



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 030388/2026

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
	
31 MARCH 2026	
.....	
SIGNATURE	DATE

In the matter between:

B XULU AND PARTNERS INCORPORATED

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

**ADVISORY PANEL FOR THE SELECTION OF
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second Respondent

MMAMOLOKO TRYPHOSA KUBAYI

Third Respondent

HERMIONE CRONJE

Fourth Respondent

NICOLETTE ASTRID BELL

Fifth Respondent

ANDREA JOHNSON

Sixth Respondent

XOLISILE JENNIFER KHANYILE

Seventh Respondent

ADRIAN CARL MOPP

Eighth Respondent

MENZI SIMELANE

Ninth Respondent

JAN LEKGOA MOTHIBI

Tenth Respondent

JUDGMENT

LABUSCHAGNE J:

[1] The applicant is a firm of attorneys which brings an urgent application seeking the following substantive relief:

- “2. Declaring the recommendation of the second respondent to the first respondent on the appointment of the National Director of Public Prosecutions as unlawful.
3. Reviewing and setting aside the decision and/or recommendation of the second respondent on the appointment of the National Director of Public Prosecutions.
4. Declaring the appointment of the tenth respondent as the National Director of Public Prosecutions as unlawful.
5. Reviewing and setting aside the decision of the first respondent appointing the tenth respondent as the National Director of Public Prosecutions.”

- [2] The First Respondent is the President of the Republic of South Africa (the “President”). The second respondent is an advisory panel (the “Advisory Panel”) appointed by the President to screen candidates and to recommend suitable candidates for appointment as National Director of Public Prosecutions (NDPP). The third respondent is the Minister of Justice and Constitutional Development, cited as a respondent in her capacity only as Chairperson of the Advisory Panel appointed by the President to assist in the appointment of the National Director of Public Prosecutions.
- [3] The fourth respondent was a candidate for appointment to the position of NDPP. The applicant submitted a 99-page written submission objecting to the appointment of the fourth respondent.
- [4] The fifth, sixth, seventh, eighth and ninth respondents were also candidates for appointment who were considered by the Advisory Panel.
- [5] The tenth respondent was appointed as the National Director of Public Prosecutions on 6 January 2026.

CHRONOLOGY

- [6] On 07 October 2025 the President announced the appointment of an independent advisory panel, established by him to conduct a selection process for a new National Director of Public Prosecutions, as the then NDPP’s terms of office was expiring at the end of January 2026. As part of the public participation process the applicant submitted an objection on 04 December 2025 to the inclusion of the fourth respondent as a candidate.

- [7] The applicant's grievance as far as the process conducted before the Advisory Panel is concerned is related to a perceived bias in favour of the fourth respondent. So, for example, she was not provided with the applicant's grievance against her so that she could defend herself. The nub of the application, as far as the first decision is concerned (the recommendation of the Advisory Panel), is the fact that the applicant's grievance against the fourth respondent was not properly considered.
- [8] Part A of the application that was subsequently brought is aimed at seeking a full record of the interview process so that the applicant could supplement its prima facie grounds of review.
- [9] On 11 December 2025 the fourth respondent was interviewed. It emerged during that interview that she had not been provided with the applicant's objection to her candidacy. The fourth respondent was allowed an opportunity to submit written responses to the objection. However, before this could take place the Advisory Panel had wrapped up its proceedings.
- [10] On 12 December 2025 the Department of Justice and Constitutional Development issued a statement on behalf of the Advisory Panel, announcing the conclusion of the interview process, which statement concluded the following:

“Following the completion of the process, the Panel will submit its report to the President on Friday, 12 December for his consideration.”

- [11] In correspondence emanating from the applicant, the Advisory Panel was advised that its proceedings were irregular and demonstrated a bias in favour of the candidacy of the fourth respondent.
- [12] At the end of December 2025, the applicant brought an urgent application to restrain the President from taking any further steps in appointing an NDPP from the list of candidates interviewed by the Advisory Panel pending finalisation of a review brought by the applicants to set aside the report of the Advisory Panel.
- [13] On 31 December 2025 the Office of the State Attorney filed a notice to oppose on behalf of the President, the Advisory Panel and the Minister of Justice and Constitutional Development.
- [14] On 06 January 2026 the applicant received a letter from the State Attorney containing a request for the withdrawal of the urgent application. The letter contains the following:

“[2] Kindly be advised that the recommendation of the Advisory Panel was that none of the persons interviewed were suitable for appointment.

[3] The President has now taken the decision to appoint Adv Jan Lekgoa Mothibi as the next National Director of Public Prosecutions, and a person that was not amongst those interviewed by the Panel.

[4] In light of the above, it is our respectful view that the concerns raised in your application no longer present a live controversy between the parties, requiring the intervention of the court, and that the relief sought by your client in the notice of motion in toto has become moot.”

[15] The applicant, nevertheless, impugns the recommendation by the Advisory Panel on the grounds that it was an irregular recommendation, as the applicant’s objection to the fourth respondent had not properly been dealt with.

[16] That having been said, the applicant also seeks to set aside the appointment by the President of Adv Mothibi as NDPP on the grounds of procedural irregularity, based on what transpired before the Advisory Panel.

[17] The appointment of Adv Mothibi is challenged on two grounds:

17.1 The appointment was made after the President accepted and/or relied upon the recommendations of the Advisory Panel that were already the subject of a legal challenge wherein the President was cited as first respondent and had joined issue by filing a notice to oppose.

17.2 Adv Mothibi was appointed without being subjected to the same application process, public participation and other criteria as the other candidates who had applied for the same position. This was seen as deferential treatment of Adv Mothibi in a process for the same appointment that had previously been submitted to proceedings before the Advisory Panel. The applicant does not impugn the fitness

of Adv Mothibi for the position to which he was appointed. It is a procedural challenge based on what preceded his appointment.

[18] The media statement of the Presidency of 6 January 2026 reads in part as follows:

“... The panel selected six candidates for interviews out of 32 applicants.

The Panel concluded its process and submitted its report to the President on the 12th of December 2025. In its report, the panel advised the President that none of the interviewed candidates were suitable for the role of NDPP.

Accordingly, President Ramaphosa has in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, read with section 10 of the NPA Act, 1998 (Act 32 of 1998), decided to appoint Adv Jan Lekgoa Mothibi, with effect from 1 February 2026 as the National Director of Public Prosecutions (NDPP).”

OPPOSITION BY MEANS OF RULE 6(5)(d)(iii)

[19] In response to this application the President filed a notice in terms of rule 6(5)(d)(iii) via the State Attorney, giving notice that he intends raising the following points of law:

“THE COURT DOES NOT HAVE JURISDICTION.

First point of law – no proper cause for review

4. The applicant has not set out the provisions in section 179(1)(a), read with section 84 of the Constitution, which regulates the legal procedure for the appointment of the National Director of Public Prosecutions, on which the contention for irregularity, and thus the illegality, is based.
5. Accordingly, the applicant has failed to engage the jurisdiction of the above Honourable Court by failing to disclose a proper cause of action to sustain a review of the President's decision to appoint the tenth respondent as the National Director of Public Prosecutions on the grounds of legality.
6. Therefore the above Honourable Court does not have review jurisdiction over the application.

Second point of law – decisions are not reviewable

7. The applicant has cited:
 - 7.1 As the second respondent, the 'Advisory Panel for the selection of National Director of Public Prosecutions' appointed by the President to make recommendations to the President in respect of the appointment of the National Director of Public Prosecutions; and
 - 7.2 As the third respondent, Mmamoloko Tryphosa Kubayi, in her capacity as the Chairperson of the Advisory Panel and not in

her capacity as the Minister of Justice and Constitutional Development, as she was not Chairing the Advisory Panel in a ministerial capacity, but a mere nominee of the President for the role of Chairperson.

8. Both the second and third respondents as cited are not statutory or public bodies. In making their recommendations to the President therefore they did not perform any administrative or public function within the principle of legality.
9. The recommendations of the second respondent to the President do not constitute a decision or conduct until translated into an overt act by the President.
10. Accordingly the recommendations or decisions of the second and/or third respondents are not reviewable on the principle of legality or at all.
11. In the premises the Honourable Court does not have jurisdiction over the application.

Third point of law - Rule 53 is not applicable

12. Rule 53 regulates the review of decisions of proceedings of any inferior court and/or tribunal, board or officer performing judicial, quasi-judicial or administrative functions.
13. The rule does not apply to this application because:

13.1 In appointing the tenth respondent as the National Director of Public Prosecutions section 179(1)(a), read with section 84 of the Constitution, the President does not preside over, nor is he a member of any of the identified institutions or offices referred to in rule 53 or any like institution;

13.2 The President is not an officer as envisaged in rule 53 or the holder of any office akin thereto;

13.3 The conduct of appointing the National Director of Public Prosecutions does not amount to the performance of any judicial, quasi-judicial, administrative or other function envisaged in rule 53.

14. Accordingly rule 53 does not apply to this application.

THE RECORD IS NOT COMPELLABLE

Fourth point of law – Record not compellable

15. Rule 53 does not apply to this application and it was impermissible for the applicant to invoke the rule in the application.

16. The applicant is therefore not entitled to the record under rule 53.

17. The applicant is similarly not entitled to a record in terms of section 173 of the Constitution, as a procedural step predicated on rule

6(12) urgency and the procedure under rule 53(1) and (4) of the Uniform Rules.

18. Accordingly the President is not obliged to produce the record, nor is the record compellable.”

[20] Counsel representing the President, Adv Chabedi SC, explained that the rule 6(5)(d)(iii) notice that was filed did not constitute an election not to file an answering affidavit, but, as it is a proper means of testing the reviewability of the decision in question, the first respondent is not yet called upon to file an answering affidavit- the right to file which has been reserved.

[21] The applicant, by contrast, contends that the President has made an election not to file an answering affidavit and is bound by that decision. This is not an issue to decide now. At this stage, I view the notice filed by the President as a challenge to the reviewability of the decision. The implication is that the factual allegations in the Founding affidavit stand as established for purposes of this leg of the proceedings.

[22] In **Famous Idea 4 Trading (Pty)(Ltd) t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme** [2026] ZACC 5 the Constitutional Court ruled on such an in limine challenge to the court’s review jurisdiction. The following was said:

“[42] A rule 6(5)(d)(iii) notice is a procedural mechanism available to a respondent to resist an application that is devoid of legal grounds. The respondent may raise the legal point *in*

limine (preliminary legal objection) at the outset. The court does not have to consider the merits. It will consider the allegations in the founding affidavit as established facts. This is a potent procedural right as it enables the early disposal of applications without requiring the respondent to file an answering affidavit. It is also a cost-effective procedure. Serving a rule 6(5)(d)(iii) notice before the record has been produced in rule 53 proceedings is competent and was correctly invoked in this matter.”

- [23] It suffices to state that the justiciability of a decision in review proceedings may be raised as a threshold position, and until that has been determined, a review record is not compellable.

LOCUS STANDI IN A LEGALITY REVIEW

- [24] In review proceedings locus standi is available to the right party at the right time for the right remedy. It is a function of timing and identity based on the impact of the decision under review. Under the common law this issue was dealt with under the rubric of ripeness or prematurity. Under PAJA the issue is dealt with in that part of the definition of administrative action referring to the adverse effect of a decision. This is summarised in **Giant Concerts CC v Rinaldo Investments (Pty) Ltd** 2012 (JDR) 2298 (CC) (see below).
- [25] In a PAJA review, the applicant would have to show that the decision impugned “adversely affects the rights of any person and which has a direct external legal effect” (part of the definition of ‘administrative action’).

[26] The Constitutional Court, with reference to this principle stated the following in **Giant Concerts** at paragraph [30]:

“[30] The Supreme Court of Appeal has rightly suggested that ‘adversely affects’ in the definition of administrative action was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that Giant, as an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.”

[27] Prior to the commencement of these proceedings, the applicant and the respondents were requested to address the court on the issue of standing, with reference to the judgment in **Malao Inc v Minister of Transport** 2022 JDR 0973. In that matter firms of attorneys, who litigate RAF matters in the High Court on behalf of their clients, challenged the legality the Minister of Transport’s decision to appoint a new the CEO. They failed for lack of locus standi. Leave to appeal was pursued but the SCA and the Constitutional Court refused leave to appeal.

[28] In determining a litigant’s standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

“The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine (at the outset), before the merits are considered.” (See **Giant Concerts**, paragraph [32]).

[29] The separation of merits from the question of standing has two implications for an own-interest litigant such as the applicant in these proceedings. This was dealt with by the Constitutional Court in **Giant Concerts** at paragraph [33] where it states:

“[33] First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if ‘the right remedy is sought by the right person in the right proceedings’. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require

investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own.

[30] This excursion into the issue of locus standi arises from the fact that the applicant's purpose for participating in the proceedings of the Advisory Panel was to make submissions aimed at precluding the fourth respondent from being appointed National Director of Public Prosecutions.

[31] The chronology indicates that this objective was achieved in that the recommendation of the Advisory Panel to the President, conveyed to the President on 12 December 2025, was to the effect that none of the candidates were suitable for appointment.

[32] Flowing from this, the question arises whether the applicant has locus standi to challenge a decision which has not adversely affected its rights. The applicant contends that its objections should have been dealt with by the Advisory Panel and should have been fully considered. This amounts to a proposition that the applicant wished the fourth respondent to be denied an appointment on the grounds set out in its objection. Where the result sought to be achieved was in fact achieved, it is apparent that the applicant cannot demonstrate that the decision of the Advisory Panel has adversely affected the applicant's own interests or had the capacity to do so. The only basis on

which the applicant could assert its locus standi is that it was a participant in the proceedings before the Advisory Panel and as an objector should therefore have the right to be heard. That in principle is correct. However, the decision sought to be impugned has no adverse effect as far as the applicant is concerned. If the decision has no impact on the applicant, the applicant does not have locus standi.

[33] It follows that I am not satisfied that the applicant has locus standi to challenge the recommendation of the Advisory Panel. That should be the end of the matter. This court's review jurisdiction is therefore not engaged.

[34] It would however be remiss not to go further, on the basis that I may have erred in such a finding. As remarked in **Giant Concerts** supra, other considerations should also be dealt with. I am mindful thereof that broader considerations related to the interests of justice require consideration of the other grounds of objection to the proceedings and, in adherence to the warning sounded by the Constitutional Court supra, I will deal with the further contentions pertaining to the merits of the review.

ARE THE TWO DECISIONS LINKED?

[35] The applicant asserts a link between the two decisions that has a domino effect on the appointment of the tenth respondent as NDPP (i.e. the second decision). Its interest in the second decision arises from the illegality of the first. Where one decision is being challenged in review proceedings, and the validity of that decision is the substratum for a subsequent decision, the so-called domino effect comes into play. If the first decision is struck down for

lack of legality, the second decision falls as a result (see **Seale v Van Rooyen NO 2008 (4) SA 43 SCA**).

[36] By contrast, if the two decisions are not so linked, the applicant's interest in the second decision cannot be established.

[37] In this instance the nature of the first decision impugned needs to be considered. It is a recommendation to the President by a body that was created to assist the President in making a decision. The Advisory Panel has no status in terms of the Constitution and is not a public body that is exercising public power. The nature of its decision is merely a recommendation. Whilst it is correct that a recommendation (in the sense of a proposed decision) would fall within the ambit of a "decision" in terms of PAJA, this is not necessarily so in respect of a legality challenge.

[38] A recommendation by its nature precedes a decision. In the context of an executive action by the President, a recommendation aimed at such an executive decision, would not stand as a separate decision, as it does in PAJA, as it is merely a precursor to the executive action itself. As far as the President is concerned his decisions must be in writing. The rationality of the recommendation may very well play a role in determining the rationality of the executive action. However, as a step on the way to a decision, it does not on its own constitute a decision for purposes of a review in terms of legality. This is what distinguishes it from a review in terms of PAJA. My primary finding is that the first decision (the recommendation) is not a separate decision capable

of sustaining a legality review. Prayer two and three of the Notice of Motion must therefore fail for this reason as well.

[39] Having said the aforesaid, I am however mindful thereof that an advisory body such as the Advisory Panel in this matter may be treated under the law as having acquired the power to exercise public power due to the role it plays in the decision of the President. In principle, if there is procedural irrationality that taints the recommendation, that may taint the President's decision.

[40] In **AAA Investments (Pty)(Ltd) v Microfinance Regulatory Council** 2006(11) BCLR 1255 (CC) the Constitutional Court established the principle that a body exercising a public function in terms of national legislation acts subject to the Constitution:

“[41] Our Constitution does not do this, however, by an expanded notion of the concept of government or the executive or by relying on concepts of agency or instrumentality. It does so by a relatively broad definition of an organ of state. This definition renders the legality principle and the Bill of Rights applicable to a wider category of function than the Charter does in Canada. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation. If the Council performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, the Council or any other entity does not have to be part

of government or the government itself to be bound by the Constitution as a whole.' The way is now open to an investigation of the nature of the Council and the nature of the function it performs."

[41] I therefore err on the side of caution in nevertheless, according the recommendation of the Advisory Panel, the status of a step in the process leading to the decision of the President.

[42] There is however a factual issue that arises. There is a factual break between the first and the second decision. The argument of the applicant is that, once the Advisory Panel had made no recommendation for appointment, the President had three options. He could close the proceedings of the Advisory Panel and determine a new means of coming to a decision. Or he could extend the term of the incumbent NDPP. Or he should have called for new nominations to be screened by the Advisory panel.

[43] These are speculative means to an end. These arguments lose sight of the fact that the President had expressly stated in his press statement that the panel had concluded their proceedings. This was also stated in correspondence from the State Attorney to the applicant on 6 January 2026. The President's attempt to obtain assistance from the panel came to nought.

[44] Having appointed an advisory panel once, was he obliged to appoint another to advise on appointing the tenth respondent? The applicant thinks so. That position flows from a perceived need for consistency under the circumstances.

PROCEDURAL FAIRNESS IS NOT REQUIRED IN APPOINTING THE NDPP

[45] However, the President is empowered by the Constitution to get on with the business of governing the state without undue procedural restraints.

[46] In **Masetla v President of the Republic of South Africa** 2008 (1) SA 566(CC) Moseneke DCJ stated as follows:

“[77] It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action. The power to dismiss - being a corollary of the power to appoint - is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security. In **Premier, Mpumalanga**, this Court has had occasion to express itself on whether to impose a requirement of procedural fairness in the following terms: ‘In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government

which will inhibit its ability to implement policy effectively (a principle well recognised under our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly’.

[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement.”

[47] The applicant is confusing consistency with rationality. It is arguably unfair to appoint the tenth respondent without him being screened by an advisory panel. The President was however not constrained to again use an advisory panel to appoint the 10th respondent. Time was running out as the incumbent would vacate her position at the end of January. The fact that the President appointed a person whose fitness is not being questioned speaks of a rational decision.

[48] Appointing the 10th respondent without a public screening process is not a deviation from a publicly announced procedure to screen candidates. That process had been concluded and had failed to identify a suitable candidate. The President was acting in a procedurally rational manner in changing tack.

- [49] The applicant has therefore not established a basis for a review of the appointment of the tenth respondent.

CONCLUSION

- [50] Having considered the arguments of the applicant I conclude that:

50.1 The applicant lacks locus standi.

50.2 The first impugned decision is a recommendation only and cannot sustain a legality review as a separate decision.

50.3 The second decision is a fresh decision after a failed advisory process, based on a power to appoint, untrammelled by the requirements of fair process.

50.4 The application must therefore fail.

50.5 However, in respect of costs, the applicant was seeking to enforce constitutional rights, albeit unsuccessfully, in a constitutional matter. The **Biowatch** principle will apply. Each party will pay its own costs.

- [51] In the premises I make the following order:

1. The application is dismissed.

2. Each party to pay its own costs.



LABUSCHAGNE J

JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR APPLICANT : ADV BUTHELEZI

INSTRUCTED BY : B XULU AND PARTNERS INCORPORATED

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