

THE REPUBLIC OF SOUTH AFRICA



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

CASE NO. 26912/12

In the matter between:

Freedom Under Law

Applicant

And

The National Director of Public Prosecutions

First Respondent

**The National Commissioner: South African
Police Service**

Second Respondent

**The Head: Specialised Commercial Crime Unit
The Inspector-General of Intelligence
Richard Naggie Mdluli
Minister of Safety and Security**

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

JUDGMENT

Murphy J

1. This application is a matter of public interest and national importance on account of it raising significant issues of propriety, accountability and justifiable conduct in the governance of the Republic. The main issue is whether certain decisions made by the various respondents to withdraw criminal and disciplinary charges against the fifth respondent, Lieutenant-General Richard Mdluli (“Mdluli”), the Head of Crime Intelligence within the South African Police Service (“SAPS”), were unlawful.

2. The applicant, Freedom under Law (“FUL”), a public interest organisation, seeks an order directing the National Prosecuting Authority (“the NPA”) to reinstate several withdrawn criminal charges, (including murder, attempted murder, kidnapping, assault, fraud and corruption), against Mdluli. It also seeks orders directing the

National Commissioner of SAPS (“the Commissioner”) to reinstate withdrawn disciplinary charges against Mdluli arising from the same alleged misconduct.

3. FUL is a non-profit company as contemplated in section 10 of the Companies Act.¹ It was established in 2008 and has offices in South Africa and Switzerland. It is actively involved *inter alia* in the promotion of democracy, the advancement of and respect for the rule of law and the principle of legality as the foundation for constitutional democracy in Southern Africa. Its board of directors and international advisory board are made up of respected lawyers, judges and role players in civil society in various parts of the world.

4. Dr Mamphela Ramphele, the deponent to the founding and supplementary affidavit, is a member of the international advisory board of FUL and was previously Vice-President of the World Bank in Washington and Vice-Chancellor of the University of Cape Town. She was a universally recognised leader of the Black Consciousness Movement in the struggle against apartheid and is currently President of Agang, a new political formation in South Africa. The deponent to the replying affidavit is the chairperson of the board of FUL, Justice Johann Kriegler, a retired judge of the Constitutional Court, who in 1994 served as Chairperson of the Independent Electoral Commission overseeing the first democratic election in South Africa.

5. Both the Constitutional Court (“the CC”) and the Supreme Court of Appeal (“the SCA”) have in the past recognised the right of FUL to act in the public interest in terms of section 38 of the Constitution in relation to infringements of the Bill of Rights.² FUL has on occasion also been admitted by the courts as *amicus curiae* in important cases involving constitutional matters.

6. These review proceedings, brought in terms of Part B of the Notice of Motion, challenge the decisions of the first, second and third respondents to withdraw the criminal and disciplinary charges that were pending against Mdluli who, though currently interdicted by this court from performing his duties, remains the Head of Crime Intelligence within SAPS; and, as stated, are aimed at reinstating the criminal and disciplinary charges forthwith. The present proceedings were preceded by an urgent application, in terms of Part A of the Notice of Motion, for an interim order interdicting Mdluli from carrying out his functions and the Commissioner from assigning any tasks to him pending the finalisation of the review proceedings. The interim order was granted by Makgoba J on 6 June 2012.

7. The first respondent is the National Director of Public Prosecutions (“the NDPP”), the head of the NPA. The NDPP is appointed by the President of the Republic and invested by section 179(2) of the Constitution and Chapter 4 of the National Prosecuting Authority Act³ (“the NPA Act”) with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary function and duty which is incidental thereto. At the time these proceedings were launched, the office of the NDPP was vacant as a consequence of the decisions of

¹ Act 71 of 2008

² *Freedom under Law v Acting Chairperson: Judicial Services Commission and Others* 2011 (3) SA 549 (SCA)

³ Act 32 of 1998

the SCA and the CC finding the appointment of the previous incumbent, Advocate Simelane, to be unconstitutional. During the period relevant to these proceedings, the position was occupied by Advocate Nomgcobo Jiba, who served as the Acting NDPP until the recent appointment of Mr Nxasana as NDPP by President Zuma.

8. The second respondent is the Commissioner, who in terms of the relevant legislation is the head of SAPS. The Commissioner withdrew the disciplinary charges against Mdluli and reinstated him as Head of Crime Intelligence in SAPS. Section 207(2) of the Constitution, read with the relevant provisions of Chapter 5 of the South African Police Services Act⁴ (“the SAPS Act”) and the Regulations made in terms thereof, oblige the Commissioner to ensure that members of SAPS diligently fulfil their duties to prevent, combat and investigate crimes, maintain public order, protect and secure the inhabitants of the Republic, and uphold and enforce the law of the land. The Commissioner and his or her provincial or divisional subordinates have the duty to institute and prosecute disciplinary action against any member of SAPS who is accused of and charged with misconduct and to suspend from office such a member, pending the outcome of disciplinary proceedings.⁵

9. When these proceedings commenced, the office of the Commissioner was occupied by Lieutenant-General Nhlanhla Mkhwanazi (“the Acting Commissioner”), who was serving in an acting capacity, following the suspension of the former Commissioner, General Bheki Cele, on grounds of alleged impropriety. Subsequent to the commencement of these proceedings and the ultimate dismissal of General Cele, President Zuma appointed General Mangwashi Phiyega as Commissioner. The impugned decisions of the Commissioner withdrawing disciplinary charges and reinstating Mdluli in his position were taken by Lieutenant-General Mkhwanazi.

10. The third respondent is Advocate Lawrence Mrwebi, (“Mrwebi”), a Special Director of Public Prosecutions, and the head of the Specialised Commercial Crimes Unit (“SSCU”) within the NPA. It was he who took the decision and gave instructions to withdraw charges of fraud and corruption against Mdluli. Other charges of murder, attempted murder, kidnapping, intimidation and assault were withdrawn by Advocate Chauke (“Chauke”), Director of Public Prosecutions (“DPP”) for South Gauteng, who has not been cited as a party, it having been deemed sufficient to cite the NDPP as titular head of the NPA to whom Chauke is accountable.

11. The fourth respondent is Ambassador Faith Radebe, the Inspector General of Intelligence (“the IGI”), appointed in terms of section 7 of the Intelligence Services Oversight Act.⁶ She is the only respondent not to oppose the application and has filed a notice to abide.

12. The fifth respondent, Mdluli, did not actively oppose the relief sought in Part B of the notice of motion. He filed an answering affidavit opposing the relief sought in Part A of the notice of motion. He however did not file further opposing papers and was not represented at the hearing before me.

⁴ Act 68 of 1995

⁵ Regulations 12 and 13 of the Discipline Regulations published under the SAPS Act in GNR. 643 GG 28985 on 3 July 2006.

⁶ Act 40 of 1994.

13. The sixth respondent, the Minister of Safety and Security, was joined in the proceedings to give effect to the interim order interdicting the assignment of tasks to Mdluli pending the finalisation of the review. He has joined the Commissioner in opposing the application.

14. In sum, FUL seeks to review and set aside four decisions in relation to Mdluli: the decision taken by Mrwebi on 5 December 2011 to withdraw the corruption and related charges; the decision taken by Chauke on 1 February 2012, to withdraw the murder and related charges; the decision taken by the Acting Commissioner, on 29 February 2012, to withdraw the disciplinary proceedings; and the decision, of 27 or 28 March 2012, to reinstate Mdluli as the Head of Crime Intelligence within SAPS. It also seeks an order directing that the criminal and disciplinary charges be immediately re-instated and prosecuted to finalisation, without delay.

Preliminary evidentiary and procedural issues

15. The background facts giving rise to the review are for the most part common cause. However, in its founding affidavit FUL conceded that it was compelled by force of circumstances in bringing the application to rely on hearsay statements reported in the media and elsewhere. It accordingly made a general application for any hearsay evidence to be admitted in the interests of justice in terms of section 3 of the Law of Evidence Amendment Act.⁷ It based the application on five broad considerations: the relevant source documents relating to the decisions were inaccessible as they are under the control of the respondents; some of the statements have been reported in the media and have not been repudiated by the respondents; the impugned decisions were taken without any public explanation in violation of the constitutional obligation of transparency, openness and accountability; the review deals with subject matter of significant public interest; and the respondents would suffer no material prejudice by the admission of the hearsay, with any prejudice being outweighed by the public interest in proper justification of the decisions.

16. In motivating the admission of the evidence, FUL did not identify the specific statements upon which it hoped to rely. Nonetheless, it is evident that it had in mind a range of statements made in certain newspaper articles, as well statements and reports made by members of SAPS and the NPA (in particular Colonel Kobus Roelofse and Colonel Peter Viljoen of the Directorate Priority Crime Investigations in Cape Town, the Hawks; and Advocate Glynnis Breytenbach of the NPA) who investigated the allegations against Mdluli but were inhibited by institutional constraints and perceived conflicts of interest from deposing to confirmatory affidavits.

17. In the answering affidavits filed by the NDPP and the Mrwebi, the hearsay evidence was for the most part dealt with in general terms without any particular statement being objected to. The Commissioner largely avoided dealing with the merits of the factual allegations in relation to the decisions, raised mainly technical defences and objected to the hearsay in general terms.

⁷ Act 45 of 1988

18. In reply, FUL reiterated the point that the problem of hearsay in most respects would have fallen away had the NDPP and the Commissioner taken the court into their confidence by making full and frank disclosure regarding the Hawks investigation and by consenting to their employees testifying in these proceedings. Instead, it alleged, the deponents, in violation of their constitutional obligations of transparency and accountability, strained to withhold vital information in their possession. FUL therefore submitted that it is not open to the respondents to seek to have the evidence disallowed on the basis that it is hearsay when they have declined to fulfil their obligation to provide it.

19. The dispute between the parties about hearsay, delineated as it is in such general terms, is frankly much ado about not a great deal and not especially helpful in deciding any disputes of fact. Because evidence was sourced from other proceedings in which evidence was given under oath, most of the relevant factual issues have become less contentious. And where there are factual disputes they must be resolved by reference to the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁸ For the reasons put forward by FUL, I will adopt a generous approach. The hearsay nature of any statements allowed as evidence in the interests of justice, and which form the basis of averments of either party, will nonetheless influence the determination of the veracity, probability, reliability and ultimate cogency of the averments.

20. FUL complained furthermore that the respondents have, through their conduct, delayed and frustrated the prosecution of the review. Each of the first to third respondents was called upon, in terms of Rule 53 of the Uniform Rules of Court, to file a record of decision, and reasons, justifying his or her decision under attack. Each of them failed to file a record timeously or on request. FUL was compelled to serve Rule 30A notices, upon which the first and third respondents eventually filed incomplete records. FUL's attorney addressed a letter to the state attorney on 25 July 2012 requesting a complete record of decision itemising twelve identified items that had not been disclosed, including the representations made to the NDPP by Mdluli requesting the withdrawal of charges, communications with the IGI and the Auditor General to whom the allegations of misconduct had been referred for investigation, representations made by Advocate Breytenbach to Mrwebi recommending that the charges not be withdrawn and so on. The request was not heeded. FUL also had to bring an application to compel production of the Commissioner's record. Even then an incomplete record was delivered. The Acting Commissioner filed a record comprising only two letters notifying Mdluli of the withdrawal of the disciplinary charges and the upliftment of his suspension.

21. The respondents' failure to comply fully with their obligations to file complete records of decision undermined FUL's ability to prosecute the review and has meant that it has had to rely on evidence put up by itself, sourced from other proceedings in which the respondents were involved, in particular those involving the suspension and discipline of Advocate Breytenbach, a Senior Deputy DPP of the NPA who doggedly insisted on the prosecution of Mdluli. On 30 April 2012 the NDPP suspended Breytenbach pending the outcome of an investigation into a complaint made against her in an unrelated matter some six months before her suspension. Breytenbach has contended in the other proceedings that the complaint was

⁸ 1984 (3) SA 623 (A) at 634-635

spurious and the real reason for her suspension was the stance she took in relation to the prosecution of Mdluli. She challenged her suspension by way of an urgent application to the Labour Court, which was struck from the roll for want of urgency. She was ultimately cleared of all charges (additional charges having been preferred against her after her suspension) in a disciplinary hearing held under the auspices of an independent chairperson. In the absence of a complete record of decision, FUL has relied on the affidavits filed in the Labour Court application and the transcript of the cross examination of NPA witnesses in the disciplinary hearing to supplement its evidence.

22. The failure to file complete records timeously contributed to a delay in the proceedings. The review in terms of Part B of the Notice of Motion was heard almost two years after it was first instituted. Throughout that time, Mdluli remained suspended on full pay. Despite the incomplete records of decision, FUL filed its supplementary founding affidavit on 8 October 2012, and a further supplementary founding affidavit, necessitated by the paucity of the records filed and by further documents becoming publicly available, on 14 March 2013. It meant that the respondents had to file answering papers by no later than 02 May 2013. None of the respondents filed answering papers in the review by that date.

23. Ultimately the Deputy Judge President (“the DJP”) directed the respondents to file answering papers by 24 June 2013, to enable the matter to be heard on 11 and 12 September 2013. Even then, the second and sixth respondents filed their answering papers only on 25 June 2013, and the first and third respondents filed theirs on 4 July 2013 – nine court days late. The NDPP and Mrwebi in addition did not file their heads of argument on 12 August 2013 as directed by the DJP, preferring to do so a month late on 9 September 2013, two days before the hearing, much to the inconvenience of the court and the other parties. The respondents filed additional affidavits in the afternoon of the day before the hearing. Despite being ambushed in this way, the applicant did not object to their admission, no doubt because it preferred not to have the matter postponed. I indicated to the parties that the creditworthiness of the averments made in the late filed supplementary affidavits would have to be assessed in the light of the applicant not having had a right of reply to them. It was agreed by all parties to proceed on that basis.

24. The reasons for the various delays, and late filing, are sparse and mostly unconvincing. However, in the interests of justice I was persuaded that the matter should proceed without further delay and condoned the non-compliance with the rules and directives of the DJP. Suffice it to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service, and especially worrying in the case of the NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold.

25. FUL submitted that the respondents’ conduct in delaying the proceedings, their lack of transparency and their attitude to disclosure and the admission of any hearsay evidence gives rise to an inference that they lack adequate justification for the decisions at issue. The legitimacy of that submission is borne out by the analysis which follows.

The facts

26. As stated, the facts giving rise to the application are for the most part common cause. Mdluli joined SAPS on 27 August 1979. He rose through the ranks and was finally appointed as the Head of the Crime Intelligence Division of SAPS on 1 July 2009. The position is one of the senior leadership positions within SAPS and in the intelligence community of the state. The incumbent exercises complete control over all surveillance that any division of SAPS carries out in any investigation, and has access to highly sensitive and confidential information, and to the funds making up the Secret Service Account ("the SSA"). The position calls for an official with an exemplary record of honesty, discretion and integrity.

27. On 31 March 2011, Mdluli was arrested and charged with 18 counts, including murder, intimidation, attempted murder, kidnapping, assault with intent to do grievous bodily harm, and with defeating the ends of justice. These charges alleged that on 17 February 1999 Mdluli was party to the unlawful and intentional killing of Mr Tefo Ramogibe, who at the time was married to Ms Tshidi Buthelezi, a former lover of Mdluli. The charges of attempted murder, kidnapping etc. make allegations that Mdluli and persons associated with him brought pressure upon the relatives and friends of Ramogibe by violence, kidnapping and other threatening means with the aim of bringing the relationship between Ramogibe and Buthelezi to an end. Ramogibe was shot dead during a pointing out while in the company of SAPS officers from Vosloorus Police Station. The pointing out was held ostensibly for the purpose of gathering evidence in relation to a case of attempted murder opened by Ramogibe at the Vosloorus Police Station a few days previously. At the time Mdluli was Branch Commander of the Detective Branch at Vosloorus. Although Mdluli was a suspect in the investigation into the murder and attempted murder of Ramogibe, he was not arrested on the charges and the matter did not proceed to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

28. Information about the discontinued investigation surfaced shortly after Mdluli was promoted to Head of Crime Intelligence in late 2009. In light of the seriousness of the charges and on the weight of the evidence, the then Commissioner, General Cele, after following due process, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him. Mdluli is of the opinion that the allegations have re-surfaced as part of a conspiracy against him by those opposed to his promotion to high rank. In a letter dated 3 November 2011, addressed to President Zuma, the Minister of Police and the Acting Commissioner, Mdluli alleged that Commissioner Bheki Cele, and other senior officers, Generals Petros, Lebeya and Dramat were "working together against" him. In the letter he tactlessly stated:

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

He did not explain how he would assist the President, but it is reasonable to assume that he had in mind the conference of the governing party in 2012 at which President Zuma was re-elected as party leader for a second five year term. His entreaty to the President implies that Mdluli believed he had it in his gift to use his influence and the means at his disposal to the advantage of the President. The Minister later responded by causing the allegations of conspiracy to be investigated by a special task team which ultimately found them to be baseless.

29. Mdluli made various appearances in court on the murder and related charges. The matter was postponed to later dates without Mdluli being asked to plead to the charges.

30. In late September 2011 Mdluli was arrested and charged on further charges of fraud, corruption, theft and money laundering ("the fraud and corruption charges"). The charges relate to the alleged unlawful utilization of funds from the SSA for the personal benefit of himself and his spouse. Mdluli was brought before the Specialized Commercial Crimes Court in Pretoria and granted bail. He was not asked to plead to the charges. The case was postponed to 14 December 2011.

31. The investigation of these charges was conducted by Colonel Viljoen of the Hawks who worked in conjunction with Advocate Smith of the Specialised Commercial Crimes Unit ("the SCCU"). Smith applied for a warrant for the arrest of Mdluli on 1 August 2011. The application was authorised by the magistrate on 6 September 2011, and executed on 20 September 2011.

32. The evidence in relation to the fraud and corruption charges is derived from an affidavit made by Viljoen in support of the application for the warrant of arrest of Mdluli and a report from Colonel Roelofse. Neither officer has deposed to an affidavit in these proceedings on the grounds of conflict of interest. Strictly speaking their evidence is hearsay. However, none of the respondents deny the averments in relation to the nature of the charges or their investigation, and they may be accepted to be common cause.

33. The charges allege that Mdluli received an unlawful gratification in an approximate amount of R90 000 when he used the funds of the SSA to acquire two vehicles supposedly for covert use, but which were recovered from his wife at their home in Cape Town. As part of the transaction, he is alleged to have traded in his own vehicle, which was valued at about R90 000 less than the amount Mdluli owed as outstanding instalments under his credit agreement. The purchase of the new vehicles, apparently for the use of himself and his wife, was allegedly done in such a manner that discounts payable to the Secret Service were applied for Mdluli's personal benefit and extinguished his obligation to pay R90 000 to his credit provider.

34. The charges thus essentially allege that Mdluli abused state financial resources for private gain for his and his wife's benefit. The SSA is controlled by the crime intelligence unit over which Mdluli exercises control. The charges are therefore serious, impacting upon the proper administration of justice and control of state resources, and raise the question of Mdluli's fitness for his position.

35. In his answering affidavit filed in the Part A proceedings, Mdluli dealt mainly with procedural issues related to his suspension, his constitutional right to be presumed innocent, attacks on his integrity in the media, the alleged conspiracy against him and the leaking of classified information. Although expressing doubt about the sufficiency of the evidence against him, he did not address the specifics of the allegations made in respect of the various criminal charges in any detail or disclose his defence in relation to them.

36. The legal representatives of Mdluli addressed, and delivered by hand, written representations to the NDPP on 26 October 2011. They were not disclosed by the respondents, as one might have expected, as part of the Rule 53 process. They are annexed as part of Annexure GB 10 to the affidavit of Breytenbach filed in the Labour Court proceedings. The opening paragraph reads:

"We hereby make representations to you as to why you should review the preference of charges against our client Lt Gen Mdluli and possibly withdraw the charges against him, as proceeding against him is less likely to result in a conviction on any of the charges preferred against him"

The Acting NDPP, Advocate Jiba, made no mention of these representations in her answering affidavit. Her scant averment on the issue is to the effect that "the decisions" of the Special DPP and the DPP who instructed the charges to be withdrawn "have not been brought to my office for consideration in terms of the regulatory framework"; the implication of her statement being that she has made no decision in relation to the representations.⁹

37. The representations contend for the most part that the charges arose from a conspiracy against Mdluli by fellow officers and others who disapproved of his promotion.

38. Written representations in relation to the fraud and corruption charges, dated 17 November 2011, were delivered by hand to Mrwebi in his capacity as a Special DPP and the head of the SCCU. They record that similar representations, presumably in relation to the murder and related charges, had been made to Chauke, the DPP South Gauteng. In the representations to the Special DPP, Mdluli's legal representatives alleged an abuse of the criminal justice system and stated:

"Our instructions are that Mdluli's arrest is a continuation of the dirty tricks and manoeuvrings relating to the contestation and jostling for the position of Head of Crime Intelligence."

The representations made to Chauke, although alluded to in his record of decision filed in terms of Rule 53, do not form part of the record of this application.

39. Mrwebi in response to the representations made to him requested a report from Breytenbach and sight of the docket. An initial report was submitted to Mrwebi under cover of a memorandum from Breytenbach. Mrwebi was dissatisfied with the report and asked for more information. A final report prepared by Smith was placed before Mrwebi on 2 December 2011. The reports and memorandum argued in favour of pursuing the case against Mdluli.

40. Mrwebi stated in his answering affidavit that after he considered the reports and examined the docket, he concluded that there "were many complications with the matter particularly with regard to the nature and quality of evidence" and how that evidence had been obtained. He was of the view that "there was no evidence, other than suspicion linking the suspects to the alleged crimes". He also had concerns that the evidence had been acquired improperly because documents in relation to the SSA are privileged and that the documents could not be relied on until the IGI waived the privilege. And, thus, he believed there would be problems with the

⁹ Para 21 of the confirmatory affidavit of the first respondent at page 1758 of the record.

admissibility of the incriminating documentation. As will appear presently, this account is inconsistent with the objective facts as reflected in contemporaneous correspondence.

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

42. Mrwebi said that he met with Advocate Mzinyathi, the DPP of North Gauteng, on 5 December 2011 to “discuss” the matter. He claims that the consultative note was incorrectly dated and was in fact drafted after he met with Mzinyathi. There is some doubt about this, but because in the final analysis not much turns on the issue I am prepared to accept that the note was written on 5 December 2011. The consultative note is addressed to Mzinyathi and Breytenbach. The opening paragraph records that Mrwebi had consulted with the DPP North Gauteng, as required by section 24(3) of the NPA Act. Mzinyathi in a confirmatory affidavit, filed on the day before the application was enrolled for hearing, contradicts this. His averments in that affidavit create the distinct impression that his engagement with Mrwebi on 5 December 2011 was in the way of a brief encounter in which the issues were not fully canvassed. They did however meet again on 9 December 2011 and had a more substantive discussion. In the consultative note, Mrwebi expressed his essential view in relation to the prosecution as follows:

“Essentially my views related to the process that was followed in dealing with the matter particularly in view of the fact that the matter fell squarely within the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigations can never be complete without access to such documents and information.”

Later in the note, after briefly referring to the investigation, Mrwebi stated:

“However, because of the view I hold of the matter, I do not propose to traverse the merits of the case and the other questions any further. Whether there was evidence in the matter or not, is in my view, not important for my decision in the matter. The proposition which I allude to below, should alone and without any further ado, be dispositive of the matter.”

43. The proposition in question, and thus the sole reason for his decision to instruct the charges to be withdrawn, was his belief that those charges fell within the exclusive preserve of the IGI in terms of section 7 of the Intelligence Services Oversight Act.¹⁰ It is common cause that Mrwebi did not consult the SAPS or the IGI prior to withdrawing the charges and that Mzinyathi and Breytenbach informed Mrwebi at the meeting with him on 9 December 2011 that the IGI was not authorised to conduct criminal investigations. However, their advice did not prompt him to change his stance.

44. In his answering affidavit, as I mentioned earlier, Mrwebi attempted to cast a different spin on his reasons for passing the matter to the IGI. He referred it to the

¹⁰ Act 40 of 1994

IGI, he said, because he believed “that the IG would not only help with access to documents and information” but could also resolve the issue of privilege. He was merely postponing the matter until the IGI sorted out the evidentiary problems.

45. Subsequent events do not bear that out. In particular, correspondence from the IGI to the Acting Commissioner dated 19 March 2012 indicates that she understood the matter to have been referred to her to investigate and institute proceedings. This letter was forwarded to the NDPP and Mrwebi on 23 March 2012, after the IGI’s legal adviser had prevailed unsuccessfully upon Mrwebi to re-instate the charges against Mdluli. In her letter the IGI commented on Mrwebi’s consultative note as follows:

“The IGI derives her mandate from the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994...which provides for the monitoring of the intelligence and counter-intelligence activities of the Intelligence Services...Any investigation conducted by the IGI is for the purposes of intelligence oversight which must result in a report containing findings and recommendations...The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the Police. As such we are of the opinion that the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that the matter be referred back to the NPA for the institution of the criminal charges.”

Her perception is patent. She appreciated that Mrwebi had instructed the charges to be withdrawn and discontinued the criminal proceedings. Both Breytenbach and Mzinyathi understood the position likewise. Mrwebi took no apparent steps to heed the advice of the IGI.

46. In his answering affidavit, and in the consultative note, Mrwebi stated that he consulted with Mzinyathi on 5 December 2011 in terms of section 24(3) of the NPA Act before making his decision. The provision requires that a Special Director may only discontinue criminal proceedings “in consultation” with the relevant DPP. The nature and extent of the consultation that occurred is a matter of dispute. The record of Breytenbach’s disciplinary proceedings indicates that it may have fallen short of the statutory requirement.

47. What transpired between Mrwebi and Mzinyathi at their meetings on 5 December 2011 and 9 December 2011 is of decisive importance. It was the subject of extensive and thorough cross examination by Advocate Trengrove SC, counsel for Breytenbach, during her disciplinary proceedings. The respondents have not placed the authenticity, accuracy or reliability of the record in issue. It therefore may be accepted as a correct and complete account of the testimony of Mrwebi and Mzinyathi under oath in those proceedings. Considering that Mrwebi and Mzinyathi are senior officers of the court, one may assume the evidence was given with due consideration to the need for propriety and appropriate candour.

48. After lengthy cross examination by Mr. Trengrove, Mrwebi conceded that when he took the final decision, either on 4 December 2011 or 5 December 2011, to withdraw the charges and discontinue the prosecution of Mdluli on the fraud and corruption charges, he did not know Mzinyathi’s view of the matter and did not have his concurrence in the decision. He admitted that he took the decision prior to writing the consultative note and did so relying on representations made to him in

confidence by anonymous people, who he was not prepared to name and whose input he did not share with Mzinyathi. Mzinyathi's views were conveyed to Mrwebi for the first time in an email on 8 December 2011 in response to the consultative note, after Mrwebi had already informed Mdluli's attorney that the charges would be withdrawn.

49. Mzinyathi acknowledged such to be the case during his evidence in the disciplinary proceedings. He was referred during cross examination to the email and affirmed the correctness of its content. In the email Mzinyathi stated:

"I am concerned that you indicate in your memorandum to me that you will advise the attorneys of Mr. Mdluli of your instruction that charges be withdrawn. I hold the view that such advice to the attorneys would be premature as I do not share your views, nor do I support your instruction that the charges will be withdrawn."

50. Mzinyathi also confirmed that at the meeting on 9 December 2011 (attended by the two of them and Breytenbach), Mrwebi took the position that he was *functus officio* because he had already informed Mdluli's attorneys of the intended withdrawal. Mzinyathi and Breytenbach, unable to persuade Mrwebi to reverse the decision, then prevailed on him to withdraw the charges provisionally, to which he agreed. Mzinyathi retreated somewhat from this testimony in his confirmatory affidavit filed on the day before the application was enrolled to be heard. His explanation of events in the affidavit differs from his testimony at the disciplinary hearing with regard to the degree of concurrence. His exchange with Advocate Trengrove is therefore important. The most relevant part merits quoting in full:

Trengrove: Now when you, when you then saw him the following day on the 9th....he told you that he was *functus officio*, do you remember that?

Mzinyathi: He did indeed.

Trengrove: Because he had already informed the attorneys of his decision to withdraw the charges.

Mzinyathi: Yes

Trengrove: Do you know that he sent off that letter to the attorneys withdrawing the charges, at the same time sending you those memos (including the consultative note)?

Mzinyathi: Oh, I was not aware.

Trengrove: That is what he told us in evidence. So, by the time he met with you on 9 December 2011 he said he was *functus officio*, correct?

Mzinyathi: Yes

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

Mzinyathi: Yes

Trengrove: So that presented you with a *fait accompli*, the horse had bolted, the case will have to be withdrawn.

Mzinyathi: Indeed.

51. In the supplementary founding affidavit, delivered in March 2013, six months before the application was heard, FUL dealt comprehensively with Mzinyathi's involvement, his evidence in the disciplinary enquiry and the contention that the failure to consult him rendered the withdrawal of the charges illegal. Mzinyathi, it may be re-called is the DPP for North Gauteng, the most senior public prosecutor in Pretoria. The record shows he has been involved in this dispute from the beginning. His evidence in the Breytenbach disciplinary hearing was that he disagreed with the decision which had been presented to him as a *fait accompli*. This was the factual basis upon which FUL relied in the founding and supplementary affidavits, as well as its heads of argument, to submit that the withdrawal of the charges was illegal.

52. Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary enquiry (or for that matter with any of the averments in the supplementary founding affidavit). His account of the events between 5 December 2011 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific allegations in the supplementary founding affidavit. He nonetheless maintained that he had consulted Mzinyathi. The answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi, who therefore initially did not confirm Mrwebi's general account. In his confirmatory affidavit filed at the eleventh hour, the day before the hearing, without any explanation whatsoever for it being filed six months after the delivery of the supplementary founding affidavit, Mzinyathi, differing from his evidence at the hearing, confirmed the allegations in Mrwebi's affidavit as they relate to him, thus saying in effect for the first time that he had indeed concurred in the decision.

53. Mzinyathi elaborated further, in paragraphs 7 to 9 of the affidavit, that Mrwebi approached him at his office on 5 December 2011, told him that he was dealing with representations regarding Mdluli and needed to consult him. Mrwebi mentioned to him that he was busy researching the Intelligence Services Oversight Act and then left his office. The impression created, as mentioned earlier, is that no substantive discussions took place that day and hence clearly there was no concurrence before Mrwebi wrote the consultative note and communicated with Mdluli's attorneys. Later Mzinyathi heard from Smith that Mrwebi had instructed the prosecutor to withdraw the charges. He then wrote the email of 8 December 2011 to Mrwebi and met him on 9 December 2011 together with Breytenbach. At the meeting he was persuaded that the matter was not ripe for trial and agreed to the provisional withdrawal of the charges. This differs materially from his original position that he was unable to influence the decision because it had been finally taken but conceded to the characterisation of the withdrawal as provisional as a compromise partially addressing his concerns.

54. Taking account of how it was placed before the court by Mzinyathi, after FUL's heads of argument were filed, without explanation for its lateness, and its inconsistency with his testimony at the disciplinary hearing that he was presented with a *fait accompli* and was unable to influence the decision because Mrwebi claimed to be *functus officio*, this evidence of the DPP of North Gauteng, to the effect that he ultimately concurred, must regrettably be rejected as un-creditworthy. The affidavit is a belated, transparent and unconvincing attempt to re-write the script to avoid the charge of unlawfulness. The version in the supplementary founding

affidavit, originally uncontested by Mzinyathi, and corroborated by Mzinyathi's testimony in the disciplinary hearing, must be preferred and accepted as the truth.

55. In light of the contemporaneous evidence, Mrwebi's averment in the answering affidavit that he consulted and reached agreement with Mzinyathi before taking the decision is equally untenable and incredible to a degree that it too falls to be rejected.

56. That a decision to withdraw the charges and discontinue the prosecution had been made without the concurrence of Mzinyathi is borne out not only by Mzinyathi's email of 8 December 2011 and his evidence at the disciplinary hearing, but also by Mrwebi's own interpretation of events. In his answering affidavit, Mrwebi described the purpose of the visit by Breytenbach and Mzinyathi to his office on 9 December 2011 as being "to discuss their concerns that they do not agree *with my decision*". After discussing the evidentiary issues, according to Mrwebi, they agreed with his position that the case against Mdluli was defective, had been enrolled prematurely and could be reinstated at any time. Breytenbach, he said, agreed to pursue the matter and would come back to him with further evidence. Breytenbach failed to pursue the matter diligently and did not come back to him. He then considered the matter "closed", as he stated in a letter to General Dramat of the Hawks, on 30 March 2012. The court, on the basis of this account, is asked to accept that the reason the prosecution has not been re-instated is that Breytenbach failed in her duty to obtain additional evidence and report back, as she had promised at the meeting of 9 December 2011.

57. Breytenbach, as mentioned, was suspended from her position as Regional Director of the SCCU in late April 2012, on numerous unrelated charges of which she was later acquitted at the disciplinary hearing.

58. Mrwebi's reference to "*my decision*" in his answering affidavit implies that he believed the decision to withdraw the charges against Mdluli was his decision and one made prior to the meeting of 9 December 2011 without the concurrence of Mzinyathi. His use of the term "closed" in the letter to Dramat, albeit a few months later, supports Mzinyathi's evidence that Mrwebi viewed himself as *functus officio*, was unwilling to re-instate the charges and that the decision was presented to him as a *fait accompli*. The subsequent agreement to categorise the withdrawal of charges as "provisional" was a concession to his concerns, which did not alter Mrwebi's prior unilateral decision and instruction that the charges should be withdrawn. Mrwebi's own evidence thus supports a finding that the decision to withdraw the fraud and corruption charges was taken by him alone before the meeting of 5 December 2011, and prior to his writing of the consultative note, without the concurrence of Mzinyathi.

59. Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in the case. He implied that had she done her job, the charges would have been re-instated.

60. FUL was justifiably sceptical in its reply to these allegations. Paragraph 106 and 107 of the reply read:

“106. Advocate Mrwebi’s version as set out in this paragraph is, I submit, palpably implausible and in conflict with his *ipsissima verba*. In its ordinary meaning ‘closed’ is unequivocal. As it is used in Advocate Mrwebi’s letter to General Dramat, seen in the context, there can in my submission be no doubt that Advocate Mrwebi was implacably opposed to any prosecution against General Mdluli.

107. Indeed, I submit that the very attempt to adhere to the untenable casts serious doubt on the veracity of the deponent and moreover casts a shadow over the propriety of his decision to block the prosecution of General Mdluli.”

61. The attempt to blame Breytenbach is frankly disingenuous and unconvincing, as is Mrwebi’s subsequent claim that investigations into the charges are continuing. Three experienced commercial prosecutors and two senior police investigators were satisfied in early December 2011 that there was sufficient evidence to prosecute Mdluli on these charges immediately. Breytenbach, who is an experienced prosecutor with more than two decades of experience in the criminal courts, accused Mrwebi, in her founding affidavit in the Labour Court application, of “blind and irrational adherence to his instruction that the charges be withdrawn” and of frustrating her efforts to prosecute to the extent of having her suspended on spurious charges. The assertion that Breytenbach agreed that the case against Mdluli was defective is irreconcilable with the contemporaneous evidence, particularly a threat made by her in a memo to the NDPP to seek legal relief to compel the NPA to pursue the charges, and is accordingly wholly improbable.

62. In a 24 page memo to the Acting NDPP dated 13 April 2012, annexed to her affidavit in the Labour Court application, Breytenbach made a forceful argument in favour of proceeding against Mdluli on the corruption charges and stated her view that the instruction to withdraw the case against Mdluli and his co-accused, Colonel Barnard, was “bad in law and in fact illegal”. She asked the NDPP for an internal review of Mrwebi’s decision not to institute criminal proceedings and to review the lawfulness of the decision.

63. The memo is a credible indication that the decisions were indeed brought to the attention of the Acting NDPP for consideration. The NDPP in her answering affidavit, though not dealing directly with the memo, maintained that the decisions to withdraw charges had not come to her office for consideration “in terms of the regulatory framework”. Be that as it may, the memo leaves no doubt that Breytenbach did not consider the case against Mdluli to be “defective”. She was confident that there was a good *prima facie* case and reasonable and probable cause for a prosecution, so much so that she wanted a review by the NDPP of the Special DPP’s decision and requested permission to re-enrol the charges and to pursue additional charges in relation to Mdluli’s misuse of the funds of the SSA. Her firm conviction that there was a good case against Mdluli was the reason she wrote the memo. Breytenbach concluded:

“Our professional ethics dictate that we pursue the matter to its logical conclusion, which may include, of necessity, taking further steps if there is no agreement between us”

64. Breytenbach’s attempts to have the charges re-instated were not successful. She was suspended about two weeks later on 30 April 2012.

65. Mrwebi offered no detail at all in his answering affidavit of any continuing investigation into the fraud and corruption charges by SAPS or the NPA, nor did he name any person supposedly seized with them. He also did not comment on the recommendation of the IGI that criminal proceedings should be instituted against Mdluli. His averments in the answering affidavit regarding continuing investigations, on the face of them, are unsubstantiated and hence unconvincing. He sought belatedly to supplement his deficient evidence in these respects in his supplementary answering affidavit filed on 10 September 2013.

66. Motivated in part, as he said, by a need to respond to what he considers to be a withering attack by Justice Kriegler on his integrity, credibility, and the propriety of his decisions, and hence by implication his suitability to hold his office, Mrwebi delivered the supplementary answering affidavit (making averments going beyond the challenge to his integrity) on the day before the matter was enrolled for hearing, two months after the replying affidavit was filed and one month after the applicant filed its heads of argument. His reasons for taking so long are not compelling and pay little heed to the fact that his timing ambushed the applicant and denied it the opportunity to deal with the allegations made in the affidavit.

67. For the most part, the affidavit does not take the matter further and basically repeats his assertion that the decision was not unilateral and that investigations are continuing. Mrwebi referred for the first time in this affidavit to five written reports from members of the prosecuting authority who are investigating the matter, the contents of which he was disinclined to share with the court for strategic and tactical reasons on the grounds that disclosure will hamper and prejudice the investigation. He was however prepared to share with the court the fact that the NPA has experienced “challenges” in relation to the declassification of documents. Moreover, on 25 June 2013, three months before the hearing of the application, it was established by investigating prosecutors that the evidence of the main witness (who is not identified by name) will have to be ignored in its entirety because it is apparently a fabrication not reflecting the true version of events. The exact nature of that evidence and the basis for its refutation is not disclosed.

68. For reasons that should be self-evident, it is not possible to attach much weight to this evidence. The applicant has been denied the opportunity to respond to it, and by its nature it is vague and unsubstantiated. Mrwebi, by his own account, and for reasons he does not explain, sat on this information for three months before disclosing it to the court on the day before the hearing. The averments accordingly can carry little weight on the grounds of unreliability. The conduct of the Special DPP, again, I regret, as evidenced by this behaviour, falls troublingly below the standard expected from a senior officer of this court.

69. Accordingly, in the final result, I am compelled to find that Mrwebi took the decision to withdraw the charges against Mdluli without the concurrence of Mzinyathi and decided to discontinue the prosecution.

70. The fraud and corruption charges were formally and “provisionally” withdrawn in the Specialised Commercial Crimes Court on 14 December 2011. FUL submits that a provisional withdrawal which has endured for two years may be considered to be a

permanent withdrawal. The characterisation of the withdrawal as provisional, as I explain later, would not normally deflect from any proven illegality or irrationality of the decision.

71. The charges of murder and related offences were withdrawn on 14 February 2011 by Chauke, the DPP for South Gauteng, based in Johannesburg, the area of jurisdiction in which the alleged offences were committed. Chauke determined to withdraw the charges on 1 February 2012 and publicly announced the fact on 2 February 2012. In his reasons for decision and in his supporting answering affidavit, Chauke explained that given the seriousness of the charges and the lack of direct evidence to sustain the charge of murder, he decided to withdraw the charges provisionally and for an inquest to be held to determine the cause of death of Ramogibe. Chauke withdrew the 17 other charges of intimidation, assault, attempted murder and kidnapping because he wanted to avoid fragmented trials.

72. An inquest is an investigatory process held in terms of the Inquests Act¹¹ which is directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. Section 16(2) of the Inquests Act requires a magistrate conducting an inquest to investigate and record his findings as to the identity of the deceased person, the date and cause (or likely cause) of his death and whether the death was brought about by any act or omission that *prima facie* amounts to an offence on the part of any person. The presiding officer is not called on to make any determinative finding as to culpability.

73. In his supporting answering affidavit, Chauke explained that he took the decision to withdraw the charges and to refer the murder allegations to an inquest in response to the written representations made on behalf of Mdluli to the DPP South Gauteng in November 2011. He did not annex a copy of those representations to his affidavit.

74. The inquest was held during the course of April and May 2012. The magistrate handed down his reasons six months later on 20 November 2012. The reasons suffer a measure of incoherence and the ultimate findings are contradictory. He found first that an inference of Mdluli's involvement would be consistent with the facts but not the only inference. He then concluded:

“The death was brought about by an act *prima facie* amounting to an offence on the part of unknown persons. There is no evidence on a balance of probabilities implicating Richard Mdluli....”

75. The magistrate found correctly that the inquest had no jurisdiction to deal with the other charges against Mdluli.

76. In its supplementary founding affidavit delivered in March 2013, FUL submitted that the evidence put up in the inquest discloses a *prima facie* case against Mdluli of murder, kidnapping, assault with intent to do grievous bodily harm and defeating the end of justice.

77. In relation to the killing of the deceased, given that he was shot three times by unknown assailants, there is no doubt that an offence was involved. The only question for the magistrate, in terms of section 16(2) of the Inquest Act, was whether

¹¹ Act 58 of 1959.

the death was brought about by conduct *prima facie* amounting to an offence on the part of any person. A *prima facie* case will exist if the allegations, as supported by statements and real documentary evidence available, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict.¹² The magistrate's conclusion that an inference of Mdluli's involvement would be consistent with the proved facts amounts to a finding that Mdluli has a *prima facie* case to answer. The magistrate in effect (but perhaps unconsciously) accepted that although a case had not been established beyond reasonable doubt or on a balance of probabilities, there was a *prima facie* case of murder against Mdluli. It was not the responsibility of the magistrate to establish culpability either beyond reasonable doubt or on a balance of probabilities.

78. The affidavits before the inquest and the evidence as summarised by the magistrate in his written reasons do indeed support a conclusion that there is a *prima facie* case against Mdluli on the murder and related charges. The magistrate found the following to be common cause. Mdluli and Ramogibe, the deceased, were both in a relationship with the same woman, Buthelezi, from 1997 until the murder of the deceased in 1999. Ramogibe had secretly married Buthelezi during the period in question. Mdluli was upset about the relationship "and on a number of occasions addressed the issue". On 23 December 1998 Ramogibe was the victim of an attempted murder. He reported the incident to the Vosloorus SAPS. Ramogibe was requested to report to the Vosloorus police station to meet with the investigating officer and to point out the scene of the attempted murder. On 17 February 1999, Ramogibe was taken to the scene in Mdluli's official vehicle, a green Volkswagen Golf. Ramogibe was murdered at the scene on that day while pointing it out to the investigating officer.

79. In its supplementary founding affidavit, FUL highlighted the following key attributes of the evidence demonstrating a *prima facie* case against Mdluli, and upon which the magistrate's inference of Mdluli's involvement is soundly based.

80. The deceased's mother, Ms Maletsatsi Sophia Ramogibe, testified that during 1998 Mdluli came to her home looking for the deceased, obviously unhappy with the fact that the deceased was in a relationship with Buthelezi. A few days later, Mdluli came and fetched her and took her to the police station. There she found her son bleeding with his shirt covered in blood. Mdluli insulted her son in his presence and warned him to keep away from Buthelezi. Her son was killed a few days later. After his death, Ms Ramogibe's daughter, Jostinah, was kidnapped and raped (confirmed by her in a confirmatory affidavit). She later received a call from an unknown caller who warned her that if she proceeded to press the case of her son's murder all her daughters would be killed.

81. Ms Alice Manana, an acquaintance of the deceased and Buthelezi, described how in August 1998 she was allegedly kidnapped, intimidated and assaulted by Mdluli and two fellow officers of the Vosloorus SAPS, and forced to disclose the whereabouts of the couple and to take the police to them at Orange Farm. The deceased and Buthelezi were then taken to Vosloorus police station where they were assaulted for 30 minutes before being discharged. On 17 October 1998, Ms Manana was repeatedly shot by an assailant who shot her at the front door of her

¹² Du Toit, *Commentary on the Criminal Procedure Act* Juta at 1-4T-7

home. During the shooting, she saw Mdluli sitting in the driver's seat of a green Volkswagen Golf, which she knew belonged to him, parked outside her house.

82. Buthelezi, now deceased, stated in an affidavit deposed to before her death that she and the deceased had been kidnapped and assaulted by Mdluli and his colleagues.

83. Five other witnesses, including the deceased's father, testified that Mdluli had visited them repeatedly looking for the deceased and informed them that he would kill Ramogibe if he did not end his relationship with Buthelezi. Mr Steven Buti Jiyane testified that Ramogibe had periodically stayed at his family home because Mdluli was threatening to kill him.

84. Mary Lokaje in her affidavit heard the shooting of Ramogibe outside her house and saw three uniformed policeman running away from the scene, and saw the Golf being driven away.

85. Various affidavits by police officers who investigated the murder were filed confirming that Mdluli was the main suspect in the case although there was no evidence of his direct involvement in the murder and dealing with the loss of the dockets and evidence linked to some of the charges.

86. The magistrate did not reject any of this evidence. He in fact accepted it. In the conclusion to his reasons, the magistrate stated:

"But be this as it may, their evidence of Mdluli being to such a degree upset with Oupa's (Ramogibe) relationship with an estranged Tshidi (Buthelezi) that they deemed it necessary to have reported it and mentioned it in their affidavits shortly after Oupa's death, runs like a golden thread through the murky waters of their evidence. Evidence that he passed threats to kill Oupa, whether made repeatedly or not, against the background of the strong current of Mdluli's emotions at the time, is in my opinion *overwhelmingly probable*" (emphasis supplied).

He then found that it had been proved on a balance of probabilities that Mdluli was "highly upset and humiliated" by Ramogibe's relationship with his former lover, had not come to terms with the fact that Buthelezi had ended their relationship, had made threats to kill Ramogibe and that his family would mourn him and had wanted Ramogibe out of Buthelezi's life in the hope that he could rescue his relationship with her. He, however, went on to point out that it might be difficult to link the threats, intimidation and alleged kidnapping to the ultimate fatal shooting of Ramogibe. The inability to call Buthelezi, now deceased, was in his opinion a complicating factor. These weaknesses (and others) in the evidence led the magistrate to conclude that an inference of Mdluli's involvement was permissible but not conclusive. His ultimate conclusion that there was no evidence on a balance of probabilities "implicating" Mdluli is wrong and inconsistent with his otherwise correct assessment and evaluation of the evidence.

87. Neither the Acting NDPP nor Chauke dealt meaningfully in their answering affidavits with the incriminating evidence against Mdluli, FUL's submissions regarding the evidence, or the finding of the magistrate that an inference of Mdluli's involvement was consistent with the facts.

88. The Acting NDPP, after setting out the legal and policy framework, confined herself to the following averments in paragraphs 19-24 of her answering affidavit:

“19. When Advocate Chauke decided to withdraw the criminal charges of murder and related charges against the Fifth Respondent (Mdluli), he was authorised to do so by the Act, the Policy and the Policy Directives.

20. I am aware that Advocate Chauke referred the matter to an inquest by a magistrate and that the magistrate found that there was no evidence on a balance of probabilities implicating the Fifth Respondent and his co-accused in the death of Mr Ramogibe.

21. The decisions of the Third Respondent and Advocate Chauke on this matter have not been brought to my office for consideration in terms of the regulatory framework.

22. In the light of the above I did not take any decision referred to in the Applicant’s founding affidavit. In terms of section 22(2)(b) of the NPA Act, I may intervene in any prosecution process when policy directives are not complied with. I may also in terms of section 22(2)(c) of the NPA Act review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations of the accused person, within the time period specified by me, the complainant or any party whom I consider to be relevant.

23. At this stage there was no policy contravention and/or representations received by me to warrant my intervention as set out above.

24. This therefore makes the application to review the withdrawal of charges by this honourable court premature.”

The Acting NDPP fails to mention the representations made to her by Breytenbach, or that Mdluli’s written representations of 26 October 2011 were in fact addressed to her. Nor does she refer to the magistrate’s finding that an inference of Mdluli’s involvement was consistent with the proven facts.

89. Chauke in his answering affidavit similarly ignored some of the inquest findings, saying simply that the magistrate had found there was no evidence implicating Mdluli. Clearly there is evidence implicating Mdluli. The magistrate’s conclusion is anyhow not decisive. Guilt or innocence is a matter for the trial court tasked with the responsibility of determining culpability. Section 16(2) of the Inquests Act only requires a magistrate conducting an inquest to determine whether the death was brought about by any act or omission that amounts *prima facie* to an offence on the part of any person and, insofar as this is possible, a finding as to whom the responsible offenders might be.¹³ The DPP is besides not bound by the findings of the inquest.

90. Chauke added that resources should not be wasted pursuing inappropriate cases where there is no prospect of success. On that basis he concluded that it would be “presumptuous and foolhardy” to proceed with the prosecution. He, in other words, is of the opinion that the charges provisionally withdrawn should now be finally withdrawn. He also contended that an inappropriate or “wrong” decision to prosecute would undermine the community’s confidence in the prosecution system. FUL’s predictable rejoinder is that his withdrawal of the charges has already done so.

¹³ *Marais NO v Tiley* 1990 (2) SA 899 (A) at 901E-H.

91. It is difficult to fathom why the DPP of South Gauteng has not proceeded with the 17 charges of attempted murder, assault, kidnapping etc. after the inquest. His reason for provisionally withdrawing them in his reasons for decision was that he wanted to avoid fragmented trials. The inquest resolved that problem. If he did not want to pursue the murder charge on the basis of the inquest finding, he had a duty to continue with the balance of the charges and has given no reason for not proceeding. The evidence given in relation to them during the inquest, on the limited information available, looks reasonably cogent and compelling.

92. In terms of the prosecution policy and directives issued in terms of the NPA Act, there is a duty to pursue a prosecution where there is a reasonable prospect of success, and regard should always be had to the nature and seriousness of the offence and the interests of the broader community. Despite the obvious anomalies in the inquest findings, the evidence as a whole, read particularly with the witness statements, establishes a *prima facie* case and points to more than a reasonable prospect that a prosecution on the murder and related charges may meet with success on at least some of the counts.

93. Two weeks after the criminal charges against Mdluli were withdrawn, on 29 February 2012, the Acting Commissioner withdrew the disciplinary charges against him and disciplinary proceedings were terminated. Mdluli was therefore re-instated and resumed office from 31 March 2012. During April 2012, his role was extended to include responsibility for the unit which provides VIP protection to members of the National Executive, including President Zuma.

94. However, shortly afterwards, as a result of the serious allegations of conspiracy that he had levelled against other senior members of the SAPS, the Minister announced, on 9 May 2012, that Mdluli would be re-deployed from his post as Head of Crime Intelligence whilst those allegations were investigated by a ministerial task team. It will be re-called also that on 19 March 2012 the IGI recommended that Mdluli be prosecuted on the fraud and corruption charges.

95. The applicant launched these proceedings on 15 May 2013. On the same day the Acting Commissioner re-initiated disciplinary proceedings and brought charges against Mdluli, the nature and extent of which remain unknown. Mdluli was suspended for a second time on 25 May 2012 pending the outcome of that new process. As mentioned earlier, this court on 6 June 2012 granted the relief sought in Part A of the notice of motion and interdicted Mdluli from discharging any function or duty as a member and senior officer of the SAPS pending the outcome of this review; and further interdicted the Commissioner and the Minister from assigning any function or duty to him.

96. In a press statement issued by SAPS on 5 July 2012 it was announced that the ministerial task team, headed by Chief State Law Adviser, Mr Enver Daniels, had found that there was no evidence of a conspiracy against Mdluli and that the officials and his colleagues who had accused him of criminal conduct had acted professionally, in good faith and with a proper sensitivity to the issues at hand.

97. No steps have been taken to re-instate the murder or related charges against Mdluli since that date – even though, to repeat, the evidence put up in the inquest proceedings discloses at least *prima facie* cases of murder, kidnapping, attempted

murder, assault to do grievous bodily harm and defeating the ends of justice against Mdluli. Chauke has given no indication of whether the murder investigation is being continued or not.

The structure of the prosecuting authority and the power to withdraw charges against an accused person

98. Before considering the grounds of review, it will be useful to examine the legislative provisions governing the structure and functioning of the prosecuting authority.

99. Section 179(1) of the Constitution establishes a single national prosecuting authority in the Republic, which is required to be structured in terms of an Act of Parliament. The relevant statute is the National Prosecuting Authority Act¹⁴ (“the NPA Act”), which was enacted shortly after the Constitution was adopted. The NPA Act must be read together with Chapter 1 of the Criminal Procedure Act¹⁵ (“the CP Act”) titled “Prosecuting Authority”, which has been amended to reflect the post-constitutional arrangements established by the NPA Act.

100. In terms of section 179(1) of the Constitution the prosecuting authority consists of the NDPP, who is the head of the prosecuting authority, and is appointed by the President; and DPPs and prosecutors as determined by the NPA Act.¹⁶ The single prosecuting authority consists of the Office of the NDPP and the Offices of the prosecuting authority at the High Courts.¹⁷ The Office of the NDPP consists of the NDPP, Deputy NDPPs, Investigating Directors and Special Directors and other members of the prosecuting authority appointed at or assigned to the Office.¹⁸

101. The powers of a Special Director are relevant to this case. A Special Director is defined in section 1 of the NPA Act to mean a DPP appointed under section 13(1)(c), which provides that the President, after consultation with the Minister and the NDPP, may appoint one or more DPP as a Special Director to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette.

102. Section 6 of the NPA Act establishes an Office for the prosecuting authority at the seat of each High Court in the Republic. Each Office established by this section consists of the head of the Office, who is required to be a DPP or a Deputy DPP, and other Deputy DPPs and prosecutors appointed in terms of section 16(1) of the NPA Act. Prosecutors are appointed on the recommendation of the NDPP or a member of the prosecuting authority designated for that purpose by the NDPP. They can be appointed to the Office of the NDPP, the Offices at the seat of a High Court, to the lower Courts or to an Investigating Directorate established by the President in terms of section 7.

¹⁴ Act 32 of 1998

¹⁵ Act 51 of 1977

¹⁶ Section 4 of the NPA Act

¹⁷ Section 3 of the NPA Act

¹⁸ Section 5 of the NPA Act

103. Section 179(2) of the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. Section 179(4) importantly provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

104. The power to institute and conduct criminal proceedings as contemplated in section 179(2) of the Constitution is given legislative expression in section 20(1) of the NPA Act, which reads:

“The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to-

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings,

vests in the prosecuting authority and shall, for all purposes be exercised on behalf of the Republic.”

105. All DPPs and Deputy DPPs in Offices at the seat of a High Court, as well as DPPs who are Special Directors in the Offices of the NDPP, are entitled to exercise the powers in section 20(1) in respect of the area of jurisdiction for which he or she has been appointed.¹⁹ There is an important qualification though in respect of Special Directors which has obvious relevance to this case. Section 24(3) of the NPA Act provides:

“A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers, duties and functions include any of the powers referred to in section 20(1), they shall be exercised, carried out and performed in consultation with the Director of the area jurisdiction concerned.”

The intended effect of the proviso to section 24(3) is that whenever a Special Director based in the office of the NDPP wishes to institute, conduct or discontinue criminal proceedings he or she is obliged to act “in consultation with” the DPP of the High Court in the area of jurisdiction concerned.

106. Prosecutors are competent to exercise the power in section 20(1) to the extent that they have been authorised by the NDPP or a person designated by the NDPP. The powers of DPPs, Deputy DPPs and Special Directors to carry out the duties and functions contemplated in section 20(1), are to be exercised subject to the control and directions of the NDPP.²⁰

107. Section 22 of the NPA Act defines the scope of the powers, duties and functions of the NDPP. Section 22(1) provides that the NDPP as head of the prosecuting authority shall have the authority over the exercising of all the powers,

¹⁹ Section 20(3) and (4) of the NPA Act

²⁰ Section 20(3) and (4). of the NPA Act

and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority. Section 22(2) gives verbatim effect to section 179(5) of the Constitution. Section 179(5) reads:

“The National Director of Public Prosecutions -

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.”

108. The power of the NDPP to issue policy directives contemplated in section 179(5)(a) and (b) must be exercised with the concurrence of the Minister and after consulting the DPPs.²¹

109. Section 22(4) bestows additional powers, duties and functions on the NDPP. They include a duty to maintain close liaison with DPPs *inter alia* to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the prosecuting authority;²² as well as a duty to assist DPPs and prosecutors in achieving the effective and fair administration of criminal justice.²³

110. The powers, duties and functions of DPPs are set out in section 24 of the NPA Act. They include the power to institute and conduct criminal proceedings. Although section 24(1) makes no express reference to the power to discontinue proceedings, such power vests in a DPP by virtue of section 20(3) which confers on DPPs the authority to exercise the powers in section 20(1), including the power to discontinue proceedings in terms of section 20(1)(c). Section 24(1)(d) is a general provision which empowers DPPs to “exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act”. As I will discuss presently, section 6 of the CP Act confers the power to withdraw charges or to stop a prosecution upon DPPs and prosecutors. There can accordingly be no doubt that DPPs have the power to discontinue criminal proceedings. However, as I have explained, the power of a Special Director, who is by definition a DPP, is qualified by the proviso to section 24(3). Similarly, only a DPP who is not a

²¹ Section 21 of the NPA Act

²² Section 22(4)(b) of the NPA Act

²³ Section 22(4)(d) of the NPA Act

Special Director²⁴ may give written directions to a prosecutor within his or her area of jurisdiction who institutes or carries on prosecutions²⁵.

111. Section 6 of the CP Act provides:

“Power to withdraw charge or stop prosecution.- An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may -
(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.”

The withdrawal of charges and the stopping of a prosecution after plea have different consequences. If the charge is withdrawn before plea, an accused is not entitled to an acquittal and the charges can be re-instated at some future date. The stopping of a prosecution, as envisaged in section 6(b), involves a conscious act to terminate the proceedings after a plea has been entered, in which event an accused will be entitled to an acquittal and to raise the plea of *autrefois acquit* (double jeopardy) if the prosecuting authority should attempt to re-institute criminal proceedings on the same or substantially similar charges. A stopping of a prosecution may occur only at the instance of a DPP²⁶ or with his consent. A prosecutor, however, may withdraw charges. At issue in this case is whether a Special Director may withdraw charges or instruct a prosecutor to withdraw charges without the consent of a DPP, a matter to which I will return when discussing the grounds of review.

112. The NDPP, acting in terms of section 21 of the NPA Act, has issued a Policy Manual containing a Prosecution Policy and Policy Directives. They set out relevant policy considerations which normally should inform any decision to review a prosecution or to discontinue proceedings by withdrawing charges or stopping a prosecution. The NDPP has stated in her answering affidavit that the review of a case is a continuing process taking account of changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made. This may occur, and I imagine often does occur, after the prosecuting authority has heard and considered the version of the accused and representations made on his or her behalf.

113. Paragraph 4(c) of the Prosecution Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction a prosecution should normally follow, unless “public interest demands otherwise”. It continues:

²⁴ i.e. one appointed in terms of section 13(1)(a)

²⁵ Section 24(4)(c)(ii)(bb) of the NPA Act

²⁶ A DPP is the equivalent of an Attorney-General under the old legislation.

“There is no rule of law which states that all provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.”

The policy further provides that when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.

114. Part 5 of the Policy Directives deals with the withdrawal and stopping of cases. The guidelines draw a clear distinction between withdrawing charges and the stopping of a prosecution. Paragraphs (8) and (9) of Part 5 note that the stopping of a prosecution in terms of section 6(b) of the CPAAct effectively means that the prosecuting authority is abandoning the case and accordingly, as a rule, criminal proceedings should only be stopped when it becomes clear during the course of the trial that it would be impossible to obtain a conviction or where the continuation thereof has become undesirable due to exceptional circumstances.

115. Likewise, in relation to the withdrawal of charges, paragraph (1) of Part 5 states that once enrolled, cases may only be withdrawn on compelling grounds “e.g. if it appears after thorough police investigation that there is no longer any reasonable prospect of a successful prosecution”. Paragraph (5) provides that no prosecutor may withdraw any charges without the prior authorisation of the NDPP or the DPP where the prosecution has been ordered by either the NDPP or DPP; while paragraph (6)(a) stipulates that the advice of the NDPP or DPP should be sought where the case is of a sensitive or contentious nature or has a high profile.

116. Part 6 of the Policy Directives governs the question of representations. It generally provides that representations should be given earnest attention. Paragraphs (5) and (6) have assumed importance in this case. They read:

- . Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. Potential representors should, where possible, be advised accordingly.

As a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP.”

The reviewability of prosecutorial decisions

117. The NDPP in paragraph 47.7 of her written submissions argued that section 179(5)(d) of the Constitution, allowing her to review decisions to prosecute or not to prosecute, excludes the power of the courts to review non-prosecution. Mr Hodes SC, on behalf of the NDPP, initially persisted in argument with the contention that the Constitution vests exclusive power in the NDPP to review prosecutorial decisions. The courts, he submitted, have no power to review any prosecutorial decision, only the NDPP may do so and her decision will be final and not reviewable. That can never be; if only because the SCA has already pronounced that prosecutorial decisions are subject to rule of law review. It is inconceivable in our constitutional

order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission. The mere existence of a permissive extra-judicial measure allowing the NDPP to review decisions to prosecute or not to prosecute taken by subordinates on policy, evidentiary and public interest grounds, does not deny an aggrieved party access to court. Section 179(5)(d) of the Constitution does not aim to oust the constitutional and statutory jurisdiction of the courts to review on grounds of legality, rationality and administrative reasonableness.

118. During the course of argument counsel's line of reasoning evolved and transformed, as it had to, into two principal assertions: first, granted that judicial review of prosecutorial decisions is constitutionally ordained, it is restricted to extremely limited grounds; and second, resort to the courts is excluded until the process envisaged in section 179(5)(d) of the Constitution has been exhausted. I deal in this part only with the nature and extent of the power to review prosecutorial decisions. I will consider counsel's contention that the section 179(5)(d) process must be exhausted before resort to the courts is permitted at a later stage in this judgment.

119. At times it would be naïve of the courts to pretend to be oblivious to the political context and consequences of disputes before them.²⁷ In politically contentious matters, the courts should expect to be called upon to explicate the source, nature and extent of their powers. There has been much public commentary in the media in relation to this case which has sought to represent the issue of contestation to be about the extent of judicial power in relation to the executive. There is an important and legitimate element of truth in that. A danger exists though in the arising of a false perception that the courts when exercising judicial review of prosecutorial decisions may trespass illegitimately into the executive domain.

120. It accordingly seems to me imperative, in light of counsel's submissions, to deal comprehensively with the power of the courts in relation to executive decisions of this kind. I do so in the hope of dispelling the myth that the courts are untowardly assuming powers of review, and to illustrate that the powers of the courts to review prosecutorial decisions are clearly defined and are consistently exercised within the parameters set by the Constitution and Parliament.

121. The discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a *prima facie* case and if there is no compelling reason for non-prosecution.

122. Courts all over the world are reluctant to interfere with a prosecuting authority's *bona fide* exercise of the discretion to prosecute. In *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office*²⁸ the House of Lords (per Lord Bingham) expressed the need for deference and caution, stating that

²⁷ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.

²⁸ [2008] UKHL 60 at paras 30-32

courts should disturb the decisions of an independent prosecutor only in “highly exceptional cases”. Courts recognise that at times it will be within neither their constitutional function nor practical competence to assess the merits of decisions where the polycentric character of official decision-making, including policy and public interest considerations, mean they are not susceptible or easily amenable to judicial review.²⁹ The constitutional requirement that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice, justifies judicial restraint.

123. However, judicial restraint can never mean total abdication. The discretions conferred on the prosecuting authority are not unfettered. In the United Kingdom, for instance, prosecutors must exercise their powers in good faith and so as to promote the statutory purpose for which they are given, direct themselves correctly in law, act lawfully, exercise an objective judgment on the relevant material available to them, and be uninfluenced by any ulterior motive, predilection or prejudice.³⁰ Hence, although following a deferential approach, in the UK review of all prosecutorial decisions is permissible on legality and rationality grounds.

124. Our law is not significantly different. Courts will interfere with decisions to prosecute where the discretion is improperly exercised (illegal and irrational),³¹ *mala fides*,³² or deployed for ulterior purposes.³³ They will do so on the ground that such conduct is in breach of the principle of legality. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.³⁴ The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of the Promotion of Administrative Action Act³⁵ (“PAJA”), our legislative code of administrative law which gives effect to the constitutional right to administrative action which is lawful, reasonable and procedurally fair,³⁶ and which to a considerable extent shapes the separation of powers between the judiciary and the executive. PAJA provides a broader range of review grounds than the principle of legality. Section 1(ff) of PAJA, however, excludes decisions *to institute or continue a prosecution* from the definition of administrative action.

125. The law in relation to decisions *not to prosecute or to discontinue a prosecution* is in some respects different. The CC has recognized in an *obiter dictum* that different policy considerations may apply to a decision to prosecute and a decision not to prosecute.³⁷ The SCA has also referred to the policy considerations underpinning the exclusion of decisions to prosecute from administrative review.³⁸ In

²⁹ *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735-736.

³⁰ *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office* [2008] UKHL 60 at para 32

³¹ *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order* 1994 (1) SA 387 (C)

³² *Mitchell v Attorney-General Natal* 1992 (2) SACR 68 (N).

³³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38.

³⁴ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.

³⁵ Act 3 of 2000

³⁶ In section 33 of the Constitution.

³⁷ *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 84

³⁸ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 35 .

*National Director of Public Prosecutions v Zuma*³⁹ Harms DP acknowledged in an *obiter dictum* the possibility of a judicial review of a decision not to prosecute and held that such review had not been excluded by PAJA. In *Democratic Alliance and Others v Acting National of Public Prosecutions and Others*⁴⁰ Navsa JA, without referring to the view of Harms DP in *Zuma*, seemed to intimate, also in an *obiter dictum*, that a decision to discontinue a prosecution might not be reviewable under PAJA, but held that a decision to discontinue a prosecution was in any event subject to a rule of law review. The learned judge of appeal said:

“While there appears to be some justification for the contention that a decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of ‘administrative action’ in terms of section 1(ff) of PAJA, it is not necessary for us to finally decide that question. Before us it was conceded...that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made ...[I]n *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) this court noted that the office of the NDPP was integral to the rule of law and to our success as a democracy. In that case this court stated emphatically that the exercise of public power...must comply with the Constitution.”

126. So whether or not PAJA applies, decisions not to prosecute or to discontinue a prosecution are subject to legality and rationality review. Legality review, if I may state the obvious, is concerned with the lawfulness of exercises of public power. Decisions must be authorised by law and any statutory requirements or preconditions that attach to the exercise of the power must be complied with. Rationality review is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must also be rational.⁴¹ As pointed out by the CC in *Democratic Alliance v President of the Republic of South Africa and Other*⁴² a rationality standard prescribes a low threshold of scrutiny, and hence validity, for executive or administrative action. It is the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.

127. Rationality review also comprises a procedural element. A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational. In *Albutt v Centre for the Study of Violence and Reconciliation and Others*⁴³ the CC held that the exclusion of victims from participation in a special pardon dispensation was irrational because it disregarded the objective of nation building and reconciliation in the legislative scheme.

128. Decisions coloured by material errors of law, based on irrelevant considerations or ignoring relevant considerations could arguably be considered to be illegal or irrational. Traditionally these grounds are acknowledged as distinct review grounds, like the ground of unreasonableness, which permits review of decisions that no reasonable person could have so decided. These grounds are available in our law

³⁹ 2009 (2) SA 277 (SCA) para 36 fn 33.

⁴⁰ 2012 (3) SA 486 (SCA) at para 27

⁴¹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

⁴² 2013 (1) SA 248 (CC) at para 42

⁴³ 2010 (3) SA 293 (CC) at paras 65-68.

under PAJA in respect of decisions that fall within the definition of “administrative action”. As some of the challenges made by the applicant to the decisions of the respondents in this case are predicated upon such grounds, it is necessary to consider if they are available. This requires me to make a finding whether or not a decision to discontinue a prosecution (or to withdraw charges) is administrative action within the meaning of that term as defined in section 1 of PAJA.

129. Section 1(ff) of PAJA, as mentioned, explicitly excludes decisions to institute or continue a prosecution from the definition of administrative action, and hence such are patently not reviewable under PAJA. The legal position with regard to decisions not to prosecute or to discontinue a prosecution is less clear. The CC has not pronounced finally on whether the decision not to prosecute constitutes administrative action; and the SCA, as mentioned, has expressed two different *prima facie* opinions on the matter.

130. In general, a decision will constitute administrative action if it is made under an empowering provision and taken by an organ of state exercising a power in terms of the Constitution, or exercising a public power or performing a public function in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect.⁴⁴ The SCA and the CC have interpreted the definition to include a decision which has the capacity to affect legal rights and where it impacts directly and immediately on individuals.⁴⁵

131. The NDPP and the DPPs, making up the prosecuting authority in terms of the Constitution and the NPA Act, are unquestionably organs of state. In addition, the power of non-prosecution is a corollary to the power to institute and carry out criminal prosecutions.⁴⁶ The power derives from s 179(2) of the Constitution which provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. It follows that a decision by the prosecuting authority to withdraw charges or to stop a prosecution constitutes the exercise of a power in terms of the Constitution. It involves exercising a public power in terms of legislation, namely the NPA Act; and has a direct, external legal effect. It results in a prosecution being stopped or avoided. And, lastly, it adversely affects the rights of the public, and at least the complainants, who are entitled to be protected against crime through, amongst other measures, the effective prosecution thereof. A decision to withdraw criminal charges or to discontinue a prosecution accordingly meets each of the definitional requirements of administrative action.

132. A purely textual interpretation of the definition of administrative action thus confirms that prosecutorial decisions in general do indeed constitute administrative action and are subject to review under PAJA. This is affirmed further by the fact that section 1(ff) excludes from the definition of administrative action specific instances of prosecutorial discretion, namely the institution and continuance of a prosecution, thus implying *ex contrariis* that other prosecutorial decisions, most especially the

⁴⁴ Section 1 of PAJA.

⁴⁵ *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23; and *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 30

⁴⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 64.

decision not to institute or to discontinue a prosecution, are not so excluded.⁴⁷ That choice by the legislature appears to have been deliberate, and is based on sound policy considerations. Professor Cora Hoexter in her seminal work, *Administrative Law in South Africa*, comments on the exclusionary clause as follows⁴⁸:

“The intention behind this provision, as reflected by the draft Administrative Justice Bill appended to the South African Law Commission’s 1999 report, was to confine reviews under PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law.”

I would accordingly respectfully disagree with the *obiter dictum* of Navsa JA, in *Democratic Alliance and Others v Acting National of Public Prosecutions and Others*,⁴⁹ that a decision to discontinue a prosecution is of the same *genus* as a decision to prosecute. For the reasons stated by Professor Hoexter, a decision of non-prosecution is of a different *genus* to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not.

133. In addition to the language of the definition of administrative action incorporating prosecutorial decisions within its ambit, as well as the implication of the text of the exclusionary clause, (that but for its terms a decision to prosecute would have fallen within the definition and would have constituted administrative action), the original historical intent, as evidenced in the context and the *travaux préparatoire* mentioned by Professor Hoexter, fortifies the proposition that the intention of the legislature was to limit the extent of the exclusion and bestow a more extensive power of review over decisions not to prosecute or to discontinue a prosecution. Added to that, as already intimated, there are legitimate structural and prudential arguments justifying the distinction. There is no need to review decisions to prosecute because the lawfulness and rationality of the decision can be challenged in the subsequent criminal trial; but there is perhaps a need for wider review of a decision not to prosecute because without it there will be inadequate supervision.

134. Consequently, the preponderance of all the modalities of interpretation, the text, historical intent, the ethos of our culture of justification, prudential and structural considerations, and doctrine, points inexorably to the conclusion that it was the intention of Parliament, pursuant to its obligation in section 33(3) of the Constitution to enact PAJA, that decisions not to prosecute or to discontinue prosecutions would be subject to judicial review in terms of PAJA.

135. Such a finding, I trust, will not be viewed as a case of the courts assuming the power of review on the basis of casuistic practice or doctrine, or worse still, a judicial whim, as the media and social commentators appear sometimes mistakenly to believe. It is not the judiciary which has mandated judicial review of decisions not to prosecute or to discontinue prosecution. It is Parliament that has done so. In fulfilment of its obligation to define the parameters of the doctrine of the separation of powers, Parliament enacted PAJA.

⁴⁷ *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 712

⁴⁸ 2ed (Juta & Co, Cape Town, 2012) at 241-242, citing the South African Law Commission (Project 115) “*Report on Administrative Justice*” (August 1999)

⁴⁹ 2012 (3) SA 486 (SCA) at para 27

136. I make the point, and most likely labour it, because the bald submission was made in argument, repeatedly, and at times vociferously, that a court exercising a power to review a decision of the prosecuting authority to discontinue prosecution *ipso facto* will trespass on the executive domain. The constitutional ethos and the governing legislative provisions, textually and contextually, demonstrate that proposition to be false. Arguments of this order are predicated on an incorrect understanding of the principle of the separation of powers. They misstate the proper legal position and carry the danger of demeaning the courts in the eyes of the public by misrepresenting the nature and legitimacy of the judicial function.

137. In conclusion, therefore, the law enacted by Parliament, in compliance with the obligation entrusted to it by the founders of our Constitution, imposes a duty on judges to review certain prosecutorial decisions. Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers. PAJA has separated the powers. And the power to review a decision not to prosecute has been constitutionally and legislatively separated to the judiciary.

138. A similarly misplaced argument calling for deference was advanced in the CC in *Democratic Alliance v President of the Republic of South Africa and Others*⁵⁰ in an attempt to persuade the court to adopt restraint in a rationality review of a decision of the President on the ground that review would violate the separation of powers. The argument was rejected as follows:

“It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not”

139. By the same token, the submission, made on behalf of the NDPP in this case, that the court should not exercise a review power over prosecutorial decisions or, if it does so, should decline from ordering a prosecution because that would offend against the principle of the separation of powers, is, as I have said, equally unsustainable. Either the decision is administrative action or it is not. If it is, it may be reviewed on the grounds enunciated in section 6 of PAJA and one of the remedies provided for in section 8 of PAJA must be appointed. Our law, unlike that of other countries, rests upon a fundamental right to administrative justice and a legislative code unambiguously bestowing a power to review decisions not to prosecute or to discontinue a prosecution on the courts.

⁵⁰ 2013 (1) SA 248 (CC)

140. There is in any event no logical reason to confine review of non-prosecution to grounds of illegality and irrationality, while excluding grounds such as reliance on irrelevant considerations, ignoring relevant considerations or even unreasonableness. These standards are judicially determinable and just as capable of application as the standards of legality and rationality. It seems to me, therefore, inherently wrong to allow laxity to prosecutors, by permitting them to act unreasonably or unfairly, when there is no compelling policy or moral reason for doing so, especially in an era where throughout the world corruption and malfeasance are on the rise. Our Parliament in permitting review of non-prosecution on these grounds is patently of similar persuasion.

The withdrawal of the fraud and corruption charges

141. The first impugned decision is the one of 5 December 2011 taken by Mrwebi to withdraw the fraud and corruption charges preferred against Mdluli on 20 December 2011. The charges essentially allege that Mdluli abused the State's financial resources for private gain for his and his wife's benefit. The SSA, as I have mentioned, is controlled by the crime intelligence unit over which Mdluli exercises control.

142. FUL contends that that decision by Mrwebi to withdraw the fraud and corruption charges is liable to review on five alternative grounds. First, in terms of the Constitution, only the NDPP is entitled to discontinue a prosecution. The decision was therefore *ultra vires*. Second, the decision was unlawful because it was taken by Mrwebi alone, when he could only take such decision in consultation with the DPP of North Gauteng. Third, the decision was irrational because it was taken without properly consulting the prosecutors and investigators directly involved in the case. Fourth, the decision was arbitrary because it was taken in the face of overwhelming evidence in support of prosecution. Fifth, the decision was based on Mrwebi's incorrect belief that the fraud and corruption charges could only be investigated by the IGI and was thus based on a material error of law.

143. The first ground rests on an interpretation of section 179(5)(d) of the Constitution, which empowers the NDPP to review a decision to prosecute or not to prosecute, after consulting with the relevant DPP, the accused, the complainant and any other relevant person. In *National Director of Public Prosecutions v Zuma*⁵¹ the SCA held that the power of review conferred on the NDPP by section 179(5)(d) of the Constitution "can only be an 'apex' function, in other words, a function of the head of the NPA qua head", which according to FUL suggests that no other functionary within the NPA may exercise the power of review.

144. Section 179(3)(b) of the Constitution provides that national legislation must ensure that DPPs are responsible for prosecutions in specific jurisdictions, but specifically adds that the provision is subject to subsection (5). The cross reference to subsection (5) implies that the DPPs are answerable to the NDPP who in terms of the various paragraphs of the subsection has the power to determine prosecution policy and the right to intervene in the prosecution process to ensure compliance with policy directives, as well as the right of review conferred in paragraph (d). The

⁵¹ 2009 (2) SA 277 (SCA) at para 55 *et seq.*

rationale for such arrangement, according to FUL, would appear to be that once commenced a prosecution should continue to conclusion unless there are weighty considerations justifying cessation. In order to avoid inappropriate influence in that regard, the Constitution consciously assigned the function of review to a more impartial official at the apex, removed from the jurisdiction in which the prosecution was commenced. FUL accordingly submits that only the NDPP is entitled to re-visit a decision to prosecute made by a member of the NPA and to withdraw the charges; and then only after proper consultation as contemplated by section 179(5)(d). If correct, it would follow that Mrwebi had no power to withdraw the fraud and corruption charges at all. It was incumbent on him to refer the matter to the NDPP. He did not do that. His decision would accordingly be *ultra vires*, and could be set aside on that basis alone.

145. I am not persuaded that this submission is correct. I doubt its merit from a pragmatic and policy perspective. It would be onerous indeed if every decision to discontinue a prosecution taken by prosecutors throughout the country had to pass across the desk of the NDPP. The argument also takes insufficient account of the context and legislative scheme enacted by the NPA Act, section 6 of the CP Act and the Prosecution Policy which, as the Acting NDPP has pointed out in her answering affidavit, allow DPPs to discontinue a prosecution and more junior prosecutors to withdraw charges and stop prosecutions.

146. As head of the SCCU, Mrwebi was a Special DPP, appointed in terms of section 13(1)(c) of the NPA Act. A Special Director is entitled to exercise the powers and perform the functions assigned to him pursuant to his appointment. In terms of section 24 of the NPA Act, a DPP may institute and conduct criminal proceedings and carry out functions incidental thereto as contemplated in section 20(3). They include the powers in section 20(1) to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and to discontinue criminal proceedings. Both a DPP and a Special DPP may therefore discontinue a prosecution.⁵²

147. Moreover, a DPP, or a more junior prosecutor, is empowered by section 6 of the CP Act to withdraw charges or stop a prosecution in circumscribed circumstances with the only limitation being that the prosecution shall not be stopped in terms of section 6(b) unless the DPP or any person authorized thereto by the DPP, whether in general or in any particular case, has consented thereto. Likewise, a prosecutor may withdraw a charge in terms of section 6(a), but where the NDPP or the DPP has ordered the prosecution he or she will need prior authorisation. Where the case is of a sensitive or contentious nature or has high profile, then in terms of the Policy Directives the prosecutor is only required to seek the advice (not even the permission) of the NDPP or DPP.

148. It is therefore evident from section 20(1)(c) of the NPA Act, section 6 of the CP Act and various provisions of the Policy Directives that legislation and prevailing practice permit prosecutors in many cases to withdraw charges without referring the question to the NDPP for permission or review. The Acting NDPP is accordingly correct in her submission that in terms of the NPA Act and the Policy Directives

⁵² Provided when a Special DPP does so, he or she acts in consultation with the relevant DPP proviso to section 24(3) of NPA Act.

Mrwebi did not need to refer the decision to withdraw the fraud and corruption charges to the NDPP.

149. In my opinion, section 179(5)(d) of the Constitution does not reserve an exclusive power to the NDPP to discontinue a prosecution. It merely empowers the NDPP to review a decision of her subordinates to prosecute or not to prosecute, and specifies the procedure he or she should follow. The use of the verb “may” in section 179(5)(d) is indicative of a permissive discretion rather than a mandatory pre-condition. The NDPP may review decisions to prosecute or not to prosecute, at his or her own instance or on application from affected and interested persons. The intention of the drafters of the constitutional provision was not that all withdrawals of charges have to be approved by the NDPP.

150. Be that as it may, and whatever the case, there is no need to pronounce finally on this ground because the decision to withdraw the charges was in fact illegal for other non-constitutional reasons.

151. Mrwebi, as I have said, is a Special DPP appointed by President Zuma as such on 1 November 2011 under proclamation 63 of 2011 published in Government Gazette no. 34767 of 25 November 2011 and in terms of section 13(1)(c) of the NPA Act. The section allows the President after consulting the NDPP and the Minister to appoint “special” DPPs. These are not ordinary DPPs or prosecutors. They have special duties and functions. In terms of the subsection they are “to exercise certain powers, carry out certain duties and to perform certain functions conferred or imposed or assigned to him or her by the President by proclamation in the Gazette.” In terms of the proviso to section 24(3) of the NPA Act a Special DPP may only exercise the powers referred to in s 20(1) of the NPA Act, including the power to discontinue criminal proceedings, in consultation with the Director of the area of jurisdiction concerned.⁵³ The rationale for this arrangement is that certain key decisions of a Special Director should be subject to the supervision of the most senior ordinary prosecutor in the area of jurisdiction. In this case, the relevant Director was the DPP of North Gauteng, Mzinyathi.

152. The requirement in section 24(3) of the NPA Act that the Special Director exercise any power to discontinue proceedings “in consultation with” the DPP meant that he could only do so with the concurrence or agreement of the DPP.⁵⁴ In *MacDonald v Minister of Minerals and Energy*⁵⁵ the principle was explained as follows:

“Likewise, where the law requires a functionary to act ‘in consultation with’ another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act ‘after consultation with’ another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.”

153. The NPA Act in various provisions reflects that distinction, by requiring certain powers to be exercised “after consultation with” a specified functionary, while others

⁵³ The proviso to section 24(3) of the NPA Act.

⁵⁴ *President of the RSA v SARFU* 1999 (4) SA 147 (CC) at para 63.

⁵⁵ 2007 (5) SA 642 (C) at para 18.

can only be taken “in consultation with” the functionary.⁵⁶ Parliament in enacting legislation is presumed to have known of the rulings of the courts on the interpretation of terms enacted in the legislation, and thus to have consciously adopted and used them in the same sense.⁵⁷ By using the term “in consultation with” in the proviso to section 24(3) of the NPA Act, Parliament consciously and deliberately introduced a requirement that a Special DPP may only discontinue a prosecution with the concurrence of the DPP in the area of jurisdiction.

154. The evidence, extensively analysed above, shows that Mrwebi did not consult with Mzinyathi before taking the decision to withdraw the charges, let alone obtain his concurrence. By the time he met Mzinyathi he had formed a fixed, pre-determined view and was not open to persuasion never mind willing to submit to disagreement. Both he and Mzinyathi confirmed under oath in the Breytenbach disciplinary proceedings that the decision to withdraw was a *fait accompli* by the time Mrwebi raised it with Mzinyathi. Under cross examination by counsel for Breytenbach, Mrwebi conceded that he had taken the decision to withdraw the charges before he wrote the consultative note. It is evident from both Mzinyathi’s email of 8 December 2011 and his testimony that Mrwebi did not seek Mzinyathi’s concurrence because he believed he was *functus officio*.

155. Mrwebi did not claim in his answering affidavit that Mzinyathi assented to the withdrawal of the charges at the 5 December 2011 meeting. He hardly could because Mzinyathi repeatedly confirmed that he did not support the withdrawal of the fraud and corruption charges against Mdluli. It is clear from the contemporaneous correspondence and his evidence in the disciplinary proceedings that Mzinyathi wished the case to continue. Mzinyathi’s changed version of the position he took in the meeting of 9 December 2011, set out in his belatedly filed confirmatory affidavit, for the reasons stated, is not credible or reliable.

156. Hence, Mrwebi’s claim in paragraphs 27-29 of his answering affidavit that Mzinyathi and Breytenbach agreed on 9 December 2011 that the case against Mdluli was defective and should only proceed with the assistance of IGI and the Auditor General is both irrelevant and improbable. It is irrelevant because Mrwebi by that time on his own admission had already taken the decision to withdraw the charges, without obtaining the consent of the DPP, North Gauteng. It is improbable for the same reasons, and also because it is in conflict with the contemporaneous and subsequent documents prepared by Breytenbach and Mzinyathi, with their conduct and with their testimony on the course of events. On the basis of that evidence it is clear that Mrwebi took the decision to withdraw the fraud and corruption charges without first securing the DPP’s consent, which is a jurisdictional prerequisite under the NPA Act. His decision was unlawful for want of jurisdiction and must be set aside for that reason alone in accordance with the principle of legality.

157. There was some debate in argument about whether Mrwebi’s decision and his consequent instruction to Breytenbach and Smith to withdraw the charges constituted a discontinuance of criminal proceedings as contemplated in section 20(1)(c) of the NPA Act. If it did not, there was no requirement for Mrwebi to have obtained the concurrence of the DPP.

⁵⁶ See, for example sections 13(1)(c), 16(3), 22(6)(a) and 43A(9)(b) of the NPA Act.

⁵⁷ *De Villiers v Sports Pools (Pty) Ltd* 1975 (2) SA 253 (RA) at 261

158. The applicable legislation uses three expressions with regard to the powers involved in a cessation of enrolled criminal proceedings. Section 6 of the CP Act speaks of the power to withdraw a charge and the power to stop a prosecution. The NPA Act refers to the power to discontinue criminal proceedings. The question arising is whether the powers in section 6 of the CP Act are specific instances of the more general power to discontinue a prosecution. Logically and linguistically it would seem they are. The *Oxford English Dictionary* gives as the first meaning of the word “discontinuance”:

“the action of discontinuing or breaking off; interruption (temporary or permanent) of continuance; cessation”

“Cessation” in turn means:

“ceasing, discontinuance, stoppage, either permanent or temporary”.

This meaning was accepted as the definitive meaning of the word in *Cape Town Municipality v Frerich Holdings*.⁵⁸ In *Mazibuko v City of Johannesburg*,⁵⁹ however, it was held that the cessation was required to be of a more permanent nature to amount to discontinuance. The meaning of the term naturally will depend on its context.

159. The withdrawal of charges in terms of section 6 of the CP Act has as its immediate consequence the interruption or stoppage, permanent or temporary, of a prosecution. The stopping of a prosecution, because of the resultant availability of the plea of *autrefois acquit*, will always be permanent. The possibility of a permanent cessation in both instances justifies the conclusion that they are species of the same *genus*, namely discontinuance. Accordingly, a decision by a DPP to withdraw charges under section 6(a) of the CP Act constitutes an exercise of the discretion to discontinue criminal proceedings in section 20(1)(c) of the NP Act. To repeat: in terms of section 24(3) of the NPA, a Special DPP like Mrwebi may only exercise that discretion with the concurrence of the DPP. On the facts he did not have it.

160. It has always been a principle of our common law that where a statute confers power on a public functionary subject to certain preconditions or jurisdictional facts, a failure to comply with the preconditions will render the exercise of the power illegal. Such jurisdictional facts are a necessary pre-requisite to the exercise of the statutory power.⁶⁰ If the jurisdictional fact does not exist, the power may not be exercised and any purported exercise of the power will be illegal and invalid. It is trite that all exercises of public power are reviewable on the same grounds for non-compliance with the constitutional requirements of the rule of law.⁶¹ The decision of Mrwebi and his instruction to withdraw the fraud and corruption charges consequently falls to be set aside irrespective of its categorisation as administrative action or not. If we accept that the decision did constitute administrative action as defined, it is reviewable in terms of section 6(2)(b) and section 6(2)(i) of PAJA which provide that a court has power to review administrative action if a mandatory and material

⁵⁸ 1981 (3) SA 1200 (AD)

⁵⁹ 2010 (4) SA 1 (CC) at para 120

⁶⁰ *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34G-H

⁶¹ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at para 27.

procedure or condition prescribed by an empowering provision was not complied with, or if the action is otherwise unconstitutional or unlawful.

161. The decision and instruction are similarly vulnerable to review on other grounds. In deciding to withdraw the corruption and fraud charges against Mdluli, Mrwebi considered representations from Mdluli's lawyers, and from further unnamed operatives. He did not, however, call for or consider representations from the investigators in the case, the Hawks, the IGI or the Acting Commissioner of Police. Nor did he consult the prosecutors directly involved in the case on his decision to refer the matter to the IGI. He contends that he was not required to do so. FUL has argued he was obliged to consult with these stakeholders in terms of section 179(5)(d) of the Constitution, which compels the NDPP to consult with the accused, the complainant and any relevant party whenever she reviews a decision to prosecute. That duty, according to FUL, applies equally to subordinate functionaries performing the same role in terms of legislation. Section 20(3) of the NPA Act provides that the powers in section 20(1) of a DPP to discontinue a prosecution are subject to the Constitution.

162. The provisions of section 20(1)(c) of the NPA Act and section 6 of the CP Act are silent on the question of consultation. It may be that an argument could be advanced that these provisions read with the Policy Directives violate section 179(5)(d) of the Constitution, which infringement might be cured by reading the procedural requirements of section 179(5)(d) into these sections. That argument was not made before me. The less adventurous submission made by Mr Maleka SC on behalf of FUL, if I understand it correctly, is that section 20(1)(c) of the NPA Act must be read in conformity with the constitutional provision.

163. While it is correct that the Constitution requires legislation to be interpreted, where possible, in ways which give effect to its fundamental values and in conformity with it, reading words into a statutory provision should only follow upon a pronouncement of constitutional invalidity under s 172(1)(a) of the Constitution. A court, however, should still prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can be reasonably ascribed to the provision. Legislation, which is open to a meaning which would be unconstitutional but is reasonably capable of being read and applied in conformity with the scheme envisaged by the Constitution, should be so read, but the interpretation and application of it may not be unduly strained.⁶²

164. I hesitate to pronounce definitively on whether the requirements of the Constitution should be read directly into the legislation solely on the basis that the powers in section 20(1) of the NPA Act are stated to be subject to the Constitution. There is no need to do so. The decision, as I have found, is illegal for not complying with the duty to consult the DPP and it is unnecessary to resort to the Constitution to introduce, as a concrete requirement, jurisdictional facts which the legislation has not expressly enacted. More compelling though, in my possibly pedantic view, and in the end of equal consequence, is FUL's argument that the failure properly to consult was fatal to the validity of Mrwebi's decision in this case because it did not meet the requirements of rationality. An interpretation that the powers conferred by the

⁶² *Minister of Safety and Security v Sekhoto and Another* [2011] 2 All SA 157 (SCA)

legislation should be exercised rationally in conformity with the Constitution will not be unduly strained and will give sufficient effect to the fundamental values.

165. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.⁶³ The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of PAJA. Rationality review, as explained earlier, is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must be rational.⁶⁴ A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational.⁶⁵

166. Given the purpose and objectives of the power to discontinue a prosecution, to ensure justice in the prosecutorial process, once Mrwebi decided to consider representations from any relevant person, the standard of rationality required him to deal with all stakeholders even-handedly and to consider representations both from those in favour of withdrawal and those against.⁶⁶ The process by which he reached his decision was arbitrary, and the consequent decision irrational, because the means were not rationally linked to the purpose. He could not do justice without hearing all relevant stakeholders. At the very least, he had to observe the Policy Directives, which he also failed to do. The Prosecution Policy requires the advice of the NDPP to be sought where a sensitive, or contentious, or high profile case is to be withdrawn.⁶⁷ My understanding of the position of the NDPP is that Mrwebi's decision was not referred to her.

167. For those reasons also, the decision to withdraw the fraud and corruption charges was irrational and consequently illegal.

168. FUL has lastly argued that Mrwebi's decision was coloured by material errors of law, based on irrelevant considerations and, though it does not say so in so many words, intimated that the decision was so unreasonable that no reasonable person could have so decided. Strictly speaking, because of my findings that the decision was illegal and irrational in violation of the principle of legality, I do not need to deal with these submissions. However, in view of the possibility of an appeal, it seems appropriate to make a finding on the merit or otherwise of these review grounds as well.

169. To recap briefly: a decision to discontinue prosecution is administrative action within the meaning of that term as defined in section 1 of PAJA. Mrwebi's decision to withdraw the fraud and corruption charges and to discontinue the prosecution is

⁶³ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.

⁶⁴ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

⁶⁵ *Albutt v Centre for the Study of Violence and Reconciliation and Others* *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 65-68.

⁶⁶ That obligation flows from the rule of law and para 3 of Part 5 of the Prosecution Policy.

⁶⁷ Prosecution Policy para 6(a).

accordingly susceptible to review on PAJA grounds other than illegality and irrationality.

170. The charges of fraud, corruption and money-laundering were initiated against Mdluli as a result of a comprehensive investigation by Colonel Viljoen that uncovered the evidence in support of his prosecution. The prosecutors, the DPP, and the IGI all opposed the withdrawal of those charges. Breytenbach, the regional head of the SCCU, wrote a detailed memorandum to the NDPP cogently motivating why the charges should not be withdrawn. The Prosecution Policy requires that cases should only be withdrawn on compelling grounds.

171. Mrwebi, however, advanced only two reasons for his decision to withdraw the charges, which were recorded in his consultative note of 4 December 2011, and which were far from compelling. First, he was concerned that the charges initiated against Mdluli may have been pursued with an ulterior motive. Second, he found that the offences with which Mdluli had been charged fell within the mandate of the IGI and could only be investigated by her offices. Mr Maleka submitted that each of these findings was unfounded, and was based on irrelevant considerations and material errors of law and fact.

172. The factual claim of a conspiracy against Mdluli by his colleagues was investigated and rejected by an inter-ministerial task team established for that purpose. The evidentiary basis for that decision is not before me and I am unable to assess its probative value. But, in any event, an improper motive would not render an otherwise lawful prosecution unlawful⁶⁸ and would not excuse a prosecutor from engaging with the merits of the case. Mrwebi at the outset stated openly in his consultative note of 4 December 2011 that he saw no need to engage with the merits of the case against Mdluli. In accordance with his incorrect understanding that it was a matter for the IGI he considered it unnecessary to traverse the merits or to evaluate the evidence. He believed the referral to the IGI was “dispositive of the matter”. He took the decision without regard to the merits of a prosecution in the interests of justice and thus ignored mandatory relevant considerations.

173. The purported referral to the IGI was equally misdirected. The IGI’s oversight role over the intelligence and counter-intelligence services is restricted to monitoring their compliance with the Constitution and other laws, and to receive complaints of misconduct.⁶⁹ As mentioned by the IGI in her letter of 19 March 2012 to the Acting Commissioner, the IGI’s mandate does not extend to criminal investigations. Mrwebi’s decision to withdraw the fraud and corruption charges because he apparently believed them to fall within the exclusive purview of the IGI was accordingly based on a material error of law. Yet, despite being aware of the IGI’s view, as appears from his reasons for decision dated 12 July 2012, he irrationally adhered to his position.

174. These were the only reasons advanced by Mrwebi at the time he decided to withdraw the charges. His decision was thus evidently based on errors of law and fact. He took account of irrelevant considerations and ignored relevant

⁶⁸ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 37.

⁶⁹ Section 7(7) of the Intelligence Services Control Act 40 of 1994.

considerations. The decision is therefore liable to review in terms of sections 6(2)(b), and 6(2)(e)(iii) of PAJA. In so far as the decision was attended by factual errors, and in view of Mrwebi's stance overall, the decision was not rationally connected to the information before him and the purpose of the NPA Act, and is thus reviewable also under section 6(2)(f)(ii)(bb) and (cc) of PAJA.

175. As discussed earlier, in his reasons filed pursuant to Rule 53 and in his answering papers, Mrwebi took a different tack. He there claimed that there was insufficient evidence to support a successful prosecution against Mdluli and that he referred the matter to the IGI so that she could investigate or facilitate access to the privileged documentation required. The withdrawal of the charges, he said, was merely provisional, to allow for further investigation to take place. This version is at odds with the contemporaneous reasons Mrwebi gave for his decision, and the evidence of Breytenbach and Mzinyathi in the disciplinary proceedings. Even if the charges were supposedly provisionally withdrawn in court, Mrwebi's pronouncements at the time evinced an unequivocal intention to stop proceedings altogether. He considered the referral to the IGI as "dispositive"; and in his letter of 30 March 2012 to General Dramat he referred to the matter as "closed". In the circumstances, his new version is implausible and probably invented after the fact, in what FUL submits was "a last-ditch attempt to explain his otherwise indefensible approach". But even if the decision was in fact "provisional", its qualification as such does not save it from illegality, irrationality and unreasonableness. A provisional decision which languishes for two years without any noticeable action to alter its status may be inferred to have acquired a more permanent character.

176. For all of the many reasons discussed, the decision and instruction by Mrwebi to withdraw the fraud and corruption charges must be set aside. It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it.

The withdrawal of the murder and related charges

177. The second decision challenged by FUL is the decision of Chauke, the DPP of South Gauteng, to withdraw the murder charge and refer the issue of Ramogibe's death to an inquest and to withdraw all the other charges against Mdluli, to avoid "fragmented trials" in order to allow Mdluli to stand one trial where he could answer all of the charges against him. FUL challenges the decision on three grounds: it was taken by the DPP, South Gauteng when only the NDPP is entitled to review a decision by another official of the NPA to discontinue a prosecution; it was taken without proper consultation; and was unfounded and irrational.

178. I have already addressed FUL's contention that the NDPP has exclusive power to review and withdraw a decision to prosecute. The power conferred on the NDPP to review the decision of a subordinate to prosecute or not to prosecute by section 179(5)(d) of the Constitution and section 22 of the NPA Act, in my estimation, does not directly exclude or limit the power conferred upon a DPP by section 20(1)(c) of the NPA Act to discontinue criminal proceedings and by section 6 of the CP Act to withdraw charges or to stop a prosecution. It was never intended in enacting the constitutional provisions that the NDPP would be the sole repository of the power to discontinue a prosecution.

179. However, as I explained in the analysis of the first impugned decision, any decision by an official of the prosecuting authority to discontinue a prosecution will need to be properly informed by relevant considerations if it is to be upheld as rational. The failure to consult with affected and interested parties often, if not invariably, will have the consequence that vital relevant information is ignored and the decision will be coloured by irrationality because there is no rational connection between the information available to the official, the purpose of the empowering provision, the decision and the reasons for it.

180. Accordingly, I accept FUL's submission that the rule of law and the requirement of rationality constrained Chauke to consider representations from the complainants and victims of the alleged crimes. Chauke did not deny the averments made in the founding affidavit and the supplementary founding affidavit that he did not seek input from the victims and other role players. He referred only to representations from the legal representatives of Mdluli. Moreover, the Policy Directives also obliged him to seek the advice of the Acting NDPP before withdrawing the murder and related charges. Both the Acting NDPP and Chauke confirm in their affidavits that he did not refer the matter to her. The decision to withdraw those charges was accordingly taken without the legal and rational prerequisites to the exercise of the power being met. The process leading to the decision being taken was irrational because it lacked input from crucial stakeholders in the process. It also appears to have given no weight at all to the evidence of the victims of the other crimes as alleged in the 17 non-murder charges, from which it may be inferred symptomatically that Chauke failed to apply his mind to all the relevant considerations mandated by the Constitution, and in the ultimate analysis acted capriciously; meaning that his decision was reviewable in terms of section 6(2)(e)(vi) of PAJA.

181. The details of the investigation that led to the murder and related charges being preferred against Mdluli are painstakingly set out in a report by the investigating officer, Colonel Roelofse, which strictly speaking is hearsay, but with the content of which none of the respondents has taken issue. The evidence against Mdluli also appears from the affidavits filed in the inquest proceedings, which, as discussed, include affidavits from different witnesses claiming that they were personally intimidated, assaulted and/or kidnapped by Mdluli; and affidavits from seven witnesses who personally witnessed Mdluli threatening to kill Ramogibe, or threatening and assaulting other people. This evidence presents a compelling *prima facie* case against Mdluli.

182. In terms of the Prosecution Policy Directives, Chauke may only withdraw charges in the face of such formidable evidence if there are compelling reasons to do so. Yet, he has advanced none. Instead, he has stated puzzlingly that he is disinclined to prosecute because there is no direct evidence linking Mdluli to the murder of Ramogibe. He has offered no evaluation of the cogency of the circumstantial evidence against Mdluli. And although circumstantial evidence involves an additional tier of inferential reasoning, it is incorrect to assume such evidence in the end will prove less cogent than direct evidence. All involved in the administration of criminal justice, including I imagine Chauke, the most senior public prosecutor in Johannesburg, know that circumstantial evidence at times can be more persuasive than direct evidence. In any event, there is in fact direct evidence in

relation to the charges of attempted murder, kidnapping and assault, which were withdrawn as a corollary to the decision to avoid prosecuting Mdluli on a piecemeal basis.

183. Chauke's reliance on the inquest finding for his decision not to proceed is patently irrational. An inquest, as I explained when discussing the facts, is an investigatory process directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. It is not aimed at establishing anyone's guilt and, indeed, could not competently do so.⁷⁰ The presiding officer is not called on to make any finding as to culpability. An inquest is no substitute for a criminal prosecution because it cannot determine guilt. In fact, once criminal charges have been brought in relation to a particular death, an inquest will generally be precluded, since the two processes should not run concurrently.

184. Chauke's motive for referring the matter to an inquest was therefore dubious. The identity of the deceased was known, as was the cause of his death. The only outstanding issue is the culpability of Mdluli. Chauke could never have hoped to establish Mdluli's culpability, and to resolve the criminal prosecution, by referring the matter to an inquest. The inquest findings are not binding on the prosecuting authority. Chauke's statement in his affidavit that in the light of the inquest finding "it would be presumptuous and foolhardy" to prosecute is accordingly wrong in law and symptomatic of the irrationality of his decision, evincing as it does a lack of rational connection between the purpose of his decision, the various empowering provisions, the evidence before him and the reasons he gave for his action.

185. In any event, to state the blatantly obvious, and as the magistrate himself was at pains to point out, the inquest could only deal with the murder charges. It could not, and did not, address the remaining 17 charges of kidnapping, assault, intimidation and defeating the ends of justice that were preferred against Mdluli. It follows that a referral to inquest proceedings could never have provided a sufficient basis to withdraw those remaining charges. The justification of avoiding fragmented trials fell away on 2 November 2012, almost a year ago, when the magistrate handed down his reasons. Chauke has failed to address these other charges (and the purported basis for their withdrawal) in his answering affidavit at all. As Mr Maleka correctly submitted, that must be because he has not properly applied his mind to those charges, and the correctness of their withdrawal; or, more troublingly, perhaps because he is acting capriciously and with an ulterior purpose.

186. Accordingly, the decision to withdraw the murder and related charges was taken in the face of compelling evidence for no proper purpose, is irrational and therefore reviewable on legality and rationality grounds, as well as in terms of section 6(2)(e) and (f) of PAJA and falls to be set aside.

The NDPPs arguments on reviewability and the duty to exhaust internal remedies

187. In both his written submissions and in argument, counsel for the NPA gave little attention to the review grounds raised by FUL in relation to the two impugned decisions, and concentrated instead upon the contention that the court had no power

⁷⁰ *De'ath (substituted by Tiley) v Additional Magistrate, Cape Town* 1988 (4) SA 769 (C) at 775G.

to review the decisions of a DPP or Special Director. As he put it in paragraph 12 of his heads of argument:

“The most significant aspect that this Honourable Court will be required to decide is whether it does in fact have the right (sic) to review these two decisions.”

The submission was developed in paragraphs 42-43 of the heads as follows:

“These statutory provisions have been the subject matter of numerous judicial decisions. Nevertheless, despite commentary and statements to the contrary, it has never been judicially pronounced that there is in fact a right to review a decision by a Director of Public Prosecutions or the National Director of Public Prosecutions to provisionally withdraw criminal charges against an accused person.

Put somewhat differently, the Applicant's legal representatives are challenged to identify any matter in which such an application for review has succeeded and resulted in a decision by the First Respondent or any of its subordinates to withdraw charges being set aside and the First Respondent being compelled to forthwith reinstate criminal charges and prosecute them without delay, which is the relief sought herein against the First and Third Respondents.”

188. After analysing the judgment of Harms DP in *National Director of Public Prosecutions v Zuma*⁷¹ in some detail, counsel submitted that the decision was authority for various propositions, only three of which are relevant for present purposes (the others have been disposed of in the preceding analysis). In paragraph 47 of the heads he submitted: firstly, a prosecutorial review is not an administrative decision that is subject to review in the normal course or in terms of PAJA; secondly, a decision to withdraw charges pending the receipt of further evidence and to prosecute or not to prosecute is not necessarily final; and thirdly a decision to prosecute or not to prosecute is not subject to judicial review.

189. As to the first proposition, if by a “prosecutorial review” is meant an exercise by the NDPP of her discretion under section 179(5)(d) of the Constitution, then the contention is not sustainable. As I have said, and it bears repeating, it is inconceivable that the Constitution intended to exclude judicial review of such decisions entirely. Whether the decision would be administrative action or not is possibly debatable, but the authorities already discussed leave no doubt that any action in terms of that provision will still be subject to a rule of law review on grounds of legality and rationality. However, it is important to note, we are not here concerned with a review under section 179(5)(d). Although Mdluli's initial representations were addressed to the NDPP, it does not seem that she acted on them. Mrwebi and Chauke took the impugned decisions. The decisions at issue are in fact decisions to withdraw charges in terms of section 6 of the CP Act

190. The third proposition, presumably with section 6 of the CP Act in mind, is plainly wrong. For the reasons spelt out earlier, when discussing the reviewability of prosecutorial decisions, a decision to prosecute is subject to rule of law review and a decision not to prosecute or to discontinue a prosecution is subject to rule of law review and in addition to review in terms of PAJA. Nor do I accept Mr Hodes' related

⁷¹ 2009 (2) SA 277 (SCA)

submission that the possibility of obtaining a certificate of *nolle prosequi* and the right to pursue a private prosecution in terms of section 7 of the CP Act ousts the review jurisdiction of the courts. The existence of this procedure cannot be read to give the NDPP *carte blanche* to act without regard to the requirements of legality, rationality and reasonableness. The suggestion is preposterous and no more need be said.

191. The second proposition does however pose a legitimate challenge. It forms the basis of the argument counsel developed in court that resort to the court should be denied until internal remedies are exhausted. All the deponents who filed affidavits on behalf of the NPA highlighted the alleged “provisional” nature of the decision to withdraw charges. And, the Acting NDPP consciously pleaded that the decisions to discontinue the prosecutions “have not been brought to my office for consideration in terms of the regulatory framework” and submitted that the application to review the withdrawal of the charges by the court was accordingly “premature”.

192. The regulatory framework to which the NDPP refers is of course section 179(5)(d) of the Constitution read with section 22(2)(c) of the NPA Act which permit her to review decisions of her subordinates to prosecute or not to prosecute. It includes also Part 6 of the Policy Directives, in particular paragraphs (5) and (6) which provide that where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. It is explicitly stated that as a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP. Unfortunately, these provisions were not referred to in argument and I do not have the benefit of counsel’s submissions regarding their content or status. They normally would require compliance, and do indicate an intention to introduce a duty to exhaust internal remedies by representors (which FUL is not) where representations have been made. However, for reasons I will elucidate presently, non-compliance is not fatal to this review application.

193. First of all, the categorisation of the withdrawal of charges as “provisional” is inconsequential. All withdrawals which do not amount to the stopping of a prosecution in terms of section 6(b) of the CP Act are provisional in the sense that it always remains possible to re-institute charges withdrawn under section 6(a) of the CP Act. The withdrawal of charges under section 6(a) of the CP Act, as explained, and as I suspect is the case in the majority of withdrawals, can easily become permanent. The mere characterisation of an illegal, irrational or unreasonable decision as provisional would not automatically save it from review. Provisional or not, an illegal decision will normally be set aside.

194. The fact of the matter, and the more relevant truth, is that the NDPP can review any decision “not to prosecute” in terms of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act; and the real inquiry therefore is whether the decisions of Mrwebi and Chauke to discontinue the prosecution of Mdluli on the respective charges could only be reviewed in court once the applicant had exhausted the remedy of a review before the NDPP under those provisions.

195. FUL’s response to the contention that the application is premature is somewhat cryptic. In paragraph 78 of the replying affidavit it first rejects the proposition that only

the NDPP may review the decisions of DPPs and Special DPPs to discontinue a prosecution and then in paragraph 79 states:

“In any event, it is plain that the first respondent has long since been aware of the relevant decisions and at the very least tacitly confirmed them.”

The Acting NDPP did not make any replicating averment in answer to this plea. In the belatedly filed supplementary answering affidavit, Mrwebi merely re-asserted that the court has no power at all to review prosecutorial decisions, which is patently wrong, and, as Justice Kriegler rightly says, a little worrying to hear from a senior prosecutor. In fairness though, Mrwebi did add that the application was in any event “premature”. However, Mrwebi did not take issue with the allegation that the NDPP had tacitly confirmed the decisions to withdraw. She clearly has done exactly that.

196. The dispute that forms the subject matter of this application has been on-going for more than 18 months since February 2012. Given its high profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli’s representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by section 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions *mero motu*; yet despite the public outcry she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by section 195 of the Constitution to be responsive, accountable and transparent.

197. Besides not availing herself of the opportunity to review the decision, she waited more than a year after the application was launched before raising the point and then did so in terms that can fairly be described as abstruse. Her “plea” made no reference to the relevant paragraphs of the Prosecution Policy Directives, the relevant provisions of PAJA or the principles of the common law. A plea resting only on an averment that an application is “premature” is meagrely particularised and lacks sufficient allegations to found a complete defence that there had been non-compliance with a duty to exhaust internal remedies. Had we to do here with a set of particulars of claim, they would have been excipiable on the grounds of being vague and embarrassing.

198. At common law the mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted before bringing a rule of law review.⁷² As I have said, I consider the power in section 179(5)(d) of the Constitution to be permissive. There is nothing in the provision itself, or expressly stated or necessarily implied in the legislative scheme as a whole, which overtly requires a person aggrieved by a decision to discontinue a prosecution to first take the matter on review to the NDPP.

⁷² See generally Hoexter *Administrative Law in South Africa* at 538 et seq

199. Moreover, in *Maluleke v MEC for Health and Welfare, Northern Province*,⁷³ Southwood J remarked, correctly in my respectful opinion, that the duty to exhaust internal remedies, if one exists, will seldom be enforced where the complaint is one of illegality, or, I would add, one of irrationality, or in cases where the remedy would be illusory. It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted before now to assess them, explain her perception, and, if so inclined, to correct them.

200. Section 7(2)(c) of PAJA is more stringent than the common law and permits exemption from the duty to exhaust internal remedies only in exceptional circumstances on application. I am satisfied that there are exceptional circumstances in this case, being those pleaded by FUL. Admittedly, there is no formal application for exemption, primarily I imagine because the special plea, if that, was so abstrusely pleaded; which is sufficient basis to grant condonation. In *Koyabe v Minister of Home Affairs*⁷⁴ the Constitutional Court stated that these requirements should not be rigidly enforced and should not be used by officials to frustrate the efforts of an aggrieved person or to shield the decision-making process from judicial scrutiny. Furthermore, and most importantly in this case, the remedy in question must be available, effective and adequate in order to count as an existing internal remedy. For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed solely at shielding the illegal and irrational decisions from judicial scrutiny.

201. In any event, if I am wrong in this, the more stringent PAJA standard does not apply to a rule of law review, and the duty to exhaust internal remedies before resorting to such a review may be dispensed with on the grounds and for the reasons to which I have already alluded.

202. In the result, the failure of FUL to resort to a review in terms of section 179(5)(d) of the Constitution is no bar to this application or the jurisdiction of the court.

The withdrawal of the disciplinary proceedings and the reinstatement of Mdluli

203. FUL challenges the decision to withdraw the disciplinary charges against Mdluli, made by the Acting Commissioner, Lieutenant-General Mkhwanazi, on 29 February 2012, as well as the related decision of 27 March 2012 to lift his suspension and to

⁷³ 1999 (4) SA 367 (T) at 372G-H

⁷⁴ 2010 (4) SA 327 (CC) para 38

re-instate him to his position, on two grounds: firstly, it contends that the Acting Commissioner took those decisions acting on the dictates of another, and therefore failed to discharge his duties under s 207(2) of the Constitution; and in taking those decisions, the Acting Commissioner failed to protect the integrity of the SAPS, and to give effect to the SAPS Act and Regulations.

204. The Commissioner has raised defences that FUL has no standing to challenge the decisions, and the court no jurisdiction to hear them, because they are disciplinary labour matters within the prerogative of the Commissioner and any dispute in that regard within the exclusive jurisdiction of the Labour Court. She contended further that the review of the disciplinary proceedings have become moot since new disciplinary proceedings were initiated on 15 May 2012 and Mdluli was re-suspended on 25 May 2012.

205. Section 207(2) of the Constitution provides:

“The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.”

206. As the official responsible for managing and controlling the SAPS, it fell to the Acting Commissioner to take disciplinary decisions concerning high-level officials. He had to exercise the discretion conferred on him himself, and could not abdicate his decision-making power to another, nor act on the instructions of a functionary not vested with those powers.⁷⁵

207. In paragraph 45 of the founding affidavit FUL, alleged that the Acting Commissioner publicly stated in Parliament that he took the decisions to withdraw the disciplinary charges on instruction from authorities “*beyond*” him. It added that by acting on the instructions of authorities beyond him, the Acting Commissioner failed to act independently in the discharge of his functions, and accordingly acted inconsistently with section 207 of the Constitution. Mkhwanazi in his answering affidavit filed in the proceedings related to Part A of the notice of motion, did not deny making the statement or the inference drawn. In paragraph 4 of his affidavit he admitted that he had read FUL’s founding affidavit and the annexures thereto but went on only to deal with points *in limine*, without admitting or denying any of the averments in the founding affidavit.

208. A respondent in motion proceedings is required in the answering affidavit to set out which of the applicant’s allegations he admits and which he denies and to set out his version of the relevant facts. A failure to deal with an allegation by the applicant amounts to an admission. An admission, including a failure to deny, will be binding on the party and prohibits any further dispute of the admitted fact by the party making it, as well as any evidence to disprove or contradict it.⁷⁶ Mkhwanazi must accordingly be taken to have admitted that he acted under dictation, without independence and inconsistently with his constitutional duties.

⁷⁵ *President of the Republic of South Africa and Others v SARFU* 2000 (1) SA 1 (CC) at paras 38- 41

⁷⁶ *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (A) 605H.

209. In paragraph 47 of her answering affidavit, the Commissioner (who was appointed subsequent to the events at issue in these proceedings) in response to the averments in paragraph 45 of the founding affidavit stated:

“General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never obtained instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue.”

210. No confirmatory affidavit was filed on behalf of Mkhwanazi, despite the issue being raised repeatedly and it being evident that the court would be called upon to assess the probative value of the statement and to make a factual finding about whether he had acted under dictation or not.

211. In paragraph 14 of his judgment in the Part A proceedings, Mokgoba J expressed concern about the allegations of political interference in the disciplinary process and noted that Mkhwanazi had not disputed them in his answering affidavit. The learned judge subtly pointed to the need for the allegations to be addressed.

212. As the issue was not adequately dealt with in the answering affidavits, FUL, in paragraph 64 of the replying affidavit, contested the explanation by the Commissioner, noted that the confirmatory affidavit and objective evidence had not been delivered, and intimated that it would argue that the appropriate factual finding should be made. It did so again more fully in paragraph 83 of its heads of argument. Despite all of these calls to the Commissioner to file an affidavit from Mkhwanazi explaining the statement, the Commissioner did not oblige.

213. When the matter was raised in argument before me, Mr Mokhari SC, counsel for the Commissioner, asserted implausibly that the non-filing of a confirmatory affidavit by Mkhwanazi was merely an oversight. He undertook to file an affidavit by the close of proceedings. It was made clear to him that absent a confirmatory affidavit, the hearsay averment of the Commissioner could not be accepted as a tenable and creditworthy denial and that the averment of FUL was likely to be preferred. After all, Mkhwanazi is available as a witness and the Commissioner in her answering affidavit gave an undertaking to file a confirmatory affidavit. After an adjournment, Mr Mokhari informed the court that his instructions were that no affidavit from Mkhwanazi would be filed. Nor has any objective evidence of his alleged statements been provided, notwithstanding the Commissioner’s tender in this regard. Mr Maleka predictably submitted that the most credible explanation for the non-filing is that neither Mkhwanazi nor Hansard supports the Commissioner’s interpretation. The allegation has always been that Mkhwanazi acted under the unauthorised and unwarranted dictates of persons who had no constitutional or legal authority over or interest in the decision. Despite having had ample opportunity, he has not refuted that allegation.

214. In the premises, the Commissioner’s explanation is untenable and must be rejected. The explanation is irreconcilable with the Acting Commissioner’s clear statement. The statement that he was instructed by authorities “*beyond*” him is

unambiguous and cannot bear the meaning that the Commissioner contends for. Mkhwanazi was not subject to the authority of or any instruction by the NPA.

215. That Mkhwanazi dropped the disciplinary charges on orders from above, is furthermore borne out by the Rule 53 record filed on his behalf. The record he supplied comprises nothing more than two letters addressed to Mdluli, one notifying him of the withdrawal of the disciplinary charges against him and the other advising him of his re-instatement. There is no charge sheet or correspondence dealing with the allegations or the process to be followed. From this it may be reasonably inferred that Mkhwanazi did not apply his mind to the facts at all, because he was inclined on the basis of instructions from beyond to stop the process irrespective of the merit or otherwise of that action.

216. The inescapable finding is that the decisions of the Acting Commissioner to withdraw the disciplinary charges and to re-instate Mdluli as head of Crime Intelligence were taken in an attitude of subservience pursuant to an unlawful dictation from a person unknown, who was “beyond” the Acting Commissioner. They were therefore unlawful and invalid. An abdication of power violates the principle that the responsibility for a discretionary power rests with the authorised body and no one else.

217. The second prong of FUL’s attack on these decisions is that the Acting Commissioner failed to protect the integrity of SAPS and to abide by its legislative framework. Every organ of state is required to exercise the powers conferred upon it accountably, responsively and openly, and to protect the integrity of the institution by ensuring the proper exercises of powers by its functionaries.⁷⁷ Congruent with that, the Commissioner is required to maintain an impartial, accountable, transparent and efficient police service.⁷⁸ The SAPS, in turn, is tasked with preventing, combating and investigating crime, and with upholding and enforcing the law.⁷⁹

218. To ensure the proper functioning of the SAPS, the Commissioner, in discharging his obligations under section 11 of the SAPS Act, must protect and give effect to SAPS Discipline Regulations.⁸⁰ These provide that serious misconduct must be referred to disciplinary proceedings⁸¹ and that, where there is strong evidence to suggest that the member will be dismissed, the member must be suspended.⁸² A suspension is a precautionary measure.

219. By withdrawing the disciplinary proceedings against Mdluli and allowing him to resume his senior position in the SAPS when there were serious and unresolved allegations of misconduct against him, which called into question his integrity, the

⁷⁷ Section 195(1) of the Constitution; see also *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) at para 66

⁷⁸ Section 11(1) of the SAPS Act. See also section 195(1)(e)(f) and (g) of the Constitution.

⁷⁹ Section 205(3) of the Constitution.

⁸⁰ GNR 643 GG 28985 3 July 2006.

⁸¹ Regulation 12(1) provides:

“ Subject to regulation 6 (2), a supervisor who is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, must ensure that the investigation into the alleged misconduct is completed as soon as reasonably possible and refer the documentation to the employer representative to initiate a disciplinary enquiry.”

⁸² Regulation 13.

Acting Commissioner frustrated the proper functioning of the SAPS Act and the Discipline Regulations. He also undermined the integrity of the SAPS and failed to ensure that it operated transparently and accountably. His conduct could only serve to damage public confidence in the SAPS, particularly where no reasons were advanced for that decision and in the face of public disquiet about possible political interference.

220. The decisions to withdraw the disciplinary charges and to re-instate Mdluli were accordingly taken in dereliction of the Acting Commissioner's constitutional and statutory duties to control and manage the SAPS in any open, transparent, accountable, impartial and efficient manner, and fall also to be set aside on that basis.

221. On both legs, the review sought by FUL is a rule of law review and it is unnecessary to locate the review grounds within the provisions of PAJA, or to determine whether the action constituted administrative action for that purpose.⁸³ The decisions are illegal for both the reasons advanced.

Standing, jurisdiction and mootness in relation to the decision to withdraw the disciplinary charges

222. Rather than engaging with the substance of the claims of illegality, the Commissioner confined herself to formal defences. As mentioned, she contended that FUL lacks *locus standi* to bring this review, that this court has no jurisdiction over it, and that the review of the decisions is, in any event, moot or academic.

223. Neither the Commissioner nor the NDPP questioned FUL's public interest standing to review the withdrawal of criminal charges against Mdluli. But the Commissioner contended that FUL has no standing to challenge the decision to withdraw disciplinary charges against Mdluli and to re-instate him to his post on the grounds that those decisions are labour decisions that are only liable to challenge by a party to the employment contract at issue. This is not correct. As discussed, the Commissioner is required, under s 207(2) of the Constitution, to manage the SAPS and to maintain the discipline and integrity of the force. The disciplinary powers are public powers and the fitness of Mdluli to hold a high ranking position in the SAPS is a matter of public concern. As Mr Maleka submitted, the issues have implications for public order and legitimacy of SAPS as a law-enforcement body. For as long as the disciplinary allegations against Mdluli remain unresolved, his presence in the senior echelons of the SAPS will diminish public confidence. The disciplinary decisions are

⁸³ The decisions to suspend Mdluli and to institute disciplinary proceedings against him were made pursuant to the powers conferred by the SAPS Discipline Regulations. The revocation of those decisions was in terms of the same public power. A decision by an organ of state to abandon disciplinary proceedings against a high-ranking police official and to re-instate him to his post while matters concerning his honesty and respect for the law remain unresolved is public in nature. It affects the security and the stability of South Africa, and goes to the accountability of its officials. The decisions have direct external legal effect, and affect the public's right to have the alleged misconduct against a high-level police official assessed and finally determined. For those reasons, FUL submits, not unconvincingly, that the decisions constitute administrative action liable to review under PAJA.

therefore public in nature, and liable to review on the grounds of illegality, at the instance of FUL acting in the public interest.

224. The Commissioner's claim that this court has no jurisdiction in terms of section 157(1) and (2) of the Labour Relations Act⁸⁴ ("the LRA") to review the disciplinary decisions is similarly unfounded. These provisions read:

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible."

225. The Commissioner argued that the relief sought by FUL is in effect a suspension from employment. The order obtained in Part A proceedings interdicted Mdluli from discharging any function or duty as an employee of SAPS. Consequently, Mdluli has been suspended from his employment. It was argued that the suspension of Mdluli can only be done in compliance with the SAPS Discipline Regulations read with section 186(2) of the LRA. Since the Labour Court has exclusive jurisdiction in terms of section 157(1) to deal *inter alia* with unfair labour practices, it was submitted that the High Court may not adjudicate such matters. The argument went further, asserting in addition that the High Court can only assume jurisdiction over a labour matter if it involves a Bill of Rights violation as contemplated by section 157(2) of the LRA.

226. Section 157(1) of the LRA confirms that the Labour Court has exclusive jurisdiction over any matter which the LRA prescribes should be determined by it, which includes the power to review unfair labour practice determinations by bargaining councils or the Commission for Conciliation Mediation and Arbitration ("the CCMA"). In terms of section 191 of the LRA, disputes about unfair labour practices must be referred either to the CCMA or a bargaining council with jurisdiction, and the award of such body is reviewable by the Labour Court. The labour forums, it is correct, do indeed have exclusive power to enforce LRA rights to the exclusion of the High Courts. However, the High Courts and the Labour Courts have concurrent jurisdiction to enforce common-law contractual rights and fundamental rights entrenched in the Bill of Rights insofar as their infringement arises from employment.⁸⁵

⁸⁴ Act 66 of 1995

⁸⁵ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 18, and section 157(2) of the LRA

227. The argument that the jurisdiction of the High Court is excluded on account of the dispute being one regarding an unfair labour practice is fundamentally misconceived and wrong, being based upon a misunderstanding of the relevant statutory provisions. It is predicated on the false supposition that the present case involves an unfair labour practice. It most certainly does not. The relevant part of the definition of an unfair labour practice in section 186(2) of the LRA reads:

“Unfair labour practice” means any unfair act or omission that arises between an employer and an *employee* involving—(b) the unfair suspension of an employee”

It must be read with section 191(1) of the LRA which provides:

“(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
(i) a council.....; or
(ii) the commission, if no council has jurisdiction”

It is thus clear from the definition that an unfair labour practice can only “arise between an employer and an employee” and from the procedural provision that only an employee can refer an unfair labour practice dispute to the CCMA or a bargaining council.

228. Notwithstanding section 157(1) of the LRA, other existing common law and statutory causes of action remain available to litigants, even in cases that arise factually out of an employment relationship between an organ of state and an individual. In *Gcaba v Minister of Safety and Security and Others*⁸⁶ the CC explained the position thus:

“Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies to the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be meant to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour-and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies”

229. The only jurisdiction removed from the High Court by section 157 of the LRA, therefore, is that in respect of those causes of action which the LRA prescribes should be dealt with by the Labour Court, and for the most part that is confined to the review of unfair dismissal and unfair labour practice awards, and the adjudication of operational requirement dismissals and unfair employment discrimination. The High Court retains its jurisdiction over all other causes of action. In fact, section 157(2) of the LRA takes nothing away from the High Court’s jurisdiction. It merely confers a concurrent human rights jurisdiction on the Labour Court in respect of Bill of Rights violations in the employment context, which it otherwise would not have enjoyed. It does not restrict the jurisdiction of the High Court, as the Commissioner incorrectly assumes. The purpose of the provision is to give jurisdiction to the Labour Court not

⁸⁶ 2010 (1) SA 238 (CC) at para 73

to remove it from the High Court. There is accordingly no merit at all in the submission that the High Court must establish a Bill of Rights violation before it may “assume jurisdiction” over a labour matter. The Commissioner’s argument misconstrues the wording and import of the subsection; she has it the wrong way round.

230. Likewise, FUL’s challenge to the Acting Commissioner’s disciplinary decisions does not involve an unfair act or omission that arises between an employer and an employee *involving the unfair suspension* of an employee. The mere fact that the remedy appointed by the court may be akin to a suspension is not sufficient for the dispute to be categorised as an unfair labour practice. A dispute in order to be an unfair labour practice, as I have said, must be between an employee and his or her employer and must arise in the employment relationship. The dispute between FUL and the Commissioner is not one which falls within the employer-employee nexus, but one which raises issues concerning the legality (and, consequently, the constitutionality) of the Acting Commissioner’s decisions, and his application and interpretation of the SAPS Act and the Regulations. It is also a matter that affects the complainants’ and the public’s constitutional rights to the protection of the rule of law. The effects of the decisions on Mdluli, which may well be the subject of an employment dispute, are not the subject of this application.

231. The review of the Acting Commissioner’s disciplinary decisions accordingly falls within the jurisdiction of this court.

232. The Commissioner’s contention that the review of the Acting Commissioner’s disciplinary decisions has become academic cannot be sustained either. She says the issue is now moot because disciplinary proceedings have been “instituted” against Mdluli and he is currently under suspension. The original disciplinary charges against Mdluli were dropped and he was re-instated in March 2012. It is common cause that Mdluli was re-suspended on 25 May 2012, shortly after this application was launched. Although it has been stated that the intention was to discipline Mdluli it is not clear on what disciplinary charges. Neither the charges in the original disciplinary proceedings nor the new disciplinary charges have been disclosed in the Rule 53 record on behalf of the Commissioner, or in any of the answering affidavits. There is no evidentiary basis to assume that the disciplinary charges and reasons underlying the most recent suspension are the same as the previous occasion; indeed, to the contrary, there are indications that his suspension may relate to other charges related to the defrauding of the SSA. The relief sought by FUL is for Mdluli to be arraigned on all of the original charges.

233. But even if we accept that the charges are the same, the court has not received any assurance from the Commissioner that she will not allow them to be dropped again. Indeed, but for the order of Makgoba J, Mdluli would have been within his rights to return to work in late July 2012. In terms of the Discipline Regulations, if an employee is suspended with full remuneration, the employer must hold a disciplinary hearing within sixty calendar days from the commencement of the suspension. Upon the expiry of the sixty days, the chairperson of the hearing must take a decision on whether the suspension should continue or be terminated.⁸⁷ It follows that a failure to

⁸⁷ Regulation 13(4).

convene disciplinary proceedings will result in the suspension automatically lapsing. Mr Mokhari was unable to give the court an assurance that a hearing had been convened at which the chairperson had taken a decision on whether the suspension should continue or be terminated. The suspension in terms of the regulations has accordingly probably lapsed. That fact alone disposes of the claim of mootness.

234. Moreover, there is no evidence of any serious intent to proceed with the disciplinary process or to finalise the matter, despite Mdluli having been suspended again more than a year ago. Yet the Commissioner in these proceedings seeks to discharge the interdict granted by Makgoba J on the spurious jurisdictional grounds just discussed, without conceding that the disciplinary proceedings should not have been withdrawn and without furnishing any undertakings that they will be pursued to finality. The Commissioner wants the interdict discharged and is happy for the disciplinary process to lapse. She apparently sees no need to place any obstacle in the way of Mdluli's return to work, despite her constitutional duty to investigate the allegations against him and the unfeasibility of his holding a position of trust at the highest level in SAPS until the truth is established in a credible process. For as long as there are serious unresolved questions concerning Mdluli's integrity, he cannot lawfully act as a member and senior officer of the SAPS, or exercise the powers and duties associated with high office in the SAPS.⁸⁸

235. The review of the Acting Commissioner's decisions is for those reason by no means academic. There remains a live dispute between the parties, and any relief granted will have practical effect.⁸⁹

Remedies

236. The automatic consequence of my findings in relation to the withdrawal of the criminal charges is that the charges will revive. FUL however seeks in addition an order directing that the fraud and corruption charges be re-enrolled and prosecuted without any further delay. Such is permissible in terms of section 172(1)(b) of the Constitution and section 8 of PAJA which empower the court on review to grant an order that is just an equitable. Given the respondents' equivocal stance and their dilatory and obstructive approach to these proceedings, it is necessary to expedite the prosecution not only in the public interest but also in the interests of Mdluli who cannot resume his duties while the charges are pending.

237. Counsel for the NDPP has argued in relation to the criminal charges that they should be referred back to the NDPP for a fresh decision instead of the court ordering a prosecution. There may be polycentric issues around the prosecution in relation to the evidence and possible defences, so he contended, which will make the prosecution difficult. I would venture the old adage: "where there is a will there is a way". In the hands of skilled prosecutors, defence counsel and an experienced trial judge, I am confident that justice will be done on the evidence available, leading as the case may be to convictions or acquittals on the various charges in accordance with the law and justice. But more than ever, justice must be seen to be done in this case. The NDPP and the DPPs have not demonstrated exemplary devotion to the

⁸⁸ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248(CC).

⁸⁹ *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) at para 16

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

238. The same can be said with regard to those responsible for the disciplinary process.

239. Accordingly, the orders sought by FUL are appropriate, just and equitable.

240. With regard to the question of costs, Mr Maleka, assisted by Ms Yacoob and Ms Goodman, together with their instructing attorneys, acted on behalf of FUL *pro bono* and in the public interest. A costs order must accordingly be restricted to the recovery of disbursements.

Orders

241. The following orders are made:

(a) The decision made on or about 5 or 6 December 2011, as the case may be, by the third respondent in terms whereof the criminal charges of fraud, corruption and money laundering instituted against the fifth respondent under case number CAS 155/07/2011 were withdrawn, is hereby reviewed and set aside

(b) The decision made on 2 February 2012 by or on behalf of the first respondent in terms whereof the criminal charges of murder, kidnapping, intimidation and assault with intent to cause grievous bodily harm and defeating the ends of justice under case number CAS 340/02/99 were withdrawn, is hereby reviewed and set aside.

(c) The decision made on 29 February 2012 by or on behalf of the second respondent in terms whereof the disciplinary proceedings instituted by the second respondent against the fifth respondent were withdrawn, is hereby reviewed and set aside.

(d) The decision made on 31 March 2013 by or on behalf of the second respondent in terms whereof the fifth respondent was reinstated as Head of Criminal Intelligence in the South African Police Services with effect from 31 March 2012, is hereby reviewed and set aside.

(e) The first and third respondents are ordered to reinstate forthwith the criminal charges which were instated against the fifth respondent under case number CAS 155/07/2011 and case number 340/02/99 and to take such steps as are necessary to ensure that criminal proceedings for the prosecution of the criminal charges under the aforesaid cases are re-enrolled and prosecuted diligently and without delay.

(f) The second respondent is ordered to reinstate disciplinary charges which had been instituted against the fifth respondent but were subsequently withdrawn on 29 February 2012, and to take such steps as are necessary to institute or reinstate disciplinary proceedings that are necessary for the prosecution and finalisation of the aforesaid disciplinary charges, diligently and without delay.

(g) The first, second, third and sixth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved on the basis that the applicant's attorneys and counsel appear *pro bono*.

(h) The Taxing Master is directed that the applicant's costs nevertheless should include all the disbursements and expenses of the applicant's attorneys of record.

JR MURPHY
JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv V Maleka SC assisted by Adv S Yacoob and Adv I Goodman; instructed by Cliffe Dekker Hofmeyr Inc.

Counsel for the first and third respondents: Adv L Hodes SC assisted by Adv N Manaka and Adv E Fasser; instructed by the State Attorney.

Counsel for the second and sixth respondents: Adv WR Mokhari SC assisted by Adv M Zulu and Adv DM Matlou; instructed by the State Attorney

Date heard: 11 and 12 September 2013

Date of judgment: 23 September 2013