CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/11
[2012] ZACC 24

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
MENZI SIMELANE	Fourth Respondent

Heard on : 8 May 2012

Decided on : 5 October 2012

JUDGMENT

YACOOB ADCJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J concurring):

Introduction

[1] This case requires a decision on whether the appointment of Mr Menzi Simelane[1] as the National Director of Public Prosecutions (National Director) of our country by the President of the Republic of South Africa[2] is within the bounds of the Constitution. The Minister for Justice and Constitutional Development[3] (Minister) and Mr Simelane appeal against a judgment and order of the Supreme Court of Appeal,[4] which concluded that the appointment of the National Director was constitutionally wanting in that the process for appointment and, consequently, the appointment itself was irrational and invalid. The High Court[5] held that, while the appointment of Mr Simelane as the National Director raised some concerns, it could not be said that the conduct of the President fell foul of the Constitution.

[2] The order of the Supreme Court of Appeal reads:

> "1. The appeal succeeds and the first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of three counsel.
> 2. The order of the court below is set aside and substituted as follows:
> '(a) It is declared that the decision of the President of the Republic of South Africa, the first respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of s 179 of the Constitution of the Republic of South Africa (the Constitution), read with ss 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint

[1] The fourth respondent.

[2] The first respondent.

[3] The second respondent.

[4] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) (SCA judgment).

[5] *Democratic Alliance v President of the Republic of South Africa and Others* [2010] ZAGPPHC 194.

> Mr Menzi Simelane, the fourth respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid.
>
> (b) The appointment is reviewed and set aside.
>
> (c) The first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellants costs, including the costs of two counsel'."

[3] The Constitution provides that an order of constitutional invalidity of any conduct of the President has no force unless it is confirmed by this Court.[6] The order of the Supreme Court of Appeal declared invalid the conduct of the President. The Democratic Alliance[7] applies for confirmation of the order of the Supreme Court of Appeal. The Minister opposes the application. The President opposed the application in the High Court and in the Supreme Court of Appeal but has decided not to participate in these proceedings.[8]

The facts broadly

[4] The facts and circumstances that form the basis upon which the Democratic Alliance contends for the unconstitutionality of the appointment of the National Director are separately set out in detail later, in relation to each argument advanced. A broad outline of the facts will suffice at this stage.

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[6] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[7] The applicant.

[8] The President initially opposed confirmation but withdrew shortly afterwards.

a. Mr Simelane, in his capacity as the Director-General of the Department for Justice and Constitutional Development (Director-General),[9] was intimately involved in a dispute concerning the proper role of the then National Director, Mr Vusi Pikoli. The dispute related to the powers and duties of the Minister for Justice and Constitutional Development and the National Director.

b. Mr Pikoli was suspended by the then President[10] on 23 September 2007.

c. Shortly after that, on 3 October 2007, Mr Mbeki appointed a commission of enquiry[11] headed by a former Speaker of Parliament, Dr Frene Ginwala (Ginwala Commission) to inquire into Mr Pikoli's fitness to hold office as the National Director.

d. Mr Simelane presented the government's submissions to, and gave evidence under oath before, the Ginwala Commission.

e. The report of the Ginwala Commission criticised with some severity the approach by Mr Simelane in making government's submissions as well as the credibility of his evidence.

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[9] A position he occupied from June 2005 to October 2009.

[10] Mr Thabo Mbeki.

[11] Section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998 (Act) provides:

> "The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."

f. The then Minister for Justice and Constitutional Development,[12] Mr Enver Surty, requested the Public Service Commission[13] to investigate Mr Simelane's conduct during the Ginwala Commission.[14]

g. The Public Service Commission, in a detailed report, recommended disciplinary proceedings against Mr Simelane arising out of his conduct and evidence before the Ginwala Commission.[15]

h. The Minister[16] rejected the recommendations of the Public Service Commission.[17]

i. The President appointed Mr Simelane as the National Director two days after the Minister rejected the Public Service Commission recommendations.

j. Mr Simelane had been appointed as the Deputy National Director of Public Prosecutions a month and a half earlier.[18]

k. This appointment took place in the wake of Mr Pikoli's dismissal[19] by the then President[20] and the settlement of a case brought by Mr Pikoli to challenge his dismissal in terms of which Mr Pikoli agreed to be relieved of his position.

[12] The predecessor of the present Minister.

[13] A constitutional institution created by section 196 of the Constitution.

[14] The request was made on 10 December 2008.

[15] The Report of the Public Service Commission is dated April 2009.

[16] Mr Jeff Radebe, who had succeeded Minister Surty as Minister for Justice and Constitutional Development.

[17] On 23 November 2009.

[18] On 6 October 2009.

[19] On 8 December 2008.

[20] Mr Kgalema Motlanthe.

l. The General Council of the Bar subsequently[21] began an investigation into Mr Simelane's fitness as an advocate arising at least out of Mr Simelane's conduct during the Ginwala Commission.

[5] The constitutional setting will be discussed in more detail later. But to understand the judgment of the Supreme Court of Appeal, it is enough to say that the appointment was made by the President as head of the National Executive in terms of the Constitution,[22] which requires national legislation to ensure that the National Director is appropriately qualified. That national legislation is the Act and provides that the National Director must be a person fit and proper for the job.[23]

The Supreme Court of Appeal

[6] The Supreme Court of Appeal considered that the President erred in four respects and that these mistakes rendered the process by which the decision to appoint Mr Simelane had been taken and, consequently, the decision itself irrational and invalid. The first was that, according to the President, he had firm views about Mr Simelane being the right person to be appointed the National Director even before he had considered whether Mr Simelane was a fit and proper person for the job. Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Mr Simelane was a fit and proper person for appointment justified the conclusion that he was indeed a fit and proper person. The correct approach,

[21] In December 2009.

[22] Section 179(1)(a).

[23] Section 9(1)(b) of the Act.

according to the Supreme Court of Appeal, was for the President to determine positively whether Mr Simelane was a fit and proper person. This the President did not do. Third, the President disregarded the criticisms of Mr Simelane made by the Ginwala Commission, on the tenuous basis that the Commission had not been appointed to investigate Mr Simelane, but Mr Pikoli. Last, the recommendations of the Public Service Commission that the Ginwala Commission's criticisms merited a disciplinary enquiry against Mr Simelane were too lightly brushed aside.[24]

[7] The Supreme Court of Appeal was of the view that the fact that the Ginwala Commission's comments were not taken into account was in itself enough to set aside the appointment as irrational.

Submissions in this Court

[8] The Minister reiterates the argument advanced in the Supreme Court of Appeal that neither the Constitution nor the Act prescribes any procedure for the appointment of the National Director. This being so, it was for the President to determine the process. This he did, so it is submitted. That process was described in the Minister's written argument as including an "*assessment and evaluation of the qualities, strengths and weakness of the person whom the President had identified for appointment.*" (Emphasis added.) The Minister stresses that the rationality requirement is not onerous, and submits that the test employed by the Supreme Court of Appeal went beyond rationality, and amounted to an unauthorised intrusion into

[24] The Supreme Court of Appeal in fact said that the President and the Minister "were too easily dismissive" of the attitude of the Public Service Commission.

presidential and executive territory. The Supreme Court of Appeal, says the Minister, applied the reasonableness standard appropriate for administrative action cases under PAJA,[25] instead of testing presidential executive action by reference to rationality alone. According to the Minister a court would, on the application of the proper test, be entitled to set aside the appointment only if it concluded that Mr Simelane was not a fit and proper person to have been appointed. Reliance is also placed on the separation of powers requiring a more deferential approach. It is contended that the President has a wide, subjective discretion in making the appointment and that it should be understood that the National Director is a political appointee who has a substantial policy-related role as distinct from other Directors of Public Prosecutions.

[9] The Minister addresses directly only one of the findings of the Supreme Court of Appeal set out earlier:[26] that the finding of the Court that the President had firm views about the appointment of Mr Simelane before he considered whether Mr Simelane should be appointed is incorrect. It is contended that the President said this after having considered the provisions of section 9(1)(b) in the process of Mr Simelane's appointment as Deputy National Director of Public Prosecutions. The

[25] In terms of section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in order to give effect to procedurally fair administrative action, the administrator must fulfil certain requirements. In terms of section 4(4)(a) an administrator may depart from the requirements if it is reasonable and justifiable to do so. In determining whether the departure is reasonable and justifiable the administrator must take into account the factors mentioned in section 4(4)(b). These factors are:

> "i) the objects of the empowering provision;
>
> ii) the nature and purpose of, and the need to take, the administrative action;
>
> iii) the likely effect of the administrative action;
>
> iv) the urgency of taking the administrative action or the urgency of the matter; and
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> v) the need to promote an efficient administration and good governance."

[26] See [6] and [7] above.

only response by the Minister to the other findings of the Supreme Court of Appeal is that the Court glossed over other indications that Mr Simelane was fit and proper of which the Minister was aware. It is also asserted that the Ginwala Commission was not a court and that the Minister was right that Mr Simelane should have had the opportunity to respond to these matters before adverse inferences were drawn against him.

[10] Mr Simelane broadly aligns himself with the Minister, clarifying however that he was not a party to the process of his appointment.

[11] The Democratic Alliance supports the reasoning and conclusion of the Supreme Court of Appeal concerning rationality. It contends in addition that the evidence showed that Mr Simelane was not a fit and proper person to be appointed National Director, which it argues is an objective jurisdictional fact antecedent to appointment, and that the President had an ulterior purpose in appointing him. The Minister and Mr Simelane take issue with these submissions too.

The issues

[12] It is common cause, and rightly so, that the decision of the President was an executive decision and that the decision had to be rational. The Democratic Alliance is of the view that it is unnecessary to decide the question whether the decision by the President constituted executive or administrative action, because even in terms of the former, rationality is a requirement under the principle of legality. The issues this

Court must traverse, after setting out the constitutional and statutory provisions that bear on the President's decision, are now defined:

a. The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.

b. The requirements of rationality concerned in particular with—

    i. the distinction between reasonableness and rationality and the relationship between means and ends;

    ii. whether the process as well as the ultimate decision must be rational;

    iii. the consequences for rationality if relevant factors are ignored; and

    iv. rationality and the separation of powers.

c. An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred.

d. If the decision is found to be rational in this sense then we must evaluate whether—

    i. the evidence shows that Mr Simelane is a fit and proper person to be appointed the National Director; and

    ii. the President had an ulterior purpose in making the appointment.

A conclusion that the appointment by the President of Mr Simelane as National Director was irrational, in the sense that the means employed to make the appointment were not rationally connected to the purpose for which the power had been conferred upon the President, would render it unnecessary to decide the issues in sub-paragraph (d) above.

The Constitution and the Act

[13] The appointment of the National Director is governed by section 179 of the Constitution and certain provisions of the Act. I set out those features that, in my view, are material to our decision:

a. The Constitution demands a single national prosecuting authority headed by a National Director of Public Prosecutions appointed by the President and Directors of Public Prosecutions appointed in terms of an Act of Parliament.[27] Section 10 of the Act requires the President to appoint the National Director according to section 179 of the Constitution.[28]

[27] Section 179(1) provides:

> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[28] Section 10 provides:

> "The President must, in accordance with section 179 of the *Constitution*, appoint the National Director."

b. Section 179 obliges national legislation to ensure that Directors of Public Prosecutions are appropriately qualified.[29] There was some suggestion, on the basis that section 179 makes a continuous distinction between National Directors and other Directors, that the Constitution does not require the National Director to be appropriately qualified. I am prepared to accept that the reference to Directors being appropriately qualified may be construed as a reference to Directors of Public Prosecutions and not the National Director. All this means is that the requirement that the National Director must be appropriately qualified is not expressly stated in section 179. This cannot mean that the Constitution does not require the National Director to be appropriately qualified. That proposition, in my view, simply has to be stated to be rejected. The Constitution by necessary implication requires the National Director to be appropriately qualified.

c. Section 9 of the Act determines these qualifications.[30] For present purposes, the only relevant prescribed qualification is that a person

[29] Section 179(3) provides:

> "National legislation must ensure that the Directors of Public Prosecutions—
>
> (a) are appropriately qualified; and
>
> (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5)."

[30] Section 9 provides:

> "(1) Any person to be appointed as *National Directo*r, *Deputy National Director* or *Director* must—
>
> (a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and
>
> (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
>
> (2) Any person to be appointed as the *National Director* must be a South African citizen."

appointed as a Director of Public Prosecutions, including the National Director, "must . . . be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned."

d. National legislation is required to ensure that the prosecuting authority, and this includes the National Director, performs its functions without fear, favour or prejudice.[31] The Act does this.[32]

e. The National Director has the power to institute criminal proceedings on behalf of the State[33] and must determine prosecution policy after consultation with the Directors of Public Prosecutions and with the concurrence of the Minister.[34] The National Director is also obliged to issue[35] and enforce[36] policy directives to be observed in the prosecution

[31] Section 179(4) provides:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[32] Section 32(1)(a) provides:

> "A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law."

[33] Section 179(2) provides:

> "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."

[34] Section 179(5)(a) provides:

> "The National Director of Public Prosecutions 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".

[35] Section 179(5)(b) provides:

> "The National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process".

[36] Section 179(5)(c) provides:

> "The National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not complied with".

process and has the power to review a decision whether to prosecute or not.[37] These powers and duties are extensive and their proper exercise and performance is crucial to the attainment of criminal justice in our country. And the attainment of an effective criminal justice system is in turn vital to our democracy.

f. The Constitution and the Act oblige the Minister to exercise final responsibility over the prosecuting authority.[38] The Act also obliges the National Director to provide certain information concerning prosecutions if the Minister requests it.[39]

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[37] Section 179(5)(d) provides:

> "The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National 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."

[38] Section 179(6) provides:

> "The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority."

Section 33(1) of the Act provides:

> "The *Minister* shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*."

[39] Section 33(2) of the Act provides:

> "To enable the *Minister* to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*—
>
> (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
>
> (b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
>
> (c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21(1)(a);

g. The President, the Minister and all other organs of state are not to interfere improperly with, hinder or obstruct the prosecuting authority.[40]

Is fitness and propriety an objective requirement?

[14] The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment. My approach is somewhat different. Questions as to whether and how the rationality requirement would apply if the criteria were merely subjective are, to my mind, complex. I therefore think it is appropriate to determine first whether the Supreme Court of Appeal was correct in concluding that the requirements represented objective jurisdictional facts.

[15] The Minister and Mr Simelane contend that the President has a wide discretion in the appointment of the National Director. It follows, so they submit, that it is for the President to make the decision – which involves a value judgment – and the

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(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21(1)(b);

(e) submit the reports contemplated in section 34 to the *Minister*; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority*."

[40] Section 32(1)(b) of the Act provides:

"Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

requirement that the person appointed "must be a fit and proper person with due regard to his experience, conscientiousness and integrity" is thus not an objective one.

[16] In developing the point, the Minister places considerable emphasis on the fact that the role of the prosecuting authority was policy driven and that the National Director was what was referred to in argument as "a political appointee". It is true that the National Director is appointed by the President. It does not follow that this renders the incumbent of that office "a political appointee". I endorse the statement in *Legal Soldier*,[41] describing the office of the National Director as a "non-political chief executive officer directly appointed by the President":

> "The most important change brought about by s 179 . . . is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various Attorneys-General, whose activities such Minister coordinated and to whom they reported. What s 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President."[42]

[17] The Minister also relied on the following statement in *Geuking*:[43]

> "The President in deciding whether to consent to the surrender of a person under s 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what

[41] *Minister of Defence v Potsane and Another*; *Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* [2001] ZACC 12; 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) (*Legal Soldier*).

[42] Id at para 19.

[43] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

> matters are appropriate or relevant for that purpose. The courts could intervene only if the President were to abuse the power vested in him or use it in a manner contrary to the provisions of the Constitution."[44] (Footnote omitted.)

[18] *Geuking* is not on point. It was concerned with a provision of the Extradition Act[45] to the effect that the President has to consent to extradition before it can validly take place. The Extradition Act lays down no criteria for the granting of the consent of the President.

[19] The present case is comparable with that part of *SARFU*[46] in which this Court held, drawing on the Appellate Division,[47] that the requirement that a matter must be one of "public concern" before the Commissions Act[48] applies to it, is an objective one:

> "In determining whether the subject-matter of the commission's investigation is indeed a 'matter of public concern', the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of 'public concern' be interpreted so as to promote the spirit, purport and objects of the

[44] Id at para 27.

[45] 67 of 1962. Section 3(2) of the Extradition Act provides:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

[46] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

[47] *Garment Workers' Union v Schoeman, NO and Others* 1949 (2) SA 455 (A) at 463.

[48] Commissions Act 8 of 1947. See Section 1(1).

> Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."[49] (Footnotes omitted.)

[20] For the reasons stated above and for the reasons that follow, I agree with the Supreme Court of Appeal that the requirement is an objective jurisdictional fact.

[21] The starting point is the Constitution itself. It requires that the National Director must be appropriately qualified and leaves it to an Act of Parliament to determine the qualification in detail. The Constitution does not, in its terms, leave the determination of appropriate qualification to the President. It obliges the Legislature to ensure that the National Director is appropriately qualified. The Legislature, in my view, had the obligation to determine qualifications that must be present before an appointment could be made.

[22] Second, and as the Supreme Court of Appeal correctly points out,[50] the Act itself does not say that the candidate for appointment as National Director should be fit and proper "in the President's view". The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as

[49] *SARFU* above n 46 at para 171.

[50] SCA judgment above n 4 at para 116.

the Supreme Court of Appeal again pointed out, the section "is couched in imperative terms. The appointee 'must' be a fit and proper person."[51]

[23] Third, it is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.

[24] Another factor that points to the criteria being objective is the statement of this Court concerning the constitutional provision that the national prosecuting authority must perform its functions without fear, favour or prejudice:

> "NT 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."[52]

A construction that renders the determination of the qualification criteria to the President's subjective opinion is not in keeping with the constitutional guarantee of

[51] Id. See also section 9(1)(b) of the Act.

[52] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 146.

prosecutorial independence. The interpretation that these requirements are objective jurisdictional facts that must exist before the appointment is made is more consistent with the constitutional guarantee.

[25] The fifth relevant consideration is that the National Director can be suspended by the President on the basis, amongst other things, that the person appointed is not a fit and proper person, and can be removed from office by the President after a commission of enquiry. The President's decision stands unless Parliament takes another view.[53] If the President is the sole determinant of fitness and propriety, then

[53] Section 12(5)-(7) of the Act provides:

> "(5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).
>
> (6)(a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
>
> (b) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.
>
> (c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.
>
> (d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.
>
> (e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.
>
> (7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the

the spectre is raised of President A appointing someone as National Director on the subjective belief that the person concerned is indeed fit and proper and President B suspending or removing that person from office in the subjective belief, equally genuine, that the incumbent is neither fit nor proper. Neither the Constitution nor the Act could have contemplated that the position of the National Director would be so vulnerable to opinion.

[26] The final reason revolves around the importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.[54]

Rationality

[27] The Minister and Mr Simelane accept that the "executive" is "constrained by the principle that [it] may exercise no power and perform no function beyond that conferred . . . by law"[55] and that the power must not be misconstrued.[56] It is also

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same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President."

[54] Section 209(2) of the Constitution.

[55] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[56] *SARFU* above n 46 at para 148. This case was concerned with the President's decision as Head of State and not as head of the National Executive but the principle remains valid. The proposition is also to be found in

accepted that the decision must be rationally related to the purpose for which the power was conferred.[57] Otherwise the exercise of the power would be arbitrary and at odds with the Constitution.[58] I agree.

[28] The four issues concerning rationality mentioned earlier[59] nevertheless require brief exploration.

Reasonableness and rationality

[29] It must be emphasised that it is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself. In the constitutional era reasonableness in the administrative law context has been authoritatively stated in *Bato Star*:[60]

> "In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then

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Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 81.

[57] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 75 and *Masetlha* above n 56.

[58] *Masetlha* id.

[59] See [12 b] above.

[60] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

> be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[61] (Footnotes omitted.)

[30] While there may be some overlap between the reasonableness and rationality evaluations, these tools are best understood as being conceptually different. As was said in *Albutt*:[62]

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[63]

[31] It was held in that case that the means employed in the process of determining whether the President should pardon people who had been convicted of certain offences, namely not to give victims or their families an opportunity to be heard, was not rationally related to the purpose of determining whether pardons should be granted.[64] On the other hand, it was held in *Poverty Alleviation*[65] that the test laid

[61] Id at para 44.

[62] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[63] Id at para 51.

[64] Id at paras 70-4.

down in *Merafong*[66] should be applied, and that the legislation aimed at transferring a part of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape was "rationally connected to a legitimate governmental end."[67] In other words, the means employed, namely the transfer of a part of Matatiele from one province to another, was rationally related to the purpose of improving conditions for the residents of that part of Matatiele on the basis that the governmental purpose could be achieved in more than one way and that it was not for the Court to decide which way was better. The decision in *Albutt* was not concerned with the evaluation of two different methods of achieving the purpose but with whether not giving the victims or their families the opportunity to be heard was rationally concerned with the governmental purpose in issue in that case.[68]

[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to

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[65] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Poverty Alleviation*) at para 66.

[66] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) (*Merafong*) at para 114:

> "What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is."

[67] Above n 65 at para 76.

[68] Compare Price "Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt"* (2010) 127 *SALJ* 580.

achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.

Decision or process?

[33] The Democratic Alliance submitted that the irrationality ground covers irrationality in process as well as on the merits. The Minister and Mr Simelane did not appear fervently to embrace this proposition but did not advance any cogent alternative submission against it. *Chonco 1*,[69] concerned with the power of the President, as Head of State, to grant pardons under the Constitution,[70] elucidated the rationality requirement in the process of granting pardons:

> "In *SARFU,* this court, affirming *Hugo,* held that the powers s 84(2) confers on the President as Head of State originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive. The powers granted by sj 84(2) are now clearly original constitutional powers. Section 84(2)(j) is the source of the power, function and obligation to decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in

[69] *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) (*Chonco 1*). This case is referred to as *Chonco 1* because of the two decisions concerning consequential cases that involved the same parties.

[70] In terms of section 84(2)(j).

> accordance with the principle of legality, diligently and without delay. That decision rests solely with the President."[71] (Footnotes omitted.)

[34] It follows that both the process by which the decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition.[72] The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard.

[35] Mr Simelane points out that this case is not concerned with pardons. He argues further that cases involving pardons are distinguishable from the present case.[73] While I agree that this case is not concerned with pardons, there is no basis for the suggestion that the proposition in *Albutt* that decisions by the President as Head of State should be rational both in process and in the final decision should not apply here. It is true that the decision by the President in this case was made as head of the National Executive. It is illogical to suggest that while decisions by the President as Head of State must be rational in process and outcome, decisions of the President as head of the National Executive should be rational only in outcome and not in so far as they relate to the process.

[71] Above n 69 at para 30.

[72] Above n 62.

[73] The Democratic Alliance relies on the case of *Albutt* above n 62, which was also concerned with pardons but the argument applies equally to the case of *Chonco 1* above n 69, which in my view is on point.

[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.

[37] This conclusion addresses the differences that emerged in argument on whether the decision needs to be rational or whether the process resulting in the decision should also have been rational for an executive decision to stand. A related question, if the process is to be rationally related to the purpose for which the power has been conferred, is whether each step in the process must be so rationally related. The parties were ultimately in agreement that, while each and every step in the process resulting in the decision need not be rationally viewed in isolation, the rationality of the steps taken have implications for whether the ultimate executive decision is rational. In my view, the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the

absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.

Rationality and ignoring relevant factors

[38] The Supreme Court of Appeal held that the President, by not taking into account the findings of the Ginwala Commission, ignored a relevant factor. This formulation takes us to the question of whether the seminal statement in *Johannesburg Stock Exchange*[74] concerning administrative action in the pre-constitutional era is at all relevant to the rationality evaluation:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735F–G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B–C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F–G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."[75]

[39] This Court in *SARFU* said that "the exercise of the President's constitutional power to appoint a commission of enquiry is not directly governed by the principle in

[74] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

[75] Id at 152A-D.

the *Johannesburg Stock Exchange* case."[76] It follows that this principle would not directly govern the President's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.

[40] I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is

[76] *SARFU* above n 46 at para 224.

inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.

Rationality and the separation of powers

[41] I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect.[77] If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large. As O'Regan J helpfully explained:

> "A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose."[78]

[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this

[77] See *Albutt* above n 62 at para 51; *Affordable Medicines* above n 57 at para 73; *Bato Star* above n 60 at para 48 and *Pharmaceutical Manufacturers* above n 57 at para 90.

[78] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 35.

Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries".[79] And the rationale for this test is "to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other."[80]

[43] And *Affordable Medicines* said:

> "The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society."[81]

This applies equally to executive decisions.

[44] 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

[79] *Pharmaceutical Manufacturers* above n 57 at para 78.

[80] *Affordable Medicines* above n 57 at para 83. See also *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 44.

[81] *Affordable Medicines* id at para 86.

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.

[45] It is now possible to consider the crux of this case to decide whether the President acted rationally in appointing Mr Simelane as the National Director and whether the President's failure to take into account the findings in relation to, and the evidence of, Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power was conferred.

Did the President act rationally?

[46] The Democratic Alliance relied mainly on the findings of the Ginwala Commission and the evidence given by Mr Simelane at that enquiry as the basis for the submission that the President did not act rationally. The conclusions of the Ginwala Commission on Mr Simelane's evidence and the evidence itself raised questions that threw so much doubt on Mr Simelane's credibility and integrity, so the argument went, that it rendered the appointment irrational.

[47] The President relied on Mr Simelane's curriculum vitae, which indicated broadly that he had been the Competition Commissioner for a period of a little more

than 5 years[82] and that he had been Director-General for a period of a little more than 4 years.[83] He also relied on his personal knowledge of Mr Simelane's personal and professional qualities, though we do not have much detail about the precise contours of this knowledge. The President also relied on the advice of the Minister to the effect that from the Minister's personal knowledge of Mr Simelane he was a fit and proper person to be appointed National Director. The Minister, who was familiar with both the Ginwala Commission and the Public Service Commission recommendations, advised the President, in effect, that there was no need for him to interrogate these documents and that he would advise that Mr Simelane be appointed, despite the recommendations made by the Ginwala Commission and the Public Service Commission. The basis on which the advice was given will be evaluated later in this judgment.

[48] The report of Mr Simelane's evidence in the Ginwala Commission and the question of whether the President was right in not taking it into account can properly be considered if we have in mind the purpose for which the power was conferred.

The purpose of the power

[49] The provisions of the Constitution and the Act must be taken together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power upon the President was to ensure that the person appointed as National Director is sufficiently conscientious and has the integrity

[82] From February 2000 to May 2005.

[83] From June 2005 to October 2009.

required to be entrusted with the responsibilities of the office. In particular, to ensure that—

a. the prosecuting authority performs its functions honestly and without fear, favour or prejudice;
b. decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;
c. prosecution policy is determined honestly and is appropriate to the needs of our country;
d. the criminal justice system in so far as it concerns prosecutions is fairly administered;
e. any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and
f. all Directors of Public Prosecutions carry out their functions honestly and fairly. [84]

It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director.

The Ginwala Commission findings

[50] In the executive summary of the Ginwala report,[85] Dr Ginwala said of Mr Simelane:

[84] See [13] above.

> "I need to draw attention to the conduct of the DG: Justice in this Enquiry. In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law. The DG: Justice was responsible for preparing Government's original submission to the Enquiry in which the allegations against Adv Pikoli's fitness to hold office were first amplified. Several of the allegations levelled against Adv Pikoli were shown to be baseless, and the DG: Justice was forced to retract several allegations against Adv Pikoli during his cross-examination."[86]

[51] In the report of the Ginwala Commission itself, Dr Ginwala said of Mr Simelane:

> "I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA.
>
> All these complaints against Adv Pikoli were spurious, and are rejected [as being] without substance, and may have been motivated by personal issues.
>
> With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects the DG: Justice's

[85] Ginwala "Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions" (November 2008), http://www.info.gov.za/view/DownloadFileAction?id=93423, accessed on 27 September 2012.

[86] Id at para 15.

> disregard and lack of appreciation and respect for the import for an Enquiry established by the President."[87]

[52] These extracts from the report of the Ginwala Commission ought to have been cause for great concern. Indeed, these comments represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's appointment to the position of National Director. Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane's appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility. The Minister did in fact study the Ginwala Commission Report to the extent that it related to Mr Simelane before advising the President. He also studied the report of the Public Service Commission[88] and representations that had been made to him by Mr Simelane's legal team in relation to that report. We must also look at Mr Simelane's evidence at the enquiry, the Public Service Commission's recommendations and, to some extent, the representations made by Mr Simelane's legal team, in order to determine whether the President acted rightly in not taking the evidence before the Commission into account.

Ginwala Commission: Mr Simelane's evidence

[53] The Democratic Alliance relies specifically on four aspects of the evidence of Mr Simelane:

[87] Id at paras 320-2.

[88] See [4 g] above.

a. Mr Simelane's failure to disclose a letter that had been drafted by him and sent by the Minister consequent upon a letter received by the Minister from the then President[89] (to Mr Pikoli) together with Mr Simelane's evidence relating to the contents of the letter he had drafted;
b. Mr Simelane's failure to disclose the former President's letter to Mr Pikoli's attorneys in response to their request for certain documents;
c. Mr Simelane's failure to disclose a legal opinion that had been obtained by him and which was adverse to his opinion concerning the relationship between the National Director and the Director-General.
d. Mr Simelane's evidence accusing Mr Pikoli of dishonesty.

The non-disclosure and content of Minister Mabandla's letter

[54] During the week immediately before Mr Pikoli's suspension, President Mbeki wrote a letter (the former President's letter) to the then Minister[90] requiring her to obtain certain information from Mr Pikoli concerning the intended arrest and prosecution of Mr J Selebi who was, at the time, the National Commissioner of the South African Police Service. The letter in relevant part reads:

> "In view of the constitutional responsibilities of the President with regard to the Office of the National Commissioner of the police service, I deem it appropriate that you obtain the necessary information from the National Director of Public Prosecution regarding the intended arrest and prosecution of the National Commissioner. This would enable me to take such informed decisions as may be necessary with regard to the National Commissioner."

[89] Mr Thabo Mbeki.

[90] Ms Bridgette Mabandla (Minister Mabandla).

It is apparent that the President's request was one for further information and did not request Minister Mabandla to give any instructions to the prosecuting authority in relation to the arrest or prosecution of Mr Selebi.

[55] It is common cause that Mr Simelane drafted Minister Mabandla's letter to Mr Pikoli consequent upon the former President's letter. The salient parts of the letter read:

> "[I]n order for me to exercise my responsibilities as required by the Constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any activity that constitutes a crime in terms of the laws of South Africa. In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account including the public interest. Therefore, I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue."

[56] There is no dispute that this letter was not disclosed to the Ginwala Commission. It is transparent that the letter, seen in isolation, can be nothing but conduct by Minister Mabandla amounting to improper interference with, as well as

hindrance and obstruction of, the National Director of Public Prosecutions in the exercise, carrying out or performance of his powers, duties and functions.[91]

[57] Mr Pikoli replied to this part of the letter in the following terms:

> "Finally your letter may be construed as an instruction to the NPA not to proceed with the arrest and preferring of charges against Mr Selebi until you have satisfied yourself that sufficient information and evidence exist to warrant such steps, and that such a prosecution would be in the public interest. I wish to point out respectfully that if indeed it were an instruction, it would be unlawful, it would place me in a position where I would have to act in breach of the oath of office I took".

[58] This reply too was not disclosed. It must be remembered that one of the issues pertinent to the Ginwala Commission was whether there had been any interference in contravention of section 32(1)(b) of the Act. It was in this context that Mr Simelane's evidence concerning the non-disclosure and content must be understood.

[59] Two aspects of the evidence are relevant here:

a. His evidence surrounding the non-disclosure of the document is absorbing indeed:

> "Adv Trengove: Did you know about the minister's letter of 18th September 2007 instructing Mr Pikoli not [to] proceed with the arrest and prosecution until she was satisfied that it was in the public interest? Did you know about that?
>
> Adv Simelane: Yes.

[91] In contravention of section 32(1)(b) of the Act, quoted above n 40.

Adv Trengove: And did you know that the letter and instruction was given on the 18th of September . . . did you know that?

Adv Simelane: Yes.

Adv Trengove: And did you know that Mr Pikoli refused to comply with that instruction?

Adv Simelane: Yes I remember his response, yes I think I read it once.

Adv Trengove: And do you know that he contended that if indeed it was such an instruction, that it would be unconstitutional?

Adv Simelane: Yes I recall that from his response.

Adv Trengove: Why didn't you disclose these events in the government's papers?

Adv Simelane: Because these are the details that wasn't necessary to disclose, because what was taken into account was not the reason why Mr Pikoli was insistent on proceeding in the manner that he had intended to proceed. What was at issue was the manner in which he proposed to do it, having regard to the representations that had been made earlier that Rev Chikane also spoke to and what implications for national security would be there if it was pursued in the manner that he had intended at that time.

Adv Trengove: Are you suggesting that these events were not relevant to the suspension of Mr Pikoli?

Adv Simelane: No.

Adv Trengove: No what?

Adv Simelane: I am not suggesting that these events were irrelevant for the suspension of Pikoli.

Adv Trengove: Sorry you have a double negative in there which makes your answer ambiguous. Are you saying that these events were irrelevant or they were relevant?

Adv Simelane: I am not saying they were irrelevant.

Adv Trengove: You are not saying they were irrelevant. Do you concede they were relevant to his suspension?

Adv Simelane: They were considered and they were part of it, so they would be relevant.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: They were relevant and they were considered in that context.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: I am not sure whether it makes a difference if they were highly, or very highly or very very highly.

Adv Trengove: Which adjective would you use?

Adv Simelane: They were important.

Adv Trengove: Important, but not disclosed.

. . .

Adv Trengove: I want to suggest to you that an honest preparation of the government's papers would have disclosed the letter and Mr Pikoli's refusal to obey the unlawful instruction a mere four days before his suspension.

Adv Simelane: I disagree and I object to the suggestion that the preparation of government's submission may have been dishonest or was dishonest. It was honest in its preparation and we, in its preparation we did not leave out that which we believed needed to be put there. This was part of the context

in which that submission was prepared. So there is nothing dishonest that went into that preparation. That would be my submission."

b. The evidence concerning content, too, is interesting:

"Adv Trengove: Important but not disclosed.

Adv Simelane: Because they constituted part of the detail of what was, or were the main reasons. And one of which linked to that was the issue of national security.

Adv Trengove: They weren't part of the detail. They were an unconstitutional and unlawful attempt to interfere with the performance by Mr Pikoli of his constitutional duty.

Adv Simelane: Those are your instructions, I disagree.

Adv Trengove: I beg your pardon.

Adv Simelane: I am saying those are your instructions, I disagree.

Adv Trengove: I see. Why do you disagree? Was it a lawful instruction given by the minister?

Adv Simelane: The instruction, if you say that was an instruction, to me it was not saying Mr Pikoli cannot carry out what he wanted to do. So I don't read, I don't recall the letter like that.

Adv Trengove: Well let me read you the critical sentence . . . :

'I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against National Commissioner of Police Service, you shall not pursue the route have taken steps to pursue.'

Is that not an instruction to stop the proposed arrest and prosecution of Mr Selebi?

Adv Simelane: No I don't read it like that because I read it in the context . . . (intervenes)

Adv Trengove: You don't like it?

Adv Simelane: No I said I don't read it like that.

Adv Trengove: I see.

Adv Simelane: Yes.

Adv Trengove: How did you read it, as a request?

Adv Simelane: Well, I read it contextually, contextually in that it's a letter that asked for a report first so that the minister could then advise the president in exercise of her responsibilities over this institution and therefore she was then saying until Mr Pikoli then gives that report which she had requested, he shouldn't pursue that route that he intended to take.

Adv Trengove: Whatever her justification for it, it was an instruction not to go ahead, correct?

Adv Simelane: Until he gave that report yes.

Adv Trengove: No, not until he gave that report, until she was satisfied there was enough evidence . . . (intervenes)

Adv Simelane: Because she would be satisfied when she receives a report with the necessary information from Mr Pikoli, that's what she asked for.

Adv Trengove: No, no, she demanded the information, but said: You stop your intended arrest and prosecution until I am satisfied that there is enough

> evidence for you to go ahead. That is an arrogation of a constitutional function that belongs to Mr Pikoli, correct?
>
> Adv Simelane: No I don't read it to say that he, Mr Pikoli couldn't carry through what he wanted to do. I don't read it the way you are reading it.
>
> Adv Trengove: Why did you not disclose this letter to this commission?
>
> Adv Simelane: Because this letter together with the point on which you have questioned me I have said were part of the issue of national security that had to be considered."

[60] I have already said that Minister Mabandla's letter appears to constitute a contravention of the Act as an improper interference with the prosecuting authority. Mr Simelane's attempt to explain its content and justify his own draft is revealing.

[61] If he did understand what he drafted he should have known that, at the very least, the letter was capable of the construction that it constituted improper interference and if he did not begin to see this possibility the question whether he would resist interference by others requires some explanation and answer. It is probable that he did indeed understand what he drafted.

[62] Mr Simelane, having conceded that the letter was both relevant and important, found himself driven to irrelevancies in the attempt to explain the failure to disclose it. These extracts reflect on Mr Simelane's credibility and conscientiousness. They are material. Any decision by any person aware of this evidence to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the

face of it and in the absence of any explanation from that person, irrational. In other words, not taking the evidence into account was not, on the face of it, rationally related to the purpose of appointing a National Director, sufficiently conscientious and credible to resist interference with his office.

[63] Almost all this evidence was also in the Public Service Commission Report. The Minister says he evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. In fact, he considered it carefully and came to the conclusion that no disciplinary enquiry should be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it.

Failure to disclose the then President's letter

[64] About a month after Mr Pikoli's suspension[92] his attorney wrote a letter to Mr Simelane, Minister Mabandla and to the Presidency requesting certain information. The letter, to the extent relevant, reads:

> "One of the issues in the inquiry is whether the President or anybody in the Presidency, the Minister of Justice or anybody in her Ministry or you or anybody in your Department interfered with the NPA's investigation and prosecution of the National Commissioner of Police Mr Selebi. Adv Pikoli informs us that there was such interference in the immediate run up to his suspension on 23 September 2007. . . . May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi which you or your Department may have sent to or received from the President or anybody in the Presidency at any time since 15 September, the Minister of Justice or anybody in her Ministry at any time since 15 September . . ."

[92] On 22 October 2007.

[65] The former President's letter of 17 September 2007 was not disclosed. We would do well to examine Mr Simelane's evidence under cross-examination:

"Adv Trengove: . . . if I may just pick it up in the opening sentence in paragraph 3:

> 'May we please have copies of all communications and documents relating to the investigation and prosecution of Mr Selebi which you or your office sent to or received from the president or anybody in The Presidency at any time since 15 September 2007.'

Do you see that?

Adv Simelane: Yes.

Adv Trengove: That squarely covered the president's letter to the minister of 17 September 2007, correct?

Adv Simelane: Yes if you mention that letter yes.

Adv Trengove: Now let's go then to your response to that letter . . . ?

Adv Simelane: Yes.

Adv Trengove: It's your response, it's dated the 1st November and it is addressed to Mr Moosajee of Deneys Reitz. . . .

. . .

Adv Trengove: . . . Then you go on in the next paragraph:

> 'We are not in possession of any documents relating to the investigation of the National Commissioner of Police, save for

> reports prepared by your client. Our information is that the investigation against the national commissioner is ongoing.'

Was that statement true?

Adv Simelane: My understanding is that the investigation was ongoing.

Adv Trengove: Why do you ignore the critical part of this statement? You denied that you were in possession . . . of any of the documents requested of you, correct?

Adv Simelane: Well save for the reports that were submitted yes.

Adv Trengove: Yes. Why did you not disclose the president's letter to the minister which was specifically sought?

Adv Simelane: Well I wasn't informed about the letter, I became aware of the letter much later.

. . .

Adv Trengove: I still don't have it. I understand that you say you haven't seen the president's letter. Is my understanding also correct that you say you had heard about that letter however?

Adv Simelane: Yes because the minister, yes had received the letter.

Adv Trengove: Now then why didn't you disclose it?

Adv Simelane: Well the way we, the way I read the request and understood the request, it was for any information that related to this investigation. I didn't read the president's letter to be one of those that they requested.

Adv Trengove: I see. So you thought about the president's letter but concluded that it wasn't covered by the request?

Adv Simelane: No, I mean I was aware of it as I said, I heard that it was there.

Adv Trengove: Yes.

Adv Simelane: But I focused on the previous correspondence and the reports that were sent. Hence I drafted the letter in this way, because I read the request from the attorneys to be requiring that only.

Adv Trengove: Are you saying that you thought the president's letter fell outside the request?

Adv Simelane: Yes I didn't read it to fall within this particular request.

Adv Trengove: Well, why don't you go back to the request of the minister . . .

> 'May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi, which you or your office sent to or received from the president.'

How can there be any ambiguity about its meaning?

Adv Simelane: I think we read this narrowly. I didn't read it to include this.

Adv Trengove: No, no you can't read it honestly and believe that the president's letter falls outside of it.

Adv Simelane: No I didn't read it to include.

Adv Trengove: I beg your pardon?

Adv Simelane: I didn't read it to, I didn't understand it to fall into this.

Adv Trengove: How did you understand it so as to exclude the letter from the president?

Adv Simelane: No I didn't read the request to be including in its ambit a letter of that type from the president, that's why I would not have . . . (intervenes)

Adv Trengove: But the request is very simple, it says to the minister: Minister, did you receive any communication from the president concerning the Selebi investigation at any time after 15 September. Now how can there be any doubt about the fact that the president's letter fell squarely within the terms of that request?

Adv Simelane: Look I didn't read it to be requiring a letter like that. So if you are saying in your view it should have been included, I can understand that interpretation.

Adv Trengove: My view is irrelevant, but we are going to submit to this inquiry that the concealment of that letter could only have been dishonest. Do you have any response to it?

Adv Simelane: No I don't think so, because we have sought to explain to this inquiry why it was felt that that letter need not be disclosed.

. . .

Adv Trengove: No, this has got nothing to do with permission, this has got to do with honesty and dishonesty. You said: We have no such a document in our possession. And I want to know who decided to tell that lie, you or the minister?

Adv Simelane: We didn't, I don't think it is a lie, because . . . (intervenes).

. . .

Adv Simelane: I think as I said I was aware that the minister had received a letter from the president, because she mentioned it. So I was aware of the letter but I hadn't seen the letter.

Adv Trengove: Won't you just answer my question though?

Adv Simelane: I don't understand, that the letter was privileged. We had always had that view that the letter was privileged.

> Adv Trengove: And is that why you denied that you had it?
>
> Adv Simelane: No we didn't, we didn't deny that the letter was there, we didn't make reference to it in our response, as I said because I didn't understand the request to be inclusive of that particular letter.
>
> Adv Trengove: You see because I want to suggest to you that if privilege was your issue or excuse, then the honest response would have been: Yes we have correspondence from The Presidency, but we refuse to give it to you because it is privileged. That would have been the honest response. It is not honest to say we don't have anything of the kind. Do you understand that?
>
> Adv Simelane: Yes I think we could have, if I had instructions to make reference to the letter and it was given to me, I would have then made reference to it."

[66] After some cross-examination, Mr Simelane conceded without qualification that the request by Mr Pikoli's lawyers squarely covered the letter of the then-President to Minister Mabandla. But then the trouble began. According to the record, Mr Simelane tried to evade the question whether the statement that the Presidency, the then Minister and Mr Simelane himself were "not in possession of any documents relating to the investigation of the National Commissioner of Police" was true. He then said that the statement was true. When pertinently asked why the letter had not been disclosed he said variously that the letter had not been disclosed because he became aware of the letter much later, that he was aware of the letter but thought it was not covered by the request, that he had known about the letter but had focused on the previous correspondence and reports that had been sent, that he considered the letter to be a privileged document, that he had no instructions to make reference to the letter (presumably from Minister Mabandla) and, most importantly, that he did not

"read" the President's letter to be one of those that had been requested. The last reason necessarily implies that he in fact read the former President's letter.

[67] All these statements cannot be true. If he read the letter, he must have known about it and if he knew about it he could not say he got to know about it much later. If he did not know about the letter, he could not have read it, could not have thought that it was privileged, could not have focused on something else and could not have been waiting for instructions.[93] It is inconceivable that the former President's letter was not in his possession when he drafted the follow up letter to Mr Pikoli, on behalf of himself, Minister Mabandla and the Presidency, presumably on instruction from Minister Mabandla.

[68] We must remember that Mr Simelane wrote this letter to the attorney saying that there was no relevant document in his possession more than a month after he had drafted the letter that had been sent to Mr Pikoli consequent upon the former President's letter.[94] Either Mr Simelane drafted the response on behalf of Minister Mabandla without reading the former President's letter or he had it in his possession and read it. If he did not have the letter when he wrote the reply, this raises serious questions about his conscientiousness. If he did indeed have the letter, sharp questions about his dishonesty rear their heads.

[93] At [64] and [65] above.

[94] The letter to Mr Pikoli consequent upon the receipt by Minister Mabandla of the former President's letter was drafted on behalf of Minister Mabandla and was dated 18 September 2007 while the letter by Mr Simelane to Mr Pikoli's attorneys was dated 1 November 2007.

[69] On the face of it, the contradictions reflect on Mr Simelane's credibility, integrity and conscientiousness. They were and remain material. Any decision, by any person aware of this evidence, to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the face of it and in the absence of any explanation from that person, not rationally related to the purpose for which the power was conferred.

[70] All but an irrelevant three and a half lines of this evidence was in the Public Service Commission Report. The Minister evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. Indeed he studied it carefully and decided that the disciplinary enquiry recommended by the Public Service Commission should not be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it. Absent any sound explanation, a decision to ignore this evidence or the failure to take it into account would be irrational in the sense of not being rationally connected to the purpose for which the power was conferred.

Failure to disclose legal opinion

[71] It is common cause that Mr Simelane obtained a legal opinion that was to some extent adverse to his view on the relative roles of the National Director and the Director-General. His evidence on this score and his disclosure only during cross-examination of the fact that he had secured that legal opinion is illuminating:

"Adv Trengove: I want to turn to a different topic and that is the difference of opinion that existed between yourself and Mr Pikoli about your role in the NPA. You are acquainted with that topic, is that correct?

Adv Simelane: Yes.

Adv Trengove: And you are aware of the fact that part of the complaint against Mr Pikoli is based on your evidence to the effect that he did not permit you to play the role in the NPA that you believed you were entitled and obliged to do.

Adv Simelane: Yes.

Adv Trengove: Correct. There was a difference of opinion between yourself and Mr Pikoli. Mr Pikoli's opinion was that he alone had the final say in the management of the NPA. Is that correct? I am not sure that your microphone is switched on, could you perhaps check?

Adv Simelane: Yes that was his opinion.

Adv Trengove: And in fact he insisted that the constitutional independence of the prosecuting service required that to be so, correct?

Adv Simelane: Yes in respect of prosecutorial decisions, yes that's what he said.

. . .

Adv Trengove: That was your opinion that you are the accounting officer and in that capacity that you have all the powers and duties of the PFMA, Public Finance Management Act, Sections 38 to 43 confer on an accounting officer, is that correct?

Adv Simelane: Yes that's my argument.

. . .

Adv Trengove: You say in paragraph 13 [in your supplementary affidavit] that part 2 of the PFMA, comprising Sections 38 to 43, deals with the responsibilities of accounting officers. Am I correct in my understanding that your contention in other words is that your responsibilities were those spelt out in Sections 38 to 43?

Adv Simelane: Yes of the accounting officer, yes.

Adv Trengove: And you go on:

> 'One such responsibility is to ensure the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.'

Correct?

Adv Simelane: Yes.

. . .

Adv Trengove: Have you taken legal advice on the issue?

Adv Simelane: It's pretty straightforward, it doesn't need legal advice in my view.

Adv Trengove: Won't you answer the question. Have you taken legal advice on the question?

Adv Simelane: No."

And then a few minutes later after discussion of another topic:

"Adv Trengove: You said you took no legal advice on this issue, correct.

Adv Simelane: No, I don't remember really getting counsel opinion on it. No in fact, yes I think you are quite right, we actually did, we got the opinion of Adv Maleka, yes now I recall and Adv Khoza, yes we did.

Adv Trengove: Mr Simelane, you said you took no advice. You repeated that same answer and then when you saw me turning up a document you changed your mind.

Adv Simelane: No you are quite wrong. What I was trying to recall was what the opinion was and it actually covered quite a lot of issues, more than this one specific issue. So I am correcting myself that we did actually get an opinion on a whole range of issues about the role of the NDPP. If I recall that was our opinion yes.

. . .

Adv Trengove: Yes. You were intimately involved in the preparations of the papers.

Adv Simelane: Absolutely.

Adv Trengove: And in those papers one of the grounds, one of the accusations against Mr Pikoli is precisely this difference of opinion between you and him, correct?

Adv Simelane: Yes.

Adv Trengove: And yet you don't tell the commission that you have taken legal advice on the question.

Adv Simelane: Sorry can you repeat that, I didn't hear it nicely.

Adv Trengove: You don't disclose to the commission that you had taken legal advice on the question.

Adv Simelane: No I didn't think there was a need to disclose that I took legal advice on the particular issue."

[72] The Minister tries to justify this about-face by saying that Mr Simelane is entitled, when he remembers something, to change his mind and say that he has done so. This attempt is, in my view, in vain.

[73] One of the important purposes of the Ginwala Commission was precisely to investigate this difference of view and to express a view on it. Mr Simelane must have deliberately taken the decision to obtain the legal opinion. He could in all probability not have forgotten about it. Absent any explanation, his failure to disclose a legal opinion adverse to his (and I may say adverse to the case he was making before the Commission) was seemingly aimed at misleading the Commission. His denial that he had obtained that legal opinion would, absent any explanation, be dishonest. What is more, when asked why the opinion had not been disclosed to the Commission, Mr Simelane did not say that he had forgotten to include it but rather that he did not think there was a need to disclose that he took advice on the issue. How does this statement square with conscientiousness? Important questions remain unanswered once again.

[74] This evidence too, reflected in the Report of the Public Service Commission, must have been known to the Minister and was ignored. The decision to ignore and the advice to the President to ignore relevant indications of dishonesty that could detract from the credibility, integrity and conscientiousness of Mr Simelane would, in the circumstances, be irrational unless there were a proper reason for ignoring it.

Improper accusation of dishonesty

[75] Mr Simelane did not accuse Mr Pikoli of dishonesty in any papers before the Commission until he was cross-examined. He then tried to improve his case by falsely accusing Mr Pikoli of dishonesty:

"Adv Trengove: Now that was the difference between you and Mr Pikoli. He insisted that he was the head and had the final say. You insisted that in your capacity as accounting officer there are certain matters in which you had the final say, correct?

Adv Simelane: Yes.

Adv Trengove: Now in fairness to you and in fairness to Mr Pikoli, could you please turn to the comment that you make, on page 3, at the foot of the page, where you say in the very last line on page 3 in paragraph 8 you say the following, you are speaking about this difference between yourself and Mr Pikoli and you say:

> 'However, having said that I wish to state that there was no acrimony between Pikoli and I as the differences between us were purely professional.'

Is that correct?

Adv Simelane: Yes that's correct.

Adv Trengove: So Mr Simelane as I understand you on this score you do not accuse Mr Pikoli of anything worse than that he held a view which differed from yours, correct?

Adv Simelane: Yes and the consequences that flow from that view.

Adv Trengove: Oh yes, but you accept that he genuinely held a different view from yours, correct?

Adv Simelane: Yes he held a different view.

Adv Trengove: And accepting that you differed from him on the law, given his perception of the law he acted entirely as he thought the law required him to do, correct?

Adv Simelane: I think with respect to the responsibilities of the accounting officer I was of the view and still am of the view that Mr Pikoli actually has a much better

understanding and shares the same understanding that I share on the responsibilities of the accounting officer.

Adv Trengove: I see, so what you are really saying is that he was dishonest?

Adv Simelane: Well what I am saying is that he knows the correct position and in my discussions with him he, in fact he has even indicated on no less than two occasions that I am the accounting officer and therefore I should deal with . . . (intervenes)

Adv Trengove: Are you saying that he was dishonest? That he said he knew one thing, but said another, is that what you are saying?

Adv Simelane: Well if you call that dishonesty then so be it, but he definitely on no less than two occasions made it clear to me that you are the accounting officer, you deal with the issues.

Adv Trengove: Are you suggesting that while he insisted to have the final say in the management of the NPA, he actually knew that you had the final say as accounting officer?

Adv Simelane: On the issues of accounting officer, yes he definitely knew, he was in that position.

Adv Trengove: Now that's a very serious accusation because that's an accusation of dishonesty, correct?

Adv Simelane: If that's what you call it, but I can't tell you . . . (intervenes)

Adv Trengove: No, no not what I call it. You do know what the difference is between honesty and dishonesty, don't you Mr Simelane?

Adv Simelane: Yes I think I know the difference.

Adv Trengove: And the evidence of what you are now giving, the implication of what you are now saying is that Mr Pikoli was dishonest on this score.

Adv Simelane: Well the point is that he deliberately argued that he is not, that the accounting officer is not responsible for the part 2 of the PFMA that you have just cited, if his evidence would be that those are not the responsibilities of the accounting officer, I disagreed with him there and I disagree with him today.

Adv Trengove: I am not asking you what the position would be if he said that or if he said this. I am asking you whether you are saying that Mr Pikoli was dishonest on this score. You were there, I wasn't. Was he dishonest or was it a purely professional difference of opinion on the law?

Adv Simelane: It was a different view and it is a dishonest view in my opinion for Mr Pikoli to argue that he does not know and he doesn't agree that the accounting officer has those responsibilities in part 2 that you cited.

Adv Trengove: It was dishonest for him to argue that you say?

Adv Simelane: Yes.

Adv Trengove: I see. Now that's a very serious accusation to make against the NDPP, correct?

Adv Simelane: Oh yes, it's a serious accusation.

Adv Trengove: Yes. Why did you never in any of your affidavits say anything of the kind?

Adv Simelane: Say what? I think I stated it in the affidavits clearly that we differed on that particular point.

Adv Moroka: Chair, if Mr Trengove would refrain from interrupting the witness. He is entitled to finish his answer.

Adv Trengove: Mr Simelane, you never in any of your affidavits suggested that Mr Pikoli was dishonest on this score, correct?

Adv Simelane: I never used the word dishonest in the affidavits.

Adv Trengove: By whatever name you did not accuse him of dishonesty, duplicity, or whatever you might call it, correct?

Adv Simelane: No I didn't accuse him of dishonesty in the affidavit.

Adv Trengove: The only thing you said in your affidavit was:

> 'I wish to state that there was no acrimony between Pikoli and I and the difference between us was purely professional.'

That means an honest difference of opinion between two professional people, correct?

Adv Simelane: A difference of opinion and a professional one, yes.

Adv Trengove: I want to suggest to you Mr Simelane your current evidence that Mr Pikoli dishonestly pretended to hold one view when in fact he knew better, is a fabrication in the witness box this morning, because otherwise you would have raised it in the affidavits.

Adv Simelane: I disagree."

[76] Again this evidence raises questions that require urgent answers about Mr Simelane's integrity and conscientiousness. Unless there is a proper explanation for the contradiction in his overall testimony about whether there was a genuine difference of opinion between him and Mr Pikoli or whether Mr Pikoli was being dishonest in holding his opinion, there is cause for grave concern. Absent the resolution of this issue, the evidence could not be ignored without affecting the rationality of the decision.

[77] This evidence was not contained in the report of the Public Service Commission and the Minister may not in fact have seen it. But having known of the evidence that Mr Simelane gave that is referred to in the report of the Public Service Commission, the Minister ought to have seen to it that Mr Simelane's evidence was subjected to closer examination. The decision not to do so in the light of the Report of the Public Service Commission is irrational. If the evidence had been subjected to closer scrutiny this aspect of the matter would undoubtedly have been discovered. Once this had happened, any decision not to investigate the matter further in the process of making the appointment would not have been rationally linked to the purpose for which the power to appoint had been conferred.

Summary of consequences of the Ginwala Commission criticisms and evidence

[78] In my view all the criticisms of the evidence and approach of Mr Simelane by the Ginwala Commission have, on the face of it, a sufficient basis in the evidence before it. So are all the criticisms expressed of Mr Simelane in the Report of the Public Service Commission. The President, on the advice of the Minister, decided to ignore the submissions in the Public Service Commission Report too. These were not to be taken into account. The reasons why he did so are important.

[79] We must now evaluate the reasons why the Minister decided to ignore the criticisms by the Ginwala Commission, the evidence before the Ginwala Commission as well as the recommendations of the Public Service Commission and to advise the President to ignore these matters in the process of making the appointment.

The Minister's reasons

[80] The first reason given is that the Public Service Commission had not given Mr Simelane an opportunity to be heard. Mr Simelane had been heard in the Ginwala Commission and had been given every opportunity to defend his position. If the Minister had decided to commence a disciplinary enquiry against Mr Simelane, he would have been given a hearing there once again. In any event, it was not the Public Service Commission that had the power to institute disciplinary proceedings against Mr Simelane. That decision had been made after Mr Simelane had been heard. The fact that Mr Simelane had not been given a hearing before the Public Service Commission had made its recommendations to the Minister is no reason for not instituting disciplinary proceedings particularly because Mr Simelane had been heard by the Minister.

[81] The second reason given was that he agreed with the submissions made to him by Mr Simelane's lawyers consequent upon the recommendations of the Public Service Commission. These submissions were aimed at and succeeded in persuading the Minister not to institute disciplinary proceedings against Mr Simelane. They were technical and legalistic in nature. They were intent upon establishing that Mr Simelane's conduct was not hit by the relevant legislation. Nowhere in these submissions to the Minister is it said, nor could it have been credibly said, that Mr Simelane's integrity and honesty had been left untouched and that he had come out of the process morally unscathed. Indeed, Mr Simelane's lawyers submitted that if

their submissions on whether Mr Simelane's conduct fell within conduct prohibited by law, he should be counselled and that disciplinary proceedings should nevertheless not be instituted against him. This was an admission by Mr Simelane's legal representatives that his conduct before the Ginwala Commission was less than desirable. It seems that the Minister ignored submissions by Mr Simelane's legal representatives conceding that his credibility was not wholly intact after evidence at the Ginwala Commission had been given. This too could not have been rationally related to the purpose for which the power had been given.

[82] Thirdly, having decided not to accept the recommendations of the Public Service Commission, and in effect not to give Mr Simelane an opportunity to explain, the Minister reasons that it was not right for Mr Simelane's conduct at the Ginwala Commission to be held against him because Mr Simelane had not been given an opportunity to respond to the Public Service Commission and because the allegations had not been proved absent an enquiry. Quite apart from the fact that it was the Minister's decision that resulted in the fact that Mr Simelane had not been able to defend himself in an enquiry, the Minister's statement is a concession that if the allegations against Mr Simelane continued to stand after being tested, they would be of a kind that would reflect badly on him. And the Minister is right in this.

[83] The fourth basis on which the findings and evidence were not taken into account is that the Commission was not investigating Mr Simelane but Mr Pikoli. This reason is also unacceptable because it implies that dishonesty on the part of a

senior state official before a commission of enquiry, where the enquiry is not directly about the person concerned, can be disregarded.

[84] The last reason given is that the Ginwala Commission is not a court. This is an irrelevant consideration. It does not matter for the purposes of evaluation of credibility whether a person is dishonest and devious to a court, to a commission of enquiry, to an employer or to anyone else for that matter. Dishonesty is dishonesty wherever it occurs. And it is much worse when the person who had been dishonest is a senior government employee who gave evidence under oath. Although not a court, the Ginwala Commission was about as important a non-judicial fact-finding forum as can be imagined.

[85] The reasons given by the Minister for ignoring these indications of dishonesty, albeit prima facie, in the evidence of Mr Simelane before the Ginwala Commission, the evaluation of his evidence by that Commission, and the recommendations of the Public Service Commission did not in all circumstances hold any water. Indeed, they do not disturb my original conclusion that the failure to take these indications into account were not rationally related to the purpose for which the power to appoint a fit and proper person as a National Director were given.

Conclusion

[86] The difficulties concerning Mr Simelane's evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to

Mr Simelane's credibility, honesty, integrity and conscientiousness. The Minister's advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.

[87] And the President decided to heed that advice. The President knew that there had been a commission of enquiry but he accepted the Minister's reasoning that the Commission's findings should be disregarded because the enquiry had not been appointed to investigate Mr Simelane. Though the President said that he accepted the findings of the Commission, this acceptance appears to have been qualified by his reliance on the circumstance that the Commission had not been appointed to investigate Mr Simelane. The President appears to be saying therefore that he accepted the findings of the Commission only to the extent that they related to Mr Pikoli.

[88] The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr Simelane's honesty and conscientiousness. This he should have done despite his knowledge of Mr Simelane as a person. There is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given.

[89] The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside.

[90] This is not to say that Mr Simelane cannot validly be appointed National Director. He may have an explanation and may well be able to persuade the President that he is a fit and proper person and should be appointed.

[91] Given this finding, it is unnecessary for this Court to determine whether Mr Simelane is in fact a fit and proper person to be appointed as the National Director or whether the President had an ulterior purpose in making the appointment. There is no finding in relation to these issues.

Remedy

[92] There is no merit in the contention by the Minister that Mr Simelane should stay in office and the matter should be referred back to the President for reconsideration. Mr Simelane is suspended and an Acting National Director has been appointed. There is accordingly no reason for our decision to have prospective effect alone.

[93] However, in these circumstances, we should make an order that the invalidity of Mr Simelane's appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid.[95]

Costs

[94] There is no reason why costs should not follow the result. The second respondent, the Minister, who opposed confirmation of the Supreme Court of Appeal order, must pay the costs. The Democratic Alliance had four counsel. In my view, the costs of two counsel in this Court are appropriate.[96]

[95] *Order*

The following order is made:

1. The appeal is dismissed.
2. The second respondent must pay the applicant's costs in this Court, including the costs of two counsel.

[95] It is not clear from the papers whether the processes followed were those appropriate to the performance of functions by the President as Head of State or as the head of the national executive. Section 179(1)(a) requires the President to appoint the National Director in his capacity as "head of the national executive". Section 84(2)(e) applies to appointments the President makes, in the words of the section, "other than as head of the national executive". There is a difference between the two provisions. See *Chonco 1* above n 69 at paras 28-40.

[96] No appropriate basis has been advanced not to interfere with the unusual costs order granted by the Supreme Court of Appeal, which included the costs of three counsel.

3. The declaration of invalidity by the Supreme Court of Appeal of the decision of the President of the Republic of South Africa, the First Respondent, taken on 25 November 2009, purportedly in terms of section 179 of the Constitution, read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions is confirmed.
4. Decisions taken and acts performed by Mr Menzi Simelane in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.

ZONDO AJ:

[96] Subject to what follows below, I agree with the order and reasoning of the main judgment.

[97] In paragraph 81 of the main judgment it is implied that there was no need for, or, no obligation on, the Public Service Commission (PSC) to afford Mr Simelane an opportunity to be heard either prior to or after it had concluded its investigation into Mr Simelane's conduct and made its recommendation that the Minister for Justice and Constitutional Development (Minister) take disciplinary action against Mr Simelane.

The main judgment makes this point in response to the Minister's view that the PSC should have given Mr Simelane an opportunity to be heard but the PSC refused to do so. The Minister criticised the PSC's failure or refusal to give Mr Simelane an opportunity to be heard as a breach of the *audi alteram partem* rule which is entrenched in our law. He said it violated Mr Simelane's right to be heard. The main judgment implies that this is not so.

[98] I am unable to say that a statutory body such as the PSC[97] is not obliged to give a person whose conduct it is asked to investigate (and in regard to which it must make recommendations) an opportunity to be heard before it can conclude its investigations or, at any rate, before it makes its recommendations to an authority that has to make a decision such as the decision the PSC recommended in this case. Experience shows that, generally speaking, statutory bodies such as the PSC usually give affected persons an opportunity to be heard before they conclude their investigations and make recommendations.[98] The main judgment says that Mr Simelane had already been heard in the enquiry into the conduct of Mr Pikoli under the National Prosecuting Authority Act[99] (Ginwala Inquiry) and he was going to be heard once again in the disciplinary inquiry.

[97] The PSC is established in terms of section 196(1) of the Constitution which provides that "[t]here is a single Public Service Commission for the Republic." In terms of section 196(4)(f) the PSC has the power to, of its own accord or on receipt of a complaint, investigate, evaluate and monitor the public service sector particularly in relation to its personnel. The Public Service Commission Act 46 of 1997 provides further for the powers, functions and operation of the PSC.

[98] For example, commissions of inquiry as contemplated in the Commissions Act 8 of 1947.

[99] 32 of 1998. See section 12(6)(a).

[99] In my view the main judgment fails to appreciate that, if Mr Simelane was entitled to a hearing, the PSC should have heard him not only on whether there were grounds to believe that he had prima facie done wrong but also on what steps, if any, the PSC had to recommend be taken by the Minister. The Ginwala Inquiry had nothing to do with hearing Mr Simelane on what steps, if any, the Minister should take concerning his conduct. Accordingly, it would be incorrect to suggest that the Ginwala Commission provided Mr Simelane with the kind of opportunity to be heard to which the Minister was referring.[100]

[100] The main judgment also says that Mr Simelane was going to be heard once again in the disciplinary enquiry. This was if the PSC's recommendation was accepted and implemented. I also do not think that this answers the criticism of the PSC on the *audi alteram partem* point. The opportunity to be heard that Mr Simelane was going to be afforded in the disciplinary inquiry, if one was established, would have focused on whether or not he was guilty of the allegations of misconduct that would have been brought against him and on what the appropriate sanction would be if he was found guilty. That focus is rather different from the focus of the opportunity to be heard to which he may have been entitled to be given by the PSC. As I have said, the focus of the latter opportunity would in part have been on what steps the PSC should recommend be taken by the Minister against Mr Simelane if, prima facie, there were grounds for some steps to be taken against him.

[100] An example of a case where the opportunity to be heard that was given to workers did not cover the critical issue on which they should have been heard is *Zondi and Others v Administrator, Natal, and Others* 1991 (3) SA 583 (A) at 591D-G.

[101] In the light of the above, although I incline towards the view that a statutory body such as the PSC is required to observe the *audi alteram partem* rule in a case such as this, it is, in my view, not necessary on the facts of this case to express a definitive view. I am prepared to assume, without deciding, in the Minister's favour that the PSC was obliged to have given Mr Simelane an opportunity to be heard. However, when one approaches the matter on this footing, it does not follow that the PSC's failure to give Mr Simelane an opportunity to be heard necessarily has the consequence that the Minister could ignore the PSC's findings and recommendations. Since the authority to initiate a disciplinary process vested in the Minister[101] and Mr Simelane's lawyers had submitted their representations to him, the Minister was obliged to take into account both the PSC's report as well as Mr Simelane's representations and decide whether he should initiate a disciplinary process. It seems that this is what the Minister did but he came to the conclusion that there were no grounds to initiate a disciplinary process. In regard to that conclusion I am in agreement with the finding of the main judgment.

[101] Sections 3(7)(b), 16A(1)(a) and 16B(1)(a), read together with the definitions provided for in section 1 of the Public Service Act, 1994 make it clear that the power to initiate a disciplinary process against the Head of the Department for Justice and Constitutional Development lies with the Minister.

For the Applicant:	Advocate O Rogers SC, Advocate A Katz SC, Advocate D Borgström and Advocate N Mayosi instructed by Minde Shapiro and Smith Inc.
For the Second Respondent:	Advocate M T K Moerane SC, Advocate L Gcabashe and Advocate P Jara (Pupil) instructed by the State Attorney.
For the Fourth Respondent:	Advocate D Unterhalter SC, Advocate G Malindi SC, Advocate I Goodman and Advocate L K Adebola-Ramadi (Pupil) instructed by the State Attorney.