IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 23576/2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

....
DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Applicant

and

NOMCGOBO JIBA 1st Respondent

LAWRENCE SITHEMBISO MRWEBI 2ND Respondent

SIBONGILE MZIYATHI 3RD Respondent

JUDGMENT

LEGODI J:

HEARD ON: 30 May - 1 June 2016

JUDGMENT HANDED DOWN ON: 14 September 2016

[1] 'An important requirement for admission as an attorney or advocate is to be a 'fit and proper' person. Lawyers are also struck from the respective rolls of advocates or attorneys if they cease to be "fit and proper". The requirements of being "fit and proper" person is not defined or described in the legislation. It is left to the subjective interpretation of and application by seniors in the profession and the ultimately the court. In the apartheid years, this requirement was applied arbitrarily, but today the question may be asked why some lawyers who have been found to be a "fit and proper" do not act as such. The pre-admission character screening of lawyers seems not to be effective any more. Post admission moral development is imperative'[1].

[2] A successful practitioner, an attorney or an advocate, should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a "fit and proper" person for the profession. An appropriate academic training may, however, play a vital part in improving them- as they are "by nature at least latent."

[3] The following are listed as the least of qualities a lawyer should possess:

'Integrity- meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,

- Dignity- practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court.
- The possession of knowledge and technical skills,
- A capacity for hard work,
- Respect for legal order and
- A sense of equality or fairness'[2].

[4] This case is about whether the respondents, Ms Nomgcobo Jiba (first respondent),referred to in these proceedings as "Jiba", an advocate who currently holds the position of Deputy National Director of the Public prosecutions, Mr Lawrence Sithembiso Mrwebi (second respondent), referred to in these proceedings as "Mrwebi", an advocate who holds the position of special director of public prosecutions and head

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[1] M slabbert, Professor Department of Juris prudence, University of South Africa (Slabbm @ Unisa.ac.).

[2] Du Plessis, " The ideal legal practitioner" (from academic angle) 1981 De Rebus at 424-427.

of the crime unit within the prosecuting authority and Mr Sibongile Mzinyati, third respondent (Mzinyathi), an advocate and a director of public prosecutions North Gauteng, are "fit and proper" persons to remain on a roll of admitted advocates in terms of Admission of Advocates Act no 74 of 1964.

[5] The application has been instituted by General Council of the Bar of South Africa ("GCB"), a voluntary association with legal personality functioning in terms of its constitution with its constituent members comprising of 10 societies of advocates throughout South Africa. GCB wants this court to consider acting against the respondents as contemplated in section 7(2) of Admission of Advocates Act. The section provides as follows:

> *"(2) Subject to the provisions of any other law, an application under paragraphs (a) (b) (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off the name of any person from the roll of advocates, may be made by the General Council of Bar of South Africa, by the Bar , or Society of Advocates for the division which made the order for his or her admission to practice as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph(c) of subsection (1) also by the State attorney referred to in the State Attorney Act 1957 (Act no 56 of 1957)".*

[6] During August 2014 and following the handing down of a judgment by the Supreme Court of Appeal on 1 April 2014 in the matter of Freedom Under Law v National Director of Public Prosecutions and others[3] (Mdluli's case), GCB received a request from the office of the National Prosecuting Authority (NPA) to consider bringing an application against the three respondents in terms of section 7 (2) of the Admission of Advocates Act quoted in paragraph 5 above. At a scheduled meeting in November 2014, GCB considered the request and decided to proceed to prepare the present application which was instituted on 1 April 2015 coincidentally exactly a year after the SCA's judgment in Mdluli's case.

[7] The gist of the complaints against the three respondents is based on their conduct in the handling of Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 254 GNP; NDPP v Freedom Under Law (see footnote 3) a case referred to in this proceedings as Mdluli or FUL case and adverse remarks made by both the high and supreme courts in that case. Other complaints are levelled against Jiba only and are founded on her handling of the following reported matters and adverse remarks made therein:

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[3] 2014(4) SA 298 SCA.

7.1 Democratic Alliance v Acting National Director of Public Prosecutions, [2013] 4 All SA 610 (GNP), Zuma v Democratic Alliance and Others [2014] 4 SA 35 (SCA), a case which ultimately became to be known as a "Spy Tape" case and will be referred to as such in these proceedings.

7.2 Booysen v Acting National Director of Public Prosecutions and Others [2013] 3 All SA 391 KZD."

[8] The structure of this judgment will be as follows:

8.1 The test

8.2 Constitutional imperative and legislative frame-work,

8.3 Points in limine,

8.4 Reasons for the order refusing Jiba's fourth affidavit,

8.5 Booysen case,

8.6 Spy tapes case and

8.7 Mdluli case.

THE TEST

[9] Section 7 (1) (d) of the Admission of Advocates Act authorises a court to remove an advocate from the roll of advocates, if satisfied that he or she is not a "fit and proper" person to continue to practice as an advocate. The test is a contemplation of three-staged inquiry, as is also the case in applying the provisions of section 22 (1) (d) of Attorneys Act 53 of 1979. First, the court must decide if the alleged conduct complained of has been established on a preponderance of probabilities. This is a factual inquiry. Secondly, it must consider if the person concerned is in the discretion of the court not a fit and proper person to continue to practice. This involves a weighing up of the conduct complained of against the conduct expected of a fit and proper person to practice. This is a value judgment consideration. Thirdly, the court must inquire whether in all of the circumstances the person in question is to be removed from the roll or whether an order of suspension from practice would suffice. This is also a matter for the discretion of the

court. In deciding on what course to follow, the court is not first and foremost imposing a penalty. Rather, the main consideration is the protection of the public[4].

CONSTITUTIONAL IMPERATIVE AND LEGISLATIVE FRAME WORK

[10] It is important to start by mentioning that all the complaints raised against the respondents arise from the handling of three review proceedings instituted against the National Prosecuting Authority, in terms of which certain decisions, two of which, that is, in Mdluli and Spy Tapes cases related to the withdrawal of criminal charges and the other decision in Booysen case related to the institution of criminal proceedings. It is for this reason that a brief outlay of the legislative-frame work governing the authority and operation of the prosecuting authority is necessary.

[11] There is a single national prosecuting authority established in terms of section 179 of the Constitution as determined in National Prosecuting Authority Act[5] (the Act). The prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions to institute criminal proceedings.[6] National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice[7]. The National Director of Public Prosecutions must issue policy directions which must be observed in the prosecution process, may intervene in prosecuting process when policy directives are not complied with, and may review a decision to prosecute or not prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period determined by the National Director of Public Prosecutions from the following: the accused, the complainant, any other person or party whom the National Director considers to be relevant[8].

[12] The "Act" is the brain-child of section 179 of the Constitution, in particular subsection (4) which requires of a national legislation to be enacted to ensure that members of the prosecuting authority exercise their duties without fear, favour or prejudice. Chapter 4 of the Act deals with powers, duties and functions of members of

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[4] Malan and Another v The Law Society, Northern Provinces 2009 (ALL) SA 133 (SCA) para [7].

[5] Section 2 of Act no 32 of 1998, s 179 (1) of the Constitution 108 of 1996.

[6] S 179 (2) of Constitution

[7] S 179 (4).

[8] S 179 (5) (b) (c) and (d).

the prosecuting authority. Of relevance to the present proceedings, they have the power to institute and conduct criminal proceedings on behalf of the state and have the power to discontinue criminal proceedings[9]. On the other hand, and in accordance with section 179 of the Constitution, the National Director may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking and considering representations from the accused, the complainant, any other person or party whom the National Director considers relevant, within the period specified by the National Director[10]. This is a replica of what is provided for in section 179 of the Constitution. The hierarchy in the exercise of powers, duties, and functions under Chapter 4 runs from the national director, deputy national director, directors, deputy directors and down to the prosecutors[11]. Section 21 is also important as it obliges and authorises the National Director to determine prosecution policies, and issue policy directions which must be observed in the prosecution process.

[13] A special director should exercise the powers, carry out the duties and perform functions considered or imposed on or assigned to him or her by the President, subject to the directions of the national director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they should be exercised, carried out and performed in consultation with the director of the area of jurisdiction concerned[12]. In the present case, the second respondent was such a "special director" and the third respondent such "director" concerning the withdrawal of the fraud and corruption charges against Mdluli. (My emphasis as it would appear later in this judgment).

[14] In terms of the legislative power to make or determine prosecution policies and to issue policy directives, the National Director of Public Prosecutions issued code of conduct inter alia, dealing with professional conduct, independence and impartiality by each member of the prosecuting authority in the exercise of their powers, duties and functions.

[15] Because of its relevance to the "fit and proper" person requirement, I find it necessary at the risk of prolonging this judgment, to repeat some of the directives contained in the code of conduct:

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[9] S 20 (1) (a) and (c) of Act 32 of 1998.

[10] S 22 (2) (c) Act 32 of 1998.

[11] Sections 22 to 25 of Act 1998.

[12] S 24 (3) of the Act.

"Prosecutors must-

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

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

(c) Protect the public interest;

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

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

(f) …

(g) At all times maintain the honour and dignity of their profession…'

Independence.

"The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the prosecution policy and the policing directive and be free from political, public or judicial interference."

Impartiality

"*The prosecutor should perform their duties without fear, favour or prejudice. In particular they should-*

(a) Carry out their functions impartially and not become personally involved in any matter;

(b) Avoid taking decisions or involving themselves in matter where a conflict of interest existent or might possibly exist;

(c) Take into consideration the public interest as instinct from media or part as an interest and concerns, however vociferously these may be presented;

(d) Avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence or impartiality;

(e) Not seek or receive gifts, donations, favour or sponsorships that may comprise or may be perceived to compromise or may be perceived to compromise their professional integrity;

(f) Act with objectivity and pay due attention to the constitutional right to equality;

(g) Take into account all relevant circumstances and ensure that the reasonable inquiries are made about evidence irrespective of whether these inquiries are to the advantage or disadvantage of the alleged offender;

(h) Be sensitive to the needs of victims and do justice between the victim, the accused and the community according to the law and the dictates of fairness and equity ; and

(i) Assist the Court to arrive at a just verdict and in the event of conviction, an appropriate sentence based on the evidence presented."

[16] Three points summarised hereto were raised as preliminary issues. First, alleged failure to afford Jiba a fair hearing, second, that the application and relief sought offend against separation of powers and lastly that the present application is pre-mature. Counsel for Jiba was asked at the start of the hearing of this application as to whether he was persisting with the three issues. The response was that preliminary issues are not abandoned.

Alleged lack of affording Jiba proper hearing and separation of powers

[17] The preliminary issues are introduced in the Jiba answering affidavit as follows:

"13. Before dealing with my response to the allegations against me, set out in the founding affidavit, I wish to raise the following as points in limine. First, the appropriateness of bringing an application such as this against the National Director of Public Prosecutions in the office of the NPA. This raised an important constitutional issue involving the interpretation of the NPA Act and the inter-relationship between section 7 of the Admission of Advocates Act. Secondly, the issue of bringing this application, where there is no urgency and none has been alleged in the founding affidavit, without affording me the opportunity to be heard by the applicant. Both issues are interlinked in the circumstances of this matter"

[18] In what I believe to be an elucidation of the statement above, Jiba in paragraphs 18 and 19 of her answering affidavit in these proceedings proceeds as follows:

"18. Thus, for the court to make an order striking my name from the roll of advocates, it has to make a finding first that I am not a fit and proper person to continue to practice as an advocate. Normally, with regard to practicing advocate at the bar an enquiry is conducted by the applicant with regard to the latter issue. The affected party is normally afforded a right of hearing. Oral evidence is led and witnesses cross-examined. Only if is the applicant is satisfied through the fair enquiry process that the affected party is indeed not fit and proper, would it bring an application to strike the name from the roll of advocates.

> *19. In this instance applicant has opted to roll the two processes into one through a motion application, based on an affidavit which replete with hearsay and innuendo, which is prejudicial to me, without having afforded the opportunity to be heard. I wish to state that much of the prejudice hearsay and innuendo would have been eliminated if applicant had followed the normal process at least of conducting an investigation and first granting me a hearing to determine the truthfulness of the allegations that are being made against me and if indeed I am not a fit and proper person to practice as an advocate."*

[19] To put the gist of Jiba's criticism in perspective, it is necessary to refer to sections 12 and 7 of the National Prosecuting Authority Act and Admission of Advocates Act respectively. Her criticism is further articulated as follows in paragraph 28 of her answering affidavit in these proceedings:

> "*An order by this Honourable Court that my name be struck off the roll of advocates would with respect, undermine the process for the removal from office of a Deputy National Director provided for by the NPA Act by essentially disqualifying me from holding the position of Deputy National Director and rendering the enquiry moot. This is in circumstances where the question of whether I am fit and proper person to hold the office would already have been determined on the basis of affidavits and, in this case, hearsay evidence. This, with respect, would infringe the doctrine of separation of powers and my right to a fair hearing."*

[20] Section 12 of the Act deal with the term of office of National Director and deputy National directors of Public Prosecutions and subsections 5, 6 and 7 of section 12 deal with the removal or suspension thereof. Because of their importance, subsections are repeated hereunder:

> *"(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).*
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> *(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-*
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> *(i) for misconduct;*
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> *(ii) on account of continued ill-health;*
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> *(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.

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a) , is presented to the President."

[21] There is a distinct difference between removal or suspension under section 12 of the Act and removal or suspension under Admission of Advocates Act. Subsection (2) of section 7 of the latter Act was quoted earlier in paragraph 5 of this judgment. Subsection (1) provides as follows:

"(1) Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates -

(a) in the case of a person who was admitted to practise from the roll as an advocate in terms of sub-section (1) of section three or is deemed to have been so admitted -

(i) if he has ceased to be a South African citizen; or

(ii) in the case of a person who is not a South African citizen, other than a person contemplated in sub-paragraph

(iii) if he has failed to obtain a certificate of naturalization in terms of the South African Citizenship Act, 1949 (Act No. 44 of 1949), within a period of six years from the date upon which before or after the commencement of this sub-paragraph he was admitted to the Republic for permanent residence therein or within such further period as the court either before or after the expiration of the said period for good cause may allow; or

(Section 7(1)(a)(ii) substituted by section 2(a) of Act 60 of 1984)

(iii)

(b) ..

(c) in the case of a person who was admitted to practise as an advocate in terms of section jive, if it appears to the court that he has ceased to reside or to practise as an advocate in the designated country or territory in which he resided and practised at the time of his admission to practise as an advocate of the Supreme Court or that that country or territory has ceased to be a designated country or territory for the purposes of the said section; or

(d) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate; or

(e) on his own application."

[22] The process under section 12 of the Act and section 7 of the Admission of Advocates Act, whilst overlapping, the distinction is sharp. In terms of the Act, the National Director or deputy National Director may be removed or suspended as such. That would not necessarily mean that such a person is automatically removed from the roll of advocates. For any such removal from the roll of advocates one has to follow the process envisaged in section 7 of the Admission of Advocates. However, the National Director or deputy National Director who is removed from the roll of advocates cannot continue to be a National Director or deputy National Director of Public Prosecutions because of the provisions of section (9) of the Act which provides:

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

(a) possess legal qualifications that would entitle him or her to practice in all courts in the Republic ; and

(b) be fit and proper person, with the regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibility of the office concerned.

[23] So, if you cease to be a fit and proper person under section 7 of Admission of Advocates, and you are removed from a roll of advocates, you cannot be entitled to practice in all courts in the Republic as contemplated in paragraph (a) of section 9 (1) of the Act. These processes can sometimes run parallel to each other but any choice of the two would not render the process unfair.

[24] The premature and or separation of powers contention should therefore be seen in the context of the above legislative framework and there can be no merit to the contention. Any suggestion that the proceedings should have been preceded by an inquiry instituted by the President as contemplated in the Act, should also be seen in context. It is worrying that Jiba or her counsel still found it necessary to persist with the argument despite the fact that the President had already put it on record in the matter between Democratic Alliance (DA) and Jiba instituted and recently finalised in the Cape High Court. In that case DA wanted court to suspend Jiba, but the President stated inter alia, as follows in a letter dated 1 September 2015 written on his behalf:

"…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 General Council of the Bar of South Africa ("the GCB") will result in a definitive outcome expressed in a court judgment ruling, as opposed to the hosting of an inquiry which will culminate in a recommendation to the President which will then require further processes to be implemented before a definitive decision;*
- *That the GCB in its wisdom has not sought 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 judgment 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 professionals. It must follow that the investigative acumen and process 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 NDP where there are either unhelpful or unwise…[13]*"*

[25] This must have sent a clear message to Jiba, who must have been aware of the President's response as quoted above long before the judgment was handed down on 23 May 2013 by Dolamo J. That being so, persistence with the premature and or separation of power point, in my view, displays unwillingness on the part of Jiba to concede to anything. She is fully aware that the President had pleaded in the Cape High Court that the matter in that court was premature in the light of the present proceedings. Despite this, she too wanted to suggest that the present proceedings are pre-mature for not allowing inquiry to take place as envisaged in section 12 of the Act or GCB for not instituting a disciplinary inquiry before approaching the court directly for removal or suspension contemplated in section 7 of the Admission of Advocates Act. Persistence in this regard seems to be consistent with Jiba conduct in the handling of cases where she is involved as it would appear later in this judgment.

[26] Coming back to GCB's alleged failure to afford Jiba a fair hearing, it is important to mention that motion proceedings differ from action proceedings or disciplinary proceedings where oral evidence is heard and the opportunity to cross-examine witnesses afforded. With motion proceedings, which are often referred to as application proceedings, evidence is placed before the court in the form of affidavits sworn to by witnesses. The proceedings are commenced by way of a notice of motion accompanied by a founding affidavit setting out facts on which a claim is based, with all the supporting documentation being annexed to the affidavits. Motion proceedings are appropriate when the issue or issues to be resolved is purely a dispute of law and there is no material dispute of fact. One cannot proceed by way of motion proceedings where there is a material dispute of fact. In essence therefore, a party who is sued by way of motion proceedings can only complain if there are material issues which cannot be resolved on affidavits. When that happens, the court is better placed to decide whether there is real

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[13] See Democratic Alliance v President of the Republic of South Africa and Others (17782/15)2016 ZAWCHC66 (23 May 2016) at Para 40

dispute of fact that cannot be resolved on affidavits. In the event of a dispute of fact that cannot be resolved on papers, the court may either dismiss the application; refer specific issues for oral evidence or for trial. The risk is on the party who elected to proceed by way of motion proceedings. In my view, neither of this finds application in the present case.

[27] It is not Jiba's case that there is a dispute of fact. The closest to this is that GCB's case is based on hearsay evidence. There is no merit to this. In any event, even if there was, this court is better placed to decide on which evidence to give a probative value.

[28] I am actually unable to understand Jiba's contention of the alleged failure by GCB to afford her proper hearing. For example, in paragraph 12 of her answering affidavit to these proceedings, she states:

> *"12 I am advised that applications of this nature are sui genesis and that I am required to assist the court in ascertaining the truth. I intend to do so…"*

Having said this, Jiba then indicated that in order to properly place her defence before this court, she will at all times refer to various documents, which she had been able to access through her position as a Deputy National Director, stating that she is fully aware that the grounds upon which GCB relies for the relief sought, arise out of her conduct in her capacity as Acting National Director of Public Prosecutions.

[29] Clearly, Jiba cannot rely on failure to be afforded a proper hearing simply because an inquiry was not followed where oral evidence could be led and cross examination allowed. She had everything at her disposal to deal with the allegations against her and no form of prejudice can be claimed to have occurred. For this, the so called *points in limine* are destined to fail. Before I turn to deal with the complaints raised in respect of each case mentioned in paragraphs 8.2, 8.3 and 8.4 of this judgment, I hereunder give reasons for the order refusing leave to file further answering affidavits.

REASONS FOR THE ORDER REFUSING FOURTH AFFIDAVIT

[30] On 18 August 2015 GCB filed a replying affidavit in these proceedings. Subsequent thereto on 15 September 2015 Jiba filed the fourth affidavit referred to as a supplementary answering affidavit. It is this affidavit which formed the subject of the

leave to file additional affidavit. For two reasons, the fourth affidavit was filed and Jiba states the reasons as follows:

> *"4. …First, in order to supplement any response to the founding affidavit of Adv. Idris Jeremy Muller SC ("ADV Muller") deposed to on behalf of the General Council of the Bar ("the GCB") the applicant in these proceedings, in the light of certain information which has come to hand subsequent to the filing of my answering affidavit. Secondly, in support of the notice of application to which this affidavit is attached, for leave to file supplementary answering affidavit."*

[31] Effectively, the suggestion is that new information came to light post the filing of the answering and replying affidavits respectively. It is in the interest of the administration of justice that well known and well established general rules regarding the number of sets of proper sequence of affidavits in motion proceedings be ordinarily observed. That is not to say that these general rules must always be lightly applied. Some form of flexibility controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must also necessarily be permitted. Where an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the court. He or she must both advance his explanation for why the affidavit it is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the instances of the case, nevertheless be received. Attempted definition of the ambit of discretion is neither not desirable… It is sufficient for the purposes - to say that on any approach to the problem, he inadequately or otherwise of the explanation for the late tendering of the affidavit will always be an important factor of enquiry[14].

[32] The rule of practice that an applicant must generally speaking, stand or fall by his founding papers, is not one cast in stone but has been bent from time to time, because of the existence of a judicial discretion which permits the filing of further affidavits so as to give effect to a solitary practice and fundamental consideration in the administration of justice, that a matter should be adjudicated upon all the facts relevant to the issues in dispute. Despite the cogency of this rule of practice, it has been frequently stated that it does not operate to preclude the introduction of further affidavit when consideration of fairness and justice to both parties dictate that this should be done. The rule remains subject to the discretionary power of the court and mere fact that the matter sought to be

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[14] James Brown v Hamer (Pty) Ltd (Previously named Gilbert Haner & Co Ltd v Simmons No 1963 (4) SA 656 A at 660 D-H

introduced in the new affidavits should properly have been included in the founding affidavit and not in reply, does not negative the existence of that discretionary power[15].

[33] The principle enunciated in the preceding case law, should apply to a respondent who wishes to file further affidavit in response to replying affidavit or new information discovered thereafter. Most importantly, all facts sought to be introduced should be relevant to the issue in dispute. In the present case, relevant facts must speak to the issue whether the first respondent (Jiba) or any of the respondents for that matter, is fit and proper to remain on a roll of advocates. Bearing this in mind, it is important to have regard to the facts which Jiba wanted to introduce in the fourth affidavit.

New information

[34] What Jiba refers to as "new information", is a letter dated 23 July 2013, marked as Annexure NJIA to her "supplementary affidavit". The essence of the letter is articulated by Jiba as follows:

> *"25. As appears from the correspondence it concerns all alleged agreement by NPA to pay through the office of the State Attorney, 75% of the applicant's attorney and client cost of instituting and prosecuting this application. There are also several demands from the applicant's attorneys of record to Mr Matubatuba in the office of the State Attorney to settle the accounts of counsel who are acting on behalf of the GCB in this application.*
>
> *26. As a matter of professional courtesy to the individual counsel involved, the amounts of these accounts referred to in the letter from the applicant's attorney of record dated 30 June 2015, have been blocked out. I also do not attach the copies of these accounts but they can be made available to this Honourable court if necessary. Suffice to state the amounts involved are substantial.*
>
> *27 The content of this correspondence is extremely concerning and I respectfully submit, makes it clear that this application forms part of a direct attempt by certain members in the NPA to remove me for political reasons…*"

[35] The removal from a roll of advocates "for political reasons" appears to be Jiba's theme in introducing the letter in question. This appears from the preceding paragraphs of her affidavit in which she states inter alia:

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[15] Tranvaal Racing club v Jockey Club of South Africa 1958 (3) SA 599 (W); Dawood v Mahamed 1979 (2) SA 361 (D).

> "*7. Adv. Muller was at pains in the founding affidavit expressly to state that notwithstanding the applicant is aware of reports of disputes and political manoeuvring between different factions within and outside the NPA, that this application for the striking off my name from the roll of advocates, is not part of any campaign to remove me from the NPA. I refer the court to paragraph 7.7 of the founding.*"

[36] 'Political manoeuvring' in the quotation above appears to be borrowed words from paragraph 7.8 of the founding affidavit wherein GCB states:

> "*7.8 The GCB is also alive to allegations which have been reported in the media to the effect that some or all of these developments are a manifestation of political manoeuvring by factions or individuals within and outside of the NPA. Beyond what has been reported in the media, the GCB has no knowledge of these allegations or their veracity.*"

[37] So, right at the onset, GCB made it known that it was aware of the allegations of in-fighting within the National Prosecuting Authority and GCB continues in its founding papers by clarifying its position as follows:

"7.9 I mention these matters, because this application may be characterised by some as another facet of the developments which appear to be taking place both within and outside the NPA. It is not, and it should not be viewed as, any such thing. As indicated, the application was indeed prompted by a request from the NPA. Having considered the NPA's request then GCB formed the view that, on the evidence available to it, the respondents' conduct obliged it to act in terms of section 7 (2) of the Admission of Advocates Act and bring these facts to this court's attention, so that the court could consider whether one or more of the respondents is a fit and proper person to continue to practice as an advocate as contemplated in section 7 (1) (d) of the Act. It is for this reason that the GCB resolved to prepare this application."

[38] What is referred to as "new information" should have been viewed in this context by Jiba. Properly considered, there was never a need to seek to introduce the letter of 25 July 2015. It was common cause or put differently, it was not in dispute that there was in-fighting within the NPA. The agreement to pay 75 % of GCB's attorney and client costs in instituting and prosecuting the application has no material relevance to the question whether the complaints forming the subject of the application are established and if so, whether the complaints are of such a nature that they make any of the respondents unfit persons to continue to practice or remain on a roll of advocates.

[39] The statement '*this correspondence and the alleged agreement between the NPA and the GCB and or its attorneys of record, further confirm my suspicions that this forms*

part of a political agenda to remove me from the NPA. I submit that this new information is highly material for the placing of this application by GCB in its proper context', is irrelevant to the factual findings this court has been called upon to pronounce on. The question in the present proceedings is whether any of the complaints made against the respondents, if proved, would make any one of them to cease to be fit and proper persons to remain on a roll of advocates. It is on the basis of this that leave to file further answering affidavit was refused.

[40] However, one could not turn a blind eye on the fact that public funds might have been improperly utilized by paying 75% of GCB's legal costs for having instituted the present proceedings as if it was doing the national prosecuting authority a favour. GCB instituted the present proceedings as is entitled to do so in terms of section 7 of the Admission of Advocates Act. Counsel for GCB was quizzed as to why the agreement and expenditure thereof if any should not be referred to the Audit-General to investigate possible contraventions of Departmental Financial Instruction (DFI) and the provisions of Public Finance Management Act. To this enquiry, the court was assured by Adv. Burger SC on behalf GCB that no cent of public funds was spent or is intended to be spent or recouped by GCB for having instituted the present proceedings based on the alleged agreement with the NPA. Consequently, the intended referral to the Audit-General will not be made. I now turn to deal with the complaints raised as the basis for the present proceedings.

BOOYSEN CASE AND COMPLAINTS AGAINST JIBA IN CONNECTION THERETO

[41] '…Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5) of the Constitution. Allowing such litigation will often place prosecutor between a rock and a hard place. They must, on the one hand, resist preliminary challenges to investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure that prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court deciding the pertinent issues is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard; however. The courts' doors should never be completely closed to litigants… But in ordinary course of events, and where the purpose of the litigation appears merely to be avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interest of all concerned. If that approach is

generally followed the state would be sufficiently constrained from acting unlawfully by the application of section 35(5) and by the possibility of civil and criminal liability'[16].

[42] The office of the National Director of Public Prosecutions is closely related to the functions of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice[17]. Courts are not overly eager to limit or interfere with the legitimate exercise of prosecuting authority. However, a prosecuting authority's discretion is not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised[18].

[43] Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted[19]. Courts do not interfere with the prosecuting authority's bona fide exercise of its discretion because prosecuting authority has the power to decide to prosecute and, once the accused is on trial, he or she will have the fullest opportunity to put his defence to the court, cross-examine prosecution witnesses and to reply on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable based on admissible evidence and prevented in terms of a regular procedure[20]. Courts can intervene where mala fide is alleged, or where it is alleged that the prosecuting authority never applied its mind to the matter or acted from ulterior motive [21]. (My emphasis).

[44] The complaints against Jiba, in her capacity as the then Acting National Director of Public Prosecutions in Booysen case, arose from the exercise of her statutory power to authorise the charging of Major-General Booysen (Booysen) with contravention of section 2(1) (e) and (f) of the Prevention of Organised Crimes Act no.121 of 1998 ("POCA"). A person shall only be charged with committing an offence contemplated in subsection (1) of section 2 POCA if prosecution thereof is authorised in writing by the National Director[22]. Any person who whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such

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[16] Thint (Pty) Ltd v National Director of Public Prosecution & Others 2009 (1) SA 1 CC para 64.

[17] Democratic Alliance V President of the Republic of South Africa & Others 2013(1) SA 248 (CC) at [26]

[18] Minister of Police & Another V Du Plessis 2014 (1) SACR 217 (SCA) at [31]

[19] S v F 1989 (1) SA 460 (ZH), S v Bester 1971 (4) SA 281(T)

[20] Commentary on the Criminal Procedure Act by Du Tiot, De Jager, Paizes, Skeen and Van Der Merwe at 1-29.

[21] Mitchell V Attorney-General, Natal 1992 (2) SACR 68 (N)

[22] Section 2(4) of POCA

enterprise's affairs through a pattern of racketeering activity, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participated in the conduct, directly or indirectly, of such enterprise affairs through a pattern of racketeering activities shall be guilty of an offence[23].

[45] On 18 August 2012 Jiba, Acting as a National Director of Public Prosecutions, issued written authorisation to have Booysen charged with contraventions of section 2(1) (e) and (f) referred to in paragraph 44 above. Booysen successfully challenged the authorisation in Kwa-Zulu Natal Division before Govern J. In his replying affidavit, before Govern J, Booysen stated that Jiba was: *"mendacious" when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the 'docket' before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision".*

[46] What is quoted above is the gist of the complaint against Jiba in the handling of Booysen case. In its founding papers, GCB articulates the conduct complained of as follows:

> "*On the evidence of her conduct in the Booysen matter as (with respect, correctly) described by Govern J in this judgment, Jiba signally failed to comply with the NPA's Code of Conduct. More pertinent to this application, the statements made by Jiba under oath is seeking to justify her decision to issue the POCA authorisations, were evidently untruthful. As such her conduct indicates that she is not a fit and proper person to practice as an advocate*."

[47] These averments seem to be based on the finding by Govern J which inter alia, included:

> *"[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets. [Jiba] says that they are all statements made under oath. [Jiba] says in addition that they implicate Mr Booysen in one or more of the offences in question*".

[48] Then in paragraphs 31 and 34 of his judgment, Govern J made adverse remarks against Jiba as follows:

> *"[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows: two of the annexures are sworn statements made under the name of one Colonel Aiyer. They are annexures NJ2 and NJ4 respectively. Mr Booysen*

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[23] Paragraph (e) and (f) of the section 2(1) of POCA.

described these statements which concern 'office politics and submit that they in no way implicate him in any of the offences with which he has been charged. The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The documents referred to as a statement by Mr Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it could be attributed to the named person and even if it was sworn statement as claimed by the NDPP, the contents do not cover the period clearly in the indictment except for one event which does not relate to Mr Booysen…

[34] Mr Booyen was clearly within his rights to deal with in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, 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 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 by the NDPP by way of a request or application to deliver further affidavit. In response to Mr Booysen's assertion mendacity on her part, there is deafening silence. In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her own version, the NDPP did not have before her annexures 4 at the time. In addition it is clear that annexure NJ3 is not a sworn statement. Most significantly the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offence in question…"

[49] Before dealing with information placed before Jiba for written authorisation in terms of section 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Govern J were based on correct evaluation and understanding of Jiba's answering affidavit. The challenge or invitation by Booysen to Jiba, was contained in the replying affidavit and at the risk of prolonging this judgment, I repeat the contents thereof in part:

"…She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision."

[50] The invitation was made after having made allegations of 'mendacity' in the same paragraph with reference to paragraph 21 of Jiba's answering affidavit in Booyesen matter and because of the relevance thereto, paragraphs 16.6, 16.7 and 17 of Jiba's answering affidavit in that case are repeated hereunder:

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

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

17. Particular reference is made in this regard to the statement made by Colonel Rajendran Sanjeevi, Mr Aris Danikas and Mr Ndlondlo from which it is apparent that the applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on You-Tube. I annex copies of these statements as NJ2, NJ3, NJ4 and NJ5, respectively."

[51] Having regard to what is quoted above, it does not seem the statement: *"Jiba says that they are all statements made under oath",* is correct. Nowhere in Jiba's answering affidavit did she make such a statement, neither did she say any of annexures, NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information were made only in paragraphs 16 and 16.6 of the answering affidavit without suggesting that all of the annexures referred to in paragraph 17 of the answering affidavit in Booysen matter were made under oath. Therefore the statement: '*The documents referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement'*, as stated in paragraph 31 of Govern J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred particularly reading in the context of paragraph 16.7 of her answering affidavit in Booysen case quoted in paragraph 50 above.

[52] The fact that Jiba did not avail herself to the invitation to deal with the allegation of being "mendacious", meaning "not telling the truth", should also be seen in context. The allegation was made in the replying affidavit. This too, Govern J was mindful of. For the purpose of these proceedings, the criticism by Govern J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen has raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that supplementary affidavit would be filed to explain the criticism against Jiba with regards to the annexures. On 19 August 2013 an email by Adv Mosing of NPA was sent to Adv Chauke Director of Public Prosecutions Johannesburg, enquiring what progress had been made with regard to filing of further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv. Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of "mendacious" made by Booysen. By seeking to file further affidavit to explain the annexures after the replying affidavit was filed, is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement: '*Despite this, the invitation by 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 ascertain of mendacity on her part, there is a deafening silence*', made by Govern J in paragraph 34 of his judgment ought to be seen in the context of what is explained in paragraph 53 above.

[55] Similarly, the statement that *'as regards the inaccuracies, the NDPP referring to Jiba), is after all an officer of the court, she must be taken to know how important it is to ensure that her affidavit is entirely accurate…'*, should be seen in the context of what is stated in paragraph 53, but even most importantly, in the context of her explanation now offered in the present proceedings.

[56] On 17 August 2012 Jiba approved the application for authorisation in terms of section 2(4) of POCA for contravention by Booysen of section 2(1)(e) and (f) of POCA. The provisions of section 2(1) (e) and (f) were referred to in paragraph 44 of this judgment. The information and advice that was placed before Jiba for the purpose of granting or refusing authorisation was prepared and compiled by Adv. Raymond K Mthenjwa and Adv. Gladstone Sello Maema, both deputy directors of public prosecutions, Adv Anthony Mosing, a senior deputy director of public prosecutions and the head of the special Projects Division, who acted as the liaison between Jiba and the prosecuting team.

[57] At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and

she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo and Annexure 6 being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booysen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Danikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booysen.. The drafted statement of Danikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booysen. Danikas was a police reservist in the Durban Organised Crime Unit based in Carto Manor and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Maema asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual legal assistance legislation, that is, sections 2 and 3 of International Cooperation in Criminal Matters Act 75 of 1996 be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolise Ntasana) at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was however intended to corroborate the evidence in possession of the prosecution team that Booysen was involved in the various activities giving rise to the charges against him of similar facts evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement, *'the document referred to as a statement by Mr Danikas annexure NJ3… is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was sworn statement as claimed by the NDPP the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen'*, as stated by Govern J ought to be seen in the context of the explanation given by Jiba in these proceedings and the fact that Jiba never said annexure NJ3 was a sworn statement as stated earlier in this judgment. I need to caution. I should not be

understood as seeking to review or upset Govern J's judgment. At the time, he did not have Jiba's responses as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the authorisation was made, the explanation by Jiba in these proceedings is as follows:

> *"217. There were also two statements by Colonel Aiger (reference to as Annexure NJ2 and NJ4). One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interferences in the activities of a section of Durban Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Aiger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Aiger at the consultation."*

[61] Therefore the statement: '*The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April 2012, some two weeks after the first impugned decision was taken',* in paragraph 31 of Govern J's judgment, inasmuch as GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of explanation quoted in paragraph 60 above. I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislature framework, what was placed before Jiba and the core function of the prosecuting authority is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (2) of section 2 of the Act notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair[24]. This should be seen in the context of the Preamble under POCA which inter alia, reads:

> *"AND BEARING IN MIND that <u>it is usually very difficult to prove the direct involvement of organised crime leaders in particular case</u>, because they do not perform the actual criminal activities themselves, <u>it is necessary to criminalise the management of and related conduct in connection with enterprises which are involved in the pattern of racketeering activity.</u>*

[24] See section 2 (2) of POCA

AND WHEREBY THE SOUTH AFRICAN common law and statutory law fail to deal effectively with organised crimes … criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime … and criminal gang activities.

AND WHEREAS pervasive presence of criminal gangs in many communities is harmful to well-being of these communities, it is necessary to criminalise participation in or promotion of criminal activities."

[63] In my view the provisions of section 2(1) (e) and (f) referred to in paragraph 44 of this judgment are meant for the criminalisation of such activities. The point I am making is this: Courts for the purpose of an exercise of its discretion in terms of section 2(2) referred to in paragraph [62] of this judgment, may rely on hearsay evidence, information and or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jiba in Booysen's case) be entitled to rely on hearsay and similar facts evidence for the purpose of authorisation as contemplated in subsection (4) of section 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities and resultantly pose harm to the well-being of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue however is whether in granting authorisation in terms of section 2(4), Jiba was mala fide or had ulterior motive, in which event, the requirements of "*fit and proper person*" to remain on a roll of Advocates becomes relevant. For this purpose, further provisions of POCA are necessary to consider, also taking into account offences under section 2(1) (e) and (f).

[65] 'Pattern of racketeering activity' means 'the planned, on-going, continues or repeated participation or involvement in any offence referred to in Schedule 1 and included at least two offences referred to in Schedule 1'. On the other hand, "enterprise" 'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'[25].

[66] The essence of the information before Jiba, can be summed up as follows: In addition to what is stated in paragraphs 56, 57 and 60 of this judgment, Booysen was the head of Carto Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of serious nature including murders against suspects who were sometimes

[25] See definition under Section 1 of POCA

framed in the commission of offences. Booysen knew, approved and or ought to have known of the commission of these offences. In reward to the members' unlawful activities, Booysen motivated for incentive of R10 000.00 for each of the 26 members of the Carto Manor Crime Unit including Booysen himself. Booysen was also commended for outstanding services rendered in that he 'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.

[67] I cannot find any mala fides and or ulterior motive in the authorisation by Jiba as contemplated in POCA. POCA is like a cry out loud for declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority in the exercise of their legislative power to investigate through members of their Investigating Directorate and under the watchful eye of a special director so appointed to prosecute without fear, favour and prejudice those implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede on this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of Section 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[68] You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution. It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba.

SPY TAPES CASE

[69] The listening of telephone conversation recorded on tapes between Bulelani Nqcuka, the then National Director of Public Prosecutions and Mr McCarthy, the then Director of Public Persecutions for Durban and withdrawal on 1 April 2009 of several of criminal charges against Mr Jacob Zuma, (currently the President of the Republic of South Africa), became to be known in South Africa as a "Spy tape case." It was a case instituted by Democratic Alliance Party against the National Prosecuting Authority in terms of which the latter's decision to withdraw several charges against Mr Zuma was

challenged. It is the handling of that case by Jiba in her capacity as the then Acting National Director of Public Prosecutions which forms the basis of the application and dispute in these proceedings. The case in question is also referred to in these proceedings as a "Spy tapes case."

[71] On 6 April 2009, the then acting National Director of Public Prosecutions, Adv. Mokotedi Mpshe, after having listened to the conversation aforesaid recorded on tape publicly announced the withdrawal of corruption and other several related charges against Mr Zuma.

[72] During April 2009 and subsequent to the withdrawal of the charges, the Democratic Alliance (DA), a registered political party and official opposition in South African national parliament instituted review proceedings in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision to discontinue the prosecution against Mr Zuma and declaring the decision to be inconsistent with the Constitution of the Republic of South Africa. DA further required Mr Zuma and NPA to deliver to the registrar of the High Court, in terms of rule 53(1) of the Uniform Rules, the record on which the impugned decision was based, which included representations made by Mr Zuma for the withdrawal of the charges. The prosecuting authority, as the decision maker refused to deliver the record contending that the record contained the said representations which had been made on confidential and without prejudice basis. It was further pointed out that Mr Zuma had declined to waive the conditions under which he had submitted his representations. Lastly, it was contended that the decision by the national prosecuting authority to discontinue a prosecution was not reviewable.

[73] In terms of Rule 53 (1) of the Uniform Rules,

> *"…all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-*
>
> *(a) Calling upon such person to show cause why such decision or proceedings should not be reviewed; and corrected or set aside and*
>
> *(b) Calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch within fifteen days after receipt of the notice of motion to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he has done so."*

[74] Jiba as acting National Director of Public Prosecutions at the time or her predecessor failed to despatch the record of the decision. This led to an application to compel in the high court Pretoria before Ranchod J. DA failed in its application to compel. However, on 20 March 2012 the SCA on appeal by DA, made an order of relevance, as follows:

> "*1.3 In the Rule 6(11) application, the first respondent (referring to NDPP) is directed to produce and lodge with the Registrar of this court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent (referring to Mr Zuma) and any consequence memorandum or report prepared in response thereto oral representations if the production thereof would breach any confidentiality attaching to representations (the reduced record). The record shall consist of the documents and materials relevance to the review, including the documents when making the decision and any documents informing such decision."(My emphasis).*

[75] The order was not complied with. Instead, on 12 April 2012 the state attorney on behalf of NPA headed by Jiba at the time wrote to DA's attorneys two days after the expiry of the 14 days set by the SCA and indicated that they were in the process of preparing copies of the reduced record as indicated in the order of the SCA, that a list of documents was supplied, which it was alleged, constituted the reduced record and that the list was not in breach of the confidentiality. Then in paragraphs 4 and 5 of the letter, it was recorded:

> "*4. Other material considered by the Acting NDPP at the time is subject to the confidentiality obligation and therefore cannot be discovered, unless it may transpire that Mr Zuma's team may at a later stage be willing to consent to a relaxation of the confidentiality in respect of particular documents or particular contents, in which event we will advise you accordingly.*
>
> *5. There are in addition certain tape recordings which are in the process of being transcribed, but that process has not been completed as yet, and will take some additional time. On completion thereof, we are obliged to give an opportunity to Mr Zuma's legal team to consider whether there is any objection to disclosure of such transcripts. On completion of that process, if there is no objection to disclosure, they will be made available as a supplement to the record."*

[76] During May 2012 the State Attorney supplied certain documents to DA's attorneys. On 9 May 2012 State Attorney then wrote again to DA's attorneys and informed them that Mr Zuma's legal representatives required a period of two to three

weeks to consider the tape transcripts, but that they were not consenting to the release thereof pending further consultation with their client.

[77] The delay in not fully complying with the order quoted in paragraph 74 above led to DA approaching this court for an order, inter alia, directing that the record be produced and lodged with the Registrar of this court in terms of the SCA order which should include a copy of electronic recording and a transcript thereof as referred to by the Acting NDPP in the announcement of his decision of 6 April 2009, internal memoranda, reports, minutes of meetings dealing with the contents of the recording and or transcripts itself, insofar as these documents do not directly refer to written or oral representations. In addition, the DA sought an order that Jiba be held in contempt of the order of the SCA referred to in paragraph 74 above.

[78] The application was heard before Mathopo J who made an order in favour of the DA except for the contempt of the court relief. Mr Zuma appealed to SCA against Mathopo J's order. The latter's order inter alia, read:

> *"1. The First Respondent is directed to comply with the order of the Supreme Court of appeal in case no: 288/2011 dated 20 March 2012 ("the SCA order"), within five days of the date of this order.*
>
> *2. The record to be produced and lodged by the First Respondent with the Registrar of this court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the first respondent in the announcement of the first respondent's decision of 6 April 2009 as well as any internal memorandum, reports or minutes of meetings dealing with and or transcript itself, insofar as the SCA documents do not serve to breach the confidentiality of the thereof of respondents' written or oral representations*."

[79] On appeal to the SCA, its order of 20 March 2012 and that of Mathopo J were varied by additions as follows:

> *"1. …*
>
> *2. …*
>
> *3. With regard to memoranda, minutes and notes of meetings, referred to by the first respondent in paragraph 26 of her answering affidavit (the internal documentation):*
>
> *3.1 Within five days of this order, the first respondent shall cause to be delivered to the Honourable Mr Justice NV Hurt (Justice Hurt) copies of the internal documentation;*

3.2 On the copy of each document forming part of the internal documentation, Justice Hurt shall mark or order that part of the document which he considers the reveal the contents of third respondent's written or oral representations(the representations) to first respondent;

3.3 The exercise referred to in paragraph 3.2 above shall be performed in accordance with any directives with any directives which the Honourable Justice Hurt may prescribe in order to fulfil his mandate;

3.4 The ruling of Justice Hurt shall be final and binding on the parties; and

3.5 Should Justice Hurt, for whatever reason, be unable to commence or complete the exercise referred to in this paragraph, the applicant and the third respondent shall attempt to reach agreement on another independent and impartial person to replace him and, if no agreement can be reached within five days of Justice Hurt becoming unavailable, then the chairperson of the General Council of the Bar of South Africa shall be requested to appoint such."

[80] Additions to the order were apparently initiated by the parties. It is the conduct of Jiba complained of in not complying with the order of 20 March 2012 and adverse remarks made by the Supreme Court of Appeal that GCB approached this court seeking the order to remove Jiba from a roll of Advocates. GCB having referred to specific paragraphs in the SCA's judgment, to which I refer later in this judgment, concluded in paragraph 17 of its founding affidavit as follows:

"*17. In my submissions these observations by the SCA were, with respect, warranted and Jiba's conduct in the Zuma matter falls well short of the conduct required of an advocate of this Honourable Court and as contained in the Code of Conduct for members of the NPA. She did not assist the court at arriving at a just verdict, and she did not perform her duties as Acting NDPP fearlessly and vigorously in accordance with the highest standard of the legal profession; as the Code of Conduct requires. Moreover, the answering affidavit deposed to by her, and the attitude she evinced towards the High Court and the SCA, was less than objective, honest and sincere."*

[81] Jiba in her answering affidavit to these proceedings correctly in my view articulated the essence of the complaints attributable to her in the Spy Tapes case as follows*:*

"241. The complaints against me in relation to the Democratic Alliance matter are as follows:

241.1 That I adopted a supine attitude to the SCA's directive;

241.2 That in my answering affidavit (in the contempt application) I did not adopt a position to the confidentially of the tapes or the transcripts but "resorted to a metaphorically shrugging of the shoulders"

241.3 That the SCA referred to my approach in the answering affidavit, in not taking a stance on the confidentiality of the material sought, as disingenuous;

241.4 That I did not take an independent view about confidentiality in the face of the order of the SCA, and that this conduct is not worthy of the office of the NDPP;

241.5 That I did not assist the court at arriving at a just verdict, and my attitude was less than objective".

[82] Very often when adverse remarks are made in legal proceedings, the person against whom the remarks are made is not given the opportunity to state his or her case to the impeding adverse remarks. It is for this reason that courts do not easily make adverse remarks. This is one of those cases. However, as I deal with each of the complaints levelled against Jiba in the "Spy Tapes case", I will also refer to her responses thereto and this will happen unfortunately at the risk of prolonging this judgment but, it is necessary to do so. Courts are of course willing to reconsider adverse remarks afresh given the responses by the person against whom they were made.

Supine attitude

[83] "Supine" is an English word which according to South African Concise Oxford Dictionary means "lying face upwards- with the palm of the hand upwards"- "failing to act as a result of moral weakness or indolence"- n. Latin verbal noun "used only in the accusative and ablative case, especially to denote purpose."

[84] The context in which Navsa ADP (as he then was) used the word might give relevance to the usage of words "supine attitude." During May 2012, DA's attorneys having received certain documents which did not include transcripts of tape recordings which were used as the basis of the withdrawal of the charges against Mr Zuma. At the end of June 2012 DA having not been satisfied with the documents provided and the response to the outstanding information from Jiba, wrote to the State Attorney and recorded:

"5. A copy of the transcript of the recordings ('the transcript") has not been furnished. The transcript itself and any consequent memorandum or report prepared in response thereto, are not covered by the limitation to the production of the record as per the order of the SCA for the following reasons:

5.1 Firstly, the recordings and\or the transcript could not possibly have been given in confidence to the first respondent because he quoted extensively from these recordings when announcing his decision to discontinue the prosecution of the Third Respondent on 6 April 2009.

5.2 Secondly, the limitation in the SCA order only relates to 'the written representations made on behalf of the Third Respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The recordings and\or the transcript are neither written, nor oral representation nor memorandum or report prepared in response thereto.

5.3 Thirdly, the limitation in the SCA order does not cover memoranda or reports prepared in response to oral representations bur merely in response to the written representations.

5.4 Fourthly, to the extent that internal NPA memoranda, report or minutes of meetings deal with the contents of the recordings and\or the transcript itself, as opposed to Third respondent's written or oral representations in respect thereof, they are not covered by the limitation in the SCA's order and should be produced. In other words in the internal debate regarding the effect of what is revealed in the recordings on the decision on whether or not to discontinue the prosecution, is not covered by the limitation to the extent that such debate does not refer to the representations themselves.

6. It is inconceivable there are no internal NPA memoranda reports or minutes of meeting dealing with the contents of the recordings and\or the transcript itself. We accordingly call on you to produce these documents, as well as the recordings and the transcripts themselves forthwith, failing which our client will take all the necessary steps to compel compliance with the order of the SCA. Naturally, costs will be sought against your client as well."

[85] Then in its judgment handed down on 20 August 2014, the SCA stated:

"[15] The exhortation in the last paragraph of the letter, set out at the end of the preceding paragraph yielded no results. It is common cause that during telephone discussions in July 2012 between specific State Attorney and DA's legal representative, the former had indicated

that the blame for the delay was attributable to Mr Zuma's attorneys. The NDPP itself adopted a supine attitude."

[86] Jiba in dealing with this criticism has now in these proceedings responded as follows:

"242. As the applicant points out, the Democratic Alliance matter arose from a decision of the then national Director of Public Prosecutions, Mr Mokotedi Mpshe ("Mr Mpshe"), to discontinue the criminal prosecution of President Zuma. The applicant's complaint goes to my response to the directive of the SCA of 20 March 2012. More particularly the applicant's complaint goes to my interpretation of the SCA's directive. I point out that at all times during the Democratic Alliance matter I was again represented by a team of experienced counsel, namely advocates P Kennedy SC and NH Maenetje (whom I am advised has subsequently taken silk) ("the Kennedy team").

243. The SCA directive is set out in paragraph 16.2 of the founding affidavit. As appears from the directive the record of decision (of the former National Director of Public Prosecutions) which I was required to produce, was to "exclude the written representations made on behalf of Mr Zuma and any consequent memorandum or report prepared in response thereto, or oral representations, if the production thereof would breach any confidentiality attaching to the representations".

244. As a result of the tape recordings which were in the process of being transcribed, the directive was not complied with within the stipulated 14 days. As the bulk of the representations, which were to be excluded from the reduced record, concerned the tape recordings, I was concerned that the content of these could potentially breach confidentiality relating to the representations. For that reason, and in order not to fall foul of the SCA directive, the decision was taken, on the advice of senior counsel representing me, to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tape recordings.

245. The applicant in the Democratic Alliance matter, the Democratic Alliance ("the DA") then brought an application to compel me to produce the record and for an order that I be held in contempt of court, as appears from the decision of Mathopo J, before whom the application was argued, a copy of which is attached hereto, marked "NJ21", the Democratic Alliance matter concerns the interpretation of the SCA's directive.

246. As appears further from paragraph 13 of the decision of Mathopo J, I abided the decision of the Court as regards the production of the transcripts. Although the Judge held that the proper construction of the SCA order confidentiality did not extend to the transcript (at paragraph 27), the court agreed that affording Mr Zuma an opportunity

to raise his concerns was in line with the SCA order, and I was therefore not found to be in contempt of court (at paragraph 50).

247. I draw to this Honourable Court's attention that at paragraph 32 of decision of Mathopo J, the learned Judge criticised me for adopting a neutral position with regard to the transcripts.

248. On appeal, (at the instance of Mr Zuma) the SCA similarly criticised me for adopting what is referred to as 'a supine attitude" to its directive. Indeed this is the basis of the applicant's complaint against me in this application. ...

249. I accept that the SCA has criticised me for not taking an "independent view" about confidentiality. I respectfully submit that this was a result of adopting a cautious approach, in order to ensure that I did not unwittingly infringe on the rights of either of the parties in the Democratic Alliance matter. I respectfully submit that this does not amount to conduct that this is less than objective, honest and sincere and does not render me not 'fit and proper to practice as an advocate."

[87] Indeed the interpretation of the order of the SCA, the relevant part of which is quoted in paragraph 74 of this judgment, did not appear to have been an easy exercise. Its correct interpretation appears to have prompted the DA to widen and clarify it, so did Mathopo J and the SCA as per Navsa ADP. I say so for the following reasons:

87.1 DA in its application before Mathopo J sought relief in addition, as paraphrased in paragraph 77 supra and by so doing sought to widen and clarify SCA 's directive of 20 March 2012.

87.2 Mathopo J also had to deal with DA's application for contempt of court, and in finding that no case has been made for contempt of court against Jiba, in paragraph 50 of his judgment, stated:

"[50] The submissions advanced on behalf of the first respondent is that the delay if any, was occasioned by the third respondent's legal representative in considering whether to object to the transcript or not. Thus no fault could be attributed to the State attorney or first respondent because in terms of the SCA's order, the first respondent was obliged to afford the third respondent, an opportunity to indicate whether he has any objection or not. I agree with first respondent that affording the third respondent an opportunity to raise his concerns was in line with the SCA's order. This conduct in my view cannot be regarded as deliberate or wilful non-compliance with the order, it follows that the contempt of court application must be dismissed". (My emphasis).

[88] The finding by Mathopo J as indicated above seems to be in line with what was stated in the Democratic Alliance v The Acting National Director of Public Prosecutions and Others[26] wherein it was said:

> *"[33] There was a debate before us about what the value would be to the reviewing court of a reduced record, namely, a record without Mr Zuma's representations. Concern was also expressed on behalf of Mr Zuma that there might be material in the record of decision which might adversely affect his rights and to which he might rightly object. The concern was met by an undertaking on behalf of the first respondent that, in the event of this court altering the decision of the court below, so as to order the production of the record of the decision sought to be reviewed, the NDPP 's office would inform Mr Zuma of its contents. Questions involving the extent of the record of the decision and its value to the court hearing the review application are speculative and premature. In the event of the order compelling production of record, the office of NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma".*

[89] That being the understanding of Mathopo J and undertaking given in the SCA as quoted in paragraphs 82.2 and 88 of this judgment respectively, the interpretation of the order of 20 March 2012 by the SCA has context as understood by Jiba and articulated in her answering affidavit quoted in paragraph 86 above.

[90] The additional order of the SCA quoted in paragraph 79 of this judgment, in my view, indicates how difficult it was to implement the order of 20 May 2012 without clarification and additions. Seeing this in context, Mathopo J was perhaps right in his conclusion in paragraph 50 of his judgment which conclusion has not been challenged or questioned.

[91] "Supine attitude" must therefore be seen in the context of the preceding paragraphs. Failure by Jiba not to respond to the articulation in the letter of 6 June 2012 from DA attorneys referred to in paragraph 84 of this judgment seems to have been dictated by two things: First, the delay by Mr Zuma's attorneys, an explanation which was accepted by Mathopo J as indicated in paragraph [50] of his judgment. Second, by Jiba's understanding of paragraph 2 of the order of 20 March 2012 which understanding was also shared by Mathopo J. The real question ultimately is whether her conduct was

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[26] 2012(3) SA 486 (SCA) at para 33

of such a nature that she had ceased to be a fit and proper person to remain on a roll of advocates. In the absence of mala fides and or ulterior motive on her part, I am unable to find against her on the "Supine attitude" complaint. I now turn to deal with other remarks made against her in the Spy tapes case.

Metaphorical shrugging of shoulders

[92] The word "shrugging" is described in the Oxford dictionary as 'raising one's shoulders slightly and momentarily to express doubt, ignorance, or indifference'. The context in which Navsa ADP used the words is important. I can do no better than giving the context by quoting what was said in paragraph 17 of the SCA judgment handed down on 28 August 2014:

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

> *'The notion of an accused making representations to the First Respondent "in confidence", which representations then lead to the discontinuation of a prosecution, is already absurd. For the time being, the Applicant has elected to live with that absurdity. But the Applicant cannot accept and will not allow the NDPP to conceal the foundation of the decision, i.e. the recordings and the internal debate regarding them."*

[93] Then in paragraph 18, Navsa ADP mentioned the 'metaphorical shrugging of shoulders" as follows:

"It is important to note that the ANDPP's answering affidavit does not adopt a position in relation to the confidentiality of the tapes or transcripts. <u>It resorts to a metaphorical shrugging of the shoulders</u>, and

places the reason for its non-compliance with the order of this court in the first appeal at the door of Mr Zuma's legal representatives, submitting that the present dispute was due to them not being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts. The NDPP's office assumes the position that the lack of consent to the release of the tapes or transcripts was sufficient to forestall compliance with the order in the first appeal."

[94] What is quoted in paragraph 86 as a response to the criticism levelled against Jiba, in my view, serves also as a response to the "metaphorical shrugging of shoulders." The delay or forestalling of compliance with the SCA order of the 20 March 2012 should similarly be seen in the context of what I said with regards to the "supine attitude", particularly now seen in the light of Jiba's responses as quoted in paragraph 86 above. What Mathopo J said in paragraph 50 of his judgment is equally important. The explanation for the delay was accepted, but even most importantly, it was also the understanding of Mathopo J that in terms of the SCA order of 20 March 2012, Mr Zuma or his attorneys were to be contacted before making the tapes and the transcript available to DA. The submission made on behalf of Mr Zuma as articulated in the SCA judgment of 28 August 2014 in my view, is also relevant to Jiba's reason for taking the position as she did. Navsa ADP referred to the submission in his judgment as follows:

"In the high court, even though Mr Zuma had not filed an answering affidavit, counsel on his behalf submited that confidentiality, as envisaged in this court's order in the first appeal, extended to everything comprising representations made on Mr Zuma's behalf. It was contended that since the office of the NDPP did not itself take steps to obtain the recordings, but accessed them through the efforts of Mr Zuma, separating them from the representation would be illogical and irrational"[27].

94.1 It could not have been easy for Jiba to deal with the issue of confidentiality seen in the light of stance articulated by Mr Zuma's attorneys. Considering Jiba's responses in these proceedings to the adverse remarks made against her, I am unable to find that her stance to abide by the decision of the court in the proceedings before Mathopo J was "metaphorical shrugging of shoulders" and neither can I find mala fides on her part or that she was motivated by ulterior motive. I now turn to deal with the other complaints levelled against Jiba.

'Disingenuous, not worthy of office of NDPP, less objective and loath to take independent view'

[27] 2014(4) ALL SA 35 SCA at para 22

[95] The words are randomly taken from the judgment of the SCA wherein Navsa ADP inter alia, stated:

> *"[41] One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in the 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 NDPP, Ms Jiba, provided an opposing affidavit in tenderised 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 institution such as 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 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 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 citizenry of this country".*

[96] Whilst these remarks were made in passing, but considered together with what was stated in paragraph 93 above, they serve as an indictment on Jiba. However, the criticism must be seen in the context of what has already been said in the preceding paragraphs. Again, the responses to the criticisms require this court to reconsider the remarks and in particular whether Jiba has ceased to be a fit and proper person to remain on a roll of advocates. 'Freedom Under Law' referred to in the quotation above in reference to Mdluli case and I deal later hereunder with the conduct of Jiba, Mrwebi and Mzinyathi in that case.

[97] As regards the hearsay information and failure to file confirmatory affidavit, Jiba of relevance, explains in paragraph 248 of her answering affidavit to the present proceedings as follows:

> *"…Navsa JA also criticised me, at paragraph 26 of his judgment, for referring to what I had been told by her Mpshe and not filing a confirmatory affidavit by him. With respect, a confirmatory affidavit was indeed filed by Mr Mpshe, and I attach a copy of it hereto marked "NJZ2". Although I cannot find a copy with a date stamp, it will be observed that this affidavit was signed by Mpshe and commissioned by Warrant officer Seleka in Sinoville Police Station on 3 April 2013, which was three months before the hearing of the matter before Mathopo J on 24 July 2013. It seems that this must have erroneously been omitted from the record of*

appeal to the SCA. I have no explanation for why this was the case as I took no part in the appeal nor was I responsible for the filing of the documents."

[98] I have already dealt with failure to take an independent view on confidentiality in the face of the order of the SCA. Jiba, DA and Mathopo J in my view, sought to interpret the order of 20 March 2012. I am unable to find that Jiba's failure to take an independent view with the benefit of her responses in these proceedings can be seen as unworthy conduct to justify removal from the roll of advocates or suspension therefrom.

[99] By the time the matter was heard before Mathopo J, Mr Zuma's attorneys had already indicated what Mr Zuma's stance was, which is more accurately stated by Navsa ADP in paragraph 22 of his judgment quoted in paragraph 94 above. His failure to put Mr Zuma's attorneys on terms should also be seen in context, more so Jiba's replies to the complaint levelled against her in this regard. As she says, she did not want to 'fall foul of the SCA directive' and 'the decision was taken on the advice of a senior counsel' representing her, 'to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tapes recordings'.[28] I therefore find that no case has been established with regard to the Spy tapes matter. But that cannot be said with regard to Mdluli case (Freedom Under Law case) to which I now turn to consider.

MDLULI CASE (FUL)

[100] Freedom Under Law (FUL) instituted review proceedings against the National Director of Public Prosecutions and others in terms of which FUL wanted the court (as per Murphy J) to review and set aside, inter alia, a decision of Mrwebi to discontinue the prosecution of Lt General Richard Mdluli (Mdluli) on corruption and fraud charges.

[101] Who is Mr Richard Mdluli? He was adequately profiled by Brand JA in his judgment handed down on 17 April 2014[29]. I can do no better than to paraphrase what was articulated by Brand JA: From about 1996 until 1998 one Mr Tefo Ramogibe (the deceased) and Mdluli were both involved in a relationship with Ms Tshidi Buthelezi (Buthelezi). The deceased and Buthelezi were secretly married during 1998. Mdluli was upset about this and addressed the issue on numerous occasions with Buthelezi, the deceased and members of their respective families. At that time Mdluli held the rank of

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[28] See the quotation in paragraph 85above (in particular 244 of answering affidavit).

[29] National Director of Public prosecutions and other V freedom Under Law 2014 (4) SA 298 SCA

senior superintendent and the position of the detective branch commander at the Vosloorus police station. Since 1 July 2009 Mdluli held the position of National Divisional Commissioner in the Police Services (SAPS), a position also described as head of Crime Intelligence Unit and at that time he assumed the rank of Lieutenant General.

[102] On 31 March 2011 Mdluli was arrested and charged with 18 criminal charges including the murder of the deceased. Many of these charges rested on allegations by relatives and friends of the deceased, Buthelezi and other persons associated with Mdluli including policemen under his command. The further allegations were that Mdluli brought pressure to bear upon these people through violence, assaults, threats and kidnapping and in one instance rape, with the view to compelling their co-operation in securing the termination of the relationship between the deceased and Buthelezi. On one occasion, Mdluli had allegedly taken the mother of the deceased to the Vooslorus police station where she found the deceased injured and bleeding. In the presence of the deceased's mother, Mdluli warned the deceased to stay away from Buthelezi. The deceased was killed few days thereafter: It is important to mention that the murder and other charges never proceeded to trial. Much of the original docket and certain exhibits were lost or disappeared. Information about discontinued investigation resurfaced after Mdluli was appointed the head of Crime Intelligence in 2009.

[103] On 8 May 2011 Mdluli was suspended from office and disciplinary proceedings were instituted against him. After Mdluli's arrest and his suspension from office some members of crime Intelligence Unit came forward with information concerning alleged crimes committed by some of its members, including Mdluli. As a result of further information, instruction was given to investigate those allegations. Upon investigations, warrant for Mdluli's arrest on charges of fraud and corruption was authorised and executed on 20 September 2011.

[104] Fraud and corruption charges emanated from the alleged unlawful utilisation of funds held in the Secret Services account created in terms of the Secret Services Act no. 56 of 1978 for the private benefit of Mdluli and his wife. It was alleged that one of Mdluli's subordinates purchased two motor vehicles ostensibly for use by the Secret Services but structured the transactions in such a manner that a discount of R90 000.00 that should have been credited to the Secret Services account was utilised for Mdluli's benefit. Further allegations were that the two motor vehicles were registered in the name of Mdluli's wife and appropriated and used by the two of them exclusively.

[105] On 3 November 2011 Mdluli wrote a letter to the President of the Republic of South Africa, Honourable Mr Jacob Zuma, the Minister of Safety and Security and to the Commissioner of Police stating that the charges against him were the result of conspiracy among senior officers including the then Commissioner of Police, General Bheki Cele who suspended Mdluli and head of the Hawks, General Anwar Dramat. In the letter it was further stated by Mdluli:

> *"…In the event that I come back to work, I will assist the President to succeed next year.*"

[106] "Next year", was reference to African National Congress (ANC) elective conference in Mangaung which was to take place towards the end of 2012. The allegations of conspiracy led to the appointment by the Minister of Safety and Security of a task team which later reported that there was no evidence of a conspiracy and that the police officers who had accused Mdluli of criminal conduct had not acted in bad faith. On 17 November 2011 Mdluli's legal representatives made representations to Mrwebi in his capacity as Special Director of Public Prosecutions and Head of Investigating Directorate, seeking the withdrawal of the fraud and corruption charges. The representations repeated what was said to President Zuma and others regarding conspiracy theory. The representations were also made with reference to the murder and other related charges to Advocate KMA Chauke (Chauke), the DPP South Gauteng for the withdrawal of those charges. The fraud and corruption charges were withdrawn in a letter dated 4 December 2011, although it was contended by Mrwebi that the decision was actually taken on 5 December 2011. On 1 February 2012 Chauke decided to withdraw the murder and related charges. These decisions formed the subject of a dispute before Murphy J in the North Gauteng High Court in review proceedings brought by FUL.

[107] I found it necessary to give this lengthy back-ground about Mdluli in order to show the kind of personality, Jiba and Mrewbi in particular, had to deal with. Jiba, Mrewbi and Mzinyathi are respondents in the present proceedings all of them implicated in Mdluli case, complaints of which serve as the basis for GCB's application to remove them from a roll of advocates, the contention being that they have ceased to be fit and proper persons. I deal with the complaints against each one of them hereunder and in some respects those against Jiba overlapping with some of the complaints levelled against Mrwebi.

<u>Complaints against Jiba in Mdluli case</u>

[108] Allegations against Jiba in Mdluli case are in my view, correctly categorised in her answering affidavit to the present proceedings as follows:

108.1 That she did not file a full and complete rule 53 record notwithstanding an order compelling her to do so.

108.2 That she did not file an answering affidavit by the due date and had to be directed to do so by the Deputy Judge President and in addition that she did not file written heads of argument timeously;

108.3 That her reasons for the various delays were sparse and unconvincing;

108.4 That her conduct in particular is unbecoming a person of such high rank in the public service.

108.5 That she did not disclose to the court that on 13 April 2012, she had received a 24 page memoranda from Adv. Breytenbach and that she deliberately attempted to mislead the court.

108.6 That she did not make a full and frank disclosure in order to refute, explain or ameliorate serious allegations made against her.

108.7 That the SCA had also criticised her conduct.

[109] In dealing with the case against Jiba, I will pick up on each complaint made against her insofar as is material, her responses thereto and evaluation of the evidence on each of the complaints so considered material. I will do so without necessarily following the sequence of the complaints identified in paragraphs 108.1 to 108.7 above.

Failure to file record of decision timeously

[110] In paragraph [73] of this judgment I referred to the provisions of sub-rule (1) of Rule 53. Because of the importance of the provisions of Rule 53 to the topic under discussion, I find it necessary to repeat the rest of the provisions in their entirety:

"(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and

the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall- (a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and (b) within thirty days after the expiry of the time referred to in sub-rule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

[111] "The record despatched to him" in sub-rule (3) above is reference to the record contemplated in sub-rule (1) (b) quoted in paragraph [73] of this judgment. The objective of rule 53 is obvious. The time frames are to ensure that review proceedings are not unnecessarily delayed. Secondly, despatching to the Registrar the record of the proceedings sought to be corrected or set aside, together with such reasons as the decision maker is by law required to give, and notifying the applicant that this has been done and making such record available to the applicant, is to ensure that a party aggrieved by the decision is properly informed as to the route to follow. The rule serves as a tool to ensure that any challenge to the proceedings sought to be reviewed is well considered and properly pleaded. For this purpose, the applicant or aggrieved party is under Sub-rule (4) given an opportunity by delivery of a notice and accompanying affidavit, to amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit if need be. Similarly, the decision maker is in terms of Sub rule (5) (b) given the opportunity to deliver any affidavit he or she may desire in an answer to allegations made therein and any further reasons as contemplated in sub-rule (1) (b).

[112] Therefore compliance with Rule 53 regarding time frames and providing complete record, is not just a procedural process, but is substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate this, should be met with displeasure by our courts.

[113] On 15 May 2012 Jiba was served with court papers in the application brought by FUL and 6 June 2012 was the date on which Jiba and Mrwebi were to despatch to the registrar the record of the decision and to advise FUL that they have done so. Instead, and without complying with the time frames, they briefed and consulted with Motimele SC and his team for the first time on 11 June 2012.

[114] Reasons for the delay is sought to be explained in paragraph 86 to 90 of Jiba's answering affidavit in these proceedings and are paraphrased as follows:

114.1 Motimele SC was briefed, inter alia, to advise on the interpretation of Rule 53 and the record of the decision as contemplated in Rule 53. The record of the decision was then allegedly prepared on the advice of Motimele SC. In paragraph 86 of the answering affidavit to these proceedings, Jiba inter alia, states:

"…It is important to note that no decision by me personally in my official capacity as an Acting NDPP was to be reviewed. My citation insofar as these decisions are concerned is, in my view, in official capacity as acting head of the NPA and not because I had made any decision."

114.1.1 I find the statement a bit startling, especially taking into account who is Jiba: She was appointed as Acting National Director of Public Prosecutions on 28 December 2011. Before that, she had gone through the ranks in the legal fraternity and within the prosecuting authority. In addition, she has a good academic record. In 1987 she completed BIuris degree, followed by LLB in 1989 obtained at Walter Sizulu University (then known as University of Transkei). In 1994 she obtained an industrial diploma from Damelin College. In 1996 she graduated with an LLM degree in commercial law. Her work professional career started in1988 in Peddie in the Eastern Cape where she was employed and worked as a prosecutor in a magistrate's court. In 1997 she resigned from the public service and commenced articles of clerkship with attorneys Qunta Ntsebeza in Cape Town. In 1998 she qualified as an attorney. In 1999 she moved to Pretoria to work at an

accounting firm, Deloitte and Touche as a senior forensic consultant. Later that year, she joined the Investigating Directorate for Serious Economic Offences (IDSEO) in Pretoria as a senior state advocate. In 2001 the IDSEO was disbanded and the Directorate for Directorate of Special Operations ("DSO") within the NPA was established. Later in 2001 she was appointed as a Deputy Director of Public Prosecutions. In 2006 she was appointed senior Deputy Director of Public Persecutions. She was then relocated to the specialised commercial crimes court in Pretoria in 2009. On 22 December 2010 she was then appointed to the position of a Deputy National Director of Public Prosecutions and then followed by her acting stint as a National Director of Public Prosecutions from December 2011.

114.1.2 So, she is clearly an astute lawyer who must know that as an Acting National Director of Public Prosecutions at all material times thereto, the buck had to stop with her and it was in that capacity that FUL cited and served her with the review proceedings. The Act is very clear:

'*Subject to the provisions of the Constitution and NPA Act, any director shall subject to the control and the directions of the National Director, exercise the powers referred to in subsection s(1) in respect of-*

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

(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director'[30].

114.1.3 Powers referred to in subsection (1) are powers as contemplated in section 179 (2) of the Constitution and all other relevant sections of the Constitution to inter alia, discontinue criminal proceedings. Therefore, the statement: *"… no decision by me personally in my official capacity as an acting ANPP was to be reviewed'*, insomuch as it was intended to serve as an execuse for not providing the record

[30] Section 21(3) of the Act

of decision in accordance with the time periods set out in rule 53, is clearly not good enough and Jiba knew or ought to have known about this. Her failure to ensure that there was compliance was therefore not only unwarranted, but was, in my view, also deliberate and or reckless. She has a vast experience to know where her responsibility in the shoes of National Director of Public Prosecutions lies, otherwise she would not have been appointed to act in that position.

114.2 In paragraph 87 of her answering affidavit to these proceedings, she inter alia, states:

> *"It is also important to point out that the advice on what should be contained in the record was given and accepted at a time when the reviewability of prosecutorial decisions to prosecute or not to prosecute was still largely uncertain and had not been pronounced upon definitively by the court…"*

114.2.1 Just starting with the latter statement regarding *'uncertain and had not been pronounced upon definitively by the court…*' regarding the reviewability of prosecutorial decisions, one is forced to refer to what was articulated in our case law before the challenged decisions of Mrwebi and Chauke to drop charges against Mdluli were taken. On 20 March 2012 in the case of Democratic Alliance v The Acting National Director of Public Prosecutions[31], of relevance, it was held:

> *"[27] Whilst there appears to be justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of administrative action in terms of Section 1 of (ff) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that the decision to discontinue a prosecution was subject to rule of law. That concession in my view was rightly made. As recently as 1 December 2011, in Democratic Alliance v President of the Republic of South Africa and Others 2012(1) SA 417 (SCA) this court noticed that the office of the NDPP was integral to the rule of law and to our success*

[31] Democratic Alliance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA (20 March 2012); 2012 (3) SA 486 SCA.

as democracy. In that case, this court stated emphatically that the exercise of public power, even if it does not constitute administrative action, must comply with the constitution. The Constitutional Court has respectively emphasised this point."

114.2.2 Now, in Mdluli case, FUL pleaded its cause of action on the basis that the withdrawal of the charges against or discontinuance of the prosecution of Mdluli was an exercise of public power to be performed in accordance with the rule of law and the supreme law of the land (the Constitution). The challenge by FUL was that the withdrawal of the fraud and corruption charges against Mdluli in the face of prima facie case was in conflict with the rule of law and the Constitution based on the facts briefly stated in paragraph 104 of this judgment.

114.2.3 Jiba was the Acting Director of Public Prosecutions when the judgment quoted in part in paragraph 114.2.1 above was handed down on 20 March 2012. She was therefore fully aware of what was stated therein or ought to have known, in particular the concession that whatever the prosecution authority does, must comply with the rule of law and the Constitution. So, for her to allege that when she deposed to her answering affidavit in Mdluli case on 2 July 2013, she moved from the premise that the decisions of Mrwebi and Chauke were not reviewable, could not have been made in good faith seen in the context of the concession made as repeated in the quotation referred to in paragraph 114.2.1 above and the pleaded cause of the review of the decision of Mrwebi. Therefore the delay and reasons for not providing the record of the decision was completely unjustified and deliberate.

114.2.4. I can do no better than repeating, at the risk of prolonging this judgment, what Navsa JA said in his judgment handed down on 20 March 2012:

"[32] The office of the NDPP exercises public power and is subject to the constraints set out in the authorities referred to above. Having made the concession that the decision to discontinue the prosecution was subject to a rule of law review, it

was nevertheless submitted on behalf of the first and third respondent that such a review would be a narrow one, on limited grounds. In light of primary concession made on behalf of the respondents, it is for present purposes not necessary to debate the extent to which a decision to discontinue a prosecution is reviewable…" (My emphasis).

114.2.5 "*On limited grounds*", should for the present purposes be seen in the context of the pleaded failure to comply with the rule of law and the Constitution by withdrawing corruption and fraud the charges against Mdluli in the face of prima facie evidence.

114.2.6 Now coming back to the other part of the quotation in paragraph 114.2 above, Jiba did not need an '*advice on what should be contained in the record.*' She knew or ought to have known and briefed fully on why Mrwebi took the decision to discontinue the fraud and corruption charges against Mdluli. She knew or ought to have known what evidence and documentation Mrwebi relied upon for the decision, for example, what was contained in the docket. So, it was incumbent on Jiba and Mwerbi to advise whoever they had briefed on the matter of the reasons for the decision to discontinue fraud and corruption charges against Mdluli and if they had done so, they would not have speculated or be uncertain about which documents and or information was necessary to form part of the record. In any event, Rule 53 is very clear. The decision maker is required to provide the aggrieved party via the Registrar the record of decision or proceedings sought to be corrected or set aside together with such reasons as he or she is by law required or desire to give or make as contemplated in sub-rule (1) (b). If Jiba was worried about confidentiality, for example, representations by Mdluli, she could have resorted to and dealt with the matter by way of an undertaking postulated in the matter of Democratic Alliance v Zuma and Others, the relevant portion of which the SCA in dealing with the topic: "*Production of Record"* stated as quoted in paragraph [88] of this judgment.

114.2.6 It cannot be difficult for any decision maker to know the reasons, information and or documentation relied upon for any challenged decision under rule 53. For this, Jiba and or Mwerbi's suggestion that the advice given to them about the

record of the decision was the reason for the delay in complying with the provisions of Rule 53, has no legal basis. The delay was their own making and was completely unreasonable, unwarranted and viewed in context, signified bad faith on the part of Jiba and Mrwebi, bearing in mind that court papers in Mdluli case were served on them on 15 May 2012, that is, two months after the SCA handed down its judgment on 20 March 20012 in DA case against Mr Zuma.

Failure to provide complete record

[115] The complaint is raised in GCB founding affidavit as follows:

> *"8.13 Rule 53 was not complied with. The "record" filed in the murder and related charges case comprised a copy of the charge sheet and three letters compiled with a two page document entitled "Reasons for decision". The "record" filed in the case of theft and corruption charges comprised a copy of the charge sheet, three internal memoranda, a fax and two letters together with a document entitled 'brief reasons for the withdrawal of charges preferred against. LTG Mdluli and another dated 5 July 2012, comprising13 pages.*
>
> *8.14 As a result of the respondent's failure to file a proper record, FUL brought an application in terms of Rule 30 A in order to compel them to do so. Such an order was granted by Prinsloo J on 3 August 2012… The order was not complied with."*

[116] Jiba in paragraph 87 of her answering affidavit in these proceedings seems to attribute the incomplete record on account of protection of *'the identity of informers and other privileged information, which an accused person is ordinarily not entitled to have sight of in criminal proceedings and that such documents fall outside of "PART A" of the docket that an accused person is entitled to have access to. In addition, there was uncertainty as to whether in the situation of a decision to withdraw charges, representations made by the accused (as had been received from Mdluli) should form part of a rule 53 record."*

[117] I should be worried about Jiba's generalisation instead of being specific and helpful. Starting with Mdluli representations, Jiba is not saying Mdluli claimed confidentiality in his representations for the withdrawal of the charges against him. If Jiba was unclear about Mdluli's stance on his representations, the least she could have done was to establish from Mdluli if his representations could be provided as part of the record of the decision in terms of rule 53. Complete record of the decision and

subsequent reasons for the decision if any, may discourage the aggrieved party to pursue a challenge to any decision taken by a public body.

[118] What is referred to as Part A of the docket, would ordinarily be instructions by the prosecuting team and memoranda if any in the investigation process. That may not necessarily constitute evidence admissible in a court of law and may not form the basis to determine the presence or absence of prima facie evidence. Jiba because of her generalisation and avoidance is unhelpful in this regard. For example, which "privileged information" is he talking about? It is not consistent with an officer of the court whose main concern should be to assist the court in arriving at a just decision. The identity of the informers, and other privileged information as alleged in paragraph 87 of Jiba's answering affidavit, should in any event be seen in context. The information that led to the corruption and the fraud charges been preferred against Mdluli did not come from the informers, but rather from fellow colleagues of Mdluli. That being so; and taking into account the general nature of Jiba's attempt to deal with the complaint against her, something which is not different from what she said previously, caused adverse remarks to be made. Murphy J referred to it as "sparse", but despite these remarks, Jiba did not find it necessary to take the court into her confidence and deal with the allegations in some more details given the opportunity to do so in the present proceedings. Clearly the points taken by Jiba in this regard had no merit from the start. For this, she must be found to have acted contrary to the oath she took when she was admitted as an advocate and in a way flouted the rules of game of the high position she holds and or held in the prosecuting authority at all material times hereto.

Failure to comply with the directive by Deputy Judge President

[119] On 8 October 2012 FUL delivered supplementary affidavit in terms of rule 53 (4) and on 14 March 2013 it filed a further supplementary affidavit. By that time, no single answering affidavit was delivered. As a result, on 3 June 2013 FUL's attorneys wrote to the Deputy Judge President Ledwaba to arrange a date for the hearing of the application. On 5 June 2013 a directive was issued directing Jiba and Mrewbi to file answering affidavit by not later than 24 June 2013. On 7June 2013 the state attorney Mr JE Ngoetjana who was handling FUL case on behalf of Jiba and Mrwebi was removed from the case and Mothimele SC, Notshe SC and Adv S Phaswane who had been on brief all along were then withdrawn from the case. This was after Ledwaba DJP had given directive on 5 June 2013 to file answering affidavit by Monday 24 June 2013.

[120] According to Jiba, on 18 June 2013, that is, eleven days after the mandate of Motimele SC was terminated and 15 days after DJP Ledwaba had given directive to file answering affidavits by the 24 June 2013, Motau SC team was briefed to replace Motimele team. He was instructed to draft answering affidavit, an application for condonation, consult with Jiba and her team, to prepare heads of argument and argue the matter. On Friday 21 June 2013 Motau SC team sent a draft answering affidavit to be considered and deposed to by Jiba after consultation. Jiba and Mrwebi were also requested to return the draft affidavit and comments if any by mid-morning on Sunday 23 June 2013. The request and the deadline set by the Deputy Judge President were not adhered to, neither was the request by Motau SC team. Instead, on 25 June 2013, a day after the expiry of the deadline set by the Deputy Judge President for the filing of the answering affidavit and two days after Motau SC's request was not met, Motau SC received an email to which two draft affidavits by Jiba and Mrwebi were attached. This was contrary to the one answering affidavit which was proposed by Motau SC to be deposed to by Jiba as the head of the prosecuting authority at the time and presumably with confirmatory affidavit/s to be made by Mrwebi and those who might have been referred to in the answering affidavit.

[121] Jiba in paragraph 79.2 of her answering affidavit in these proceedings correctly set out one of the complaints levelled against her by GCB as follows:

> "*79.2 That I did not file answering affidavit by the deadline directed by the Deputy Judge President*"

[122] One would have expected that she will offer an explanation. However, that was not to be. The complaint is sufficiently set out in paragraph 8.19 of the founding affidavit in these proceedings to which the answer is offered by Jiba as follows:

> *"AD paragraph 8.19*
>
> *155. Save to deny that the draft answering affidavit prepared by Motau SC team was sent to me on 21 June 2013, and that the email of the 25 June 2013 (annexure "GCBB") came from my office I admit the remainder of the content of this paragraph. The reasons why two separate affidavits were prepared and why the LAD did not agree with the approach of the Motau SC team that I should be the main deponent to the answering affidavit, is dealt with above."*

[123] The quotation above was preceded by the following statement in paragraph 101 of Jiba's answering affidavit in the present proceedings:

"*…Indeed as stated by the applicant in paragraph 8.19, the Motau SC team prepared a draft answering affidavit prior to any consultation with representatives from NPA. I deny however that this draft was sent to me personally. As appears from annexure "GCB12" this email was not sent to me. I further deny that the email dated 25 June 2013 (i.e annexure "GCB13") was sent from my office. It was in fact sent on my behalf by Adv Chita from the LAD."*

[124] Jiba cannot escape the criticism by seeking to attribute the blame to LAD and the emails not having been sent to her personally. The context is this:

124.1 The directive which was given on the 5 June 2013 to file answering affidavit by 24 June 2013 was followed by a meeting on 7 June 2013 between Jiba, her team and acting deputy state attorney Mr Chouw and Mr Tshivase. Then in paragraph 97 of the answering affidavit in the present proceedings, Jiba states:

"After discussion we agreed that since the legal team for the NPA had failed to file the answering affidavit within time periods required by the rules, their mandate should be terminated and they should be replaced".

124.1.1 'The legal team for the NPA,' she is referring to Motimele team. So, Jiba knew at least by 7 June 2012 about the directive given by the Deputy Judge President. From that date onwards, she had a flickering red light pointing towards the deadline of the 24 June 2013 set by the Deputy Judge President. But, she did nothing until on18 June 2013 when Motau SC was briefed. In the present proceedings she does not explain what has happened between 5 and 18 June 2013.

124.1.2 Insofar as she might have wanted to blame LAD, she was mistaken, because the final responsibility rested on her, and she had a duty to ensure that the flickering of red light did not to go beyond 24 June 2013. That however, did not worry Jiba as it would appear later hereunder. As explained by Jiba, the Legal Affairs Division ('LAD') is a division within the NPA tasked with handling of all matters pertaining to the civil litigation involving the NPA. It is headed by a Deputy National Director of Public Prosecutions who at all relevant times hereto was Adv. Nomvula Mokhatla and was assisted *inter alia, by* Deputy Directors, Senior State Advocates and

> Senior Prosecutors. When court papers against the NPA are received, they are referred to LAD and the Deputy National Director heading LAD. Thereafter, they are referred to a member of their team who would then prepare a memorandum on steps to be taken and that would then be discussed with the Deputy National Director. A consultation will then be arranged to brief and advise the National Director and for the present proceedings (Jiba) who was the Acting National Director at the time. It will then be decided how LAD intends to handle the matter and thereafter the state attorney will be briefed. (My emphasis).

124.2 Jiba did not seem to be worried by the flickering of the red light. Despite the request to return the draft answering affidavit by Sunday morning of 23 June 2013, with such comments as Jiba and Mr Mrwebi might wish to make, the request was not heeded to. The fact that an email of 21 June 2013 to which the draft affidavit was attached, was not sent to Jiba personally, is not an excuse. It should be concluded from the email of the 26 June 2013 sent by Motau SC to the State Attorney that Jiba knew or ought to have known of the contents of the email of 21 June 2013 before 24 June 2013:

124.2.1 The following is recorded by Motau SC in the email of 26 June 2013:

> *"A draft was produced and circulated on Friday with a request that comments, if any, be sent to us by mid-morning of Sunday, 23rd of June 2013. The requested comments were not received as stipulated. We received an email to the effect that an affidavit be prepared in the name of Adv. Mrwebi, which we advised has been incorrect. This despite, we note that the same outcome is sought to be achieved by dividing the affidavits as proposed*".

124.2.2 The latter statement quoted above was prompted by an email of 25 June 2013 to Motau SC from the state attorney in which it was recorded: *"Please find the draft amended affidavit for your attention. We have separated the affidavit of Jiba from that of Adv. Mrwebi*".

124.2.3 Clearly, the statement, *"we have received an email to the effect that an affidavit be prepared in the name of Adv Mrwebi, which we have advised has been incorrect*"; is reference to a stand-alone email before the email of 25 June 2013 to which 'separated affidavits of Adv. Jiba from that of Adv. Mrwebi' were attached. Jiba must have indicated before 25 June 2013 or per the email of 25 June 2013 that she did not want to depose to any affidavit. Most importantly, she must have known of the request by Motau SC to comment on the draft answering affidavit and to have it returned by not later than Sunday 23 June 2013.

124.2.4 It is actually worrying that an officer of the court, who occupied and continues to occupy a very important high profile public office within the prosecuting authority by virtue of being an admitted advocate, would adopt that kind of an attitude. Wishing to wash her hands at every given opportunity prevailing has a bearing on her fitness to remain on a roll of advocates. What is even more worrying is Jiba's failure to deal with the statement by Motau SC as quoted in paragraph 124.2.1 above. Reference to the email of 26 June 2013 addressed to the State Attorney by Motau SC and the quotation in paragraph 124.2.1 is dealt by Jiba as follows:

"AD PARAGRAPH 8.20

156. I deny that the email dated 26 June 2013 was addressed to myself or the second respondent. It was sent to Adv. Chita and Adv. Mokhatla of the LAD".

124.2.4 As to whom the email was sent, is really not the issue. The issue is how Jiba dealt with the directive by the Deputy Judge President. I return later to the other issues recorded in the email of 26 June 2013 sent to the State Attorney by Motau SC. Jiba did not seem to be concerned with the snail pace at which the matter was being dealt with. This constituted a wanting conduct on her part which cumulatively considered with other complaints relating to

her handling of Mdluli case, should justify a removal from a roll of advocates

Failure to heed to Motau's advice

[125] It is advisable for any person who is a party to any legal proceedings to get someone who would be impartial, objective and independent to handle a particular litigation, if that affects you personally. Lawyers do not normally defend themselves in legal proceedings. They get another lawyer to advise and defend them and understandably, so. Seeking to defend yourself can cloud and blur issues as your own interest is at stake. It is for this reason that I want to believe that Jiba and her team on 18 June 2013 briefed Motau SC. It does not happen often that a client will easily litigate contrary to the advice given by counsel or attorney on brief. Any such conduct contrary to the advice would be unprecedented to constitute a reason for a legal representative on brief to withdraw.

[126] Jiba correctly paraphrased the complaint relevant to the topic under discussion as follows:

> *"79.3 That I persisted, despite the advice of Adv. Motau SC and his team to the contrary, with filing a substantive confirmatory affidavit which was alleged untenable given the evidence that had been given under -oath by the second and third respondents at the Breytenbach disciplinary inquiry".*

[127] The original draft answering affidavit was provided to Jiba and her team on 21 June 2013, although Jiba seeks to deny that it ever came to her attention until 26 July 2013. It was to be considered and commented upon. Jiba and her team suggested that Mrwebi be the one to depose to the answering affidavit. Motau SC advised against this. Despite the advice, on 25 June 2013 separated affidavits were brought to the attention of Motau SC. On 26 June 2013 Motau SC after having met with Jiba at an unscheduled meeting on that day, responded to the proposed separated affidavits and similarly advised against the move and suggested that the issue be discussed during consultation which was still to be arranged. Instead of consultation, Jiba and her team decided to instruct the state attorney to deliver the separated affidavits, which were served and filed with the Registrar on 4 July 2013 as per instruction of the prosecuting authority headed by Jiba at the time.

[128] To give a proper perspective to the complaint, I can do no better than to quote the relevant averments in the founding affidavit and the answer thereto by Jiba. In the founding affidavit GCB states:

"8.24. It appears that the State Attorney who was handling the matter at the time, Mr Sebelemetsa, was not present at the unscheduled consultation of 26 June 2013. In an email dated 3 September 2013, he set out his chronology of what had transpired. I attached hereto as annexure "GCB15" a copy of that email. In the email he states that as a result of the fact that by Monday, 24 June 2013, no comments had been received from Jiba and Mrwebi on the contents of the draft answering affidavit which Motau SC and his team had drafted, he (Mr Sebelemetsa) received numerous calls from counsel as to what they should do since the affidavit had to be filed by 24 June 2013. Mr Sebelemetsa thereupon enquired from "the client" and was told that there were many averments (like the disclosure of internal memos) in the draft prepared by Motau SC and his team with which they did not agree. I infer that "the client" is a reference to Jiba and Mrwebi. Without further input from the State Attorney or counsel, Mr Sebelemetsa on 2 or 3 July 2013 received a "signed copy" of an answering affidavit by Mrwebi , a supporting affidavit by Jiba and a confirmatory affidavit by the South Gauteng Director of Public Prosecutions, Adv Chauke. Mr Sebelemetsa states in his email that ".. the mandate from client was that I must proceed to serve and file the said affidavit". Again, I assume that this is a reference to Jiba and Mrwebi. On the face of it, both affidavits were commissioned on 2 July 2012 (although the date "2 June 2012" was, I assume, incorrectly written in handwriting on the affidavit of Jiba. The date stamp however confirms that it was commissioned on 2 July 2012). Mr Sebelementsa then discussed the matter with Mr Tshivase and was told to file the affidavit since the time was already up for their filing. He was also told to forward copies to counsel. He proceeded to serve and file same on 4 July 2013. (My emphasis).

[129] Jiba in her own wisdom decided to respond as follows:

"AD PARAGRAPH 8.24

160. I admit that Mr Sebelemetsa was not present at the "unscheduled consultation". As I pointed out above, I was at chambers in connection with an unrelated matter and decided on the spur of the moment to stop at Adv Motau SC's chamers to introduce myself.

161. As I have also mentioned above the email by Mr Sebelemetsa dated 3 September 2013 (annexure "GCB15") was addressed to the Hodes SC team in order to assist them in preparing an application for condonation.

162. I deny that the reference to "the client" should be read as a reference to me personally. I never instructed Mr Sebelemetsa personally. All instructions received from him would have come

from members of the LAD,usually Adv Chita or Adv Mokhatla. Adv Muller's assumptions are, with respect, incorrect.

163. I have dealt with the serving and filing of the affidavit deposed to myself and by the second respondent and the reasons therefor, above."

[130 Earlier in this judgment I mentioned Jiba's washing of hands in dealing with the complaints against her. The answer quoted above is no different from that attitude. "*All instructions received from him (referring to state attorney) would have come from members of the LAD, usually Adv Chita or Adv Mokhatla"*, is intended to suggest that Jiba instructs or instructed no one, but rather that LAD does or did. She is again mistaken and this appears to be once more an attempt to run away from her responsibilities as the head of the prosecuting authority, but even most importantly as an officer of the court.

[131] Jiba in her answering affidavit paraphrased in paragraph 124.1.2 of this judgment, explains how matters against the NPA are brought to the attention of the National Director of Public Prosecutions. For this, it cannot be expected that the instruction to file one affidavit by Mrwebi and later separated affidavits contrary to the advice of Motau SC would have been conveyed to the state attorney by LAD without the knowledge and approval of Jiba. In any event, she should have known on her own initiative taking into account the fact she had a red light flickering towards 24 June 2013 since a directive to this effect was made by the Deputy Judge President on 5 June 2013.

[132] There are actually serious worrying features in Jiba's response as quoted in paragraph 129 above. Clearly, the suggestion is that she had no knowledge of the instruction to file separated affidavits. ''*I never instructed Mr Sebelemetsa personally*", should be seen in the context of the events preceding the filing and service of the separated affidavits on 4 July 2013:

132.1 On 24 June 2013, Motau SC out of concern to miss the deadline set by the Deputy Judge President, made several calls to Sebelenetsa (state attorney). Subsequent to this, the state attorney enquired from 'the client' and was told that there were many averments in the draft prepared by Motau SC they did not agree with. Jiba was proposed by Motau SC to be the deponent to the answering affidavit. It is highly unlikely and improbable that LAD, either through Adv Chita and or Adv. D Mokhatla would receive a draft answering affidavit, decide to have it deposed to by Mrwebi against the advice of Motau SC and then instruct the state attorney to file and serve separated affidavits without discussing their

strategy with Jiba. Seen in the context of what is stated in paragraph 124.1.2, the state attorney could not have been instructed by LAD to file separated affidavits without LAD having obtained the go ahead from Jiba. For this reason, her attempt to distance herself from the decision to file separated affidavits is not consistent with the conduct befitting an officer of the court.

132.2 In paragraph 102 of the answering affidavit to these proceedings, Jiba states:

"*On 26 June 2013 I happened to be at chambers with Adv Andrew Chauke (Adv Chauke), the Director of Public Prosecutions for south Gauteng (and the person who withdrew the murder charges against Mdluli) for an unrelated matter and decided to stop in to introduce myself to Adv. Motau SC. This was the "unscheduled consultation" referred to in paragraph 8.21 of the founding affidavit. This was however not a full consultation and the merits of the matter was certainly not discussed. Adv Motau SC did mention that draft answering affidavit has been sent and I informed him that I had not received this affidavit. He undertook to send same but I never received it."*

133.2.1 With the greatest respect to Jiba, this is a duck and dive tactic. Two things had happened before the so-called "unscheduled consultation" of 26 June 2013: First, on 24 June 2013 Motau SC contacted the state attorney several times to enquire about the draft answering affidavit sent on 21 June 2013. The response by the NPA regarding the enquiry by the state attorney was that "*there were many averments (like the disclosure of internal memos) in the draft prepared by Motau SC and his team with which they did not agree".* The correctness of this statement by the state attorney (Mr Sebelemetsa) as indicated in his email dated 3 September 2013 is not denied or placed in dispute by Jiba. That being so, Jiba knew or must have known before 24 June 2013 about the draft answering affidavit which was supposed to be deposed to by her. Her statement: "I had not received this affidavit", suggesting as on 26 June 2013, cannot be true. As I said, it is highly unlikely and improbable that Adv Chita and Adv Mokhatla of LAD would have expressed a view about *"many averments… they did not agree with"* without consultation

and approval of Jiba. The suggestion in these proceedings that she did not receive or was not told about the draft answering affidavit by the time she decided to introduce herself to Adv Motau SC on 26 June 2013 and that therefore she did not ignore Motau SC's advice's, cannot be true and is misleading.

134.2.2 Whilst still on the decision to introduce herself to Adv Motau, I find it particularly discontenting that instead of being concerned about whether the deadline set by the Deputy Judge President has been adhered to, she was more interested in introducing herself to Adv Motau SC. That consultation, should never have been "unscheduled consultation"; neither should it have been a brief consultation nor at the spur of the moment consultation. Merits of the matter should have been discussed in detail. Everything to the matter was at stake. There was a deadline of 24 June 2013 already missed to file an answering affidavit which was set by the Deputy Judge President on 5 June 2013. Jiba knew about this because according to her on 7 June 2013 *'due to the alleged concerns and frustrations expressed with regard to the delays in filing answering affidavits, a meeting was held with the state attorney and after the discussion it was agreed that since Motimele SC and his team had failed to file the answering affidavit within the time periods required, their mandate should be terminated and that they should be replaced*'. This was stated in paragraphs 96 to 97 of Jiba's answering affidavit. With this knowledge and not having deposed to any affidavit to meet the deadline set by the Deputy Judge President, it was incumbent on Jiba to be more concerned with the deadline than just introducing herself and then states in these proceedings: "*This was however not a full consultation and the merits of the matter was certainly not discussed"*.

134.2.3 The other thing which had happened before 26 June 2013 was conveyed in the email of 25 June 2013

from the state attorney. In the email, *inter alia, was* stated: "*Please find the draft amended affidavit for your attention. We have separated the affidavit of Adv Jiba from that of Adv Mrwebi*".

134.2.4 Therefore the statement: *"I informed him that I had not received it'* in paragraph 102 of her affidavit referring to the meeting of 26 June 2013 with Motau SC, could only have been a lie. How can the state attorney prepare separated affidavits of Jiba and Mrwebi at least on 25 July 2013 without Jiba having been told of the draft affidavit prepared and sent by Motau SC on 21 June 2013? The story is far-fetched and improbable. In other words, Motau SC was misled too. This conduct is so serious that Jiba cannot remain on a roll of advocates. This brings me to the other discontenting issue.

134.2.5 The statement: "*he undertook to send same, but I did not receive it",* referring to Motau SC and the draft answering affidavit, does not make Jiba's case any better. In fact it makes it worse. If she did not receive it, what did she do? She had then introduced herself to Motau SC. She therefore had the opportunity to enquire from Motau SC about the answering affidavit when she did not allegedly receive it. On the same date, that is, 26 June 2013, Motau SC in response to the proposed separated affidavits as per the email of 25 June 2013 recorded: and I do this at the risk of repetition and prolonging this judgment:

"… This despite we note that the same outcome is sought to be achieved by dividing the affidavits as proposed. I do not want us to waste time in dealing with this aspect it shall be one of the agenda items to be discussed at the consultation which is still to be confirmed. In the meantime, may we request that comments and outstanding information be furnished using our original affidavit. We also request that a

condonation affidavit be furnished to explain the failure to comply with the filing period as set out in the directives issued by the DJP.

Upon receipt of your comments and the outstanding information using our original draft affidavit as a working document, we shall set a date and time for a consultation to deal with issues in the following sequence:

1. *Comments to our original answering affidavit and our reaction thereto,*

2. *The permissibility or otherwise of the proposed splitting of affidavits,*

3. *Our comments on the condonation affidavit to be prepared by the NPA accounting for each day that passes without having filed the answering affidavit in terms of the directive,*

4. *We propose that a period of five hours be set aside for such a consultation".*

134.2.6 In dealing with what is stated above which is quoted in paragraph 8.21 of GCB's founding affidavit, Jiba in one paragraph stated:

"AD PARAGRAPH 8.21

157. I have dealt with the unscheduled consultation above. I reiterate that the merits of the application were not discussed in any detail with the Adv. Motau SC. It is indeed correct that I advised Adv Motau SC that I had not seen his draft answering affidavit. As mentioned above, he undertook to forward it to me, however I never received it".

134.2.7 It was not about the brief consultation of 26 June 2013, neither is it about whether merits of the application were discussed in any detail. The issue was rather how she dealt with the information in the email of 25 June 2013 from Motau SC quoted in part in paragraph 134.2.5 above. In

addition, how she dealt with the draft answering affidavit after her consultation with Motau SC on 26 June 2013.

134.3 After consultation with Jiba on 26 June 2013, Motau SC again forwarded to Jiba and Mrwebi the original draft affidavit and again advised that the way forward would be a per the steps outlined in paragraphs 1 to 4 of Adv. Motau SC's email of 26 June 2013 quoted in paragraph 134.2.5 above. These averments are contained in paragraph 8.2.2 of the founding affidavit to which Jiba in these proceedings responds as follows:

> *"158. I deny each and every allegation contained in this paragraph as if specifically traversed. No such affidavit was ever sent to me or if it was sent, I never received it. I wish to state that none of the emails referred to in the deponent's founding affidavit were ever sent to my email address of that of my PA. All were sent to the LAD staff in particular Adv Chita and Adv Mokhatla and my PA, Khanya Lamola".*

134.3.1 One is by now accustomed to this kind of responses by Jiba in these proceedings. But again, she misses the point and displays conduct which is not only unbefitting of an officer of the court, but also not befitting the conduct of a person holding such high public position in the prosecuting authority.

134.4 On her own version, on 26 June 2016 without discussing merits of the application in Mdluli case, she was told of the draft answering affidavit which was sent on 21 June 2013. It was an officer of the court talking to another officer of the court, the other one having been briefed to deal with the opposition to an application against the prosecuting authority which was at the time headed by Jiba. Without reverting to Adv Motau SC subsequent to the meeting of 26 June 2013 and without terminating Motau SC's mandate, on 2 July 2013 the state attorney received a signed copy of the answering affidavit by Mrwebi, a signed supporting affidavit by Jiba and a confirmatory affidavit by Chauke, (the South Gauteng Director of Public Prosecutions) with the instruction to proceed to serve and file the said affidavits and was also told to forward copies to Motau SC. The state attorney then proceeded to serve and file on 4 July 2013. As accustomed to, the response by Jiba to this is: "*I never instructed Mr Sebelemetsa personally"*.

134.5 It is clear that right at the outset, Jiba and her team did not like the advice given to them by Motau SC. Otherwise the separated affidavits would never have been signed, filed and served. Jiba knew or must have known that by so doing, she will be pushing Motau SC and his team out of the brief. Deposing to the separated affidavits, filing and serving them contrary to the advice of counsel on brief, was in my view, very serious and unprecedented. If she wanted to rely on people internally, that is, Adv. Chita and or Adv. Mokhatla, she should first have withdrawn their instruction to the state attorney and Motau SC as Jiba and her team decided to handle the matter on their own. But instead, she deposed to a separated affidavit and then caused the instruction to be given to the state attorney to serve and file the affidavits without reverting to Motau SC. This was deliberate and displayed an un-repented conduct then and now. She was steadfast to defy logic and advice for as long as her wishes were not accommodated. That is the kind of conduct making Jiba to cease to be a fit and proper person and to remain on a roll of advocates. The conduct is even more glaringly displayed when dealing with the next topic.

Jiba's failure to heed to the advice of advocate Halgryn SC

[135] Later in this judgment I will deal with Mrwebi's failure to heed to advocate Halgryn SC's advice from paragraphs 153 to 153.3.1. The application in FUL (Mdluli) case before Murphy J was set down for hearing on 11 and 12 September 2013. On 5 July 2013 Motau SC and his team, as one would expect, withdrew as counsel for Jiba and Mrwebi. On 2 August 2013 a new legal team was briefed namely, Adv. Leon Halgryn SC and Adv. Johan Uys (Halgryn SC team). On 6 August 2012 Advocate Eulande Mahlangu was added to Halgryn SC team. A series of consultations were held on 5, 6, 7 and 8 August 2013 between the State Attorney, Jiba and her team. Halgryn SC team also studied the case dockets in both the murder and corruption charges. On Friday 10 August 2013, a further consultation took place between counsel and Jiba. Following the latter consultation, Halgryn SC team also withdrew from the brief. This was unprecedented happening indeed:

135.1 Three teams of counsel on brief in one matter, all withdrawing within a short space of time one after the other, was, in my view, a sign of unwillingness on the part of Jiba not to let go the decision to withdraw the charges against Mdluli. Halgryn SC provided Jiba with a document titled

"*Confidential and privileged memorandum and opinion dated 12 August 2013".* This memorandum was provided to GCB by the Prosecuting Authority. It must therefore be accepted that confidentially and privilege with regard to the document has been waived.

135.2 In the memorandum, Halgryn SC expressed scathing criticism of the manner in which the proceedings were conducted to that date and stressed the fact that the record filed by Jiba and Mrwebi did not constitute the record of the proceedings as required in terms of Rule 53.

135.3 In a topic headed "*Fundamental flaws in the prosecution of the matter thus far",* Halgryn SC referred to the opposition of the application brought by FUL for the review and setting aside of Mrwebi's decision to withdraw the charges against Mdluili as a "*sinking ship*" and then in paragraphs 9 and 10 of his memo advised:

> *"9. These flaws in the prosecution of the matter thus far, (which we had very little difficulty in uncovering), on behalf of our clients are fundamental- so much so- that we are under no doubt that as matters now currently stand our clients are headed towards a certain judgment against them, with every potential of irreparable harm to the credibility and reputation of the National Prosecution Authority.*
>
> *10. As the papers correctly stand there is simply no defence".*

135.4 Then in paragraph 51 of the memorandum, Halgryn SC stated:

> *"If there is a decision to continue with the opposition of this matter, on the basis of attempting to justify the decisions to discontinue the prosecutions, with reference to the records/dockets, our client will regrettably have to find yet, another team of counsel to do so. We are unable to do so. None of the reasons advanced thus far makes any rational sense, let alone establish a defence".*

135.5 I do not intend to traverse the content of a 21 page memorandum of Halgryn SC. It suffices to mention that anyone who might have thought that Jiba will be deterred in her tracks, one would have been mistaken. Secondly, it suffices to mention that Halgryn SC's prediction of the possible scathing criticism by the court was spot on. For example, Murphy J in his judgment *inter alia*, stated:

> *"[24] The reasons for the various delays, and late filing, <u>are sparse and most unconvincing.</u> However, in the interests of justice I was persuaded that the*

> *matter should proceed without further delay and condoned the non-compliance with the rules and directives of the DJP. Suffice to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service and is 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 Constitution ethos and principles underpinning the office they hold".* (The emphasis is mine as was also that of GCB in their founding affidavit).

135.6 I cannot agree more with the sentiments expressed by Murphy J both with regards to the delay, incomplete record and holding steadfast on the decision to discontinue the prosecution against Mdluli despite clear *'sinking ship'* and prima facie case in particular regarding the corruption and fraud charges against Mr Mdluli as indicated briefly in paragraph 104 of this judgment.

135.7 Jiba was not deterred in her tracks by the criticism made by her counsel, Adv. Halgryn SC. Instead, Jiba and Mrwebi insisted in defending the 'sinking ship' which ultimately caused Halgryn SC team to withdraw on 12 August 2013. Thereafter yet another set of counsel Hodes SC's team was briefed and a belated attempt was made to file supplementary affidavit. The application was heard on 11 September 2013 and judgment was handed down on 23 September 2013. The application by FUL was granted by Murphy J making a number of adverse remarks against Jiba including the one quoted in paragraph 135.5 above.

135.8 Attempts to justify her decision not to heed to the advice of Halgryn SC, in my view, just makes her situation worse. In her answering affidavit to the present proceedings, she seems to suggest that the assumption by Halgryn SC team that there was a prima facie case against Mr Mdluli of fraud and corruption charges was wrong. In paragraph 112 of her answering affidavit to these proceedings she states:

> *"… After I learnt that the charges were withdrawn, I called for a briefing from both the second respondent and Adv Chauke. I was satisfied with the reasons that were advanced for the withdrawal of the charges. With regard to the fraud and corruption charges, it was my understanding that the case was withdrawn to enable the police to finalise the investigations as at that time there was no evidence that linked Mdluli to the offences to which he was charged. To me there was nothing untoward about this".*

135.9 For the following reasons such understanding could never have been honestly and truly made:

135.9.1 There was everything untoward about the decision to withdraw the charges. There was a clear prima facie case against Mdluli in the corruption and fraud charges.

135.9.2 Having been briefed by Mrwebi on her request about the merits or demerits of the decision to withdraw the charges, she would have known that Mrwebi, as a special director, was obliged to take the decision to withdraw the corruption and fraud charges in consultation with Mzinyathi as contemplated in the Act. I deal with the relevant provisions in some more detail when I deal with the complaints against Mrwebi. It suffices for now to mention that it is striking that Jiba decided to be briefed by Mrwebi on the corruption and fraud charges to the exclusion of Mzinyathi.

135.9.3 Jiba having called for a meeting with Mrwebi to be briefed on the withdrawal of the fraud and corruption charges, she would have been told that on 8 December 2011 Mzinyathi sent an email to Mrwebi in which he recorded inter alia:

> *"Essentially the aspect I want to discuss is that I do not agree with your understanding (as expressed in your memorandum, that you can instruct prosecutors in the North Gauteng Division in respect of which I am appointed as the Director of Public Prosecutions irrespective of my views on the matter. As explained above in summarising our meeting of 5 December 2011, we did not discuss that you have prepared memorandums (already singed on 4 December 2011) in which you are giving the said instructions. Had you mentioned this aspect, I would have made my objections to your approach during our meeting. I am also concerned that you indicated in your memorandum to me that you will advise the attorneys of Mr Mdluli of your instructions that charges will be withdrawn. I hold the view that such advice to the attorneys would be premature as I do not share your views/ nor do I support your instructions that the murder charge be withdrawn". (My emphasis)*

135.9.4 Jiba having consulted and briefed by Mrwebi on the withdrawal of the charges against Mdluli, would have been told that the provisional withdrawal of the fraud and corruption charges after the meeting of 9 December 2013 between Mrwebi, Mzinyathi and Breytenmbach was a damage control compromise as he (Mrwebi), had already notified Mdluli's lawyers about his decision to discontinue the prosecution. I deal with this in some more detail when I deal with the complaints against Mrwebi.

135.9.5 In my view, Jiba was steadfast to do everything in her power to ensure that the charges against Mdluli were permanently withdrawn. This was despite the prima facie evidence against Mdluli and failure to withdraw the fraud and corruption charges in consultation with Mzinyathi. By so doing, was mala fide and displayed ulterior motive and thus offended against the rule of law and the Constitution. She must be found to be no longer fit and proper person to remain on a roll of advocates. This then brings me to another complaint against Jiba.

Jiba's failure to disclose to the court Breytenbach's memo and representations for the internal review of Mrwebi's decision.

[136] On 12 April 2012 Breytenbach sent a memorandum to Jiba in terms of which she requested Jiba to review the decision of Mrwebi to discontinue the prosecution of Mdluli on the fraud and corruption charges. The memo was received by Jiba on 13 April 2012. On 2 July 2013 Jiba deposed to an affidavit opposing the application by FUL in terms of which the decision by Mrwebi was sought to be reviewed. In paragraphs 21 to 25 of her answering affidavit in FUL application she stated:

"21. The decisions of the third respondent (Mrwebi) and Adv Chauke (the South Gauteng DPP) on this matter have not been brought to my office for consideration in terms of regulatory framework.

22. In the light of the above I did not take any decision referred to in the applicant's founding affidavit. In terms of s 22(2)(b) of the NPA Act, I may intervene in any prosecution process when policy directives are not complied with. I may also in terms of section 22 (c) of the NPA Act review a decision to prosecute or not to

prosecute after consulting the relevant director and after taking representations of the accused person within the time period specified by me, the complainant or any other party whom I consider to be relevant.

23. At this state there was no policy contravention and/or representations received by me to warrant my intervention.

24. …

25. To descend to the arena without any representations being made to my office would prejudice the fifth respondent or any other interested party in this matter".

136.1 GCB in paragraph 9.19 of its founding affidavit in these proceedings, inter alia, states: *"It is difficult to avoid the conclusion that her affidavit was an attempt by Jiba to deliberately to mislead the court".* I tend to agree. Jiba probably when she deposed to her affidavit on 2 July 2013 and stated what is quoted in paragraph 136 above, particularly paragraphs 21, 22 and 25 never thought that one day the memorandum of Breytenbach will surface in court proceedings. It is not her version that she forgot about it when she deposed to her affidavit on 2 July 2013. Instead, she brings in a very startling defence, which in my view, only serves as a trap to herself and displays her again as an un-repented and dishonest person.

136.2 Her explanation in these proceedings is as follows:

"135. I deny that the memorandum received from Adv Breytenbach was from a person or party that I considered relevant or was obliged to consider relevant. It therefore did not constitute representations from a person contemplated by the provisions of section 22(2)(c) of the NPA Act, or at all. It was a document from a prosecutor who failed to execute tasks assigned to her by her superior. Pursuant to the suspension of Adv. Breytenbach another team of prosecutors was appointed to take the case forward, namely Adv. Becker and Adv Viljoen. There were memoranda submitted by these prosecutors in terms of which the opposite view was expressed. There was similarly no mention made of this in my affidavit. I deny that I was under any obligation to place the content of internal memoranda received from colleagues before court. (My emphasis).

136.2.1 Jiba is again mistaken. In my view, she was driven by the desire to bury the charges against Mduli once and for all. The provisions of section 22(2)(c) is clear and simple. Jiba being such an astute lawyer as profiled in paragraph

114.1.1 of this judgment, could never have made such a mistake about the interpretation and application of the provisions of section 22(2)(c) of the NPA Act. At the risk of repeating myself, the section reads as follows:

"22. Powers, duties and functions of National Director

1. …

2. In accordance with section 179 of the Constitution, the National Director-

(a)…

(b)…

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking presentations within the period specified by the National Director, of that accused person, the complainant and any other person whom the National Director considers to be relevant".

136.2.2 Breytenbach was not only such person who Jiba should have considered relevant, but was also the person best placed to provide Jiba with the relevant information regarding the prima facie evidence against Mdluli. For example, she was involved in the prosecution of Mdluli. On 9 December 2011 she was together with Mzinyathi when they confronted Mrwebi for having withdrawn the charges against Mdluli. On 13 April 2012 by virtue of her having had access to the contents of the docket, provided Jiba with a detailed 24 page memorandum setting out her view why Mrwebi's decision ought to be reviewed in terms of section 22(2)(c) of the Act. Jiba was therefore obliged to disclose the memorandum to the court and to consider the merits of the internal review provided for in section 22 (2) (c) quoted above. She however, chose to ignore Breytenbach and her detailed memorandum. I cannot believe that it was because she felt that Breytenbach was not '*any other person'* she was obliged to listen to and consider her memorandum. As

I said, her motivation in adopting the attitude as she did must be found in her willingness to protect Mdluli by all means. In so doing she offended against section 179 of the Constitution and the rule of law, something which has a direct relevance to the question whether she should remain on a roll of advocates. She was occupying the highest position in the prosecuting authority by virtue of the fact that she is an admitted advocate on a roll of advocates. Her conduct in bringing the image of the prosecuting authority into disrepute also questions her suitability to remain on a roll of advocates.

136.3 Failure by Jiba not to disclose Breytenbach's memo in the proceedings before Murphy J and failure to consider the request by Breytenbach for internal review of Mrwebi's decision was, in my view, deliberate and was intended to mislead Murphy J.

Jiba's failure to consider the contradictions in the evidence of Mrwebi

[137] During April 2012 Breytenbach was charged with misconduct and suspended by Jiba from work pending finalisation of her disciplinary enquiry. On 15 May 2012 FUL served on the prosecuting authority an application to set aside the decisions to withdraw charges against Mdluli. On 22 and 23 January 2013 Mrwebi and Mzinyathi respectively testified in the disciplinary enquiry of Bretenbach. On or about 26 June 2013 Motau SC and his team whilst waiting for the comments of Jiba and Mrwebi on the draft answering affidavit, received from NPA or State Attorney, certain further documentation from the NPA and or State Attorney including the transcript of Bretenbach's disciplinary hearing were received. Upon consideration of such documentation and the transcript, they noticed a series of contradictions between the evidence which had been given on behalf of Jiba in her capacity as Acting National Director of Public Prosecutions during Bretenbach's hearing and the contents of the two draft affidavits prepared by Jiba and Mrwebi. This information as distilled from paragraph 8.23 of the founding affidavit, is dealt with by Jiba in one sentence as follows: *"I have no direct knowledge of the contents of this paragraph":*

137.1 Jiba cannot claim not to have known of the contradictions of the evidence adduced during the disciplinary enquiry and the relevance thereof to FUL's

application and in particular the validity of the decision to withdraw the fraud and corruption charges against Mdluli. She cannot suspend Breytenbach for misconduct and thereafter pretend like she had nothing to do with Breytenbach disciplinary enquiry. Mrwebi in dealing with section 24 (3) of the Act made a concession during cross-examination in the disciplinary proceedings of Breytenbach, which unfolded as follows:

"Adv Trengrove: *No, you must understand that consult means little bit more than telling the guy what your views are. Correct?*

Adv Mrwebi: *Yes you are right, because I consulted with him, the point is that I consulted with him.*

Adv Trengrove: *By telling him what your views were.?*

Adv Mrwebi: *We did not strictly speaking at first, at first agree, that's the point.*

Adv Trengrove: *By the time you took this decision …?*

Adv Mrwebi: *We were not the same mind."*

137.2 I revert later to the evidence of Mrwebi when I deal with the complaints against him. I have referred to this evidence just to show that when Jiba deposed to her affidavit opposing the setting aside of the decision of Mrwebi, knew or ought to have known as put by Halgryn SC that they were chasing a 'sinking ship'. The application was clearly unassailable for the following reason: A Special Director (Mrwebi) shall exercise the powers, carry out duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directives of the National Director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred in section 20 (1), they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned as contemplated in suction 24(3) of the Act.

[138] It is common cause that Mrwebi could only have discontinued the prosecution of Mdluli on the corruption and fraud charges in consultation with Mzinyathi. I dealt earlier in paragraph 135.9.3 above how Mzinyathi reacted angrily to the conduct of Mrwebi. The real point for the topic under discussion is that: Jiba on 2 July 2013 when she deposed to her answering affidavit, which affidavit she deposed contrary to the advice of her counsel (Motau SC), was aware that there was no defence to hold on the decision of

Mrwebi regarding the discontinuance of the prosecution against Mdluli on the fraud and corruption charges. In this regard her conduct was wanting and inconsistent with the conduct of a lawyer who should remain on a roll of advocates. But Jiba was relentless in fighting the case brought by FUL and directly or indirectly dismissed team of advocates one after the other because she did not agree with their advices. That was done irrespective of the merits of the advices. By so doing, she ceased to be a fit and proper person to remain on a roll of advocates. I make the order accordingly later in this judgment.

COMPLAINTS AGAINST MRWEBI IN MDLULI (FUL)

[139] Mrwebi in his answering affidavit to the present proceedings categorises complaints levelled against him as follows:

139.1 That he sought to mislead the court by not placing before it a proper record of all the documents and facts relevant for the court to arrive at a proper decision;

139.2 That he persisted with the aforesaid conduct even after he had received the memoranda of Motau SC and Halgryn SC;

139.3 That he sought to mislead the court as to the fact or extent of consultation that allegedly took place between him and Mzinyathi;

139.4 That he made the decision to withdraw the charges before he had consulted with Mzinyathi;

139.5 That he persisted with his conduct even after it had been pointed out to him by both Motau SC and Halgryn SC that his version was demonstratively false.

[140] For the purposes of this judgment, I will not necessarily follow Mrwebi's categorisation of the complaints aforesaid. I will however deal with what I consider to be the essence of GCB's complaints against Mrwebi. In some instances, extensive quotations of his evidence in these proceedings, in FUL and disciplinary proceedings of Breytenbach might be necessary. Some of the complaints against Mrwebi have already been dealt with insofar as they overlap with those against Jiba.

Alleged mistake on the date Mrwebi took the decision to withdraw the charges

[141] Just to recap, Mrwebi was a special director appointed in terms of section 13(1)(c) of the Act, which provides that the President, after consultation with the Minister and the National Director – may appoint one or more Directors of Public Prosecutions, (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette. On the other hand, the President shall as contemplated in section 13(1)(b) in respect of any Investigating Directorate established in terms of section 7(IA), appoint a Director of Public Prosecutions as head of such an Investigating Directorate established by the President in the office of the National Director contemplated in section 7 to deal with offences or criminal offences or unlawful activities as set out in the proclamation issued in the Gazette for establishment of such Investigating Directorate . Mrwebi at all material hereto was the head of the Investigating Directorate and corruption and fraud charges are offences set out in the proclamation by the President as envisaged in section 7(1) of the Act.

141.1 In paragraphs 100 to 107 of this judgment I referred to the events which preceded the taking of the decision to discontinue fraud and corruption charges against Mdluli. On 4 December 2011 not less than two documents were issued under the signature of Mrwebi. Firstly, it was a letter addressed to the Mdluli's lawyers advising them of the withdrawal of the charges. Secondly, it was a document titled: "CONSULTATIVE NOTE IN TERMS OF SECTION 24(3) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998 (NPA) ON REPRESENTATIONS OF LT. GENERAL MDLULI".

141.2 Mrwebi suggested during the disciplinary proceedings of Breytenbach, proceedings before Murphy J and in the present proceedings that his decision to withdraw the charges was not taken on 4 December 2011, but rather on 5 December 2011. I have very serious problems with this. For the following reasons the decision must have been taken on 4 December 2011 before Mrwebi met and allegedly consulted with Mzinyathi:

141.2.1 It was common cause that on the morning of 5 December 2011 Mrwebi visited the office of Mzinyathi regarding representations by Mdluli for the withdrawal of the charges against him. Mrwebi in his answering affidavit of 2 July 2013 dealing with the opposition to FUL application, and in seeking to explain himself, stated:

> *"25. Later the same day on 5 December 2011 I drafted and directed a memorandum to Adv Mzinyathi in which I recorded some of my views on the matter as well as the fact that I consulted him as required by section 24(3) of the NPA Act. The Regional Head of SCCU, Adv Breytenbach was copied merely for her information. I also directed correspondences incorrectly dated 4 December 2011 to Adv Breytenbach in which I advised of my decision that the matter must be withdrawn. A further correspondence was directed to the legal representative of Fifth Respondent also advising of my decision. The date appearing on these documents should be 5 December 2011 not 4 December 2011. This was clearly a mistake on my part."*

141.3 For the following reasons I do not think it was a mistake:

141.3.1 Firstly, the alleged mistake is not explained. There were at least three documents on which the date of 4 December 2011 was indicated. On each of these documents the date of 4 December 2011 is reflected twice, that is, on the first and last page. The third document which I have not mentioned yet, was a covering letter to the "consultative note". Repetition of the date about six times, without more, could not have been a mistake.

141.3.2 The consultative note and the covering letter to it, were both addressed to Breytenbach, Mzinyathi being the person copied. It is not explained why the two documents dated 4 December 2011 were incorrectly directed to Adv. Breytenbach and incorrectly copied to Mzinyathi, particularly that Breytenbach was not part of consultation between Mrwebi and Mzinyathi on 5 December 2013.

141.3.3 On the morning of 5 December 2011 Mrwebi went to Mzinyathi's office to discuss Mdluli matter. Then in his 'consultative note' he concluded by seeking to explain what had happened during the discussion as follows:

> *"Because I believed that the IG's assistance would serve to address any short comings\defects about the evidence, I did not during the discussion with the DPP deem it necessary to go into much detail about the merits of the matter although there was brief reference to the merits during the discussions"*

141.3.4 "IG" is reference to "Inspector General" in terms of Intelligence Services Oversight Act. Accepting that this is what had happened, there was no need to take a decision to withdraw the charges immediately after having deemed it *not 'necessary to go into much detail about the merits of the matter'* as that would not have constituted 'in consultation' with Mzinyathi.

141.3.5 According Mzinyathi, it was Mwrebi who approached him in his office. He informed him that he (Mrwebi) was dealing with the representations in connection with the matter of Mdluli. Mzinyathi then in paragraph 7 of his confirmatory affidavit dated 10 September 2013 in FUL case stated:

"…*He further informed me that he was going to conduct some research on the Intelligence Serving Oversight. Act, No 40 of 1994. Thereafter he left my office*."

141.3.6 So, because there was no basis to take the decision, no such decision could have been taken on 5 December 2011. It appears from the quotation above that when Mrwebi approached Mzinyanthi, he knew that he was going to raise the provisions of the Intelligence Services Oversight Act, whilst on the other hand he had already taken a decision to withdraw the charges against Mdluli. The contents of "consultation note" dealing with what Mwerbi referred to in paragraph 24 of his opposing affidavit in FUL matter, as *'the views that IG can help in the matter as he/she has unlimited access to documents and information in possession of crime intelligence'*, in my view, was a well-planned mission calculated to give Mzinyathi the impression that a decision to withdraw the corruption and fraud charges against Mdluli was not taken when in actual fact that was fait accompli. I am satisfied that Mwerbi took the decision before he met with Mzinyathi on 5 December 2011.

141.3.7 This is also the understanding of Mzinyathi, which is articulated as follows in his affidavit to the present proceedings:

> "*71. I need to emphasise that on 5 December 2011, <u>we did not discuss the fact that he had prepared memoranda, nor did he say he had prepared any, nor did he bring any along</u>. I had no idea that as of the following day, I would suddenly get two*

memoranda of the nature that I have indicated herein above. I wish to make in unequivocally clear that if we had had such a discussion on the 5 December 2011, I would have raised my objections to his approach during that very meeting."(My emphasis).

141.3.8 Just to conclude on the topic, what is recorded in the 'consultative note'; in my view, serves to support the conclusion I have reached. In paragraph 2 of the 'consultative note' Mrwebi refers to the representations received from Mdluli and then ends the paragraph in the last four lines by stating as follows:

"*The purpose of this document is therefore to deal with and record a decision on the matter. It is the further aim that the document shall serve as a consultative document with the Director of Public Prosecutions North Gauteng as required by Section 24(3) of the NPA Act."* (My emphasis)

141.3.9 The two underlined sentences cannot go together. The latter sentence gives the impression that the Mzinyathi (the Director of Public Prosecutions North Gauteng) was still to be consulted on the document, whilst the former announces a decision already taken by announcing that the "document is…to deal with and record a decision on the matter". In my view, it is very clear from the quotation above that the document in question could only have been written before the meeting of the 5 December 2011. The way it is coached, speaks to that conclusion. If the document was not there before he met with Mzinyathi, how 'a consultative document' which was not in existence could have been used as a 'further aim that the document shall serve as a consultative document', with Mzinyathi on 5 December 2011? In cross-examination during Breytenbach disciplinary proceedings, Mrwebi blamed the construction as quoted in paragraph 141.3.8 above on being an African. The answer to this effect was preceded by cross-examination of Mrwebi which unfolded as follows:

"ADV TRENGROVE: Can I take you through sentences one by one. You say the purpose of this document is to deal with and record a decision on the matter, Correct?

ADV MWERBI: Yes.

ADV TRENGROVE: So you had taken your decision by the time you issued this document.

ADV MRWEBI: The decision, I had taken a decision, I had issued, I have taken a decision by the time I wrote this document.

ADV THENGROVE: But then you say that the aim of this document is to serve as a consultative document with Advocate Mzinyathi.

ADV MWERBI: Yes, that is correct Sir because I did not record, we had a verbal meeting with Advocate Mzinyathi, I was trying to capture the things that we discussed there with Mzinyathi, that was the idea of…, that's what I'm…

ADV THENGROVE: I see, so this is not, not then to serve, because you say, it doesn't say: "I record, this is to record the meeting we've already had", this says: "This shall serve as a consultative document."

ADV MWERBI: As a record may be because the point is my intention Sir, you know you will excuse me, maybe my language is not very well. I'm an African Sir, my language is not very good maybe, my English language is not…

ADV TRENGROVE: Sorry?

ADV MRWEBI: My English language may not be very good…
ADV TRENGROVE: Yes neither is mine.

ADV MWERBI: Yes, but the point is, is the intention was to record the consultative discussions that I had with Mzinyathi on the matter".

141.4 With the quotation above, I am even more convinced that the document was prepared before the meeting of 5 December 2011. How can Mrwebi use the document as a "consultative document" with Mzinyathi when he allegedly produced it after he had consultation with Mzinyathi. This should find to have constituted a lie on the part of Mwerbi.

Mrwebi's failure to disclose 'consultative note' and to despatch a complete record

[142] Murphy J in paragraph 41 of his judgment said this concerning Mrwebi:

"Mrwebi determined to withdraw the fraud and corruption charges against Mdluli and prepared a memorandum and a consultative note setting out his reasons dated 4 December 2011. Mrwebi did not disclose these obvious relevant documents as part of his record of decision belatedly filed in terms of Rule 53.They came to light however as annexures to Breytenbach's founding affidavit in her application to the Labour Court".

142.1 The quotation above is referred to in paragraph 9.9 of the GCB's founding affidavit in these proceedings. It is one of the complaints for the case against Mrwebi. In an answer specifically to paragraph 9.9 of GCB's founding affidavit, Mrwebi states:

"116. I have already dealt with the disclosure of the record in proceedings involving NPA and reiterate what I have already stated".

142.2 This statement was preceded by what Mrwebi stated in the present proceedings as follows:

"15… I must emphasise that this document was purely an internal memorandum meant for the attention of the NDP North Gauteng only and was in no way meant to be a complete recording of the reasons for the decision in the matter".

142.2.1 Mrwebi could never have come to the conclusion that a document which contains his reasons for the decision would remain to be '*purely an internal memorandum meant for the attention of the DPP North Gauteng only'.* Rule 53 (1) (b) is very clear. It required Mrwebi to despatch within 15 days upon receipt of notice of motion to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required to give. So, in addition to the record of the proceedings, his consultative note which contained his reasons should have been filed. The consultative note did not have to be a complete record of the reasons for the decision in the matter before he was obliged to disclose or despatch it to the registrar as required by the Rules.

142.2.2 On 12 August 2013 Halgryn SC provided NDPP with his memorandum in which inter alia, he recorded:

> *"21. We have had regard to 'records' which were indeed filed (which comprise of a scant odd 67 pages) and if we compare it to the actual dockets (each of which comprise of 3 lever arch files there seems to be no logic behind the filing of the skimpy document*
>
> *22. It is palpably not the entire records and our clients are not only going to lose this case for reasons alone, but in the process will undoubtedly be the subject of scathing attacks in open court for failing to provide the full records/ dockets, let alone be the subject of a highly critical judgment in which this aspect will receive much attention"*.

142.2.3 With the critical advice and possible scathing attacks on the skimpy compliance with the provisions of Rule 53, Mrwebi cannot hide, like Jiba attempted to do, behind the fact that LAD was doing everything and that he was just a by-standing person having nothing to do with the case. It was his decision which was challenged. He is a lawyer, an advocate admitted in 1988. During June/July 2012 he was informed of the challenges by FUL. He subsequently consulted with Motimele SC. Then in paragraph 24 of these proceedings, he states:

> *"After the aforesaid consultation, I was never contacted by any official in regard to the application of FUL until a year later, during July/August 2013 when I was again requested by the Legal Affairs Division to attend another consultation with counsel in Sandton. I duly attended the aforesaid consultation with Halgryn SC, Johan Uys and Eulande Mahlangu". (my emhasis*

142.3 Mrwebi has shot himself in the foot for this statement. The statement is for the following reasons false:

142.3.1 On 2 July 2013 Mrwebi deposed to an answering affidavit in FUL matter. At that time, Motau SC was still on brief and Halgryn SC with whom he consulted in August 2013 was not in the picture yet. The answering affidavit was according to his counsel finalised and deposed to on the advice of LAD. If that is so, his statement, "*After the aforesaid consultation, I was never contacted by any official in regard to the application of FUL until a year later, (during July/August 2013* …), referring to consultation with Motimele SC on 11 June 2012, cannot be correct.

142.3.2 Between 21 and 25 June 2013 Motau SC by email was told that only Mrwebi should be deposing to an affidavit as the decision maker. When Motau SC did not accede to this, on 25 June 2013 state attorney and Motau SC were provided with separated affidavits of Mrwebi and Jiba. On 26 June 2013 Motau SC sent an email to the State Attorney objecting to the separated affidavits. Subsequent thereto separated affidavits were commissioned on 2 July 2013 and filed on 4 July 2013. Now, Mrwebi wants this court to believe that all of this about him, had happened without his knowledge and approval until he was contacted during 'July/ August 2013' to consult with Halgryn SC who was briefed on 2 August 2013 and first consultation with him having taken place only on 5 August 2013. His version cannot be true.

142.3.3 Another worrying factor was Mrwebi's suggestion stated in his affidavit of 2 July 2013 as follows:

> *"3 Where I make submissions of a legal nature I do so on the advice of the NPA's legal representative".*

142.3.4 The first question about the statement is which NPA's legal representative was he referring to? It could not have been Motau SC team because his advice was ignored by the NPA and then Mrwebi and Jiba on their own settled separated affidavits on or before 25 June 2013 and the instruction to serve and file same must have been given before the end of June 2013. So, if Mrwebi intended to suggest that he relied on the advice of NPA's legal representative referring to Motau SC team he would have been untruthful. If he sought to rely on LAD for such an advice, his suggestion that the last time he had anything to do with FUL application was 2012 and that he was then contacted to consult with Halgryn SC in July/ August 2013 similarly cannot be correct for the reason already mentioned above.

142.3.5 As I said, Halgryn SC team was briefed on 2 August 2013 and first consultation with him took place on 4 August 2013. So, by the time Mrwebi deposed to his answering affidavit on 2 July 2013, he had nothing to do with Halgryn SC team, but one thing

for sure he knew of the draft answering affidavit. First, he proposed one affidavit by him and later separated affidavits.

142.4 In terms of the statement quoted in paragraph 143.2.3 above, Mrwebi is effectively seeking to suggest that he had nothing to do with the defiance of Motau SC's advice. The tactic adopted by Mrwebi in these proceedings as was the tactic in FULmatter before Murphy J, is the same as the adopted by Jiba, i.e. 'the application was never served on me personally' and as stated in paragraph 32 of his affidavit in the present proceedings, "did not know or become aware that the complete record for purposes of review had not been disclosed".

143.4.1 If his statement is true that he never became aware that the complete record for the purposed of review had not been discovered what did he then do after he had become aware of the critical memorandum of Halgran SC in August 2013? The case was proceeded with and finalised before Murphy J. Seeing that it was his decision which was under attack, he was not expected to play a passive role. It was his duty to ensure that there was compliance with the Rules of court and advice by Halgryn SC. His attempt to blame LAD is of no help to his conduct complained of. Failure to disclose the consultative note and to provide complete record should be found to have been deliberate.

Mrwebi's failure to heed to the understanding he had with Mzinyathi

[144] According to Mzinyathi, on 5 December 2011 Mrwebi visited his office. Mrwebi informed him of the representations made by Mdluli and made Mzinyathi to believe that the meeting was a way of fulfilling the requirement for consultation contemplated in the relevant section 24 (3) of the Act which Mrwebi quoted to Mzinyathi. This version was never disputed by Mrwebi and therefore he would have known that Mzinyathi's attitude was that the decision to withdraw the fraud and corruption charges against Mdluli can only be taken if Mzinyathi agreed thereto.

[145] The discussion centred around section 7(7) of the Intelligence Services Oversight Act no. 40 of 1994 as according to Mrwebi, the section was critical in dealing with Mdluli's representations. They then parted on the understanding that Mrwebi was going

to conduct some research on the regulations applicable to the intelligence environment in which Mdluli worked. Section 7(7) has nothing to do with the prima facie case which was established as contained in the docket placed before Mrwebi.

[146] In paragraph 135.9.3 of this judgment I referred to what Mzinyathi 's reaction was to the decision taken by Mrwebi after the meeting of 5 December 2011, a version which is not placed in dispute by Mrwebi. To discuss with a colleague whom you are obliged in terms of the legislative framework to consult and agree with; and parted on the understanding that a decision will not be taken before a research is conducted, but, then thereafter took a decision contrary to the understanding, in my view, can only be ascribed to as a betrayal and consultation in bad faith by an officer of the court. This in my view is so serious that it should justify a removal from the roll of advocates.

Mrwebi's failure to take advice offered by Mzinyathi

[147] Mzinyathi knew on 6 December 2011 when he received two memorandums from Mrwebi that the latter has taken a decision to withdraw the charges against Mdluli on the corruption and fraud charges. The one memo was addressed to Mzinyathi and another one to Adv. Glynis Breytenbach. The one addressed to Mzinyathi was entitled "consultative note" in terms of section 24(3) of the National Prosecuting Authority Act, referred to earlier in this judgment. The one addressed to Breytenbach was headed "Decision regarding the representations of Lt. General Mdluli". In paragraph 28 of the memorandum addressed to Mzinyathi, Mrwebi stated: *"The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Col. Barnard immediately".* Furthermore, in paragraph 29 of the memo Mrwebi stated that Lt-General Mdluli's lawyers will be advised accordingly.

[148] In the memorandum to Breytenbach, Mrwebi stated:

> *"I refer to the attached consultative note in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 to the Director of Public Prosecutions, North Gauteng and which was copied to your office. For reasons stated in the said note, the charges against Lt-General Mdluli and Colonel Barnard must be withdrawn immediately".*

[149] That appeared to have infuriated Mzinyathi terribly. On the morning of 7 December 2011, Mzinyathi called Mrwebi and requested to meet with him during the cause of that day. This was after Mzinyathi had a meeting with the prosecutors Mr Smith

and Breytenbach that morning. Mrwebi was apparently in Bloemfontein and then, they agreed to meet on 9 December 2011.

[150] On 8 December 2011, Mzinyathi apparently out of anxiety sent an email to Mrwebi. The relevant portion of the email is quoted in paragraph 135.9.3 of this judgment. Of importance, it was clearly conveyed to Mrwebi that he (Mrwebi) cannot instruct prosecutors in the North Gauteng Division in respect of which Mzinyathi is appointed as a Director of Public Prosecutions.

[151] In the present proceedings, Mrwebi seeks to find an excuse in the following statement made by him in paragraph 17 of his answering affidavit:

> *"17. Even though the North Gauteng High Court as well as the Supreme Court of Appeal, subsequently ruled that the phrase "in consultation with" as contained in section 24(3) of the National Prosecuting Authority means that there must be concurrence between two functionaries, I was as at 05 December 2011 of the view that my consultation with Adv Mzinyathi, such as it was in full compliance with the provisions of section 24(3) of the National Prosecuting Act".*

[152] For the following reasons Mrwebi should be found not to be honest and candid with this court, as he was also not honest in the proceedings before Murphy J.

152.1 Firstly, he was warned in the email of 8 December 2011 that he cannot legally instruct prosecutors in the North Gauteng Division without Mzinyathi agreeing thereto;

152.2 Secondly, according to Mzinyathi on the 9 December 2011 when they met with Mrwebi, the latter was told that his withdrawal of the charges against Mdluli was contested by both of them, that is, Mzinyathi and Breytenbach. It has always been Mzinyathi's contention that a decision to withdraw the charges could not be taken without his concurrence. This version by Mzinyathi was never questioned by Mrwebi, nor did he at any stage raise it with Mzinyathi that the latter's concurrence was not required in terms of section 24(3) of the Act. Only in these proceedings did Mrwebi plead as quoted in paragraph 151 above.

152.3 On 22 January 2013 Mrwebi took the witness stand in the disciplinary proceedings of Breytenbach. Interpretation and application of the provisions of section 24(3) featured prominently particularly under cross-examination. For its importance, I find it necessary to quote the relevant portion of Mrwebi's evidence during cross-examination:

"ADV TRENGROVE: Did he agree to stop the prosecution?

ADV MRWEBI: The decision was mine.

ADV TRENGROVE: Did he agree to stop the prosecution?

ADV MRWEBI: Okay let's say he did not agree to stop the prosecution.

CHAIRPERSON: Is that your answer?

ADV MRWEBI: That is my final answer.

ADV TRENGROVE: Which means that your decision was unlawful, correct?

ADV MRWEBI: I did not believe so, no.

ADV TRENGROVE: No there is no doubt about this legal rule.

ADV MOKHARI: It's a legal argument.

ADV TRENGROVE: There is no doubt about this legal argument and I simply say to the witness I agree with you that your view is correct, it accords with these cases, but let me do it on that basis. You understood the law to be, rightly or wrongly, that you required substantial agreement on the exercise of that power correct? We also know that Mr Mzinyathi did not agree with you that the prosecution be stopped, correct?

ADV MRWEBI: Mr Mzinyathi did not wholly agree with me in respect of issues that I raise.

ADV TRENGROVE: Mr Mzinyathi did not agree with you that the prosecution be stopped, correct?

ADV MRWEBI: We left on the understanding that I am going to take a decision. To me that's sufficient agreement. We left on the understanding that I will go and take the decision based on what we have discussed. To me that would have …

ADV TRENGROVE: Why don't you just answer the question?

ADV MRWEBI: No, no, no, there was no express agreement, expressly, expressly, in express terms

ADV TRENGROVE: *The only view he expressed was that the prosecution should go on?*

ADV MRWEBI: *On the one part.*

ADV TRENGROVE: *On that issue?*

ADV. MRWEBI: *Yes.*

ADV. TRENGROVE: *Yes?*

ADV. MRWEBI: *Yes.*

ADV TRENGROVE: *On your understanding of the law thereof your decision was unlawfully taken?*

ADV MRWEBI: *I do not think it was sir.*

ADV TRENGROVE: *Because you did not have substantial agreement to stop the prosecution?*

ADV MRWEBI: *Because sir, I believe I had substantial agreement Sir.*

ADV TRENGROVE: *You believe you..?*

ADV MRWEBI: *I believe I had substantial agreement*

ADV TRENGROVE: *I see, so you believed that Adv Mzinyathi substantially agreed that the prosecution should be stopped?*

ADV MRWEBI: *Agreed with me, discuss the issue and these are the issues, then he said he will take the decision*

ADV TRENGROVE: *Mr Mrwebi we will submit to the chair that this evidence is patently, dishonestly given. It can't be honest.*

ADV MRWEBI: That's your view Sir. I can't stop you from saying that".

152.3.1 What is quoted in paragraph 152.3 above was preceded by cross-examination of Mrwebi during the disciplinary hearing of Breytenbach which unfolded as follows:

"ADV TRENGROVE: Was there anybody else who shared your view? Any lawyer who shared your view?

ADV MRWEBI: I do not know, I do not know because I did not consult with anybody else.

ADV TRENGROVE: You don't know because you didn't consult anybody?

ADV MRWEBI: I don't know.

ADV TRENGROVE: I see. Now by the time you took this decision that the matter be withdraw, as you said, you did not yet know what Advocate Mzinyathi's view was, correct?

ADV MRWEBI: You know, the simple view of Advocate Mzenyathi was known, I would say it was known because I, this is what I picked up later on you know, because he says he believed there is a case, that's his view, that was his view. yet I told him the problems later.

ADV TRENGROVE: So at the time you took this decision to the best of your belief Advocate Mzinyathi was of the view that the prosecution should continue?

ADV. MRWEBI: Not necessarily.

TRENGROVE: Yes, but that's what I understand you to say Mrwebi?

ADV MRWEBI: Yes, you said there was …Yes.

ADV TRENGROVE: I beg your pardon?

ADV MRWEBI: Well, maybe let's say yes.

ADV MRWEBI: Yes, what?

ADV MRWEBI: Yes it's what, he wanted the prosecution to continue.

CHAIRPERSON: He had that view?

ADV MRWEBI: Well, he did not say so. He did not say so.

ADV TRENGROVE: But your belief was …

ADV MRWEBI: His view was that you know, on his… In fact he says he did not get deeper into the matter but on the face of it, looks like you know we can, there is a case, that was his view".

152.3.2 Further in cross-examination, his evidence which preceded also what is quoted in 152.3 above unfolded:

ADV TRENGROVE: Did you and he agree to discontinue the prosecution on that day?

ADV MRWEBI: No, we agree on the problems, we did not agree to discontinue the prosecution on that day.

ADV TRENGROVE: You unilaterally decided to discontinue the prosecution without his agreement, correct?

ADV MRWEBI: I think I did so after I consulted him, as I thought I consulted him I was required.

ADV TRENGROVE: Just answer my question. You unilaterally stopped the prosecution with…

ADV MRWEBI: I did not think it was unilateral Sir.

ADV TRENGROVE: You unilaterally stopped the prosecution without his agreement, correct?

ADV MRWEBI: In certain respects, let's say in certain respects.

ADV TRENGROVE: You unilaterally stopped the prosecution without his agreement to stop the prosecution.

ADV MRWEBI: In certain respects.

ADV TRENGROVE: In … He did not agree to stop the prosecution at all. Correct?

ADV MRWEBI: No, in respect of certain issues.

ADV TRENGROVE: He did not agree to stop the prosecution at all.

ADV MRWEBI: In respect of certain issues.

ADV TRENGROVE: What do you mean by that?

ADV MRWEBI: He identified, he agreed with me in terms of the problems that there were that…"

152.3.3 I agree with the conclusion by Mr Trengrove as in the quotation under paragraph 152.3 of this judgment. That is, Mrwebi's evidence was 'patently, dishonestly given". Mr Mrwebi seems to have forgotten about the oath which he took as a witness, but also as an officer of the court when he was admitted as an advocate in 1988. He turned himself into an unreliable and dishonest witness.

> Unfortunately that finds its way into the present proceedings. His statement in paragraph 17 of his answering affidavit in these proceedings quoted in paragraph 151 above is not only a lie, but is intended to mislead this court. He clearly knew long before he deposed to his answering affidavit in FUL matter on 2 July 2013 that his decision would never have been lawful without the agreement, concurrence or substantial agreement with Mzinyathi. I am not sure if he thought this court will have no regard to his evidence adduced during the disciplinary proceedings of Breytenbach. There cannot be any excuse for his lies. He should be found to have ceased to be a fit and proper person to remain on a roll of advocates. He betrayed his oath of office as an advocate and in doing so, also brought the prosecuting authority into disrepute

Mrwebi's failure to heed to Hagryn SC's advice

[153] In paragraphs 135 to 135.9.5 of this judgment I dealt with Jiba's failure to adhere to Halgryn SC's advice. In some respects what is stated therein finds some relevance to the topic under discussion. On 12 August 2013 Halgryn SC provided his written opinion in which he clearly pointed out that the decision to withdraw the charges against Mdluli will not stand in court. Despite the advice, Mrwebi and Jiba persisted in seeking to oppose the application brought by FUL. In paragraph 24 of his answering affidavit in the present proceedings, Mrwebi states that he consulted with Halgryn SC in August 2013. Then in paragraph 25 he concludes by saying: *"After the aforesaid consultation, I never interacted in any manner whatsoever with Halgryn SC or any other external legal practitioner in regard to the FUL matter":*

153.1 Mrwebi cannot wash his hands. First, he is the person who made the decision which was challenged. Secondly, he knew of the advice by Halgryn SC or ought to have known. *" I never interacted in any manner whatsoever with….or <u>any other external legal practitioner</u>",* confirms that after consultation with Halgryn SC, he (Mrwebi) interacted with "internal legal practioner/s" seen in the light of what follows hereunder. Jiba in her answering affidavit to the present proceedings puts it this way:

> *"110. The approach suggested by Halgryn SC team at the consultation held on 8 August 2013 and prior consultations made a number of*

assumptions… His advice was that therefore that I should review the decision of the second respondent and Adv Chauke in terms of section 22(2) (c) of the NPA Act and give FUL an opportunity to amend their grounds for relief if they still disagree".

153.2 Then in paragraph 111 of her answering affidavit in the present proceedings, Jiba says:

"*I together with the NPA team could not agree with Halgran SC".*

153.3 Furthermore, in paragraph 137 of Jiba's answering affidavit in these proceedings and after having dealt with a range of oral advices given by Halgran SC during consultation, she concludes by saying:

"It was for these reasons that I was uncomfortable with the oral advice furnished to me by the Halgryn SC team. Indeed the entire team of representatives from the NPA disagreed with his advice. I therefore requested the Halgryn SC team to prepare a written memorandum of advice. The representatives of the NPA then also went away and reconstructed the respective dockets".

153.3.1 Clearly none of the above would have happened without the decision maker's (Mrwebi's) involvement. The point is, Mrwebi's attempt to distance himself from the decision to defy Halgryn SC's advice, smacks him as untruthful and dishonest person in the handling of Mdluli case up to the present proceedings. He should know as a decision maker and a person against whom serious allegations are made in the present proceedings, that he ought to take this court into his confidence than just stating that he never interacted with Halgryn SC or any other external legal practitioner' after consultation with Halgryn SC. The real issue is what he did with Halgryn SC's advice. He together with Jiba ignored solid and right advice given by Halgryn SC. That does not accord with a fit and proper requirement to remain on a roll of advocates. I now turn to deal with the other issue.

Mrwebi's withdrawal of corruption and fraud charges in the face of prima facie evidence

[154] There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, namely the National Prosecuting Authority Act. The

prosecuting authority has the power inter alia, to institute criminal proceedings on behalf of the state and to carry out any necessary functions included to incidental to instituting criminal proceedings (section 179(1) and (2) of the Constitution).

154.1 Anyone within the prosecuting authority, who exercises this power, must do so in accordance with the rule of law and the Constitution. Short of this, would be in conflict with the Constitution and the national legislation. Failure to prosecute any case in the face of a prima facie evidence would offend against the law and the Constitution, being the supreme law of the Republic of South Africa.

154.2 It is not my understanding that Mrwebi suggested that there was no prima facie case on the corruption and fraud charges. In his 'consultative note' he expressed himself on the issue as follows and I do this at the risk of repetition:

> *"…Essentially my views related to the process that was followed in dealing with the matter particularly in view of the fact that the matter fell squarely within the mandate of the Inspector-General in terms of Intelligence Services Act 40 of 1994. I noted that it is only the Inspector General who by law is authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigative can never be complete without access to such documents and information. In my view, the process followed in this matter is possibly illegal as being in contravention of the said provisions of the Intelligence Services Oversight Act 40 of 1994".*

[156] For the following reasons there was no legal basis to come to the conclusion as quoted above and Mrwebi knew about it:

156.1 If the concern expressed above was genuine, instead of withdrawing the charges, Mrwebi could have allowed the prosecution team and the investigating officer to resort to utilisation of the provisions of section 205 of the Criminal Procedure Act, which allows the Director of Public Prosecutions or a public prosecutor authorised thereto in writing, to request a judge of a High Court, a regional court magistrate or a magistrate subject to the provisions of subsection (4) and section 15 of the Regulation 12 Interception of Communicative and Provisions of Communication – related Information Act 2002, to require the attendance before him or her or any other Judge, regional court magistrate or magistrate for examination by the Director of Public Prosecutions or the

public prosecutor authorised thereto in writing, of person who is likely to give material or relevant information as to any alleged offence.

156.1.1 Therefore, Mrwebi could have advised the investigating and prosecution team in the matter to resort to section 205 of Act 51 of 1977 in order '*to have full access to…documents and information'* and to subpoena whoever *'can give a complete view of the matter'* by submitting documents and information during the proceedings in terms of section 205.

156.2 It looks like the raising of the Intelligence Services Oversight Act was just a shield behind the real intention of Mrwebi, the intention being the withdrawal the charges despite prima facie case against Mdluli and with or without the concurrence of Mzinyathi.

156.3 Before Mzinyathi and Breytenbach met with Mrwebi on 9 December 2011, together with a member of the South African Police Services met with Inspector General of Intelligence's legal advisor, Ms Joy Governder who expressed the view that Inspector General of Intelligence (IGI) does not investigate criminal offences as such investigations are within the domain of the SAPS.

[157] On 19 March 2012 IGI ambassador, Adv FD Radebe prepared a memo which memo was later forwarded by Lt. Gen. Dramat to Jiba and Mrwebi on 23 March 2012. In the memo addressed to Lt. Gen, NS Mkhwanazi, Acting National Commissioner of Police at the time, it was recorded:

"1. We refer to your letter of the 22nd February 2012 wherein you requested an opinion on the reasons advanced by the National Prosecuting Authority for the withdrawal of the criminal charges against General Mdluli.

2, In response to the memorandum of Adv. Mrwebi of the 4 December 2011 we advise as follows:

2.1 The Inspector- General of Intelligence (IGI) derives her mandate from the Constitution of the Republic of South Africa, which provides for the monitoring of the intelligence oversight which much result in a report containing findings and recommendations;

2.2 Any investigation conducted by the Inspector-General is for the purposes of intelligence oversight which must result in a report containing findings and recommendations;

2.3 The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the police;

As such we are of the opinion the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that this matter be referred back to the NPA for the institution of the criminal charges".

[158] How Mrwebi could have missed this simple mandate of IGI is mind boggling. His intention, in my view, was to withdraw the charges against Mdluli and never to reinstate them. The following facts seem to support the conclusion: The memorandum quoted above was brought to the attention of Mrwebi by Breytenbach in the company of Adv Ferreira. Mrwebi in paragraph 21 of his answering affidavit deposed to on 2 July 2013 in the FUL matter, stated:

"… The document from the IGI in the last paragraph thereof contained a recommendation that this matter must be referred back to the NPA for the investigation of criminal charges".

[159] Then in paragraph 32 of the answering affidavit of 2 July 2013, Mrwebi introduced a revealing shift from his initial basic reason for the withdrawal of charges against Mdluli, and by so doing exposed himself in bad light. He stated inter alia:

"Later on 30 March 2012 I addressed to General Dramat, advising of the fact that any decision to instruct the withdrawal of the charges still stands and that the matter is closed…" (My emphasis)

159.1 The statement above is in direct contrast to what Mrwebi said in the preceding paragraph 24 of his affidavit deposed to on 2 July 2013 wherein he stated:

"*On 5 December 2011 I met Adv Mzinyathi, the DPP of Gauteng North to discuss the Mdluli matter. In the light of the views I held about the matter that the IG would not only help with access to documents and information as well as the fact that she/he would also assist with the issue of privilege my view as conveyed to the DPP related to the process that was followed by the police in dealing with the matter as well as the view that, in the nature of the matter, the IG can help in the matter as she/he has unlimited access to documents and information in possession of crime intelligence. Because I believe that the IG's assistance would serve to address any shortcomings or defects about the evidence… "*

159.1.1 A turn around on the statement quoted above is sought to be explained further in the same paragraph 32 of the answering affidavit of 2 July 2013 as follows:

> *"I want to clarify that I wrote in the fashion I did (referring to 'the withdrawal of the charges still stands and the matter is closed'), I did because since our agreement with the DPP, North Gauteng and Adv. Breytenbach on 9 December 2011 nothing, as far as I was aware changed in terms of the status of the investigation in the matter, no new information was presented on which the earlier decision could be reconsidered and accordingly in my view what was the point of keeping the matter open in the books of NPA, hence my statement that 'the matter is closed'. This statement does not however, mean that should new evidence come to light it may be reopened and dealt with according law".*

[160] *"I wrote in the fashion I did…", Mrwebi was referring to "the withdrawal of the charges still stands and the matter is closed."* Mrwebi was dishonest and sought to mislead the court in FUL matter. First, the charges were not withdrawn because there was lack of evidence. The brief summary of evidence in paragraph 104 above is quite clear that there was *prima facie evidence upon which* to proceed on the fraud and corruption charges about Mdluli. That was also the views of Mzinyathi to which Mrwebi conceded during the disciplinary hearing of Breytenbach. Secondly, the "consultative note" containing the reasons for the withdrawal of the charges focused on the views of the Inspector General. Lastly, the discussion of 9 December 2011 came after the horse had bolted because Mdluli's lawyers were already informed that the charges against Mdluil would be withdrawn.

160.1 Mzinyathi explained it on 23 January 2013 as follows during his cross-examination in the disciplinary proceedings against Breytenbach:

"ADV TRENGROVE: *So, by the time he met with you on the 9th December he said he was functus officio*, correct?

ADV MZINYATHI: Yes

ADV TRENGROVE: And we all know that *functus officio means that I have taken any decision and I no longer have power to reopen it, correct?*

ADV TRENGROVE: So that presented you with a fait accompli, the horse bolted, the case will have to be withdrawn;

ADV MZINYATHI: Indeed.

ADV TRENGROVE: And it was in the light of that fait accompli that you then had your discussion as to what now, correct?

ADV MZINYATHI: Yes.

ADV TRENGROVE: And I understand your evidence that you felt, and I'm told that Advocate Breytenbach agreed with you, whether she said so or not, that you did not want the spectacle of a public clash between various affidavits of the NPA, correct?

ADV MZINYATHI: Yes.

[161] So, the provisional withdrawal as agreed on 9 December 2011 had context and the context was not that there was insufficient evidence to prosecute Mdluli on the fraud and corruption charges. Refusing to reinstate the charges after the Intelligence had cleared the way for Mrwebi, bearing in mind that, that was his initial main concern, in my view, displayed how Mrwebi was determined to flout the rule of law and the Constitution by discontinuing the prosecution against Mdluli in the face prima facie evidence and in contravention of the provisions of section 24 (3) of the Act, that is, without concurring with Mzinyathi.

Insistence on 'in consultation' with Mzinyathi

[162] On 9 September 2013, that is, few days before the hearing of FUL application which was scheduled for 11 September 2013, Mrwebi delivered supplementary answering affidavit in an attempt to respond to FUL replying affidavit in which retired Judge Kriegler stated:

"83. The second is that Advocate Mrwebi still seeks to sit on two stools: whereas his cotemporaneous actions and documents clearly point to withdrawal of charges, i.e. an unequivocal withdrawal of proceedings against General Mdluli, he subsequently sought – and still seeks – to suggest a "provisional" withdrawal.

84. The third is that Advocate Mrwebi still persists in generalising when seeking to justify his criticism of the case against the General and his disagreement with the Specialised Commercial Crimes Court prosecutor who had worked up the case with senior investigators and the prosecutor's two experienced supervisors, Advocates Brytenbach and Mzinyathi.

85. Then, when the Inspector General of Intelligence ("the IGI") (the fourth respondent) intimated that Advocate Mrwebi was quite wrong in seeking to involve her office

instead of the Police, he doggedly adhered to the manifestly position he had adopted from the outset".

[163] I cannot agree more with the criticism. The 'fourth respondent' was with reference to the Inspector General of Intelligence. Mrwebi in seeking to tackle the criticism as he should, in my view, made his position worse by responding as follows:

"AD PARAGRAPHS 83 TO 85

23. The allegations herein are denied. The Applicant has not made any basis for its bold allegation that I had made the decision to cease the prosecution of the firth respondent.

24. I took the decision to withdraw the criminal case in consultation with Adv. Breytenbach and Mzinyathi …"

[164] There was no 'bold allegation' about it. In the preceding paragraphs, I particularly dealt with the concession and at times serious contradictions made by Mrwebi at every corner regarding the withdrawal of the charges against Mdluli on the corruption and fraud charges. He clearly discontinued the prosecution by all means in the face of a clear prima facie evidence and without concurring with Mzinyathi.

[165] But what has really brought down Mrwebi in the quotation above, is his alleged in consultation with Mzinyathi. For the first time since his decision on 4 December 2011, did he use the words 'in consultation' with Mzinyathi. By 9 September 2013 when he deposed to the supplementary affidavit in Mdluli/FUL case he had already conceded on 22 January 2013 during the disciplinary hearing against Breytenbach that he single-handedly took the decision to withdraw the charges against Mdluli. He later in the disciplinary proceedings moved to 'substantial agreement' with Mzinyathi, something branded by Advocate Trengrove SC as evidence which was 'patently, dishonestly given'.

[166] In paragraph 37 of his supplementary affidavit deposed to on 9 September 2013, he persisted with the evidence 'patently, dishonestly given' as follows:

"… *The decision to withdraw charges was taken in consultation with Advocate Mzinyathi"*.

166.1 Mrwebi clearly has made himself liable to cease to be a fit and proper person to remain on a roll of advocates.

Concluding words on Mrwebi and Jiba

[167] I cannot believe that two officers of the court (advocates) who hold such high positions in the prosecuting authority will stoop so low for the protection and defence of one individual who had been implicated in serious offences.

[168] In fact, taking into account the kind of personality (referring to Mdluli), Mrwebi and Jiba had to deal with, they should have stood firm and vigorous on the ground by persisting to prosecute Mdluli on fraud and corruption charges. By their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him.

[169] It is this kind of behaviour that diminishes the image of our country and its institutions which are meant to be impartial, independent and transparent in the exercise of their legislative public powers. Retired Judge Johan Kriegler in his replying affidavit in FUL review proceedings had the occasion to put it this way:

> *"128. In serious matter of public interest, an accountable and transparent organ of state has a responsibility to keep the public informed and to make full and frank disclosure in order to refute, explain or ameliorate dangerous allegations..."*

169.1 POCA as a national legislation was introduced in our country and in its preamble, a concern is raised of the ineffectiveness of the ordinary laws of the country to deal with the surge of crimes like corruption and fraud. The Prosecuting Authority Act makes a provision for the establishment of the Investigating Directorate and special Director, (who was Mrwebi at all material times hereto) within the prosecuting authority, to deal with the surge of crimes like corruption and fraud, the mandate being to effectively investigate and prosecute these offences without fear, favour and prejudice.

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

COMPLAINTS AGAINST MZINYATHI

[171] GCB's complaint against Mzinyathi arose from his confirmatory affidavit deposed to on 10 September 2013. This was a confirmatory affidavit to Mrwebi's supplementary answering affidavit deposed to on 9 September 2013. Murphy J in his judgment in FUL matter handed down on 28 September 2013 inter alia, criticised Mzinyathi as follows:

> *"[52] Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary enquiry or for that matter with any of the averments in the supplementary affidavit. His account of the events between 5 December 2011 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific allegations in the supplementary founding affidavit. He nonetheless maintained that he had consulted Mzinyathi. The answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi who therefore initially did not confirm Mrwebi's general account. In his confirmatory affidavit filed at the 11th hour the day before the hearing without any explanatory whatsoever for it being filed 6 months after the delivery of the supplementary founding affidavit, Mzinyathi differing from his evidence at the hearing, confirmed the allegations in Mrwebi's affidavit as they relate to herein thus saying in effect for the first time that he had indeed concurred in the decision.*
>
> *[53] Mzinyathi elaborated further in ragraph 7 to 9 of the affidavit that Mrwebi approached him at his office on 5 December 2011, told him that he was dealing with representations regarding Mdluli and needed to consult him. Mrwebi mentioned to him that he was busy researching the Intelligence Services Oversight Act and then left his office. The impression created as mentioned earlier is that no substantive discussions took place that day and hence clearly there was concurrence before Mrwebi wrote the consultative note and communicated with Mdluli's attorneys. Later Mzinyathi heard from Smith that Mrwebi had instructed the prosecutor to withdraw the charges. He then wrote the e-mail of 8 December 2011 to Mrwebi and met him on 9 December 2011 together with Breytenbach. At the meeting he was persuaded that the matter was not ripe for trial and agreed to the provisional withdrawal of the charges. This differs materially from his original position that he was unable to influence the decision because it has been finally taken, but conceded to the characterization of the withdrawal as provisional as a compromise partially addressing his concerns.*
>
> *[54] Taking into account of how it was placed before the court by Mzinyathi after FUL's heads of argument were filed, without explanation for its lateness, and its inconsistency with his testimony at the disciplinary hearing that he was presented*

> *with a fait accompli and was unable to influence the decision because Mrwebi claimed to be functus officio, this evidence of the DPP of North Gauteng to the effect that he ultimately concurred, must regrettably be rejected as creditworthy. The affidavit is a belated transparent and unconvincing attempt to rewrite the script to avoid the charges of unlawfulness. The version in the supplementary founding affidavit, originally uncontested by Mzinyathi and corroborated by Mzinyathi's testimony at the disciplinary hearing, must be preferred and accepted as the truth".*

[171] In the present proceedings Mzinyathi deals with these criticisms and explains himself extensively in more than twenty page affidavit made out of several paragraphs. I do not intend to deal with his responses in detail. Mzinyathi in paragraph 13 of his confirmatory affidavit deposed to on 10 September 2013 stated:

"*I have read the answering affidavit of Mrwebi and the first respondent and confirm the allegations made therein in so far as they relate to me".*

[172] It is this statement that brought Mzinyathi in the firing line with Murphy J. This court now has the benefit of hearing Mzinyathi on the remarks made against him. I must immediately point out that I have not been able to find in Mzinyathi's confirmatory affidavit that at the meeting of 9 December 2011 *'he was persuaded that the matter was not ripe for trial and agree to the provisional withdrawal of the charges'.* What I read in his confirmatory affidavit of 10 September 2013 is that he *'…initially disagreed with Adv Mrwebi's decision that the matter should be withdrawn'*. The *'not ripe for trial'* statement in paragraph 10 of Mzinyathi confirmatory affidavit cannot be attributable to him as his statement, but rather that of Mrwebi and it reads: *"The other issue which he raised was that the investigation were incomplete and the matter was not ripe for trial. After extensive discussions we agreed that the matter should be withdrawn provisionally so that the investigating officers can work with the office of the Inspector General of Intelligence to conduct further investigations. Adv. Mrwebi informed Adv. Breytenbach that once the investigations were completed she could re-enroll the matter for trial"*, something which Mrwebi refused to do after the Inspector General advised that '*the matter be referred to the NPA for the institution of the criminal charges'* afresh against Mdluli as quoted in paragraph 157 of this judgment. What is clear from what was stated in paragraph 10 of Mzinyathi's confirmatory affidavit is that "*not ripe for trial*", was a statement made by Mrwebi to Mzinyathi and Mzinyathi did not own the statement in his confirmatory affidavit. The agreement of 9 December 2013 to provisionally withdraw the fraud and corruption charges against Mdluli has context which is briefly referred to hereunder:

172.1 The statement quoted in paragraph 171 above was preceded in particular by paragraphs 7 to 9 in which Mzinyathi recorded:

"7. On 5 December 2011, Adv, Lawrence Mrwebi approached my office and informed me that he was dealing with representations in connection with the matter of the Fifth Respondent, and that he needed to consult with me in this regard, He further informed me that he was going to conduct some research on the Intelligence Services Oversight Act No 40 1994. Thereafter he left my office.

8. Later I received a copy of a letter from the prosecutor, Adv. Smith in which Adv. Mrwebi instructed the prosecutor to withdraw charges against the Fifth Respondent. In response to the said instruction I wrote an email to Adv. Mrwebi in which I requested a meeting with him to discuss the matter.

9. On 9 December 2011, I and Adv. Breytenbach held a meeting with Adv.Mrwebi in his office, 2nd Floor, VGM Building 123 West Lake Avenue, Weavind Park in Silverton, the NPA Head Office. During our meeting, I initially disagreed with Adv Mrwebi decision that the matter should be withdrawn."

[173] What is quoted above should be seen in the context of the email of 8 December 2011 quoted in part in paragraph 153.9.3 of this judgment, which email Mzinyathi sent to Mrwebi before their meeting of 9 December 2011. This email is also mentioned by Mzinyathi in the present proceedings. Mzinyathi in my view should be commended for standing firm against Mrwebi's withdrawal of the charges against Mdluli. His evidence during Breytenbach's disciplinary proceedings part of which is quoted in paragraph 160 above was consistent with his stand point about what had transpired on 5, 8 and 9 December 2011. That coupled with his detailed answering affidavit in the present proceedings tackling the adverse remarks made against him as quoted in paragraph 169 of this judgment, should bring the complaints against Mzinyathi to rest. Murphy J did not have the benefit of the detailed response which has now been placed before this court by Mzinyathi. The agreement on 9 December 2011 as indicated in paragraph 10 of Mzinyathi's confirmatory affidavit deposed to on 10 September 2013 to have the charges 'withdrawn provisionally' against Mdluli was not inconsistent with what Mzinyathi said during the disciplinary proceedings of Breytenbach as quoted in paragraph 160 of this judgment.

[174] GBC seems to have been mindful of the insufficient information against Mzinyathi to justify any of the reliefs sought. For example, in paragraph 20 of its founding affidavit, it states:

"Jiba and Mrwebi, in particular, appear to be entirely indifferent to the demands of the advocates profession and high standard required of them as officers of the court. They have fallen well short of their high duty to the court, which requires absolute honesty and integrity. The affidavits deposed by Jiba and Mrwebi in the FUL matter

evince an attempt to mislead the court, at best and, indeed, appear to have been untruthful in material respects". (my emphasis).

[175] Mzinyathi in my view, was consistent throughout. His confirmatory statement quoted in paragraph 171 above has to be considered in the light of what is stated in paragraph 173, all of which speak to the contextualisation of the statement in paragraphs 10 and 13 of his confirmatory affidavit. It is for this reason, amongst others, that this court did not deem it necessary for Mzinyathi to address the court in the present proceedings, neither did GCB insist to proceed against Mzinyathi after counsel for GCB was requested to indicate whether GCB still persists with its application against Mzinyathi.

COSTS

[176] Mzinyathi should be found to have substantially succeeded in his opposition for the relief sought by GCB. For this reason he should be entitled to costs up to the stage when counsel for GCB indicated that the latter will not persist with its relief against Mzinyathi. Similarly, GCB should be found to have substantially succeeded arising from my findings with regard to Jiba and Mrwebi conduct in their handling of Mdluli case.

[177] An order is hereby made as follows:

177.1 The case against Mzinyathi (third respondent) is hereby dismissed with costs, such costs to include the costs of two counsel up to the stage when the applicant (GCB) indicated that it will not persist against the third respondent.

177.2 The application against Jiba (first respondent) and Mrwebi (second respondent) with regard to their handling of Mdluli's (FUL) case is hereby granted and an order is hereby made as follows:

177.2.1 The names of Ms Nomgcobo Jiba (first respondent) and Mr Lawrence Sithembiso Mrwebi (second respondent) are hereby struck from the roll of advocates;

177.2.2 The first and second respondents to pay the costs of the application the one paying the other to be absolved and such costs to include the costs of two counsel.

M F LEGODI

JUDGE OF THE HIGH COURT

I agree

W.HUGHES

JUDGE OF THE HIGH COURT

For the Applicant:	Adv S Burger SC
	Adv N Mayosi
Instructed by:	Bernard Van Der Hoven Attorneys
For the 1st Respondent	Adv N Arendse SC
	Adv S Fergus
Instructed by:	Majavu Incorporated
For the 2nd Respondent	Adv RPA Ramawele
	Adv k Magano
Instructed by Attorneys:	AM Vilakazi Tau Attorneys
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