

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 10/11/10 In the matter between SIGNATURE

CASE No. 59628/2009

10/11/2010

DEMOCRATIC ALLIANCE

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Second Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Respondent

MENZI SIMELANE

Fourth Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this application the Applicant, the Democratic Alliance ("the DA"), seeks an order -

(a) declaring the decision of the First Respondent, the President of the Republic of South Africa (*"the President"*), taken on or about 25 November 2009 to appoint the Fourth Respondent, Adv Menzi Simelane (*"Mr Simelane"*), as the National Director of Public Prosecutions (*"the NDPP"*) to be inconsistent with the provisions of section 179 of the Constitution, read with sections 9 and 10 of the National Prosecution Authority Act, 1998 (Act 32 of 1998) (*"the NPA Act"*) and, therefore, to be invalid;

(b) reviewing and setting aside such appointment;

(c) ordering that the costs of the application be paid by the President and any of the other Respondents who oppose this application.

2. In terms of section 179 of the Constitution -

(a) there is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of, *inter alia*, a National Director of Public Prosecutions, who is the head of the prosecuting authority, and who is appointed by the President, as head of the national executive (**subsection (1)**);

(b) national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice (**subsections (3) and (4)**);

- (c) the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority (**subsection (6)**).

[3] In terms of the NPA Act, being the national legislation envisaged in section 179 of the Constitution -

- (a) any person to be appointed as, *inter alia*, NDPP must -
 - (i) possess legal qualifications that would entitle him or her to practise in all courts in the Republic (**section 9(1)(a)**);
 - (ii) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned (**section 9(1)(b)**) ("*the fitness requirement*"; and
 - (iii) be a South African citizen (**section 9(2)**);
- (b) a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law (**section 32(1)(a)**);
- (c) no organ of state and no member or employee of an organ of state nor any

other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions (**section 32(1)(b)**);

(c) the Minister shall, for purposes of section 179 of the Constitution, the NPA Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of NPA Act (**section 33(1)**);

(e) the NDPP must, to enable the Minister to exercise his or her final responsibility over the prosecuting authority, at the request of the Minister -

- (i) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the NDPP in the exercise of his or her powers, the carrying out of his or her duties and the performance of his or her functions;
- (ii) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions.

(Section 33(2))

(4) It is apparent from these provisions that they have as their aim the existence of

a national prosecuting authority having prosecutorial independence with a fit and proper person as its head who is able to ensure that such independence is lived out impartially, in good faith and without fear, favour or prejudice (see: ***Pikoli v President and Others 2010(1) SA 400 (GNP) at 406F***).

[5] It follows that the appointment of a person who does not comply with any one of the three requirements for appointment will be inconsistent with the Constitution and the NPA Act and, therefore, invalid (***section 2 of the Constitution***).

[6] Although the parties were in agreement, correctly in my view, that the requirements relating to a prospective candidate's legal qualifications and his or her citizenship are objectively determinable, they were not in agreement on the determination of such a candidate's fitness or propriety for appointment.

[7] On behalf of the Respondents it is contended that the question whether a person is fit and proper has been entrusted to the President to be determined in his or her subjective discretion whilst it is the Applicant's contention, although it held the view that the appointment constitutes administrative action, that it is not necessary to decide this issue as the Applicant's grounds of review can be accommodated by the principle of legality, being a doctrine that covers the case where the decision-maker (a) acts in excess of the powers conferred upon him or her by the enabling legislation; (b) acts *mala fide* or from improper or ulterior motive; (c) has failed to apply his or her mind to the matter; (d) has abdicated his or her powers to another; (e) has acted arbitrarily or in a way which is, objectively viewed, not rationally related to the purpose for which the

power was give.

[8] I can refer in this regard to the judgment in *Pharmaceutical Manufacturers Assoc of SA: In re Ex p President of the RSA 2000 (2) SA 674 (CC) at 707H, para [83]* in which the Constitutional Court has approved the much quoted statement from the judgment of Innes ACJ in *Shidiack v Union Government (Minister of the Interior) 1912 AD 642 at 651* that our Courts will interfere with the exercise of powers by public officials if any such official had acted in bad faith or from ulterior and improper motives or if he or she had not applied his or her mind to the matter or exercised his discretion at all or if he had disregarded the express provisions of the statute. It has, however, added (at 707H-708G, para [83], [84], [85] and [86]) that our Constitution also requires in addition that the exercise of public power by the Executive and other functionaries should be rationally related to the purpose for which the power was given otherwise they are arbitrary and inconsistent with such constitutional requirement.

Relevant facts of this matter

[9] The disputes in this matter are a sequel to the events leading up to, and certain events following, the removal of Mr Simelane's predecessor, Mr. Pikoli, from his position as NDPP.

[10] Mr. Pikoli in his capacity as NDPP had during September 2007 taken legal steps against the National Commissioner of Police, Mr. Selebi, to effect his arrest and the institution of criminal proceedings against him.

[11] The then President, Mr. Mbeki, in order to enable him to take an informed decision as may be necessary regarding the National Commissioner as his appointee, addressed a letter to the then Minister of Justice, Ms. Mabandla, on 17 September 2007 to obtain, by virtue of the powers vested in her in terms of section 179(6) of the Constitution, read with section 33 of the NPA Act, from Mr. Pikoli information regarding the intended arrest and prosecution of Mr. Selebi.

[12] The Minister, thereupon, on 18 September 2007 addressed a letter (admittedly prepared by Mr. Simelane who was then the Director-General of Justice and Constitutional Development) to Mr. Pikoli. In this letter the Minister requested Mr. Pikoli to provide her with all information on which he relied in taking legal steps against Mr. Selebi. The letter then proceeds in the following terms:

"In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account including the public interest. Therefore, I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of an preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue."

[13] Although Mr. Pikoli provided the information requested, his attitude was, clearly within his powers, that the Minister could not give him any instructions not to proceed with the steps he had taken.

[14] The Minister, thereupon, on 23 September 2007 requested him to resign. He refused and was later informed by the President that he would suspend him if he did

not resign. He again declined, whereupon, Mr. Mbeki then, purportedly in terms of section 12(6)(a)(i) of the NPA Act, suspended him and appointed Dr. F Ginwala to chair an enquiry into Mr. Pikoli's fitness to hold office as NDPP. Adv. Mpshe was shortly thereafter appointed as acting NDPP.

[15] Dr Ginwala invited the parties to make submissions on Mr. Pikoli's fitness as NDPP. On 18 October 2007 the Government filed submissions, prepared by Mr. Simelane, with the Ginwala Enquiry. At the direction of Dr. Ginwala after receipt of these submissions, the Government and Mr. Pikoli filed affidavits during January and February 2008. Because of factual disputes which emerged from these affidavits Dr. Ginwala directed that oral evidence be adduced at the Enquiry. The evidence of, *inter alia*, Messrs Simelane and Pikoli, was then heard in May and June 2008.

[16] In her report delivered on 4 November 2008 Dr. Ginwala found that most of the charges against Mr. Pikoli were unsubstantiated and, although she had some criticism against Mr. Pikoli on ancillary matters, recommended his reinstatement.

[17] She, however, expressed, in terms to which I will refer below, strong criticism of Mr. Simelane's conduct and testimony.

[18] On 8 December 2008, contrary to the recommendations of Dr. Ginwala, President Motlanthe (who in the meantime succeeded President Mbeki) finally removed Mr. Pikoli from office, a decision which was eventually confirmed by Parliament.

[19] On 10 December 2008 the then Minister of Justice and Constitutional Development, Mr. Surty, requested the Public Service Commission to investigate, evaluate and advise him on the criticisms expressed by Dr Ginwala on Mr. Simelane.

[20] Mr. Pikoli on 18 February 2009 launched, under Case No. 8550/09, an application for the setting aside of his removal from office, but an interim order was rendered unnecessary by an undertaking from President Motlanthe not to appoint a new NDPP without prior notice to Mr. Pikoli.

[21] On 6 April 2009 the Public Service Commission furnished its report on Mr. Simelane's conduct and recommended disciplinary action against Mr. Simelane.

[22] Following the national elections and after Mr. Mpshe had withdrawn all charges against Mr. Zuma, Mr. Zuma was on 9 May 2009 inaugurated as President and Mr. Radebe was appointed as Minister of Justice and Constitutional Development.

[23] On 4 June 2009 Mr. Simelane's counsel made written submissions to the Minister regarding the recommendations of the Public Service Commission requesting that no disciplinary steps be taken against him and that counselling rather be considered.

[24] On 15 July 2009 President Zuma's attorneys advised, true to the earlier undertaking given by President Motlanthe to Mr. Pikoli, Mr. Pikoli's attorneys that the President intended to appoint a new NDPP, whereupon, Mr. Pikoli renewed his

application for interim relief.

[25] On 11 August 2009 Du Plessis J gave judgment in favour of Mr. Pikoli and interdicted President Zuma from making a new appointment pending finalization of Mr. Pikoli's application challenging his removal from office.

[26] On 9 October 2009 the Minister of Justice and Constitutional Development wrote to the Public Service Commission asking for the consideration of the submissions made on 4 June 2009 on behalf of Mr. Simelane's and hearing evidence from Mr. Simelane. The Public Service Commission on 19 October 2009 declined to do so.

[27] On 11 October 2009 the President appointed Mr. Simelane (who at some stage must have resigned as Director-General of the Department of Justice and Constitutional Development) as Deputy NDPP.

[28] Mr. Pikoli's application challenging his removal from office was due to be argued on Monday, 23 November 2009, but was on Saturday, 21 November 2009 settled in terms of which he withdrew his application and he was paid R7,5 million.

[29] On 23 November 2009 the Minister of Justice and Constitutional Development announced that he rejected the Public Service Commission's recommendations and would not order the institution of disciplinary proceedings against Mr. Simelane.

[30] On 25 November 2009 Mr. Simelane was appointed as the new NDPP with

effect from 1 December 2009.

[31] The DA, thereupon, on 10 December 2009 launched, as a matter of urgency, this application challenging the validity of the President's decision to appoint Mr. Simelane.

[32] The validity of the President's decision is challenged by the DA mainly on three grounds, namely -

- (a) that objectively Mr. Simelane was not a fit and proper person and that his appointment was, therefore, *ultra vires* the provisions of section 9(1)(b) of the NPA Act ("**the fitness requirement**");,
- (b) that the process followed by the President in arriving at his decision that Mr. Simelane was a fit and proper person for appointment was not rationally related to the objectives sought to be achieved by the Constitution and the NPA Act and that his decision was, therefore, unconstitutional, arbitrary and did not involve a proper application of his mind; and
- (c) that the appointment was made for an improper ulterior motive, namely, to install an NDPP who was thought to be malleable to the executive's wishes.

The DA's case

[33] I can now, against the background of the foregoing facts and legal principles,

realistically deal with the factual and legal averments on which the DA's case on the three grounds raised is based.

[34] **Firstly, the fitness requirement**

[35] This requirement has, so it was contended by the DA, an internal aspect and an external aspect which are to be viewed cumulatively.

[36] The **internal aspect** relates to the following, namely -

- (a) the evidence given by Mr. Simelane at the Ginwala Enquiry and the comments rendered in the report of the Ginwala Commission;
- (b) the recommendations of the Public Service Commission;
- (c) the comments rendered in a judgment in the case of *Pretoria Portlands Cement Co. Ltd and Another v Competition and Others 2003(2) SA 385 (SCA)*;
- (d) the approach followed by Mr. Simelane in his capacity as Competition Commissioner in the so-called "*Glenister matter*";
- (d) a probe launched by the General Bar Council into Mr. Simelane's fitness as an advocate;

- (e) the contents of his *curriculum vitae* which seems to be the only document made available to the President at the time he was considering Mr. Simelane's appointment as NDPP.

[37] As far as Mr. Simelane's evidence at the Ginwala Enquiry is concerned, the Applicant's case is based on six issues which arose from his evidence.

[38] In the first place there is the fact that the Government's submissions to the Ginwala Enquiry (which were admittedly prepared by Mr. Simelane) did not disclose the events that occurred during the week immediately preceding Mr. Pikoli's suspension on 23 September 2007 which seems to lie at the heart of President Mbeki's decision to suspend Mr. Pikoli. Instead it sought to explain the breakdown in the relationship between Mr. Pikoli and the Minister referring to events that occurred over several years.

[39] In the second place there is the letter dated 17 September 2007 by President Mbeki to the then Minister of Justice and Constitutional Development requesting her to obtain information from Mr. Pikoli on the intended arrest and prosecution of Mr. Selebi. This letter was not disclosed by Mr. Simelane to Mr. Pikoli's attorneys, Deneys Reitz, who requested Mr. Simelane on 22 October 2007 to provide them with all "*communications and other documents relating to the investigation and prosecution of Mr. Selebi*" which he or his Department may have sent or received from the President or anybody in the Presidency at any time since 15 September 2007. Notwithstanding the fact that Mr. Simelane was in possession of that letter, he on 1 November 2007 informed Deneys Reitz that there were no documents as requested.

[40] In the third place there is the letter admittedly prepared by Mr. Simelane dated 18 September 2007 of the Minister addressed to Mr. Pikoli in which she requested the information President Mbeki was seeking and in which he was in addition instructed not to pursue the route he has taken until she was satisfied herself that sufficient information and evidence exist for the arrest and prosecution of Mr. Selebi.

[41] In the fourth place there is Mr. Simelane's evidence at the Ginwala Enquiry on his function as accounting officer *vis-a-vis* the prosecutorial functions of the NDPP. On a question under cross-examination whether he obtained a legal opinion on the issue he at first indicated that he had no such legal opinion. Later in his cross-examination, so it is contended, he on having seen the cross-examiner (Mr. Wim Trengove) turning to a document, admitted that he had indeed taken legal opinion on the issue. From this legal opinion it was apparent that he had been advised that he had no authority at all over the exercise of powers, functions and duties of the national prosecuting authority.

[42] In the fifth place there is the contention that Mr. Simelane accused Mr. Pikoli of dishonesty in that he in relation to a dispute between them on their respective functions pretended to hold one view when in fact he knew better.

[43] In the sixth place there are the comments rendered in the Ginwala report on the evidence given by Mr. Simelane at the enquiry. My attention has been drawn to the following comments so rendered, namely:-

In paragraph 15 of the report (**record p. 269**):

"In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law. [Mr. Simelane] was responsible for preparing Government's original submission to the Enquiry in which the allegations against Adv Pikoli's fitness to hold office were first amplified. Several of the allegations levelled against Adv Pikoli were shown to be baseless, and [Mr. Simelane] was forced to retract several allegations against Adv Pikoli during his cross-examination."

In paragraph 154 of the report (record p. 314) it is found that Mr. Simelane *"deliberately withheld"* the opinions of his counsel from Mr. Pikoli and the Enquiry and that he by *"persisting in this conduct he could have misled the Enquiry"*.

In paragraph 155 of the report (record p. 314):

"It is unacceptable that [Mr. Simelane] elected not to heed the legal advice that he sought and obtained from senior counsel relating to the relationship between his office and the NPA. The legal advice furnished to him clearly shows that his accounting responsibilities over the NPA were limited and did not extend to the areas of responsibility that he claimed. 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 he 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."

In paragraphs 86 (record p. 295) and 156 (record p. 314) of the report Mr. Simelane's view of the legal dispute was rejected and it was held that his view would have clouded the Minister's judgment which was, so it was held, contrary to the *"obligation of a Director General to provide accurate, sound and unbiased information and advice to the Minister"*.

In paragraph 157 (record p. 315) of the report:

...

"I must also state that I have found the conduct of [Mr. Simelane] 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."

In paragraph 158 (**record p. 315**) of the report it is found that Mr. Simelane -

"... did not heed the legal advice he had sought and received, and continued to assert powers he did not have. 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."

In paragraph 159 (**record p. 316**) of the report it is noted that only in cross-examination did Mr. Simelane admit he wrote the Minister's letter of 18 September 2007 and, bearing in mind that the Minister in her affidavit submitted to the Enquiry that she did not intend to instruct Adv Pikoli not to pursue his actions, the report continues as follows:

"Assuming this is correct, the conduct of [Mr. Simelane] in drafting the document in the manner it reads was reckless to say the least. [Mr. Simelane] 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."

In paragraph 289 (**record p. 353**) of the report it is found that nothing was presented to dissuade the Enquiry from accepting the literal interpretation of the letter, which "was an attempt to unlawfully interfere with Adv. Pikoli's prosecutorial independence".

In paragraph 320 (record p. 361) of the report:

"I must express my displeasure at the conduct of [Mr. Simelane] 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."

[44] In relation to the recommendation of the Public Service Commission, the then Minister of Justice and Constitutional Development, Mr. Surty, having taken note of the Ginwala report, on 19 November 2007 referred the matter to the Public Service Commission to "investigate, evaluate and report" to him regarding *"the conduct of Adv Menzi Simelane towards the Ginwala Enquiry, the National Prosecuting Authority, the National Director of Public Prosecutions, as well as the previous Minister of Justice and Constitutional Development, with specific reference to the following:*

- (i) *The alleged misrepresentations of facts and the alleged failure by Adv Simelane to provide impartial and relevant advice to the Ginwala Enquiry;*
- (ii) *The alleged withholding of documents under his care which were relevant to the Ginwala Enquiry;*
- (iii) *Any other material misrepresentations made by Adv Simelane to the Ginwala Enquiry; and*
- (iv) *Whether or not any alleged conduct of Adv Simelane, as referred to in the Ginwala Report, amounts to breach of any Act, regulations, code of conduct or*

...I...

any other prescript, that are applicable in respect of his duties as Director-General."

The Public Service Commission, having assessed Mr. Simelane's conduct as reflected in the Ginwala Report and the record of the proceedings, prepared and submitted during April 2008 a report to then Minister in which it recommended that the Minister should give "*immediate attention*" to the institution of disciplinary action against Mr. Simelane in terms of the Disciplinary Code and Procedure for the Members of Senior Management Staff as his conduct could be in transgression of certain codes in that -

- (a) he failed to co-operate and provide relevant information to the Ginwala Enquiry on the conduct of Mr. Simelane by not disclosing the letter of the former Minister dated 18 September 2007 addressed to Mr. Pikoli and the legal advice obtained from counsel on his functions as accounting officer;
- (b) he gave a false statement or evidence in the execution of his duties in that he whilst under oath initially denied that he had taken legal advice on the interpretation of and the application of the powers derived from the Public Finance Management Act and the role of the accounting officer *vis-a-vis* that Act;
- (c) he made a misrepresentation in his reply dated 1 November 2007 to Deneys Reitz when he indicated that the Department is not in possession of any documents relating to the investigation of Mr. Pikoli whilst he was aware of the

letter dated 17 September 2007 received from the President.

[45] As far as the criticism against Mr. Simelane in the case of ***Pretoria Portlands Cement Co. Ltd and Another v Competition Commission and Others 2003(2) SA 385 (SCA)*** is concerned, the Applicant relies on criticism expressed in that judgment on the manner in which the Competition Commission exercised its powers during Mr. Simelane's tenure as a Competition Commissioner.

This case arose out of the execution of search warrants granted on an *ex parte* application by the Competition Commission during August 2000.

Two findings were made by the Supreme Court of Appeal which reflects negatively on Mr. Simelane's conduct at the time of the execution of the warrants.

At **409D** the following was said by Schutz JA:

"[62] I can only conclude that the Commission was intent on advertising itself, with no regard to the harm it might do to its suspects. Not all firms suspected of monopolistic practices are guilty of them and it must be remembered that the innocent among the suspects might be harmed, or even put out of business by bad publicity, with consequences not only for the shareholders but also the workers, and indeed the public at large.

[63] The impression of publicity-seeking is reinforced by Simelane's uninvited media interview held in PPC's own car park. There is another aspect of his conduct that deserves comment. In his replying affidavit Gommersall stated that the book kept at the entrance gate reflected that at 12:40 Simelane had signed and stated in the 'Whom visited' column, 'MD'. Gommersall added that it was simply untrue for Simelane to have said that he intended visiting the managing director. And we know from one of the Commission's witnesses that the meeting in the car park was pre-arranged. Now it is true that Simelane had no right or duty to answer

this allegation, made in reply, but I would have expected him to offer to do so if Gommersall's imputation of dishonesty were false."

[46] As far as *the Glenister matter* is concerned, Mr. Glenister launched an application for the setting aside the dissolution of the Scorpions. In an affidavit filed in that matter by Mr. Simelane on 29 April 2008 he stated that no decision had been taken by the Cabinet to dissolve the Scorpions. It, however, appeared that the very next day the Cabinet approved the draft legislation providing for the dissolution of the Scorpions.

In the Constitutional Court Mr. Simelane was rebuked by Justices O'Regan and Yacoob for not complying with the Government's obligation to respond fully, frankly and openly.

[47] As far as the probe launched by the General Bar Council into Mr. Simelane's fitness as an advocate is concerned, it would appear that Mr. Simelane did not traverse these allegations in his answering affidavit, but instead indicated in his answering affidavit that there had never been a complaint of unprofessional conduct against him and, not referring to the remarks of the Judges in the *Portland Cement* and *Glenister* cases, that his integrity and honesty have for the first time been called into doubt in the Ginwala report.

[48] As far as Mr. Simelane's *curriculum vitae* is concerned, it indicates -

- (a) that he was 38 years old at the time of his appointment;
- (b) that in his mid-twenties he practised for two years as an advocate;

- (c) that he held positions at the Competition Commission and in the Department of Justice and Constitutional Development; and
- (c) that he served for a period of six weeks as one of four Deputy National Directors of Public Prosecutions.

[49] Furthermore, it is pointed out by the Applicant that the Department of Justice and Constitutional Development received qualified reports from the Auditor-General in each year during the period that Mr. Simelane was the Director-General (and accounting officer) of that Department.

[50] As far as **the external aspect** which also according to the Applicant reflects on Mr. Simelane's fitness is concerned, relates to the manner in which his appointment was perceived by society at large.

It is pointed out by the Applicant that, against the background of the circumstances under which Mr. Pikoli was removed from office and the role Mr. Simelane played in the findings of the Ginwala Enquiry, dismay was, apart from the Applicant, expressed by the ACDP, the ID, COPE and the IFP. Other commentators who condemned the appointment included Judith February of IDASA, Adv De Havilland of the Institution for Constitutional Rights, Jay Kruse of the Public Service Accountability Monitor, Pierre de Vos, a constitutional law expert, and Archbishop Emeritus Desmond Tutu.

[51] It is on these factual averments that it is contended that Mr. Simelane is

J.

objectively not a fit and proper person for appointment.

[52] This brings me to the **second** ground on which Mr. Simelane's appointment is challenged.

[53] **Secondly, the process of appointment**

[54] As already indicated, it is, furthermore, the DA's contention that the process of appointment was irrational resulting in an arbitrary and irrational decision to which the President failed to properly apply his mind.

[55] The contention seems to be that the means chosen by the President to satisfy himself of Mr Simelane's fitness were not rationally related to the objects of section 179 of the Constitution and sections 9 and 10 of the NPA Act which resulted in an irrational and arbitrary appointment to which the President did not properly apply his mind.

[56] In this regard it is contended that the process chosen by the President was wholly irrational because -

- (a) the only written material he had before him was Mr. Simelane's CV which was his own brief self-assessment;
- (b) he did not take any steps to investigate and receive information about Mr. Simelane's performance at the Competition Commission and as Director-

General of Justice and Constitutional Development;

- (c) he did not take steps to receive information as to the findings of the Ginwala Enquiry against Mr. Simelane and the terms of those findings;
 - (d) he did not insist on receiving the report of the Public Service Commission;
 - (e) he did not take any steps to receive any motivational memoranda and supporting documents from the Minister or from anybody else;
 - (f) he did not require the oral briefings with the Minister to be minuted;
 - (g) he prejudged the matter by deciding as early as 15 July 2009, alternatively, 6 October 2009 that Mr Simelane was fit for appointment even though the recommendations of the Public Service Commission were still pending;
 - (h) he, in general, followed such a haphazard process that he could have no confidence that he was receiving reliable and complete information;
 - (i) he relied exclusively on informal oral briefings, thereby depriving himself of the opportunity for proper reflection on relevant information.
- (j) This brings me to the third on which the appointment is challenged.

[58] **Thirdly, improper ulterior motive**

[59] In this regard it is contended, as I already indicated, that the appointment was made for an improper ulterior motive, namely, to install an NDPP who was thought to be malleable to the executive's wishes, particularly, in regard to criminal investigations against high-profile members of Government or criminal investigations which could embarrass the Government.

[60] This contention is based on the evidence already referred to from which, so it was argued, an inference of ulterior motive can be drawn, such as the evidence -

- (a) that Mr. Simelane was, objectively, not a fit and proper person in the internal sense of fitness;
- (b) that he was reasonably and predictably perceived in many quarters to be unfit for appointment in the sense of the external aspect of fitness;
- (c) that an inadequate process was followed by the President in appointing Mr. Simelane.

The President's case

[61] It would appear, as is apparent from the President's answering affidavit, to be his case in response to the allegations made on behalf of the DA in its founding and

supplementary papers -

- (a) that he acknowledges, although he regarded it to be a matter falling within his subjective discretion, the fact that the person appointed in the position of NDPP must with regard to his experience, conscientiousness and integrity be a fit and proper person who is able to exercise his functions without fear, favour and prejudice and who would in his view be able to co-ordinate harmoniously with the national executive, Parliament and other officials and personnel of the NPA;
- (b) that he has known Mr. Simelane "*for a number of years*" as a member of the Competition Commission and thereafter as Director-General of the Department of Justice and Constitutional Development;
- (c) that when he considered appointing Mr. Simelane as Deputy National Director of Public Prosecutions he had regard to Mr. Simelane's *curriculum vitae* and consulted the acting National Director of Public Prosecutions and the Minister of Justice who highlighted the achievements of Mr. Simelane as the head of the Competition Commission and as Director-General "*because they were in the public domain*";
- (d) that he discussed the issue of the Ginwala Report with the Minister who conveyed to him that Mr. Simelane was in his view a person of integrity and competence;

- (e) that he understood the Ginwala Enquiry as a fact-finding exercise established to assist the President to take a decision on whether Mr. Pikoli was a fit and proper person to hold the office of NDPP;
- (f) that he considered the Ginwala Enquiry's view on Mr. Simelane as a note of precaution to the national executive, the NPA and Parliament to streamline the relationship between all of them and that the report was not intended to have Mr. Simelane disqualified for future appointments;
- (g) that after the litigation instituted by Mr. Pikoli came to an end, he again considered Mr. Simelane's *curriculum vitae*, his personal knowledge and the Minister's input and enquired from the Minister whether there are other issues that he wished to bring to his attention;
- (h) that he also discussed the issue of the Public Service Commission with the Minister who confirmed that he decided not to institute any disciplinary proceedings against Mr. Simelane because the Public Service Commission had not provided him an opportunity to inform the Commission on his views on the matter under investigation;
- (i) that the Minister assured him that under the leadership of Mr. Simelane he would continue to have a healthy professional relationship with the NPA founded on the provisions of the Constitution and the law;

- (j) that he accordingly decided that Mr. Simelane was fit and proper with due regard to his experience, conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP and duly appointed him.

[62] The President conceded that in considering Mr. Simelane's appointment, he did not have regard to the transcripts of the Ginwala Enquiry as he was of the view that he was not required to go behind the Ginwala Report and interrogate the testimony led in the Enquiry.

[63] Having, however, now considered the relevant excerpts of the transcript he remains, so it is stated in his affidavit, of the firm view that the appointment of Mr. Simelane is lawful and in accordance with the Constitution and the provisions of the NPA Act.

[64] It is apparent that the President elected not to respond, *inter alia*, to the following allegations made by the DA in its founding papers -

- (a) the comments rendered in a judgment in the case of ***Pretoria Portlands Cement Co. Ltd and Another v Competition and Others 2003(2) SA 385 (SCA)***;
- (b) the approach followed by Mr. Simelane in his capacity as Competition Commissioner in the so-called "*Glenister matter*";

- (c) the probe launched by the General Bar Council into Mr. Simelane's fitness as an advocate;
- (d) the fact that the Auditor-General in each year during the period that Mr. Simelane was the Director-General (and accounting officer) of that Department submitted qualified reports on the administration of the Department;
- (e) the dismay expressed, albeit after the fact, by various prominent members of the community on Mr. Simelane's appointment;
- (f) the criticism on the process he followed in determining Mr. Simelane's fitness for appointment as NDPP.

The Minister's case

[65] The Minister in turn acknowledges in his affidavit the independence of the prosecuting authority which, so it is conceded, must be preserved to enable the NDPP to discharge his duties without fear, favour or prejudice.

[66] In his affidavit he, furthermore, confirms -

- (a) that, as stated in his media release, **Annexure JTR 1**, he is satisfied that Mr Simelane is a fit and proper person to provide leadership at the NPA, that he as Minister will have a healthy relationship with the NPA founded on the

Constitution and the law and that he has no doubt that Mr. Simelane will ensure that the NPA will discharge its prosecutorial mandate and independence in accordance with the Constitution;

(b) that he did discuss the report of the Public Service Commission with the President and "*explained in detail*" the reason why he concluded that the process adopted by the PSC had been flawed because its refusal to consider Mr. Simelane's representations;

(c) that in his view the Ginwala Enquiry was a "*fact finding exercise*" to assist the President to take a decision as to whether Mr. Pikoli was a fit and proper person and not a judicial commission of enquiry and was aimed at enabling "*the relevant parties in the national executive, the national prosecuting authority and Parliament to sort out their relationships ... and not to require that disciplinary steps be taken against Simelane or any other party*";

(d) that the President indicated to him that although he had firm views on appointing Mr. Simelane he wished to obtain an opinion from him;

(e) that he, having had knowledge of Mr. Simelane's qualities, diligence and tireless dedication in his capacity as Commissioner of the Competition Commission and as Director-General of his Department, he did not hesitate in briefing the President fully on Mr. Simelane's qualities and that he was indeed capable of executing the functions attendant to the position of NDPP;

- (f) that the President specifically sought his view on the findings and recommendations of the Ginwala Enquiry;
- (g) that he, having familiarized himself with the criticisms expressed in the Ginwala Report and the investigative process followed by his predecessor, Mr. Surty, to have referred the matter to the PSC, was able to have a detailed discussion with the President on these issues.

[67] The Minister elected not to comment in any particular detail on his decision to reject the recommendations of the Public Service Commission.

[68] It would appear, as I have already indicated, that the Minister on 23 November 2009, ie., some 19 months after the report of the PSC was submitted and two days after the dispute relating to Mr. Pikoli's removal from office was settled, being two days before Mr. Simelane's appointment as NDPP, rejected these recommendations largely on his criticism that the PSC did not give Mr. Simelane a hearing before reaching its findings and had not amended its findings in the light of a statement provided to it on Mr. Simelane's behalf.

(I pause here to add that this "*statement*" contains representations made on 4 June 2009 by Mr. Simelane's legal representative to the current Minister in which the findings of the Ginwala Enquiry were analysed and commented on and the Minister was requested not to proceed with disciplinary action against Mr. Simelane or, alternatively, to direct that an appropriate person counsel him on the issues raised in the Ginwala

report. The statement contains no indication that the PSC should have given Mr. Simelane a hearing before making its recommendations. On what basis the Minister took the view that the PSC should have done that, instead of himself doing it, is unclear)

[69] This brings me to the contents of Mr. Simelane's answering affidavit.

Mr. Simelane's contentions raised in his answering affidavit in relation to the attack on his fitness to be appointed as NDPP

[70] As is apparent from Mr. Simelane's affidavit, he was, despite that no relief is sought against him, advised to depose to an affidavit so as to set out facts which only he can put before court regarding the Applicant's allegations that he gave incorrect, misleading and untruthful evidence before the Ginwala Enquiry.

[71] Of some significance is his allegation that throughout since his admission as an advocate there has never been a complaint of unprofessional conduct against him or that he had ceased to be a fit and proper person to remain on the roll of advocates.

This contention had given rise to the criticism raised by the Applicant in its replying affidavits to which I have already referred to.

[72] It, furthermore, appears from his affidavit -

(a) that he, although he concedes having in some instances made incorrect

statements in his evidence before the Ginwala Enquiry, denies that he made those statements deliberately knowing their incorrectness and never intended to mislead;

- (b) that what he intended to convey at the Ginwala Enquiry is that the NDPP or the NPA is guaranteed prosecutorial independence, but not institutional independence because it is part of the Department of Justice and Constitutional Development of which he as Director-General was for purposes of the Public Finance Management Act the accounting officer;
- (c) that the criticism by the courts in the matters referred to by the Applicant was not directed at his integrity.

[73] In his answering affidavit Mr Simelane claimed, in his effort to deal with the manner in which he performed his functions as Commissioner of the Competition Commission, that "*an OECD peer review*" had concluded that the SA competition authorities were compliant with international best practice.

However, the "*OECD report*" produced by way of the Applicant's replying affidavit does not contain such a conclusion.

[74] It is, furthermore, categorically stated by him in his affidavit that he, having grown up during the previous dispensation during which he gained a consciousness of the gross abuse of political power, will never sacrifice the independence of the office of

the NDPP as that will, according to him be tantamount to acting against Government's commitment to "*respect, protect, promote and fulfil the rights in the Bill of Rights*" and that he never, nor will he ever seek to limit anybody's rights except as provided for in the Constitution or relevant legislation.

[75] I may add that an NDPP is in terms of section 32 of the NPA Act required to take an oath or to solemnly affirm that he will in that capacity "*uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law*".

Evaluation of evidence and submissions made for and against relief claimed

[76] The averments made by the DA, after an extensive investigation and consideration of Mr. Simelane's background, indeed constitute a formidable onslaught on Mr Simelane's fitness and propriety for appointment as NDPP and, therefore, also on the validity of the President's decision.

[77] The question, however, is whether I can on the papers hold, on a balance of probabilities, that the President's decision to appoint Mr. Simelane as NDPP is on any of the three grounds raised inconsistent, either individually or cumulatively, with section 179 of the Constitution, read with sections 9 and 10 of the NPA Act.

[78] In order to come to such a conclusion on the papers is an extremely difficult

task.

[79] My task is as a point of departure difficult because of the fact that no process is prescribed which the President is required to follow in considering an appropriate appointment to the position of NDPP. One cannot help to wonder, regard being had, particularly, to the fact that the position of NDPP is an important functionary in the administration of justice, why the Legislature has in its wisdom elected not to have prescribed an open and transparent process to be followed, like, for instance, as in the case of Judges, for appointments of this nature.

[80] Despite the absence of an open and transparent process and, regard being had to all the issues raised by the DA which could or, perhaps, have been considered, it would appear that relative superficial consideration had been given to the election of a suitable candidate for appointment in the position of NDPP. There is no indication that the President has given any attention to any other possible candidates. On the contrary all indications are that the President had at some stage, as it was, perhaps, his right to do, favoured Mr. Simelane, and no one else, for the position of NDPP.

[81] It, however, does not mean that the President, in the exercise of his powers, did not take the decision to appoint Mr. Simelane in good faith or that his decision was not, as held in, *inter alia*, the **Pharmaceutical case, supra, 708E**, "*rationally related to the purpose for which the power was given*".

[82] The purpose of the power conferred on the President in terms of section 179(1)

of the Constitution, read with sections 9 and 10 of the NPA Act, is to give effect to the constitutional imperative of a national prosecuting authority that will execute its functions independently and without any interference, politically or otherwise.

[83] It accordingly follows that if it can be said that the President appointed a person, as is contended by the DA, who "*displayed a fundamental lack of appreciation for prosecutorial independence; or worse still, while being fully aware of what prosecutorial independence entailed, he was willing to assist the (Minister of Justice) to override it*", the decision is not rationally related to the purpose for which the power to appoint an NDPP is conferred on the President.

[84] This brings me to a consideration of the grounds on which this application is based.

The fitness requirement

[85] A fit and proper person for appointment is in my view, regard being had to the purpose of the power conferred upon the President, is obviously a sufficiently experienced one that will, apart from the other prescribed or required requirements, be able to conscientiously maintain, with integrity and without fear, favour and prejudice, free from any interference by any person and in the public interest, the independence of the prosecuting authority.

[86] As is apparent from the papers, it is almost all of these qualities and

characteristics of Mr. Simelane that are being questioned in this application.

[87] Of particular significance is his view on the prosecutorial independence of the NPA in general and the NDPP in particular as is embodied in the letter dated 18 September 2007 of which he was admittedly the author. The contents of this letter, in so far as it purported to have instructed Mr Pikoli not to pursue any steps against Mr. Selebi until such time as the Minister is satisfied that sufficient information and evidence exist for such action, seem no doubt to be the spark that ignited the whole inferno that followed and which had eventually given rise to this application and, perhaps, the suspension of Mr Pikoli. The parties were all in agreement that the Minister had no right to interfere to that extent in the performance by the NDPP of his functions. Mr. Pikoli did, as he was bound to do, provided the Minister with all the information she called for, but refused to comply with her instruction not to proceed with the legal steps he was at the time in the process of taking. There is much to say in this regard for the comments rendered in the Ginwala report that 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*" and that Mr. Simelane's view have in all probability clouded the Minister's judgment which was, so it was held, contrary to the "*obligation of a Director General to provide accurate, sound and unbiased information and advice to the Minister*".

Mr. Simelane, like the Minister, denies that it was the intention to interfere in the performance of the duties of the NDPP. According to him the letter was intended to convey a message that the arrest, search and seizure should not go ahead immediately

until the Minister was in possession of sufficient information and evidence so as to be able to advise President Mbeki on how to handle the situation.

The question immediately arises, if that was the position, why was Mr. Pikoli in the context of his actions against Mr. Selebi asked to resign at first by the Minister and eventually by Mr. Mbeki.

Although the criticism levelled at him in this regard may be justified, I find myself unable to hold that he is not a fit and proper person to hold the position of NDPP.

It in fact now appears that he indeed believes in the independence of the office of the NDPP and must have on his appointment taken an oath that he will in that capacity *"uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law"*.

[88] His integrity and honesty are being challenged because of the non-disclosure of certain information and documents to the Enquiry and in one instance to Mr. Pikoli's attorneys. This evoked negative comments in the Ginwala report.

Although the criticism levelled at Mr. Simelane in this regard may to a certain extent be justified, I also find myself here unable, even if it is considered in context with the foregoing criticism, to hold him to be a person that is unfit to hold the position of NDPP.

[89] As far as the recommendations of the PSC are concerned, I fail to see, except to note that the PSC was of the view that Mr. Simelane's conduct justifies disciplinary proceedings, how any inference, other than the one that I have drawn from the Ginwala Report, can be drawn from those recommendations. As a matter of fact Mr. Simelane cannot be blamed for the fact that the Minister refused to accept those recommendations.

[90] The criticism in judgment in the *Pretoria Portlands Cement matter, supra*, in the manner in which Mr. Simelane conducted himself in the actions of the Competition Commission shows, perhaps, an over-eagerness on his part, albeit an ill-considered one, to draw attention to the Commission's role and function, but I fail to see how his actions in this regard disqualified him as a fit and proper person to hold the position of NDPP.

[91] As far as the criticism against him in the *Glenister matter* is concerned, it is not clear to me whether Mr. Simelane knew that the issue of the Scorpions would be considered by the Cabinet the day after he deposed to his affidavit or whether he was free to anticipate decisions to be taken by Cabinet.

[92] The fact that a probe has been or was about to be launched by the GCB or the Bar Council was not relevant at the time of his appointment. It does not appear that the GCB or Bar Council has at any stage evaluated any complaints against him or has formulated any charges against him and, I doubt whether it can be said that he was facing any complaints of unprofessional conduct.

The process followed by the President in taking the decision to appoint Mr. Simelane

[93] As I have already indicated, no competitive selection process is prescribed by either the Constitution or the NPA Act as a prerequisite for a lawful appointment of an NDPP.

[94] The President has, as head of the executive authority, made the appointment, after, as he was required to do, having consulted the Minister of Justice and Constitutional Development.

[95] In doing so, he, albeit, as I have already indicated somewhat superficially, made enquiries on the occurrences at the Ginwala Enquiry and on the recommendations of the PSC and took into consideration the facts set out in his *curriculum vitae* from which it appears that he practised for two years as an advocate, that he was a commissioner of the Competition Commission and the Director-General of the Department of Justice and Constitutional Development.

[96] In the absence of any prescribed process, I am unable to hold that the process followed was irrational as the President's aim was, as is apparent from his answering affidavit, to determine whether Mr. Simelane was a fit and proper person for appointment as envisaged in the Constitution and the NPA Act.

The alleged improper or ulterior motive for appointing Mr Simelane

[97] This ground of review is dependent on, and linked with, the first two grounds of review which, if held to be correct, may lead to an inference that the appointment of Mr. Simelane effected to secure as NDPP a person who would be susceptible to influence by the Executive in regard to prosecutorial decisions, particularly, in regard to criminal investigations against high-profile members of Government or criminal investigations which could embarrass the Government.

[98] In view of the conclusions I have reached in the first two grounds of review raised, there is no basis to draw any such inference.

Conclusion

[99] I am accordingly unpersuaded that it has been shown on the probabilities that Mr. Simelane is not a fit and proper person for appointment.

[100] I am not persuaded that, if regard is had to all the averments made in the papers, that he is not a controversial person and one with an unblemished background or that he is one of the most experienced persons who could have been taken into consideration for appointment.

[101] That is, however, not the test.

[102] At the time the replying affidavits were filed on 29 June 2010 Mr. Simelane was already in office for a period of seven months. The papers contain no allegations on the

manner in which Mr. Simelane conducted his functions as NDPP and which reflects negatively on his fitness as NDPP.

[103] As I have already indicated, he has stated explicitly that he believes in the independence of the office of the NDPP and must have taken an oath to uphold and protect the Constitution and the fundamental rights entrenched therein.

[104] Whether he will adhere to his belief and be true to the oath he has taken, only time will tell.

[105] Should he fail to do so the General Bar Council is authorized to take him to task and should it appear that he in some way conducted him in a manner not deserving to remain on the roll of advocates, and to bring an application for him to be removed from the roll of advocates which will, if he is so removed, immediately disqualify him to remain in office as NDPP.

[106] This brings me to the question of costs.

Costs

[107] As far as costs are concerned, it was submitted on behalf of the DA, relying on the judgment of the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) at 245C-247E, para [21] to [25]* in which the Constitutional Court, as in previous judgements in that Court, again confirmed the

general rule that in constitutional litigation an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.

[108] This rule is based on the rationale that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. An exception is, however, acknowledged to this general rule where, for instance, litigation is frivolous or vexatious or in any other way manifestly inappropriate.

[109] In this matter we are not here concerned with an individual litigant who sought to vindicate his or her rights, but with a political party which has obviously raised a constitutional issue, namely, the constitutional validity of executive action.

[110] I can see no reason why this rule should not also find application in the case where a political party seeks to challenge the validity of actions which in its view is inconsistent with the provisions of the constitutional and democratic dispensation envisaged in the Constitution. To deny a political party the benefit of this rule might have a negative effect on it to in so far as it reasonably deems it necessary ensure the promotion and advancement of constitutional justice.

[111] It has been argued on behalf of the Respondents that this is a case where a political party has sought to advance its political aspirations through litigation.

[112] Even though a political party, particularly, one in opposition to government might, perhaps, benefit politically by successfully litigating against government on a

constitutional issue, it does not in my opinion detract from a case where it seeks to remedy a constitutional injustice in the public interest.

[113] In this matter the DA launched this application clearly on its perception of a wrong appointment that may have a serious impact on the administration of justice, particularly, if such appointment was made for an improper or ulterior motive, namely, to install an NDPP who was thought to be malleable to the executive's wishes.

[114] I have no reason to believe that the DA launched these proceedings for frivolous or vexatious reasons. It is undoubtedly the purpose of the Constitution to have, as head of the NPA, a person of the utmost integrity and independence and of sufficient experience and conscientiousness to lead the NPA in the fearless, fair and efficient execution of the prosecutorial mandate to instill confidence in the NPA.

[115] I have no doubt that, in view of the background facts on which its application was based, the DA acted fairly and reasonably to have been concerned, as a number of other prominent persons in our community, on the person of Mr. Simelane and the manner in which the appointment had been effected.

For these reasons I make the following orders:-

1. The Applicant's application is dismissed.
2. No order is made as to costs.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV O ROGERS SC
ADV A KATZ SC
ADV D BORGSTROM
ADV N MAYOSI

On the instructions of:

MERVYN SMITH
Tyger Valley Office Park
Cnr Willie van Schoor & Old Oak Roads
BELLVILLE
Ref: Mr Mervyn Smith / Ms Samantha Solomons
Tel : (021) 918 9000

c/ o EDELSTEIN-BOSMAN INC
222 Lange Street
New Muckleneuk
PRETORIA
Ref: A Jogi/LT/DM1004
Ms Anisha Jogi
Tel: (012) 452 8900

ON BEHALF OF THE FIRST RESPONDENT

ADV N A CASSIM SC
ADV V NOTSHE SC
ADV M SELLO

On the instructions of:

STATE ATTORNEY
167 Andries Street
8th Floor
Manaka Heights
PRETORIA
Ref : 8018/2009/Z65/jb
G P Seleka
(012) 309 1545

ON BEHALF OF THE SECOND RESPONDENT

ADV M T K MOERANE SC
ADV L GCABASHE

On the instructions of:

STATE ATTORNEY
167 Andries Street
8th Floor
Manaka Heights
PRETORIA
Ref : 8018/2009/Z65/jb

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G P Seleka
(012) 309 1545

ON BEHALF OF THE FOURTH RESPONDENT

ADV D UNTERHALTER SC
ADV G MALINDI

On the instructions of:

STATE ATTORNEY
167 Andries Street
8th Floor
Manaka Heights
PRETORIA
Ref : 8018/2009/Z65/jb
G P Seleka
(012) 309 1545

DATE OF HEARING

13, 14 and 15 September 2010

JUDGMENT DELIVERED ON

10 November 2010