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TO : THE CHAIRMAN: PRETORIA SOCIETY OF ADVOCATES
DATE: 30 NOVEMBER 2009
IN RE: COMPLAINT AGAINST ADV MENZI SIMELANE

MEMORANDUM

1. As you know, the former Director-General: Department of Justice and Constitutional Development, Menzi Simelane, was appointed as National Director of Public Prosecutions.
2. Some time ago, in my capacity as Convener of the Professional & Ethics Committee, I received a report on the conduct of Simelane before the Ginwala Commission of Enquiry from a source which I am not at liberty to disclose.
3. I subsequently compared that report with the report of the Ginwala Commission and found it to be accurate in all material respects.
4. I then took the matter up with Pretorius SC who I knew to have been a member of the GCB EXCO, and *inter alia* to hold the portfolio of professional

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and ethical matters. He was, like me, outraged at the contents thereof.

5. The purpose of this approach was to bring the adverse comments made against adv Simelane to the attention of the GCB, because I felt that it, should take the initiative to initiate an investigation *mero motu*. That did not appear to have happened. The reason may be attributed to the fact that the complaint originated from an anonymous source.

6. I attach hereto :

- 6.1 A copy of the complaint;
- 6.2 A copy of Simelane's evidence before the Ginwala Commission;
- 6.3 A copy of the Report of the Ginwala Commission.

7. I, in my personal capacity, hereby report the misconduct of Simelane, as is evident from the evidence before and report of the Ginwala Commission, to the Bar Council with the request that it be formally and thoroughly investigated. I propose that the file compiled by me should be handed to a silk from this Bar with particular experience of ethical matters, to advise the Bar Council (and/or the GCB) on the question of whether there are sufficient grounds appearing from the evidence before and findings of the Ginwala Commission, to bring an application to court for the striking off or suspension of Simelane, and to advise the Bar Council on the procedure to be followed.

8. In my capacity as Convenor of the Professional and Ethics Committee I have,

in the last two years, deposed to numerous affidavits in striking off applications where the conduct of the advocate complained of consisted of him or her misleading the Court, and the two of them have been struck from the roll already.

9. This Bar Council cannot, with respect, ignore the fact that an important Tribunal such as the Ginwala Commission made serious adverse comments about the honesty and truthfulness of an advocate of the High Court, which I may add, have not been challenged in a Court of Law. Should these facts not be properly investigated, it will no doubt create the impression the Bar Council is selective in meting out discipline. The investigation is so much more important because of the high profile of the individual concerned and the controversy surrounding his recent appointment as NDPP.
10. I may also add that, according to the constitution of this Society, the Local DPP (and I assume also the NDPP) as well as his or her deputies, are *ex officio* members of this bar. I hereby also ask the Bar Council to consider, if he is a member of this Society *ex officio*, to suspend his membership pending the finalization of the investigation.

P ELLIS SC
CHAMBERS
30 NOVEMBER 2009

SIMELANE MEMO

CONFIDENTIAL

MEMORANDUM TO PUBLIC SERVICE COMMISSION: ENQUIRY RELATING TO CONDUCT OF ADV MENZI SIMELANE

Introduction

1. According to media reports of 9 December 2008, the Minister of Justice and Constitutional Development, Mr Enver Surty, announced on 5 December 2008 that he has referred the Ginwala report on Adv Simelane's conduct to the Chairperson of the Public Service Commission (PSC) for further investigation. According to the *Mail & Guardian Online* of 9 December 2008, the Ginwala report accuses Adv Menzi Simelane of misleading the former Minister of Justice and of interfering with the independence of the National Prosecuting Authority by drafting a letter for Minister Mabandla which instructed the National Director (Adv Pikoli) to cease his probe into the National Commissioner, Mr Jackie Selebi. Regarding the investigation of the PSC, Minister Surty remarked as follows:

"We are taking the allegations very seriously. It is now a day after the Ginwala report was released and I have already referred it to the PSC for investigation."

2. The purpose of this memorandum is to—
 - (a) provide the PSC with advice and viewpoints relating to its task and to raise certain serious concerns regarding the PSC's enquiry into Adv Simelane's conduct (Simelane Enquiry); and
 - (b) bring this matter to the attention of the General Council of the Bar for its consideration.

Terms of reference and rules of Simelane Enquiry

3. It is believed that the Minister of Justice has provided the PSC with its terms of reference relating to the Simelane Enquiry. According to a media report in *the Star* of 6 January 2009, **Ms Koko Mashigo**, acting head of the PSC, confirmed on 5 January 2009 that the PSC *"had received terms of reference for the Simelane inquiry from the Justice Department, but said only the department could release them to the public. She was adamant that the PSC did not conduct its 'interventions' in the public eye"*.

Up to now these terms of reference have not been made public and members of the public, public servants, members of the National Prosecuting Authority (NPA), officials of the Department of Justice, and legal representatives present at the Ginwala Enquiry are in the dark as to whether they may make submissions to the PSC in respect of Adv Simelane's conduct. Surely, there are various persons who would wish to make further submissions to support the findings of the Ginwala Report in relation to Adv Simelane's conduct.

4. This is an extremely unsatisfactory situation and the PSC is urged to conduct the Simelane Enquiry in a transparent manner. The argument that normally these enquiries are not open to the public is not a valid reason. This is a very senior official that was directly responsible for the suspension of Adv Pikoli and it would only be fair that his Enquiry, as was the case with Adv Pikoli's Enquiry, be conducted in the open. To conduct such an Enquiry *in camera*, would cloud the Enquiry and create the impression that the investigation was specifically referred to the PSC so as to protect Adv Simelane.

Prejudging the PSC's Simelane Enquiry

5. The conduct of the Minister of Justice when referring the matter to the PSC and making remarks regarding the conduct of Adv Simelane is reprehensible. According to various newspaper reports, the Minister, at the same time when he made the announcement that the matter has been referred to the PSC, remarked as follows:

"I found him to be extremely hard-working, very committed, passionate about his work in carrying out instructions in a way that will add value to the ministry."

6. The above remark clearly creates an impression that the Minister does not necessarily agree with the findings of the Ginwala Enquiry. This impression was confirmed during the Minister's appearance before the Select Committee of Parliament at the hearings on 21 January 2009. When asked for his opinion relating to the interpretation of the letter that was drafted by Adv Simelane referred to in paragraph 1 above, the Minister, against all other interpretations, held the view that the wording was unfortunate but that it does not amount to interference. Again, the Minister is clearly prejudging the PSC's Simelane Enquiry and made use of a privileged opportunity to directly influencing the PSC.

7. The Ginwala Enquiry's finding in this regard is very important. Dr Ginwala remarked as follows at paragraph 159:

"The Minister has since on affidavit said that it was not her intention to stop Adv Pikoli from discharging his duties or performing his functions as the NDPP. Assuming this is correct, the conduct of the DG: Justice in drafting the document in the manner it reads was reckless to say the least. The DG: Justice should have been acutely aware of the constitutional protection afforded to the NPA to conduct its work without fear, favour or prejudice. The contents of the letter were tantamount to executive interference with the prosecutorial independence of the NPA, which is recognised as a serious offence in the Act."

8. Taking the above into account, the Minister's viewpoint on the interpretation of the letter was extremely uncalled for and constitutes an attempt to prejudge the PSC's Simelane Enquiry.
9. The DG: Justice is an admitted Advocate. As such, the Uniform Rules of Ethics applicable to advocates also apply to him. In terms of these Rules, there is a duty on counsel to, where appropriate, divulge to the court material facts. There is also an overriding duty not to mislead the court. It is submitted that the DG: Justice owed the same duty to the Ginwala Enquiry.

PSC's role relating to finding of Ginwala Enquiry relating to demeanour of Adv Simelane

10. Dr Ginwala makes various findings relating to the **demeanour** of Adv Simelane at the Enquiry proceedings. For example;
- ❖ **At par 15:** *"In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law."*
 - ❖ **At par 15:** *"Several of the allegations levelled against Adv Pikoli were shown to be baseless, and the DG: Justice was forced to retract several allegations against Adv Pikoli during his cross-examination."*
 - ❖ **At par 154:** *"It is clear that the DG: Justice deliberately withheld these legal opinions from Adv Pikoli and the Enquiry. By persisting in this conduct he could have misled the Enquiry."*

- ❖ **At paragraph 155:** *“Not only did he ignore this legal advice; he did not share it with Adv Pikoli and he also did not disclose it to the Enquiry when it was his responsibility to do so – not even after it was requested. He attempted to suppress the disclosure of the information that was of significance to the work of this Enquiry. He only acknowledged the existence of these legal opinions when they were presented to him by Adv Pikoli’s legal representatives during his cross examination.”.*
- ❖ **At par 157:** *“I must also state that I have found the conduct of the DG: Justice highly irregular. His failure to include all the relevant material at his disposal in the original submission by Government was not consonant with the responsibilities of a senior state official furnishing information to an investigative enquiry established by the President. He had a duty to place all relevant information before the Enquiry. His testimony before the Enquiry was also not particularly helpful to me; his evidence was contradictory and I found him to be arrogant and condescending in his attitude towards Adv Pikoli.”.* (Emphasis added)

11. It is a well-known principle that the trial court or trial body is in better position than an appeal court or body to draw inferences from the demeanour of a witness appearing before it. In this regard, the following judgements are relevant:

- (a) In *Rex v Tshelembe and others* 1933 AD 323 AT 325, Stratford JA remarked as follows:
“In all but one respect the Court of Appeal is in as good a position to judge of the merits of the case as was the court below. The important qualification is that when credibility of witnesses turns upon their deportment in the witness-box and the impression they have made upon the Court which saw and heard them, then that Court is better able than the Court of Appeal to estimate the acceptability or otherwise of their testimony. For the rest, after making due allowance for the lower court's more favoured position in this one respect, a court of appeal can and should freely and fairly estimate and weigh all considerations and draw all inferences which the record before it justifies.”.
(Emphasis added)
- (b) In *S v Mogorosi* 1979 (2) SA 938 (A), Viljoen AJA remarks as follows:
“The display by the accused of a truculent attitude in the witness-box relates to demeanour of which this Court, not having seen the accused, cannot Judge.”. (Emphasis added)

- (c) In *S v Gerbers* 1997 SACR 601 (SCA) at 604 G-H Malan JA remarks as follows:

"Our consideration of this appeal is therefore limited in ambit and confined to an examination of the trial Judge's conduct with a view to determine whether or not it was irregular and, if so, whether there has been a failure of justice." (Emphasis added)

And further at pages 606 to 607 (par G-J):

"It does not follow of course, from the mere existence of these discretionary powers, that it can never be said that a trial Judge who exercises them has done so 'irregularly' as that word is understood in the jurisprudence of criminal procedure. The many cases in which a Court of Appeal has set aside a conviction on the ground of irregular questioning by a judicial officer bear testimony to that. Nor does it follow from the mere existence of a positive duty to exercise those powers in circumstances where it appears essential to the just decision of the case, that a trial Judge's conclusion that the circumstances were indeed such, is unassailable in a higher Court and that, no matter what the circumstances may have been, his carrying out of what he perceived to be his duty can never constitute an irregularity. On the other hand, it is necessary to remind oneself that there are well-known limits to the power of a Court of Appeal to gainsay the bona fide exercise by a trial court of a judicial discretion vested in it. As for the conclusion of a trial court that it is duty-bound to exercise the powers under consideration, there too I think that a Court of Appeal should not lightly substitute its own opinion, reached with the benefit of hindsight, for that of the trial court which had to reach its conclusion that the exercise of the particular power was essential to the just decision of the case upon the evidence which had thus far been placed before it and without the benefit of knowing that, in the result the evidence given by persons whom it decided to call would be."

12. In view of the above, the opinion is held that the SPC has a limited function in its investigation and is clearly not allowed to judge the demeanour findings of Dr Ginwala, unless it can be shown that were irregularities in the Enquiry. Furthermore, the evidence of any other person relating to Adv Simelane's demeanour before the Ginwala Enquiry is irrelevant and should be discarded.

Allegations against Adv Simelane

13. The Table hereunder contains a summary of the allegations and negative finding against Adv Simelane by the Ginwala Enquiry:

No.	Allegation or negative finding	Paragraph	Comment
1.	Adv Pikoli was not obliged to account to the DG: Justice in the manner alleged by Government.	Par 11.5	The allegations can be attributed to Adv Simelane, because he was responsible for drafting of the Government's submission.
2.	"Moreover, I find it probable that the differences in their (the Minister and Adv Pikoli's) respective understandings were precipitated by the DG: Justice's misconception of his authority over the NPA, which influenced his reports to the Minister."	Par 14.	In studying the Report as a whole, it is clear that Dr Ginwala mainly blames Adv Simelane for the bad relationship between the Minister and Adv Pikoli.
3.	"I need to draw attention to the conduct of the DG: Justice in this Enquiry. <u>In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law.</u> "	Par 15.	As pointed out in par. 9 to 11 above, the PSC is not in a position to pronounce on these findings of the Ginwala Enquiry. The contradictions and unfounded allegations clearly amount to dishonesty.
4.	" <u>Several of the allegations levelled against Adv Pikoli were shown to be baseless.</u> and the DG: Justice was forced to retract several allegations against Adv Pikoli during his cross-examination."	See end of par 15.	What is the reason for making baseless allegations? Clearly this raises serious concerns relating to Adv Simelane's integrity and his fitness to hold such a high office.
5.	"The differences in opinion over the status of the NPA and its relationship with the Department of Justice and	Par 86.	See comment in par 2 above.

	Constitutional Development were primarily with the DG: Justice... The DG: Justice had an incorrect understanding of his role in relation to the NPA resulting in constant conflict with Adv Pikoli and officials in the NPA. These conflicts were undoubtedly referred to in the DG: Justice's reports to the Minister, and to some extent would at least have given rise to the Minister's misplaced concerns."		
6.	<p>In paragraphs 133 to 142 the Ginwala Enquiry referred to various specific complaints that Adv Simelane listed to show Adv Pikoli's failure to report to him. In respect of these specific complaints, Dr Ginwala made the following findings:</p> <p>(a) "The DG: Justice conceded that he had not conveyed in writing his concerns that the CEO of the NPA was not providing him with sufficient information regarding the delegated powers."</p> <p>(b) "The CEO of the NPA is clearly accountable to the NDPP and not to the DG: Justice. <u>There is therefore no basis for this complaint.</u>"</p> <p>(c) "It is clear that the <u>DG: Justice did not have the authority</u> to direct or determine how the NPA was to be managed and</p>	See para-graphs 144, 147, 148, 149, 150, 151 and 152 respectively	The seven complaints listed in column 2 of this Table were all found to be without basis and Adv Simelane conceded that there was no basis for these complaints and even admitted that he should have checked his facts in respect of one of the complaints. This clearly creates the impression that Adv Simelane made these allegations with an ulterior motive and at all costs wants to nail Adv Pikoli. In order to succeed in this objective, he did not hesitate to be dishonest in his submissions.

	<p>structured, <u>and it is clear that there is also no basis for this complaint.</u>”.</p> <p>(d) “<u>The DG: Justice conceded in cross examination that he has no authority over the DSO and this complaint is also not valid.</u>”.</p> <p>(e) “The DG: Justice conceded that Adv Pikoli did not have a duty to report to him on this matter, and that the CEO of the DSO was not accountable to him for the Confidential Fund. <u>The complaint in this regard can be considered spurious and falls to be adjudged not sound.</u>”.</p> <p>(f) “The DG: Justice concedes that it is for the NDPP to make a final decision on where the prosecutors are accommodated. He also concedes that it was brought to his attention that the building in Johannesburg was bought before Adv Pikoli took office and <u>that he should have checked this fact before stating the contrary under oath in his affidavit.</u>”.</p> <p>(g) “Adv Pikoli states that the DG: Justice discussed a possible merger of the DSO and the SIU with the head of the DSO and the head of the Asset Forfeiture Unit, who men-</p>		
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	<p>tioned it to Adv Pikoli in passing. Adv Pikoli did not directly discuss the issue with the DG. <u>It was not within the remit of the DG: Justice to make such a proposal as both the entities were created by legislation passed by Parliament.</u>"</p>		
7.	<p>With reference to two legal opinions obtained by Adv Simelane relating to his role as accounting officer of the NPA, Ginwala Enquiry remarked as follows:</p> <p>"It is clear that the DG: Justice <u>deliberately withheld these legal opinions</u> from Adv Pikoli and the Enquiry. <u>By persisting in this conduct he could have misled the Enquiry.</u>"</p>	At par 154	
8.	<p>Further relating to the legal opinions:</p> <p>"Not only did he ignore this legal advice; he did not share it with Adv Pikoli and he also did not disclose it to the Enquiry when it was his responsibility to do so – not even after it was requested. <u>He attempted to suppress the disclosure of the information that was of significance to the work of this Enquiry.</u> He only acknowledged the existence of these legal opinions when they were presented to him by Adv Pikoli's legal representatives during his cross examination."</p>	Paragraph 155	See in respect of item 6 above.

9.	<p>Further relating to Adv Simelane's conduct in respect of Government's submission:</p> <p><u>"I must also state that I have found the conduct of the DG: Justice highly irregular. His failure to include all the relevant material at his disposal in the original submission by Government was not consonant with the responsibilities of a senior state official furnishing information to an investigative enquiry established by the President. He had a duty to place all relevant information before the Enquiry. His testimony before the Enquiry was also not particularly helpful to me; his evidence was contradictory and I found him to be arrogant and condescending in his attitude towards Adv Pikoli."</u></p>	Par 157.	This irregular finding impacts negatively on the integrity of Adv Simelane. Such irregular conduct clearly constitutes misconduct.
10.	<p>His personal view informed the complaints against Adv Pikoli that formed part of Government's submissions to the Enquiry. For that reason he made statements in his evidence in chief that he was forced to retract under cross examination.</p>	Par 158.	A clear indication that his complaints against Adv Pikoli were personal and amount to dishonest conduct.
11.	<p>"The DG: Justice had an incorrect understanding of his accounting responsibilities under the PFMA, despite being in possession of legal opinions from senior counsel explaining the ambit of his responsibilities. <u>He allowed the Minister to continue with an incorrect</u></p>	Par 318.	

	<u>understanding of the responsibilities of the NDPP.”.</u>		
12.	<u>“I must express my displeasure at the conduct of the DG: Justice in the preparation of Government’s submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation.”.</u>	Par 320.	
13.	In relation to all the complaints listed against Adv Pikoli by Adv Simelane, Dr Ginwala found as follows: <u>“All these complaints against Adv Pikoli were spurious, and are rejected without substance, and may have been motivated by personal issues.”.</u>	Par 321.	
14.	<u>“With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects the DG: Justice’s disregard and lack of appreciation and respect for the import for an Enquiry established by the President.”.</u>	Par 322.	

14. Although the Ginwala Enquiry surprisingly does not deal with this incident, it is important to refer thereto, since it also impacts on Adv Simelane’s integrity. In Adv Pikoli’s affidavit to the Enquiry, he testified as follows:

"It is also clear from Mr Mpshe's affidavit that Advocate Gumbi requested him to apply for the cancellation of the warrants and that the DG of the Department (Mr Simelane) had prepared a draft affidavit in support of the application to cancel the warrants. This is a clear indication that Government interfered in the prosecution of Mr Selebi and led the decision to apply for the cancellation of the arrest and search warrants." (Emphasis added)

Unfortunately Adv Mpshe's affidavit was not available, but can be obtained from the Ginwala Enquiry. This is a clear indication that Adv Simelane interfered with the functioning of the NPA and thereby committed an offence.

Other incidents and matters impacting on integrity of Adv Simelane

15. There are also others incidents reflecting negatively on the integrity of Adv Simelane. For example, on 24 August 2008 the *Mail & Guardian Online*, reported as follows: *"Justices Zak Yacoob and Kate O'Regan reprimanded Simelane for 'taking technical points' in his founding affidavit to support government's opposition to Glenister's application. ...In his affidavit, signed on April 29, Simelane stated 'no decision has been taken by Cabinet to dissolve the DSO [Directorate of Special Operations]'. Both Justice Minister Brigitte Mabandla and Safety and Security Minister Charles Nqakula confirmed the affidavit. The next day, however, Cabinet approved the General Law Amendment Bill and National Prosecuting Authority Bill -- the two pieces of legislation to implement the ANC's Polokwane resolution that the Scorpions must be moved into the SAPS. ...Yacoob started his questioning of government's senior counsel Tshepo Sibeko by asking him why Simelane said nothing in his affidavit about the Bills when he knew 'the decision was in the pipeline'. Government must account fully in court papers and look beyond technical positions, Yacoob said. 'Government must respond fully, frankly and openly to affidavits. This is a very serious matter'."*

Furthermore, Judge Kate O'Regan pointed out that all legislation is preceded by drafts and that it must have been clear to Adv Simelane on April 29 that the Bills were ready for approval. As a result, Adv Sibeko, appearing on behalf of the Minister, backed down and told the Court he could not take the point any further. He subsequently withdrew Government's critique in court papers that Mr Glenister's

complaint about the Simelane affidavit was "absurd". Judge O'Regan was clearly correct, because when the Government responded to the recommendations of the Khampepe Commission, it was announced that the legislation was referred to the Justice Cluster of which Adv Simelane was a member. Adv Simelane also appeared at the hearings of the Portfolio Committees when they considered the relevant Bills. The National Prosecuting Authority Amendment Bill and the SAPS Amendment Bill were drafted by the Department of Justice and the SAPS and each Department submitted a Cabinet Memorandum to Cabinet. There is no doubt that Adv Simelane was fully aware of the progress of these Bills and his affidavit to the Constitutional Court was false and constituted an offence.

16. According to the *Mail & Guardian* of 15 August 2008, Adv Simelane was also involved in the following incidents that impact negatively on the integrity of Adv Simelane:
 - (a) Adv Simelane engaged senior officials of the NPA so as to spy on Adv Pikoli. Adv Pikoli confirmed that he received reports from prosecutors regarding Adv Simelane's conduct. It would not be difficult for the PSC to find evidence in this regard.
 - (b) Adv Simelane has also assisted the ANC in KwaZulu-Natal with its anti-Scorpions submission to the public hearings on the Bills. According to the article Adv Simelane admitted that he briefed the ANC KZN on the legislation. Is it desirable for a Head of the Department to get involved in party briefings?
17. In view of the above, the opinion is held that the Ginwala's findings regarding Adv Simelane's conduct is correct and that the PSC does not have a choice than recommending to the Minister of Justice that Adv Simelane should be dismissed as DG: Justice and Constitutional Development.
18. It is finally submitted that Adv Simelane's conduct also reflects on his status as an advocate and begs the question whether he is still a fit and proper person to be an advocate as required by the Admission of Advocates Act. It is, therefore, suggested that the matters referred to above should also be brought to the attention of the General Council of the Bar.