, as set out in this memorandum was never given to her orally or discussed with her before the second Senior Counsel's withdrawal or at any time thereafter. She accordingly disputed the allegation that she persisted with her opposition of the relief sought by FUL in the Mdluli matter despite being advised by Senior Counsel to the contrary.

[58] Following the withdrawal from the matter by the second Senior Counsel another Senior Counsel, (the "third Senior Counsel") was instructed to deal with the applicants' replying affidavit and to advise whether a supplementary answering affidavit was necessary, and if so, to prepare a condonation application for its late

filing. She pointed out that the applicants' replying affidavit did not raise as an issue the filing of the answering affidavit after the deadline which was set by that divisions' Deputy Judge President.

[59] Adv Jiba did not agree with the approach suggested by the third Senior Counsel that she must review the decision of the second respondent in terms of section 22 (2)(c) of the NPA Act, and thereafter allow the applicants an opportunity to amend their grounds for relief, if they still disagreed. Such a course, according to her, was unnecessary as she had already reviewed the decision to provisionally withdraw charges against Mdluli, as at the time there was no evidence which linked him with the offences with which he was charged. This decision was in line with the NPA's Prosecution Policy.[27] She argued that the decision of the SCA implicitly confirmed that there was nothing wrong or inherently problematic with withdrawing charges against Mdluli for the purposes of further investigation, which had since occurred.

[60] She submitted that the entire team of representatives from the NPA disagreed with the advice by the third Senior Counsel. As a result she requested Senior Counsel to provide a memorandum of advice. On providing this memorandum the third Senior Counsel indicated that he would be forced to withdraw from the matter. Ultimately a fourth Senior Counsel took over and appeared in the High Court before Murphy J as well as on appeal in the SCA.

[27] Which requires that the NDPP may review a decision to prosecute or decline to prosecute after consulting the relevant Director and taking representation within the specified period from the accused person, the complainant and any other person or party who the NDPP consider to be relevant.

[61] Adv Jiba also furnished background information to the Breytenbach memorandum and her stance that it was not in accordance with internal regulations. According to her, after the judgment of the SCA in the Mdluli matter, Adv Breytenbach was appointed to oversee the further investigation against Mdluli which she did not do. Breytenbach's memorandum, according to Adv Jiba, was delivered to her office in her absence while she was on leave, four months after the decision to provisionally withdraw the case against Mdluli was taken and two months after Adv Breytenbach was informed of a decision to suspend her pending an investigation into allegations of unprofessional and unethical conduct. She accordingly denied that she had deliberately set to mislead the Court by failing to bring the existence of the memorandum to the attention of Murphy J.

[62] Adv Jiba also proffered her version to the complaints against her in the Booysen matter. She was in particular responding to the criticism that she did not file a record or provide the reasons required by Rule 53 for her decision to authorise that Booysen be charged with offences in terms of section 2 (1) of POCA; that she did not respond to Booysen's allegations that statements in her answering affidavit were mendacious; that the only inference to be drawn therefrom was that none of the information she claimed to have relied on linked Booysen to the offences in question; and that therefore her statement made under oath was evidently untruthful.

[63] In this respect she stated that the information and advice that was placed before her for purposes of granting authorisations in terms of section 2 (4) of POCA were prepared and compiled by two Deputy Directors of Public Prosecution and the Head of Special Projects Division, who were directly involved in the prosecution and

liaising with her respectively. After Booysen brought the review application these members of the NPA continued to liaise with her and were involved in preparing the information necessary to instruct the Senior Counsel who was briefed in the matter. According to the view prevailing at the time and on the advice of Senior Counsel, the NPA adopted the stance that the decision to grant the authorisation in terms of section 2 of POCA was not reviewable and this was conveyed in her answering affidavit and set out in Counsel's heads of argument.

[64] Pursuant the standpoint, that the decision to grant the authorisation was not reviewable Senior Counsel's advice was that it was not necessary to file a Rule 53 record. Furthermore, a member of the prosecution team was placed in charge of that matter and instructed to provide the Senior Counsel, who was briefed on the matter, with all the facts and evidence in the docket which were necessary to prepare an answering affidavit to be deposed to by Adv Jiba on behalf of the NPA. After the filing of the answering affidavit and when it was discovered that Booysen was raising certain issues in his replying affidavit to which the prosecution team needed to respond, a Memorandum to Senior Counsel on brief was prepared and forwarded to him requesting further guidance. The latter, in response, advised that no further action was necessary.

[65] As regards the unsigned witness' statement Adv Jiba stated that this was a statement by a witness who was overseas, had security concerns and was unwilling to come to South Africa but willing to sign it at the South African Embassy pursuant to the provisions of sections 2 and 3 of the International Co-operation in Criminal Matters

Act.[28] The prosecution team was confident that the statement would ultimately be signed through that process, and this formed part of her briefing, until the process was brought to an abrupt halt by the then NDPP, Mr Nxasana. On the advice of the Senior Counsel in the matter, a decision was taken to apply for leave to appeal the judgment of Gorven J, in particular, the finding that Counsel had conceded that there was no evidence implicating Booysen. The application for leave to appeal was prepared but, Mr Nxasana, who had just been appointed was of the view that the decision to appeal was taken to save the reputations of Adv Jiba and the Senior Counsel who acted in the matter, and ordered that the application for leave to appeal be abandoned.

[66] Adv Jiba also dealt with the comments by the SCA in the DA matter in which she was criticised.[29] As in the other matters, Adv Jiba pointed out that she was represented and advised by an experienced legal team, which included a Senior Counsel, in all the steps she took[30]. Regarding the criticism that she did not take an independent view about the confidentiality of the spy tapes she submitted that this was because she took a cautionary approach in order to ensure that she did not unwittingly infringe on the rights of either of the parties'. In her view this did not amount to conduct which is less than objective, honest or sincere and did not render her unfit to practice as an Advocate. At the time, she was of the view that ultimately it was in everyone's interests, including the NPA's, that the SCA order regarding the production of the spy tapes be clarified.

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[28] Act 75 of 1996.
[29] *DA* case n 18 above.
[30] In the decision of the SCA in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) recognised that : "*Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open."*

[67] Adv Jiba's response to the report by the Yacoob Committee was that she had not been provided with any evidence, witness statements or annexures upon which the report was based and as such could not comment on any of the recommendations it made. She argued that none of the officials in the hierarchy of the NPA, including the NDPP, has the power to institute an enquiry against her through this commission as such powers are reserved for the President.[31]

[68] I have set out in detail Adv Jiba's response to the application by the GCB because she had provided a background to the adverse judicial comments against her. Her version had assisted in contextualising these adverse comments. This also assisted in understanding her stance in this matter, namely that she was not opposed to an einquiry in terms of section 12 (6)(a) but vehemently opposed her suspension.

[69] I need to emphasise that this judgment is not intended as a review of the judgments in which adverse comments were made against Adv Jiba nor to determine the merits of Adv. Jiba's responses thereto. Such a course is not open to this Court. Outlining Adv Jiba's response to the various allegations and adverse judicial comments is merely aimed at painting a full picture of the facts which were allegedly presented to and considered by the President when he was called upon to act in terms of section 12 (6) (a) of the NPA Act. These were the facts which were collated by Adv Abrahams and formed part of his briefing to the Minister who in turn briefed the President. These, in my view, ultimately informed the President's decision not to act. They become relevant in determining whether the decision of the President not to invoke section 12 (6)(a) of the NPA Act was unlawful and irrational.

[70] The question is whether the President, equipped with all these information, and the surrounding circumstance, exercised his power in terms of section 12 (6) (a) rationally and lawfully in declining to suspend Adv Jiba or hold an enquiry into her fitness to hold office.

[71] I deal first with the DA's argument that the President had relied on the advice of the Minister who was merely relying on the advice of Adv Abrahams; that this in essence meant that the President solely relied on Adv Abrahams' advice; that these were new reasons which were not contained in his letter of 1 September 2014; and that therefore these reasons fell outside what was contained in the Rule 53 record. I digress here to point out that the DA complained that it was highly irregular for Adv Abrahams to provide the primary response to a challenge to a decision taken by the President. It went on to submit that while it was permissible for Adv Abrahams to advise the President on the conduct of a DNDPP it was not appropriate for him to defend the President's decision as if it were his own; that Adv Abrahams is supposed to be merely an interested bystander as the Constitution guaranteed his independence and not overstep the appropriate limits of his position and offer the primary defence for a decision he did not take. In my view this argument, although technically correct is superfluous. It loses sight of the fact that while it was the President who took the impugned decision and the genesis thereof was the advice Adv Abrahams had given to the Minister, who in turn advised the President. When interpreted in context it is obvious that it was merely to avoid repetitions that the affidavit of Adv Abrahams be used to convey the President's position in opposing the application.

[72] Expounding on this submission that the President relied on reasons which were not part of the Rule 53 record the DA stated that in the notice of motion, following Rule 53, the President was required to dispatch the record of the decision, including memoranda, reports, minutes of meetings, recorded deliberation, letters and other documents which relate to his decision or which were before him when his decision was made, together with such reasons as he may desire to give; that the only documents the President filed were the DA's letter of 26 August 2015 and his response thereto contained in his letter of 1 September 2015; and that it was entitled to accept that these were the only documents he had considered when he took his decision. As such the DA argued that it adopted the position that the only reason the President relied on to justify his decision was the pending GCB application. This was the position the DA took in its supplementary affidavit.

[73] The DA submitted that there were two basic reasons why the President cannot advance new reasons in his affidavit which were not contained in his Rule 53 record. The first was that these, according to the DA, were *ex post facto* justification and not the true reasons for the decision. Secondly, the DA argued that it would be unfair to an applicant for judicial review to be confronted with new reasons after it had already nailed its sails to the mast. Although it acknowledged that the rule that a state official being reviewed cannot introduce new reasons was not absolute, the DA argued, relying on *Jicama 17 (Pty) Ltd v West Coast District Municipality*[32]*,* that it was not open to the President to raise the other defences he raised for the first time in his answering papers because it has come to Court to deal with the reason which was conveyed to it in the Rule 53 record as being the basis on which the decision had been

[32] 2006 (1) SA 116 (C) at para 11.

made. The DA accordingly submitted that there are good grounds to believe that the reasons advanced by the President were not his true reasons and that the reasons advanced in the answering affidavit were *ex post facto* justifications developed to respond to the inadequacy of the original reasons advanced.

[74] The respondents, on the other hand, argued that the various bases for the President's decision which were set out in detail in the answering affidavit, could hardly have surprised the DA. They submitted that when one reads the pre-litigation correspondence as a whole and in context, it becomes clear that the DA was on notice as to the gist of the substantive reasons for the President's decision i.e the jurisprudential grounds referred to in the letter from the President were those invoked by the DA in its letter of 26 August 2016, being the adverse judicial comments, and what flowed therefrom.

[75] As conceded by the DA the rule that a party being reviewed cannot advance new reasons in his answering affidavit is not absolute and Courts have often allowed a decision maker to advance new reasons. In *Van Zyl and Others v Government of the Republic of South Africa and Others*[33] a matter in which the appellants argued that the Government of South Africa was obliged to provide them with diplomatic protection against the Government of Lesotho, after the latter had cancelled their mineral rights leases (on the advice of the Minister and Legal advisers the President declined to intervene), submitted that the respondents were not allowed to advance new reasons in their answering affidavit which were not covered in correspondence between the parties prior to the launch of the application. In this

[33] 2008 (3) SA 294 (SCA).

respect, the appellant argued that the overarching "*Policy*" consideration not mentioned in correspondence constituted new reasons. The SCA, per Harms ADP, drew a distinction between the facts of that case and those of *Jicama* on which the appellants relied, and found that an organ of State would not be entitled to raise new reasons for an administrative decision in an answering affidavit when the new reasons were an *ex post facto* reason, and accordingly, not the true reasons for the decision.[34]

[76] Recently the question was again authoritatively decided by the SCA, in the *Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others*[35]. The respondent challenged the Minister's decision to close certain schools, in accordance with particular government policy considerations, on the ground that he had failed to disclose his reasons at the outset and did not adequately set out the nature and the substance of the case for those who intended to make representations. The SCA held that the Minister would have complied with procedural fairness requirements as long as the gist of his reasons was conveyed and was thus not obliged to spell out in great detail why the particular schools were being considered for closure. The Court went on to hold that the fact that the Minister's ultimate reasons for closure may not have tallied precisely with his initial reasons does not mean either that his final decision is vitiated by procedural unfairness or that additional reasons emerging during the process prescribed cannot be taken into account and relied upon without giving further notice to the schools or public.[36]

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[34] *Van Zyl* n 32 at para 55.
[35] 2015 (2) SA 154 (SCA).
[36] *Beauvallon* n 34 at paras 19 and 27.

[77] In the letter to the DA the President made it clear that he was advised and had formed the view that none of the jurisprudential grounds which would trigger the application of section 12 (6)(a) were present. He further conveyed his view that to wait for the outcome of the GCB application, instead of instituting an enquiry, was the best option. This, in my view, communicated to the DA the gist of the President's reasons for not invoking section 12 (6)(a). They are not different to the reasons he advanced in his answering affidavit. In the latter the details are expansive and were not fundamentally different to what he stated in his letter of 1 September 2015. There was, in my view, compliance with the requirement that in fairness the person affected by a decision be informed of the gist of the case which he has to answer.

WHETHER THE PRESIDENT'S ACTION IS EXECUTIVE OR ADMINISTRATIVE

[78] There were subtle differences between the parties as to whether the decision of the President was an executive or administrative action. I however, do not deem it necessary at any rate to resolve this issue in the present matter; it is now well established that even in cases where PAJA is not of application, the principle of legality may be relied upon to set aside an executive decision made not in accordance with the empowering statute[37]. In fact the DA conceded that it was not necessary for this Court to determine whether or not the President's decision amounted to administrative action since it was challenging the decision solely on a rationality and legality basis. I accordingly proceed to determine whether the President's action was unlawful and irrational.

[37] *Beauvallon* n 34 at para 16.

THE PRINCIPLE OF LEGALITY

[79] The principle of legality demands that public power may only be exercised in accordance with the law. The executive, for example, may exercise no power or perform no function beyond that which is conferred upon it by law.[38] In *SARFU*[39] the Constitutional Court held that the principle of legality required that the President must act personally, in good faith, and without misconstruing the nature of his power. The President should not only exercise his powers in good faith and not arbitrarily, but such decision must also be rationally related to the purpose for which the power was given.

[80] Any action which fails to pass the threshold of rationality would be inconsistent with the requirements of the Constitution and therefore unlawful. The Constitutional Court in *Pharmaceutical Manufacturers*[40] introduced an important injunction on the Courts: the setting of this standard [however] does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinion of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively is rational, a Court cannot interfere with the decision simply because it disagrees with or considers that the power was exercised inappropriately.[41]

[81] The principles of legality has been developed jurisprudentially to require that the exercise of power must not only be objectively rational but must also be

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[38] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at para 58.*
[39] *SARFU* n 5 at paras 148 and 149.
[40] *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte Parte President of the Republic of South Africa and Others* 2000 (2) SA 674.
[41] *Pharmaceutical Manufacturers* n 39.

procedurally fair and substantively reasonable. This expansion of the principle is tempered by a practical requirement that in determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively.[42]

[82] In *Kannaland Municipality v Minister for Local Government Environmental Affairs and Development Planning in the Western Cape and Another*[43] Traverso DJP, in dismissing an application to review and set aside a MEC of Local Government's refusal to remove a Municipality Councillor in terms of item 14 (2) (e) of the Code of Conduct of Councillors, held that intervening in the exercise of a discretion of this nature is narrowly circumscribed; and is limited to such grounds as mala fide; ulterior motive and/or a failure to apply one's mind; and in the light of a Constitutional right to just administrative action these requirements now include rationality and reasonableness.[44]

[83] The principle of legality further requires that both the process by which the decision is made and the decision itself must be rational. In the *Simelane* case, the Constitutional Court held that the requirements of rationality are concerned in particular with, first, the distinction between reasonableness and rationality and the relationship between means and ends; secondly, whether the process as well as the ultimate decision were rational. In the third what would be the consequence for

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[42] See *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at* para 41.
[43] (20763/13) [2014] ZAWCHC 42 (24 March 2014).
[44] *Kannaland* n 42 at para 39.

rationality if relevant factors were ignored and, lastly, the relation between rationality and the separation of powers.[45]

[84] Reasonableness and rationality are two distinct concepts. Reasonableness is generally concerned with the decision itself, while rationality has to do with the reason for the decision. It was held by the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*[46] that:

> *"[51] The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j)."*

[85] A Court must therefore look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step

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[45] See *Simelane* n 23 at para 12.
[46] 2010 (3) SA 293 (CC) at para 51.

(part of the means) is so unrelated to the end as to taint the whole process with irrationality[47]. A rationality review therefore is really concerned with the evaluation of a relationship between means and ends. The aim is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. The decision of the President can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the powers were conferred and the absence of this connection will render the process as a whole, and hence the ultimate decision, irrational.[48]

[86] The DA submitted that the only question the President had to ask himself when called upon to decide whether to apply section 12 (6)(a) was whether the allegations were serious enough to warrant that she be suspended and investigated. I do not agree with the simplistic view taken by the DA of the matter. The first problem with this approach is that no real basis for this drastic measure was laid. The DA does not lay a basis for any real apprehension of harm if Adv Jiba were to remain in office pending the outcome of the GCB application. There is no allegation that Adv Jiba is conducting, or a real apprehension that she will conduct, herself in a dishonest or biased manner in the discharge of her duties.

[87] The DA also does not allege that her presence currently affects the effective functioning of the NPA. Even the allegations that public perception of the NPA is affected by her presence are not supported by any objective and empirical

[47] See Simelane n 23 at para 37.
[48] See *Simelane* n 23 at para 37.

facts. Similarly the allegation that the President failed to suspend her for an ulterior purpose, at best, is pure speculation. There is no nexus between the stance she took in relation to the spy tapes and the allegation that the President has an interest in retaining her in her position so that she can continue to act in the President's own personal interest.

[88] As the President correctly pointed out, in my view, has an important responsibility entrusted upon him by section 12 (6)(a) of the NPA Act, which is not only to ensure that the NDPP and the DNDPP are fit and proper people to lead the NPA but also to ensure that this important institution, underpinning our democracy, is allowed to function properly and without undue interruption which may be brought about by unwarranted suspensions of key personnel. Unwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution. While the President is empowered by section 12 (6)(a) to take swift action when necessary to allay concerns about the integrity of the NPA or when the conduct of the DNDPP is called into question, he however, cannot do so without due consideration for all the relevant factors and circumstances. In this respect, he would call for, be guided by and rely on people who have intimate knowledge of the facts and their surrounding circumstances. He will be in a better position to exercise his discretionary powers on receipt of appropriate advice.

[89] Relevant factors which the President would consider would include *inter alia,* Adv Jiba's response to the criticism which had been levelled against her. Her response certainly brought about a different perspective to the judicial and other criticism against her. I must hasten to add that I do not, by any stretch of the

imagination, suggest that her response has lessened the severity of the criticism. This has merely presented another side which the President had to take into consideration, and he said he did, did as in concluding that it is best to await the outcome of the GCB application.

[90] The DA argued that the fact that the GCB has launched an application to have Adv Jiba removed from the roll of Advocates emphasise the fact that Adv Jiba's conduct is so serious as to warrant immediate suspension pending an investigation and that it should not be a reason for the President not to invoke the provisions of section 12 (6)(a). I agree that in certain circumstances that should be the immediate reaction: suspend and hold an enquiry. But the circumstances of this case do not necessarily justify such cause of action.

[91] The judicial criticism of Adv Jiba which is the reason why the DA acted in order to protect the integrity of the NPA where made in the context of what the various Courts were gleaning from the papers which were filed off record. The President, on the other hand, was not only dealing with the record of the various proceedings and the comments made by the various judges but has the benefit of Adv Jiba's response thereto as well as Adv Abrahams' input on the state of affairs in the NPA. All these may have tipped the scales to the extent that the President, in his wisdom and in the exercise of the discretionary powers in terms of section 12 (6)(a), deemed it advisable to await judicial interpretation which can be achieved in the GCB application. This in my view is not an abdication of responsibility by the President but a cautious approach dictated by the circumstances. The circumstances demanded that the President take a balanced view.

[92] It does not follow that immediately after the GCB application was launched, the President was compelled to suspend Adv Jiba. The President must first satisfy himself that the circumstances justify such a step. When one consider the peculiar circumstances under which the GCB came to be involved in the matter one cannot but agree that a cautious approach is warranted. While the GCB has been entrusted by the legislature, in terms of section 7 of the Advocates Act,[49] to regulate the standards of the profession, and in my view, has, indeed over the years fulfilled this role, it is not clear why it adopted a wait and see attitude until it was prompted by Adv Van Rensburg of the NPA to apply for Adv Jiba's removal from the roll of Advocates or why the application was not preceded by an internal disciplinary hearing.[50]

[93] I should not be understood to be casting any aspersions on the GCB's decision to wait for months before it applied for Adv Jiba's name to be removed from the roll of Advocates and making the decision only after the request by Adv Van Rensburg, when the criticism against Adv Jiba had been in the public domain for months. All I am saying is that it is not irrational for the President, after consideration of all the facts to resolve to wait for the outcome of this application. The hesitation to move for her striking off may be for various reasons which are not apparent. This may be because Adv Jiba is not a member of any Bar, the GCB. This is an august body which is entrusted with oversight responsibilities to the advocates' profession and would not have hesitated had the case for striking off against Adv Jiba been so strong justifying action without being prompted by the NPA. All these, however, is pure speculation. Such speculation may be removed when the application for her striking off

[49] Act 74 of 1964.
[50] As was the case in the *Simelane* matter, for example.

is finally argued and the Court has given judgment. A judgment which no doubt will guide the President as to how to act.

[94] I therefore do not find it irrational for the President, in the circumstances, to take the view that it is best to await the outcome of the GCB application which would provide a better guarantee for ensuring the constitutional safeguards for all concerned.

[95] Even if I am convinced that the President should have decided otherwise, I am not at liberty to intervene. I can only intervene if it can be shown that the President exercised the power bestowed upon him by section 12 (6)(a) of the NPA Act in a manner manifestly at odds with the purpose for which the power was conferred. This has not been shown to be the case.

[96] The DA argued further that it was incongruous that Adv Jiba would demand an enquiry in terms of section 12 (6)(a) while the President, on the other hand took the view that it is best to put trust in the GCB application. This is because, in my conclusion, the President took a considered independent decision while Adv Jiba pursued her own cause which need not necessarily coincide with that of the President. Whether Adv Jiba by calling for an enquiry in terms of section 12 (6)(a) holds a different view than that of the President is not the issue. The only question is whether the President's decision was irrational. It would have been irrational for example if the President held a different view to that of Adv Abrahams and/or the Minister who had furnished him with the advice which ultimately informed his decision.

[97] Even if I am wrong in concluding that the President's decision to await the outcome of the GCB application was irrational and unlawful it does not follow that I am

at liberty to usurp his powers and order a suspension and the holding of an enquiry. I am constrained by the separation of powers doctrine which precludes me from wading in an announcing my preferences. This doctrine only allows the Courts to infer with this constitutional arrangement on rare occasions. I find that there would have been no compelling reasons to substitute the President's decision with this Court's order. This however, is only hypothetical as I have come to the conclusion that the impugned decision was not unlawful or irrational.

COSTS

[98] The DA argued that in the event of this Court dismissing the application it should not be mulcted with costs as this was not a spurious application but one brought in pursued of a constitutional issue involving the principle of legality. It was also submitted that the matter was of considerable public interest. As the Constitutional Court held in *Biowatch Trust v Registrar, Genetics Resources*[51] that when it comes to costs the primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice. The general rule in constitutional litigation is that unsuccessful litigants ought not to be ordered to pay costs to the State. No doubt this matter has the potential to enhance our constitutional democracy.

[99] People should not be discouraged from pursing constitutional claims against the State for fear of being ordered to pay costs if they were to lose. As held by Constitutional Court in *Affordable Medicine* such orders may have an unduly inhibiting or chilling effect on other potential litigants in this category. The only limitation to this general rule the Constitutional Court introduced was that this should not be seen as a

[51] 2009 (6) SA 232 (CC) at para 23.

licence for litigants to challenge the constitutionality of statutory provisions in the Constitutional Court no matter how spurious the grounds for doing do may be or how remote the possibility of success.

[100] There is no reason, in my view, why this sound principle regarding the costs in constitutional litigation should not apply equally where the challenge is to the exercise of statutory powers by functionaries. This however should not be seen as a *carte blanche* to turn the courts into a battle field to settle political scores or into an arbiter of political disputes which should be debated an settled in the appropriate forum. A challenge does not gain constitutional legitimacy merely because it is a challenge to the incumbent at the helm of the administration of the country for real or perceived illegitimacy to be in charge. We live in a democratic state where the will of the majority expressed in general election would inevitably determine who seats at the top of the administration of the State or is removed by legitimate means. I am satisfied, however, that this matter was of considerable public interest as it involved the exercise of statutory powers by the Head of State. For this reason I decline to make a costs order.

[101] The order of this Court is as follows:

1. the application is dismissed; and
2. no order as to costs is made.

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M J DOLAMO
HIGH COURT JUDGE