

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

APPEAL CASE NO: CCT102/2022
Case CCT 120/22

In the matter between:

ADVOCATE RON SIMPHIWE MNCWABE

Appellant
(Applicant in the Application)

and

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

1st Respondent

& 3 OTHERS

In the matter between:

KHULEKANI RAYMOND MATHENJWA

APPLICANT

and

**THE PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA**


FIRST RESPONDENT

& 5 OTHERS

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DATED AT PRETORIA on this the 06TH day of DECEMBER 2022


EHLERS FAKUDE INC
ATTORNEY FOR THE APPLICANT

BLOCK 3A & 3B, SUNWOODPARK
379 QUEENS CRESCENT
LYNNWOOD, PRETORIA
TEL:(012) 361-7102

E-MAIL:

litigation3@ehlersinc.co.za

REF: MR Z.E

FAKUDE/Stella/MAT17629

c/o THAANYANE ATTORNEYS

ANGLO VAAL BUILDING

56 MAIN STREET

MARSHALLTOWN,

JOHANNESBURG

TEL: 011 832 2323

E-mail:

nkosithembinkosi7@gmail.com

REF: MR N THAANYANE

**TO: THE REGISTRAR OF THE
CONSTITUTIONAL COURT
BRAAMFONTEIN, JOHANNESBURG**

**AND THE STATE ATTORNEY
TO: ATTORNEY FOR THE 1st to 3rd
RESPONDENTS
SALU BUILDING, 316 THABO SEHUME
STREET, PRETORIA
ATTENTION: MR ISAAC CHOWE
REF: 1714/18/Z75/jjs
E-MAIL: ichowe@justice.gov.za;
jsesana@justice.gov.za
jditshwane@justice.gov.za**

BY E-MAIL

**c/o THE STATE ATTORNEY
JOHANNESBURG
ROOM 1320, 13TH FLOOR,
NORTH STATE BUILDING
95 ALBERTINA SISULU, CNR. KRUIS
STREET
JOHANNESBURG, 2000
TEL NO: (011) 330 – 7600
REF: 1714/18/Z75/gk
E-MAIL: VDhulam@justice.gov.za**

**AND THE DIRECTOR OF PUBLIC
TO: PROSECUTIONS -NORTHERN CAPE
KIMBERLEY
ATT: MR LIVINGSTONE MZUKISI
SAKATA
THE 4th RESPONDENT
BY E-MAIL: imsakata@npa.gov.za
LOUW DELANO: DLouw@justice.gov.za**

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**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

SECOND RESPONDENT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

THIRD RESPONDENT

LIVINGSTONE MZUKISI SAKATA N.O

FOURTH RESPONDENT

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THIRD RESPONDENT

SHAUN ABRAHAMS

FOURTH RESPONDENT

NATIONAL PROSECUTING AUTHORITY
OF SOUTH AFRICA

FIFTH RESPONDENT

NKEBE REBECCA KANYANE

SIXTH RESPONDENT

SERVICE & FILING NOTICE

DOCUMENTS FILED : APPLICANT'S CONCISE SUPPLEMENTARY
HEADS OF ARGUMENT

DATE ON ROLL: 07 FEBRUARY 2023

DATED AT PRETORIA on this the 06TH day of DECEMBER 2022



EHLERS FAKUDE INCORPORATED
ATTORNEY FOR THE APPLICANT
BLOCK 3A & 3B, SUNWOODPARK
379 QUEENS CRESCENT
LYNNWOOD, PRETORIA
TEL: (012) 361-7102
E-MAIL: litigation3@ehlersinc.co.za
REF: MR Z.E
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FAKUDE/Stella/MAT17629
c/o THAANYANE ATTORNEYS
ANGLO VAAL BUILDING
56 MAIN STREET
MARSHALLTOWN,
JOHANNESBURG
TEL: 011 832 2323
E-mail:
nkosithembinkosi7@gmail.com
REF: MR N THAANYANE

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SALU BUILDING, 316 THABO SEHUME
STREET, PRETORIA
ATTENTION: MR ISAAC CHOWE
REF: 1714/18/Z75/js
E-MAIL: ichowe@justice.gov.za;
isesana@justice.gov.za
jditshwane@justice.gov.za
c/o THE STATE ATTORNEY
JOHANNESBURG
ROOM 1320, 13TH FLOOR,
NORTH STATE BUILDING
95 ALBERTINA SISULU, CNR. KRUIS
STREET
JOHANNESBURG, 2000
TEL NO: (011) 330 – 7600
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E-MAIL: VDhulam@justice.gov.za

BY E-MAIL

AND
TO: THE DIRECTOR OF PUBLIC
PROSECUTIONS -NORTHERN CAPE
KIMBERLEY
ATT: MR LIVINGSTONE MZUKISI
SAKATA
THE 4th RESPONDENT
BY E-MAIL: Imsakata@npa.gov.za
LOUW DELANO: DLouw@justice.gov.za

BY E-MAIL

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APPLICANT'S CONCISE SUPPLEMENTARY HEADS OF ARGUMENT

1.

INTRODUCTION

This is the Applicant's Supplementary Heads of Argument (Concise Heads of Argument) in which the Applicant addresses **three (3) issues//three (3) topics**, in supplementing the Applicant's Heads of Argument dated 30 November 2022.

2.

LEGISLATIVE FRAMEWORK // SECTION 13(1)(a)

2.1 The appointment of the Applicant as the Director of Public Prosecutions, Northern Cape Division of the High Court, was in

terms of Section 13(1)(a)¹ of the National Prosecuting Authority Act.²

- 2.2 This was pursuant to the President's Minute 18 of 2018. Section 13, of the NPA Act, derives its powers from Section 101(a)³ of the Constitution, which deals with the executive decisions.
- 2.3 The NPA Act, in turn, derives its powers from Section 179(5)⁴ of the Constitution.
- 2.4 **Reading in** into Section 13(1)(a) of the NPA Act by Honourable Fourie J, not only was same unfortunate, same is also not supported by the *Plover's Nest* as well as the *The Rugby Union (SARFU)*, case law authorities, wherein it is stated and has been held that a decision (including an executive decision) becomes final when one of the two requirements has been met, viz:
- i) When such a decision has been communicated publicly;

¹ (1) The President, after consultation with the Minister and the National Director –
(a) May, subject to Section 6(2), appoint a Director of Public Prosecutions in respect of an office of the Prosecuting Authority established by

Section 6(1).

² Act No 32 of 1998 as amended

³ Section 101(a) "A decision by the President must be in writing if it –

a) Is taken in terms of Legislation; or

b) Has legal consequences;

Section 101(2) "A written decision by the President must be counter-signed by another Cabinet member if that decision concerns a function assigned to that other Cabinet member".

⁴ This Section deals with the establishment of a National prosecuting authority in RSA.

ii) When such a decision has been communicated to those that are affected by it.

2.5 Section 13(1)(a), unlike Section 13(1)(c) requires no public notification nor proclamation in the Government Gazette. Therefore, the appointment of the Applicant would have become final when it was signed by the President and counter-signed by the Responsible Minister as per the provisions of Section 101(1) and (2) of the Constitution, or as soon as when such a decision was communicated to the Applicant by the former NDPP.

2.6 As already alluded above, the NPA Act (Act 32 of 1998, as amended) derives its powers or originates from Section 179⁵ of the Constitution (Act 108 of 1996, as amended).

2.7 Section 2⁶ of the Constitution (Act 108 of 1996, as amended), deals with the Supremacy of the Constitution.

2.8 Therefore the question is whether the 1st Respondent was *functus officio* and therefore precluded from interfering with President's Minute 18 of 2018.

⁵ Section 179 of the Constitution deals with the prosecuting authority.

⁶ "Sec 2 – This constitution is the Supreme Law of the Republic; Law or Conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

- 2.9 Whether the Applicant's Appointment as the Director of Public Prosecutions: Northern Cape, Division of the High Court, Kimberley, Northern Cape, was revoked by the 1st Respondent, acting together with the 2nd Respondent, as per the President's Minute 69 of 2019 dated 11 March 2019.
- 2.10 And whether, if such revocation is found to have taken place, whether same was procedurally and constitutionally compliant (rationality).

3.

INADMISSIBLE HEARSAY EVIDENCE

- 3.1 The narration by the 1st Respondent under the heading **Factual Background** of his Affidavit in answer to the 4th Respondent's Explanatory Affidavit, stands to be dismissed as being inadmissible and irrelevant hearsay evidence.
- 3.2 Quite clearly, and as correctly stated/narrated by the 1st Respondent, at the time the appointments were brought to his (1st Respondent's) attention and later finalized in February 2018 (when such decisions were communicated to the affected parties), the 1st Respondent was the Deputy President of the Country and as such was **not personally nor directly involved with such appointments** (words in bold being my own emphasis). It is quite

clear and apparent, from the record, that only 3 (three) parties were, at all relevant times, directly involved with the process of the appointment of the Applicant's, i.e.:

- i) Former President JG Zuma;
- ii) Former Minister, Adv Michael Masutha; and
- iii) Former NDPP, Adv Shaun Abrahams.

3.3 Consequently the 1st Respondent cannot dispute, as a matter of fact, what Adv Shaun Abrahams states, under oath, in his Explanatory Affidavit. The 1st Respondent repeatedly refers to what was allegedly and purportedly communicated to him (1st Respondent), by the former Minister of Justice, Adv Masutha, yet there is **no Confirmatory Affidavit by former Minister Masutha attached**, as should have been.

3.4 As such, the narration by the 1st Respondent, in as far as same relates to what happened or transpired amongst the former President JG Zuma, former Minister Adv Michael Masutha and former NDPP Adv Shaun Abrahams, stands to be dismissed as hearsay evidence/inadmissible hearsay evidence.

3.5 Under paragraph 20 of his Affidavit in answer to the 4th Respondent's Explanatory Affidavit, the 1st Respondent states, amongst others, as follows: "*Pursuant to the advise received from*

*Adv Trengove SC and the Ministry of Justice **I exercised my discretion** and decided not to proceed to give effect to – and publicly announce – the purported appointments by my former President Zuma. **I was not satisfied** that the persons purportedly appointed by the former President, on the recommendation of Adv Abrahams, would necessarily best serve the interests of a highly effective NDPP or be in the best interests of the restructuring and re-vitalization of the NDPP, as a vital organ in the justice system. **I determined** that the appointment of suitable persons to those positions should rather be considered afresh by the new NDPP, Adv Batohi, who could then make recommendations in due course to me as President for appointment” (words in bold/underline being my own emphasis). It is important to note that the 1st Respondent has acted unconstitutionally and in a grossly improper manner in that him and him alone took a unilateral and unlawful decision to “revoke” the Applicant’s appointment. This quite clearly is apparent from the wording of this paragraph where amongst, the 1st Respondent uses the words “**I exercise my discretion**”, “**I determined that**”, “**I was not satisfied**”. The NPA Act read together with the Constitution, quite clearly states that the **President’s in consultation with the Minister of Justice, as well as the head of the NPA** must work together. This quite clearly did not happen herein as confirmed by the contents of paragraph 20 and the wording used by the 1st Respondent.*

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4. **CASE LAW AUTHORITY**

4.1 Our Constitution, Act 108 of 1996 is premised on the **doctrine of separation of powers** and confirms the three levels/spheres of Government, i.e:

4.1.1 The Judiciary;

4.1.2 The Legislature; and

4.1.3 The Executive.

Each separate sphere of Government should not encroach upon and/or interfere with the authority of one other.

4.2 In the matter between *The Master of the High Court (GNP) v Motala N.O.*⁷, it was held, under paragraph 14 that

"In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the Order that he did. The learned Judge had usurped for himself a power that he did not have. That power had been expressly left for the Master by the Act. His Order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our Law that a thing done

⁷ 2012(3) SA 325 SCA