



**IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: _____
19/4/21	
DATE	SIGNATURE

CASE NO: 22356/2019

In the matter between:

ADVOCATE RON SIMPHIWE MNCWABE

Applicant

and

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA:
HON. CYRIL M RAMAPHOSA**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS:
ADV. SHAMILA BATOHI N.O.**

Third Respondent

and

CASE NO: 31464/2019

In the matter between:

KHULEKANI RAYMOND MATHENJWA

Applicant

and

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
(THE HONOURABLE CYRIL M. RAMAPHOSA N.O.)**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES (THE HONOURABLE T M MASUTHA N.O.)**

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
(ADV. SHAMILA BATOHI N.O.)**

Third Respondent

ADV. SHAUN ABRAHAMS

Fourth Respondent

**NATIONAL PROSECUTING AUTHORITY OF
SOUTH AFRICA**

Fifth Respondent

JUDGMENT

D S FOURIE, J:

[1] The two applicants each launched a separate application against the respondents in which they apply for substantially the same relief. Both seek an order that the first respondent's decision to withdraw their appointment as Director of Public Prosecutions: Northern Cape Division of the High Court ("Mncwabe application") and Director of Public Prosecutions: Mpumalanga Division of the High Court ("Mathenjwa application"), should be reviewed and set aside. The two applications are substantially the same and as there is a considerable overlap between them, it was decided by the Acting Deputy Judge President of this Division that both applications should be heard together by the same Court.

[2] Advocate Shaun Abrahams, the former National Director of Public Prosecutions, has filed an explanatory affidavit as the fourth respondent in the Mathenjwa application. He was not joined as a respondent in the Mncwabe application, but it seems that the parties have informally agreed that his affidavit should also form part of the papers in both the Mncwabe and Mathenjwa applications.

[3] The President's affidavit in answer to the fourth respondent's explanatory affidavit was filed in the Mathenjwa application, but not in the Mncwabe application. To rectify this mistake the President filed an interlocutory

application in terms whereof he applied for condonation for the late filing of his answer to the fourth respondent's explanatory affidavit and that his answer should be considered applicable in both the Mncwabe and Mathenjwa applications. This application was opposed by only Mr Mncwabe.

[4] During argument and after having heard submissions in this regard, an order as prayed for was granted. The main reason for having granted such an order is because Abrahams raised in his affidavit issues relevant to both the Mncwabe and Mathenjwa applications and it would therefore be in the interest of justice to allow the first respondent's answer to also form part of the papers in the Mncwabe application. It was ordered that costs of the interlocutory application shall be costs in the main application.

BACKGROUND

[5] Prior to his resignation, former President Zuma took certain steps to appoint five senior members as either Directors or Special Directors of Public Prosecutions in various offices of the National Prosecuting Authority (NPA). It is in dispute whether these appointments have been made final. Following President Zuma's resignation, President Ramaphosa assumed office and decided not to announce the appointments and to withdraw these appointments.

[6] Three of the five purported appointees, Dr Pretorius, Mr Mncwabe and Mr Mathenjwa, launched separate applications before this Court seeking to review and set aside the decision of President Ramaphosa to withdraw their purported appointments and to seek to enforce former President Zuma's decision. The application by Dr Pretorius (Case No: 60640/2019) was withdrawn

on 9 March 2020. Mr Mncwabe and Mr Mathenjwa's applications remain pending and are the subjects of the current proceedings.

[7] The main issue to be considered in both the applications is whether the applicants' appointments as a Director of Public Prosecutions (DPP) were final and had full legal force and effect. This issue also raises other questions, such as, for instance, whether President Ramaphosa was *functus officio* and whether his decision to withdraw their appointments was invalid, unlawful and unconstitutional?

THE MNCWABE APPLICATION

[8] During or about July 2017 Mr Mncwabe received a call from the personal assistant of the former National Director of Public Prosecutions (Adv. Abrahams) who asked him for a detailed *curriculum vitae* on the apparent request or instruction of former President Zuma, which Mr Mncwabe furnished soon thereafter.

[9] Mr Mncwabe then gives the following explanation:

"From then onwards and for a period of not less than eight (8) months I never heard anything from the office of the then NDPP, until on 7 February 2018, when I was both telephonically as well as electronically (via Whatsapp) advised and notified about my appointment as the Director of Public Prosecutions: Northern Cape Division of the High Court, Kimberley, Northern Cape, as confirmed by the attached and self-explanatory President's Minute No 18 of 2018 ... which I received on the same date via Whatsapp and later around November 2018 on hard copy. I

immediately, telephonically and via email, accepted the appointment ...”.

[10] It is further explained by Mr Mncwabe that *“due to the political climate”* and former President Zuma eventually resigning as President, Abrahams then advised him telephonically *“that the issue pertaining to myself commencing with my duties and the logistics related thereto shall be communicated to myself by the Office of the incoming President who will announce my appointment together with the former NDPP and the second respondent”.*

[11] A period of approximately eight months then lapsed without Mr Mncwabe hearing anything from either of the respondents. It is common cause that he never assumed office as DPP or acted in the position of DPP. On 18 March 2019 a communication was received from the office of the NDPP to which was attached *“the first respondent’s minute, President’s Minute 69 of 2019, which amongst others states that my appointment by the former President is hereby revoked”.*

[12] Various *“legal grounds for the application”* are then pleaded in the founding affidavit, including allegations such as the impugned decision and accompanying conduct were taken without affording Mr Mncwabe the right to a hearing, violate his constitutional rights, are irrational and against administrative laws and should therefore be reviewed and set aside.

THE MATHENJWA APPLICATION

[13] In June 2017 Abrahams requested Mr Mathenjwa to provide him with a copy of his *curriculum vitae*. On 5 February 2018, during a discussion with Abrahams concerning certain matters related to Mr Mathenjwa's involvement as a member of the prosecution team advising on the prosecution of former President Zuma, and whether the charges against him ought to be withdrawn or not (based on the representations which had been made), Abrahams informed Mr Mathenjwa that he had been promoted and elevated by former President Zuma to the Office of Director of Public Prosecutions: Mpumalanga and that there was a presidential minute to confirm his appointment as such.

[14] On 12 February 2018, with a view to discuss the logistics around implementing his appointment, Mr Mathenjwa was informed that Abrahams had received a call from the then Justice Minister Masutha's office informing him that the President had requested that Abrahams "*hold off on announcing my and other appointments until the President had publicly announced same.*" Shortly thereafter, on 14 February 2018 President Zuma resigned as President of the RSA "*prior to him having announced my appointment publicly.*"

[15] Mr Mathenjwa then gives the following explanation:

"Due to the change in administration, I did not insist on the immediate implementation of my appointment as I believed it prudent and collegial to allow the new President of the Republic of South Africa to settle into office before implementing my position as DDP Mpumalanga."

[16] On 12 March 2019 Mr Mathenjwa had a meeting with Adv. Batohi, the National Director of Public Prosecutions. Batohi advised him that the executive was of the view that Mr Mathenjwa was not appointed and that she *“was dealing with a similar matter in the case of Adv. Mncwabe who was also enquiring about his appointment as Director of Public Prosecutions in the Northern Cape”*.

[17] On 19 March 2019 Mr Mathenjwa was informed by the third respondent (then Minister of Justice) that *“the first respondent had revoked my appointment as the DPP Mpumalanga.”* It is then concluded by Mr Mathenjwa that the decision to revoke his appointment was unlawful and should be reviewed and set aside.

THE EXPLANATORY AFFIDAVIT BY ABRAHAMS

[18] In his explanatory affidavit Abrahams indicates that *“I do not oppose this application and instead would abide by the decision of this honourable Court”* and that *“I deemed it prudent to depose and file this affidavit for the assistance of this honourable Court”*.

[19] During February 2018, whilst being in Cape Town on official business, Abrahams was given several signed Presidential Minutes by the *“Ministry of Justice”* to enable him to communicate with the individuals concerned. These Presidential Minutes were contained *“in their original customary red folders in which they were initially submitted to the Ministry”* together with certain signed memoranda. This included the following:

- (a) Signed Presidential Minute No 10, dated 1 February 2018, in which the then President appointed Mr Mathenjwa as the DPP: Mpumalanga Division of the High Court;
- (b) Signed Presidential Minute No 18, dated 1 February 2018, in which the then President appointed Mr Mncwabe as the DPP: Northern Cape Division of the High Court.

[20] Abrahams then states the following:

“As Head of the National Prosecuting Authority, and having authority over the exercising of all my powers, and the performance of all my duties and functions conferred or imposed on or assigned to any member of the Prosecuting Authority by the Constitution, the NPA Act or any other law, I immediately informed each candidate of their respective appointments and congratulated them.”

[21] Before requesting his spokesperson to prepare an internal communication to announce the new appointments internally within the NPA, Abrahams contacted the Ministry to establish whether the Ministry, the then President or Abrahams would make a media statement. He also pointed out to the Ministry that he had already informed all the appointees of their appointments. He gives the following explanation:

“Notwithstanding the Ministries position, I advised Mr Moleme to discuss the issue of publicly announcing the appointments with the then Minister and the Presidency to seek clarification. As a result I held back on issuing an NPA internal communication

announcing the February appointments made by the then President.”

[22] Abrahams was then requested *“to hold off on the internal announcement”* as the then Minister had agreed with the then President that he would make the necessary media announcement. He was advised by the Minister that he had spoken to the then President and that the latter had requested that they attend a meeting with him and the newly elected President of the African National Congress, Mr Ramaphosa, *“as the then President, as a matter of courtesy, wanted to brief the new President of the ANC on the recent resignations from the NPA, along with the new appointments that he had affected in the NPA on 1 February 2018.”*

[23] It is finally concluded by Abrahams that once a decision was made by the then President to appoint Mr Mncwabe and Mr Mathenjwa, and same was communicated by him to those affected by the decision, that the decision was no longer susceptible to revocation without resorting to the Courts, *“as that would infringe the principle of legality”*.

THE PRESIDENTIAL MINUTES

[24] The Presidential Minutes No 10 and 18 with regard to the appointment of Messrs Mathenjwa and Mncwabe are both dated 1 February 2018. The wording thereof (save for their names and the Division of the High Court concerned) is the same. It reads as follows:

“Under section 13(1)(a) read with sections 6(2) and 9(1) of the National Prosecuting Authority Act, 1998 (Act No 32 of 1998), I, Jacob Gedleyihlekisa Zuma, after consulting with the Minister for Justice and Correctional Services and the National Director of Public Prosecutions, hereby appoint ... as Director of Public Prosecutions of the ... Division of the High Court ... with effect from 1 February 2018.”

[25] On 11 March 2019 President Ramaphosa issued Presidential Minutes No 67 and 69. In terms thereof he revoked the appointment of both Messrs Mathenjwa and Mncwabe. Both these minutes are the same, save for the names of the individuals concerned and the Division of the High Court applicable. It reads as follows:

“Whereas ... was appointed, as Director of Public Prosecutions ... in terms of President’s Minute No ... of 1 February 2018.

Under section 13(1)(a) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998) read with section 101 of the Constitution of the Republic of South Africa, 1996 and after consulting with the Minister of Justice and Correctional Service and the National Director of Public Prosecutions, I hereby revoke the appointment of ... and the said President’s Minute No ... of 1 February 2018.”

THE FIRST RESPONDENT’S ANSWER

[26] An answering affidavit deposed to by the Director-General in the Presidency and Secretary of the Cabinet was filed in both applications. In answer to the fourth respondent’s explanatory affidavit an affidavit by President Ramaphosa was also filed.

[27] By the end of January 2018 (in his capacity as the newly elected President of the African National Congress and Deputy President of the country) President Ramaphosa was informed by former Minister Masutha of the intention to make a number of appointments of Directors and Special Directors of Public Prosecutions in the NPA across the country. It was also explained to him that former President Zuma had intended to make these appointments, but they had not been finalised and no public announcement had been made.

[28] Following his appointment as President, a series of briefing sessions took place with various organs of State, including the NPA. During a briefing session with Abrahams on or about 27 February 2018, the President enquired from Abrahams whether these appointments had been fast-tracked and, if so, what were the reasons therefore. He was given the assurance that the appointments had not been fast-tracked and Abrahams was then informed that the President needed to apply his mind to the proposed appointees.

[29] In August 2018 the Constitutional Court delivered its judgment in the Nxasana matter and decided that the purported appointment of Abrahams as NDPP was unlawful and that he had to vacate that office. The appointment of a new NDPP was of critical importance and took priority. Once a new NDPP was appointed, the President turned to consider the other issues facing the leadership of the NPA including the appointments which are the subject matter of these proceedings.

[30] At the request of the President, a legal opinion was sought and obtained on the status of those proposed appointments. The essence of the opinion was

that the proposed appointments were not final and as a result they could be revoked in the discretion of the President. The President gives the following explanation:

"I was thus at liberty to decide whether or not to give effect to those purported appointments by ratifying and announcing them in public, and, to the extent necessary, to retract or amend the purported appointments."

[31] Pursuant to the advice received the President then exercised his discretion and decided not to proceed with giving effect to – and publicly announcing – the purported appointments by former President Zuma. The following explanation is given by the President:

"I was not satisfied that the persons purportedly appointed by the former President, on the recommendation of Adv Abrahams, would necessarily best serve the interests of a highly effective NDPP or be in the best interests of the restructuring and revitalisation of the NDPP, as a vital organ in the justice system. I determined that the appointment of suitable persons to those positions should rather be considered afresh by the new NDPP, Adv. Batohi, who could then make recommendations in due course to me as President for appointment. That process awaits the outcome of the present litigation."

[32] The President then exercised his discretion not to finalise the appointment of the selected individuals. This was reflected in Presidential Minutes 67 and 69 referred to above.

THE LEGISLATIVE FRAMEWORK

[33] Section 179(1) of the Constitution, 1996 provides that there is a single National Prosecuting Authority consisting of a National Director of Public Prosecutions, Directors of Public Prosecutions and Prosecutors as determined by an Act of Parliament. Subsection (3) stipulates that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions. Subsection (4) stipulates that national legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice.

[34] Executive decisions are dealt with in section 101 of the Constitution. Subsection (1) provides that a decision by the President must be in writing if it is taken in terms of legislation, or has legal consequences. Subsection (2) stipulates that a written decision by the President must be counter-signed by another Cabinet Member if that decision concerns a function assigned to that other Cabinet Member. Section 85(2)(e) is also relevant. It provides that the President exercises the executive authority, together with the other members of the Cabinet, by performing any other executive function provided for in the Constitution or in national legislation.

[35] In terms of the National Prosecuting Authority Act No 32 of 1998 ("NPA Act"), which is the legislation giving effect to the constitutional directive contained in section 179, the single National Prosecuting Authority is structured with an office of the National Director of Public Prosecutions and offices of the Prosecuting Authority at each Division of the High Court. These offices are

established under section 6(1) of the NPA Act and headed either by a Director of Public Prosecutions or a Deputy Director of Public Prosecutions appointed to the seat of each Division of the High Court.

[36] The appointment of Directors of Public Prosecutions is prescribed in section 13(1) of the NPA Act. It provides as follows:

“(1) The President, after consultation with the Minister and the National Director –

(a) may, subject to section 6(2) appoint a Director of Public Prosecutions in respect of an office of the Prosecuting Authority established by section 6(1);

(aA) ...

(b) ...

(c) may appoint one or more Directors of Public Prosecutions (herein referred to as ‘Special Directors’) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to them or her by the President by proclamation in the Gazette.”

[37] Section 14(3) provides that section 12(3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the National Director, shall apply, with the necessary changes, with regard to the vacation of office and discharge of a Director.

DISCUSSION

[38] The main issue to be considered is whether President Ramaphosa was entitled to reverse the initial decision of former President Zuma regarding the appointments of the applicants. Put differently, was he not precluded from doing so in view of the fact that the applicants had by then already been informed by Abrahams about their appointments?

[39] It was contended on behalf of the applicants that President Ramaphosa was *functus officio* (he was not entitled to reconsider the decision which had already been made) and could therefore not set aside the decision of former President Zuma. It was further submitted that Presidential Minutes No 10 and 18 in terms whereof the applicants were appointed by former President Zuma are both final and valid documents, fully compliant with the provisions of section 13(1)(a) of the NPA Act read together with section 101(1) and (2) of the Constitution.

[40] Counsel for the President accepted that section 101 of the Constitution has been complied with, but submitted that compliance cannot alone determine the issue. It was further contended that a decision only becomes final and binding once it has been implemented by an overt external act by the decision-maker. Until then, and despite the completion of certain procedural steps, the decision originally made is merely preliminary and therefore, so it was contended, the decision-maker may reverse or amend his or her preliminary decision.

[41] The *functus officio* doctrine states, generally speaking, that once a decision-maker has rendered a final decision, he becomes *functus officio* and cannot reconsider the decision made (*Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA) par 23). This principle was applied in *Milnerton Lagoon Mouth Development (Pty) Ltd v The Municipality of George & Others* 2004 JDR 0258 (C) par 12 where the High Court held as follows:

“The applicant submits, however, that the decision in Hopf v Pretoria City Council is no longer good law on the grounds that the Constitution and the statutory duties imposed on a municipality militate against the rule that a public authority may rescind its own decision. The short answer to this submission, in my view, is that it loses sight of the distinction between a preliminary decision and a final decision. A public authority is regarded as being functus officio only once a final decision has been made. The authority may at any time revoke a decision before the actual exercise of a power in terms of an empowering law. This principle has been followed by the Constitutional Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others.”

[42] The principle referred to in the *Milnerton Lagoon* case has been explained by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) par 44 as follows:

“In law, the appointment of a commission only takes place when the President’s decision is translated into an overt act, through public notification ... section 84(2)(f) does not prescribe the mode of public

notification in the case of the appointment of a commission of enquiry but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation."

[43] Taking into account the *dicta* referred to above, it is clear that the *functus officio* doctrine applies only to final decisions. As the Constitutional Court indicated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, *supra*, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification – meaning that the President would have been entitled "*to change his mind at any time prior to the promulgation of the notice*".

[44] However, it was submitted on behalf of the applicants, and also by counsel for Abrahams, that an overt act through public notification is not necessarily applicable in all cases - also not in this one - more particularly when there is no statutory requirement for publication in the Government Gazette or otherwise. Taking into account that the decision to appoint the applicants was conveyed to them by Abrahams, it was contended that a point of finality is also arrived at when the decision is "*announced or otherwise conveyed to those affected by it*". In support of this submission, I was referred to the following statement by Prof Hoexter, *Administrative Law in South Africa*, 2nd Ed, p 278:

"In general, the functus officio doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it." (my emphasis)

[45] I think there may be some merit, generally speaking, in the submission that in some cases finality is a point arrived at when the decision is conveyed to those affected by it, without a public announcement. This raises the question whether in this case the decision taken by former President Zuma, and the notification thereof by Abrahams to both the applicants, are sufficient to meet the requirement of finality.

[46] Counsel for the President pointed out the importance of the role of the Director of Public Prosecutions. In terms of the NPA Act there is a single National Prosecuting Authority structured with an office of the National Director of Public Prosecutions and offices of the Prosecuting Authority at each Division of the High Court. The offices of the Prosecuting Authority are established under section 6(1) of the NPA Act and headed either by a Director of Public Prosecutions or a Deputy-Director of Public Prosecutions appointed to the seat of each Division of the High Court. I think there is merit in this argument.

[47] The importance of the role of the Director of Public Prosecutions is underscored and amplified by the fact that in section 13(1)(a) of the NPA Act the President appoints the Director of Public Prosecutions. The significance of this cannot be understated. The President is the Head of State and Head of the National Executive. His is indeed the highest calling to the highest office in the country (*Economic Freedom Fighter v Speaker of the National Assembly* 2016

(3) SA 580 (CC) at 20). The decision of the President to appoint a Director of Public Prosecutions is therefore not the same, and also not on the same level, as a decision, for example, of a functionary to grant or refuse a licence. In such a case it may be sufficient if the applicant is formally notified of the decision without it having been passed into the public domain (cf. Rajee v Zeerust Town Council 1938 TPD 283 at 290 as well as MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 219 (SCA) where a subsequent decision to grant a licence to operate a hospital was only communicated to the applicant).

[48] I was also referred to the decision of the Supreme Court of Appeal in Plover's Nest Investment v De Haan [2015] ZASCA (193) where the issue was whether conditions imposed on owners of unimproved erven, which were not communicated to them, and not registered against the title deeds of the respective properties, were binding on the owner. Mhlantla JA held, with reference to SARFU (President of the Republic of South Africa and Others v South African Rugby Football Union and Others, *supra*) referred to above, as follows (in par 24):

“SARFU III related to the exercise of presidential executive powers to appoint a commission of enquiry in terms of s 84(2)(f) of the Constitution. The question before the Court was whether the exercise of the power conferred on the President constituted administrative action. The Constitutional Court held that the decision was executive rather than administrative action. But Plover's Nest argued that SARFU III was authority for the proposition that a decision takes effect only when communicated. The Court said (para 44) that the appointment of a commission of enquiry ‘only takes place when the President's decision is

translated into an overt act, through public notification'. The argument loses sight of the fact that the President was the repository of power in terms of the Constitution: only he could take such a decision and he was required to make it public. In this matter Geyer was not the repository of power. Geyer simply miscommunicated its decision." (my emphasis)

[49] It was submitted by counsel for the President that an essential part of a final decision, when exercising this type of executive power, is some form of publication through an overt act of the decision, which announcement is made in the public domain. That is because it is an executive action, which affects the wider public. I agree with this submission.

[50] In the present case the President is the repository of the power in terms of the NPA Act. He is the only one who has the power to appoint Directors of Public Prosecutions in terms of s 13(1) of the NPA Act. In terms of s 179(3) of the Constitution they should be appropriately qualified and are responsible for prosecutions in specific jurisdictions. They, as part of the Prosecuting Authority, should exercise their functions without fear, favour or prejudice. No doubt, the public has a direct interest in not only the appointment, but also the identity of the person or persons appointed as Directors of Public Prosecutions. Therefore, taking into account the executive power of only the President to appoint Directors of Public Prosecutions, the statutory requirements regarding their responsibilities, the importance of their role in society and the public interest with regard to their appointment, such an appointment only takes place, in my view, when the President's decision is translated into an overt act, through public

notification (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, *supra*, par 44).

[51] In short, and put somewhat differently, the appointment of a Director of Public Prosecutions by the President should not be made in secret, behind closed doors or unobtrusive, for obvious reasons. This is not a private affair. It is also not a daily occurrence. This is a necessary and important public appointment provided by statute. The right of the public to be informed is implicit in the constitutional ordering so that the public may know who to hold accountable. Public notification is therefore, in my view, a necessary requirement and forms part of the appointment process. Without that the decision to appoint would be incomplete and therefore not final.

[52] There seems to be no dispute that the appointment of the applicants had never been announced in the public domain. According to Abrahams he was requested "*to hold off on the internal announcement*" as the then Minister had agreed with the then President that he would make the necessary media announcement. Former President Zuma never reached the stage where he decided that the decisions be published. There is no written instruction or evidence regarding a delegation of authority empowering Abrahams or any other person, other than the President himself, to publish the decision and thereby make it final and irrevocable. Abrahams does not state that he was instructed or authorised by the President or the Presidency to publish and thereby finalise the appointments. All he says is that he exercised his powers as the erstwhile Head of the NPA *to inform the purported appointees*. There is no indication in the Constitution or the NPA Act that the Head of the NPA is empowered to finalise a

decision for and on behalf of the President. On the contrary, it had been made clear to Abrahams that the then President would make the necessary media announcement. That was never done. President Ramaphosa was therefore at liberty to decide whether or not to give effect to those purported appointments by announcing them in public or not to proceed and finalise the purported appointments. Put differently, the President was entitled not to finalise the purported appointments as those appointments, decided by former President Zuma, had never become a final decision. The “*revocation*” by the President is just another way of saying that the President has decided not to finalise and give effect to the purported appointments.

[53] It was also suggested on behalf of the applicants that President Ramaphosa should have approached the Courts to review and set aside former President Zuma’s decisions. Counsel for the President pointed out that we are not here dealing with an administrative decision, but an executive decision. I agree with this submission. This case is not about an invalid decision, it is about whether the decision by former President Zuma was final, and if it was, whether it was subject to the *functus officio* principle. I have already concluded that the decision by former President Zuma was not final and therefore the *functus officio* principle is not applicable.

[54] It was further contended on behalf of the applicants that the impugned decision taken by President Ramaphosa should be reviewed and set aside, because the decision was taken without affording the applicants the right to be heard. In answer thereto, counsel for the President argued that the President had acted in terms of his executive – not administrative – powers and therefore

the procedural requirement of *audi alteram partem* (to hear the other side) is not applicable.

[55] I was referred to the decision in Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) where the Constitutional Court dealt with the constitutional validity of two decisions by the President. Mr Masetlha had been appointed as Director-General of the National Intelligence Agency. He was first suspended and later his employment was terminated. The President did so unilaterally.

[56] One of the main questions that arose in that case was whether the power to appoint and the correlative power to dismiss a head of the National Intelligence Agency as conferred by section 209(2) of the Constitution is subject to procedural fairness. The complaint was that the President did not afford Mr Masetlha an opportunity to be heard before he was dismissed.

[57] It was pointed out by the Constitutional Court that the *audi*-principle, or the right to be heard, which is derived from the tenets of natural justice, is part of the common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them (par 75). However, it was also pointed out that an important distinguishing feature is that the power to dismiss is an executive function that derives from the Constitution and national legislation (par 75). The Court then held as follows:

“Section 85(2)(e) of the Constitution, in particular, stipulates that the President exercises executive authority by performing ‘any other executive function provided for in the Constitution or in

national legislation'. Furthermore, it is important to understand that s 1 of PAJA expressly excludes, from the purview of 'administrative action', executive powers or functions of the President referred to in s 85(2)(e). In other words presidential decisions which constitute the exercise of executive powers and functions under s 85(2)(e) are clearly not susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action." (Par 76)

[58] The Court found that while the power in question had to be exercised lawfully, rationally and in a manner consistent with the Constitution, procedural fairness is not a requirement (par 78). It was also held that the exercise of the power to dismiss by the President *"is constrained by the principle of legality, which is implicit in our constitutional ordering."* (Par 81)

[59] It therefore seems to me that, generally speaking, executive action of this nature is not subject to procedural fairness, is not susceptible to administrative review in terms of PAJA and does not require the right to be heard. More importantly, this case is not about a dismissal as was the position in the *Masetlha* matter. The applicants in this matter were not removed from office or discharged as contemplated in section 12(6), read with section 14(3), of the NPA Act, as they never had been finally appointed or assumed office as DPP. In this case the President exercised his executive powers by simply deciding not to finalise and give effect to the inchoate decision of former President Zuma and the purported appointments which had been made by him. This is another reason why the *audi*-principle should not be applicable. However, the authorities are clear that when the President is exercising an executive

function, the authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution.

[60] In this regard it is important to point out that according to the evidence of President Ramaphosa, he exercised his discretion not to proceed and finalise the appointments made by former President Zuma, because he:

“(w)as not satisfied that the persons purportedly appointed by the former President, on the recommendation of Adv. Abrahams, would necessarily best serve the interests of a highly effective NDPP or be in the best interests of the restructuring and revitalisation of the NDPP, as a vital organ in the justice system.”

[61] It is also clear, according to his explanation that he was of the view that the appointment of suitable persons to these positions should rather be considered afresh by the new NDPP, who would then make recommendations in due course to the President for appointment. He points out that process awaits the outcome of this litigation.

[62] It furthermore appears that the President had concerns that the proposed appointments were hastily made and therefore he enquired from Abrahams whether these appointments had been fast-tracked and, if so, what were the reasons therefore. In August 2018 the Constitutional Court delivered its judgment and decided that the purported appointment of Abrahams as NDPP was unlawful and that he had to vacate his office. At the request of the President a legal opinion was sought and obtained on the status of the proposed appointments regarding the applicants in the present matter. He then gives the following explanation:

"I was thus at liberty to decide whether or not to give effect to those purported appointments by ratifying and announcing them in public, and, to the extent necessary, to retract or amend the purported appointments."

[63] It therefore appears that President Ramaphosa properly applied his mind to these proposed appointments, and considered the finalization thereof carefully, especially if one takes into account the concerns raised in other cases involving appointments to the National Prosecuting Authority (cf. Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC); Nxasana v Corruption Watch NPC and Others 2018 (2) SACR 442 (CC) and Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa 2019 (1) SA 130 SCA)). The President then states that *"these issues, including this batch of proposed leadership appointments, required full and proper consideration before any further steps could be taken, so as to achieve stability in the NPA..."*

[64] Taking into account the facts and circumstances referred to above, I agree with counsel for the President that the reversal of the preliminary decision for the proposed appointments, being in the President's discretion, was rational, and was exercised for the legitimate purpose of ensuring the constitutionally protected functioning and integrity of the National Prosecuting Authority. For all these reasons I am of the view that that when the President exercised his discretion not to finalise the appointment of the applicants, he did so lawfully, rationally and in a manner consistent with the Constitution.

[65] In the result both applications should be dismissed with costs. In view of the fact that Abrahams did not oppose the applications and only filed an affidavit to assist the court, he shall not be entitled to any costs.

[66] It should finally be pointed out that the remarks, comments and conclusion made in this judgment are not intended, and should not be interpreted, to cast a negative reflection on the character, integrity and competence of either of the applicants, or that of Abrahams. That was not the purpose of this judgment.

ORDER

In the result I make the following order:

1. The application of Mr Mncwabe as applicant in case number 22356/2019 is dismissed with costs, excluding the costs of Adv Abrahams;
2. The application of Mr Mathenjwa as applicant in case number 31464/2019 is dismissed with costs, excluding the costs of Adv Abrahams;
3. Costs which have been incurred jointly by the two applicants and/or costs incurred as a result of the joint hearing and/or costs which cannot

easily be separated and assigned to a particular application, shall be shared and paid equally (50/50) by the two applicants;

4. All costs referred to above shall include the costs of two counsel where so employed, excluding the costs of Adv Abrahams.



D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 19/4/21

Matter heard: 11 and 12 March 2021.

Judgment delivered: 19 April 2021.

APPEARANCES:

Counsel for the applicant (Mr Mncwabe) in case 22356/2019:
Mr EZ Fakude.

Counsel for the applicant (Mr Mathenjwa) in case 31464/2019:
Mr D Reddy.

Counsel for First respondent (President of the RSA) and Third respondent (National Director of Public Prosecutions) in both applications:
Adv P Kennedy SC.
Adv L Zikalala.
Adv L Mokgoroane.

Counsel for Fourth respondent (Adv Abrahams) in case 31464/2019:
Adv IAM Semanya SC.
Adv MP Mahlatsi.