

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CC CASE NO:CCT102/2022  
SCA CASE NO: 1167/2021  
HIGH COURT CASE NO: 22356/2019  
HIGH COURT CASE: 13859/2022**

In the matter between:

**ADVOCATE RON SIMPHIWE MNCWABE**

**APPLICANT**

And

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

**FIRST RESPONDENT**

**THE MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

**SECOND RESPONDENT**

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**THIRD RESPONDENT**

**LIVINGSTONE MZUKISI SAKATA**

**FOURTH RESPONDENT**

**FILING SHEET**

**DOCUMENTS:**

**FIRST RESPONDENT'S ANSWERING  
AFFIDAVIT**

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**TO: THE REGISTRAR OF THE  
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**AND  
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**AND TO: MR LIVINGSTONE MZUKASI SAKATA  
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**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CC Case No: \_\_\_\_\_/2022

SCA Case No: 1167/2021

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High Court Case No: 13859/2022

In the matter between:

**ADV RON SIMPHIWE MNCWABE**

Applicant

and

**PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Third Respondent

**LIVINGSTONE MZUKISI SAKATA**

Fourth Respondent

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**FIRST RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**PHINDILE BALENI**

do hereby make oath and state that:

- 1 I am the Director-General in the Presidency and Secretary of the Cabinet.
- 2 I am duly authorised to make this affidavit on behalf of the first respondent and to oppose this application on his behalf.
- 3 The facts to which I depose are within my own knowledge, or derived from records under my control, and are true and correct. Where I deal with questions of law, I do so on the advice of the first respondent's legal representatives.
- 4 This affidavit is made in answer to the application by the Applicant in terms of Rules 18 and 19 of Constitutional Court Rules. The First Respondent will abide the decision of the court in the application for condonation.
- 5 In the affidavit, I discuss the following:
  - 5.1 Chronology of the relevant facts;
  - 5.2 The constitutional and statutory framework; and
  - 5.3 *Ad seriatim* responses.

#### **CHRONOLOGY OF THE RELEVANT FACTS**

- 6 In the two weeks leading up to the resignation of former President Zuma, the

former President began taking steps to appoint five senior members as either Directors or Special Directors of Public Prosecutions in various offices of the National Prosecuting Authority ("NPA").

7 Of the five purported appointments of individuals to senior posts within the NPA, two have challenged President Ramaphosa's decision not to finalise President Zuma's inchoate decisions to appoint or promote them in the NPA.

8 This application for leave to appeal and direct access pertains to the purported appointment of the Applicant as the Director of Public Prosecution in the Northern Cape ("DPP: Northern Cape"). The appointment was ostensibly made by former President Jacob Zuma ("President Zuma") on 1 February 2018, by signing a presidential minute.

9 The core facts are:

9.1 In July 2017, the personal assistant of the former National Director of Public Prosecutions (Adv Shaun Abrahams SC) contacted the Applicant and asked him for a detailed *curriculum vitae* (cv) on the request or instruction of former President Zuma. The Applicant submitted his cv on the same day.

9.2 There was no further contact with the Applicant for approximately eight months.

9.3 In a memorandum that was approved for recommendation on 17

January 2018, Adv Abrahams recommended various candidates for appointment as directors of public prosecution in various posts around the country, including the Applicant.

9.4 On 1 February 2018, former President Zuma signed presidential minutes for the appointment of five individuals to posts within the NPA including:

9.4.1 Advocate Malini Govender as DPP of the Free State Division of the High Court in Bloemfontein;

9.4.2 Advocate Khulekani Mathew as DPP of the Mpumalanga Division of the High Court in Mbombela;

9.4.3 The Applicant, Advocate Ron Mncwabe, as DPP of the Northern Cape Division of the High Court in Kimberley;

9.4.4 Dr Torie Pretorius SC as Special DPP and the head of the Priority Crimes; and

9.4.5 Advocate Bonnie Currie-Gamwo as Special DPP and the head of the Sexual Offences and Community Affairs Unit.

9.5 On 7 February 2018, the Applicant was contacted telephonically and then by WhatsApp by Adv Abrahams informing him of his "appointment" as the DPP: Northern Cape. Adv Abrahams also sent him a copy of the presidential minute purporting to appoint him by WhatsApp messenger. A hard copy of the presidential minute was also apparently sent to the Applicant in November 2018. It is unclear who furnished him with the

hardcopy of the presidential minute purporting to appoint him.

9.6 On the same date, 7 February 2018, the Applicant received another phone call from Adv Abrahams in which he made mention of the political climate at the time and informed the Applicant that he must await communication of his appointment from the President. The Applicant states:

“...I was telephonically advised by the former NDPP on the same date that the issue pertaining to myself commencing with my duties and the logistics related thereto shall be communicated to myself by the office of the incoming President who will announce my appointment together with Mr Shaun Abrahams and the Minister of Justice.”<sup>1</sup>

9.7 No such announcement was made by the President or the Presidency.

9.8 The Applicant never resigned from his previous job as a magistrate and never assumed duties as the DPP: Northern Cape. The purported appointment of the Applicant remained frozen in time awaiting the further action of the President to elect whether to make it final and thereby give it legal force and effect.

10 The appointment was never formally communicated to the public or privately to the Applicant by President Zuma, the repository of power, or someone authorised by the President. President Zuma resigned on 14 February 2018.

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<sup>1</sup> Mncwabe FA p 12 – 13 para 15.



11 On 15 February 2018, President Ramaphosa assumed office. The President was informed by the erstwhile Minister of Justice ("Minister Masutha") that:

11.1 a raft of proposed appointments of various Directors of Public Prosecutions, which included Messrs Mncwabe and Mathenjwa were pending before President Zuma.<sup>2</sup>

11.2 the appointments were not finalised.<sup>3</sup>

11.3 Discussions concerning the finalisation of the appointments continued in the ensuing weeks and months, with the former Minister of Justice and the former NDPP.<sup>4</sup>

12 As such, in the weeks and months after President Ramaphosa assumed office, he engaged with the erstwhile Minister of Justice and Advocate Abrahams regarding these proposed appointments to allay his concern that the senior NPA appointments may have been fast-tracked ahead of President Zuma's resignation and to apply his mind as to the appropriateness of the proposed individuals given the seniority of the positions concerned and the issues plaguing the NPA.<sup>5</sup>

13 On 11 March 2019 and following legal advice, the President decided not to make

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<sup>2</sup> President's answering affidavit to Abraham's explanatory affidavit para 11.

<sup>3</sup> President's answering affidavit to Abrahams' explanatory affidavit para 10 -11.

<sup>4</sup> President's answering affidavit to Abrahams' explanatory affidavit para 12.

<sup>5</sup> President's answering affidavit to Abrahams' explanatory affidavit para 14.

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the appointments final and accordingly withdrew the minute that purported to appoint the Applicant as the DPP: Northern Cape.

- 14 Unbeknown to the Office of the Presidency, Adv Abrahams had informally communicated the purported appointment to the Applicant by "WhatsApp" and telephonically.<sup>6</sup> The alleged appointment appears to have been informally communicated to the Applicant *"even though no authorisation had been granted by the Office of the Presidency to do so."*<sup>7</sup> Further, as noted above, Adv Abrahams had specifically informed the Applicant that a formal announcement still needed to be issued by the President, which never happened.

#### **CONSTITUTIONAL AND STATUTORY FRAMEWORK**

- 15 The National Prosecuting Authority is established in terms of section 179 of the Constitution. Section 179(1)(a) provides that the responsibility to appoint the NDPP falls on the President as the head of the national executive.
- 16 The NPA is given the power in section 179(2) to *"institute criminal proceedings on behalf of the state."*<sup>8</sup> In order to achieve this, the independence of the NPA is constitutionally and statutorily enshrined. Section 179(4) reads: *"National legislation must ensure that the prosecuting authority exercises its functions*

<sup>6</sup> Dr Lubisi's affidavit in the High Court para 24.

<sup>7</sup> Dr Lubisi's affidavit in the High Court para 26.

<sup>8</sup> Section 179(1)(a) of the Constitution.

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*without fear, favour or prejudice.*<sup>49</sup> The NPA Act is the legislation intended to secure the necessary independence for the NPA to act as it is constitutionally instructed to do so.

- 17 Section 13(1)(a) of the National Prosecuting Authority, Act 32 of 1998 (NPA Act) provides (in relevant part) that:

"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)."

- 18 Section 101 of the Constitution is also applicable. It provides that any decision by the President must be in writing if it is taken in terms of legislation or has legal consequences. If the decision concerns a function assigned to a Minister, then he or she must also countersign the written decision.

- 19 The NPA Act empowers a director of public prosecutions to institute and conduct criminal proceedings as well as to supervise, direct and co-ordinate specific investigations. The role of the director of public prosecution is critical to a well-functioning criminal justice system which is at the heart of ensuring that there is the Rule of Law. The appointments made in terms of section 13 of the NPA Act must be done lawfully in a manner that is consistent with the seriousness and importance of the offices in question. The NPA Act read with the Constitution leave such appointments to the President.

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<sup>49</sup> Section 179(4) of the Constitution.

20 Having discussed the chronology of events and constitutional and statutory framework, I will now turn to set the reasons why the application for leave to appeal and direct access has no merit.

### **WAS THE APPOINTMENT OF THE APPLICANT COMPLETE**

21 The Applicant alleges that the central question in the appeal is whether the decision by President Zuma to appoint him as DPP was final in effect. The Applicant contends that the High Court "read in" the requirement of publication. Further, the Applicant alleges that the appointment was final because he was notified and alternatively that it was final even if he was not notified.

22 The Applicant's contention is misplaced and was rejected by the High Court. The High Court held that the main question was whether President Ramaphosa was entitled to reverse the initial decision of President Zuma regarding the appointments of the Applicant or was he precluded from doing so because the applicants had been told informally of their appointments.<sup>10</sup> Simply, the main question was whether President Ramaphosa was *functus officio*.

23 The High Court found that President Ramaphosa was not *functus officio* as the decision was not final. In this regard, the High Court found that:

23.1 It is clear that the *functus officio* doctrine applies only to final decisions.<sup>11</sup>

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<sup>10</sup> High Court judgment para 38.

<sup>11</sup> High Court judgment para 41.

23.2 The importance of the role of the DPP is underscored and amplified by the fact that in section 13(1)(a) of the NPA the President appoints the DPP and the significance of this cannot be understated.<sup>12</sup>

23.3 The decision of the President to appoint a DPP is therefore not the same as a decision of a functionary to grant or refuse a licence.<sup>13</sup>

23.4 An essential part of a final decision when exercising executive power is some form of publication through an overt act of the decision, which announcement must be made in the public domain as it is an executive action that affects the wider public.<sup>14</sup>

23.5 The President is the repository of the relevant power in terms of the NPA Act. He is the only one who has the power to appoint DPPs in terms of section 13(1) of the NPA Act.<sup>15</sup>

23.6 Public notification is a necessary requirement and forms part of the appointment process and without public notification, the decision to appoint would be incomplete and therefore not final.<sup>16</sup>

24 This finding by the High Court is, with respect, based on sound and well-established legal principles pronounced by this Court and the SCA.

<sup>12</sup> High Court judgment para 47.

<sup>13</sup> High Court judgment para 47.

<sup>14</sup> High Court judgment para 49.

<sup>15</sup> High Court judgment para 50.

<sup>16</sup> High Court judgment para 51.

24.1 The requirement for notification in the form of an overt act is based on settled law, including *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>17</sup> ("SARFU").

24.2 The court *a quo* in this matter correctly relied on the SARFU judgment in concluding that:

24.2.1 The President's decision had to be translated into an overt act, through public notification;

24.2.2 The President would be entitled to change his mind at any time prior to the promulgation of the notice.<sup>18</sup>

24.3 The Supreme Court of Appeal ("SCA") also reiterated in *Plover's Nest Investment v De Haan*<sup>19</sup> the importance of public notification made by the repository of power as found in SARFU.

25 The Applicant in his founding affidavit has not provided any reason why this Court and the SCA's jurisprudence needs to be revisited. The principles applied in this matter by the court *a quo* is based on settled law. As such, the court *a quo* was correct in its findings and holding and there is no sound and rational basis to assume that another court would come to a different conclusion.

<sup>17</sup> 2000 (1) SA (1) (CC).

<sup>18</sup> High Court judgment para 43.

<sup>19</sup> *Plover's Nest Investment v De Haan* (20590/2014) [2015] ZASCA 193.

## **PUBLICATION OF THE DECISION TO APPOINT**

26 The Applicant alleges that imposing a public announcement would foster uncertainty. This contention is misplaced. On the contrary, the public announcement accords with the nature of the executive action, the importance of the DPP and transparency and accountability in the exercise of public power.

27 The High Court held that public notification is a necessary requirement and forms part of the appointment process, and that without public notification, the appointment is incomplete and therefore not final.<sup>20</sup> The High Court accepted that a media announcement would be sufficient to meet the public notification requirement.<sup>21</sup>

## **PRESIDENT RAMAPHOSA EXERCISED HIS DISCRETION RATIONALLY AND FOR A LEGITIMATE PURPOSE**

28 The High Court correctly held that the President applied his mind to the proposed appointments and considered the finalisation carefully especially considering the concerns raised in other cases involving the NPA.<sup>22</sup>

29 Further, the High Court correctly held that considering the facts and circumstances of this case, the President's discretion was exercised rationally

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<sup>20</sup> High Court judgment para 51.

<sup>21</sup> High Court judgment para 52.

<sup>22</sup> High Court judgment para 63.

and was exercised for purpose of ensuring the constitutionally protected functioning and integrity of the NPA.<sup>23</sup>

30 Additionally, the High Court correctly held that the Applicant was not removed from office or discharged as contemplated in section 12(6) of the NPA, read with section 14(3), of the NPA Act, as he had never been finally appointed or assumed office as DPP. In this regard, the High Court held that the President exercised his executive powers by simply deciding not to finalise and give effect to the inchoate decision of President Zuma and the purported appointments which had been made by him.<sup>24</sup>

31 The High Court correctly held that the President exercised his powers in a lawful and rational matter that is consistent with the Constitution.

32 It is submitted with respect that there is no reasonable prospect that this Court disagrees with the reasoning or findings of the Court below in this regard. Nor are there any other reasons which would justify the grant of appeal.

#### **NO GROUNDS ESTABLISHED FOR DIRECT ACCESS**

33 The applicant has established no grounds for direct access. This is contrary to this Court's jurisprudence which has emphasised the extraordinary nature of

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<sup>23</sup> High Court judgment para 64.

<sup>24</sup> High Court judgment para 57.



direct access and that it must be convinced that it should determine the application as a court of first and last instance.

33.1 First, the record pertaining to the legality of the appointment of the fourth respondent does not form part of the record of proceedings in this matter. I deny that the issue can be dealt with based on the record and common cause facts. I also deny that the issues presented are solely questions of law.

33.2 Second, whether President Ramaphosa's appointment of the fourth respondent is irrational depends on the President's reasons for the decision taken. These do not form part of the record in this matter. Rationality simply requires that a decision is objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. It does not depend on the outcome of this application for leave to appeal.

33.3 Third, the fourth respondent was lawfully appointed to a vacant post. The applicant never resigned from his previous position as a magistrate and never assumed duties as the DPP: Northern Cape. The purported appointment of the applicant remained frozen in time awaiting the further action of the President to elect whether to make it final and thereby give it legal force and effect. This was not done.

33.4 Fourth, there is a need for finality in the appointments of senior leadership in the NPA. The DPP: NC position has been vacant since 25

June 2016. This has become an intolerable situation for the NPA, undermining service delivery as deputies have filled the position, creating a shortage of staff to execute the office's core functions. There needs to be stability in leadership, and the non-filling of the DPP: NC position was creating instability.

33.5 The NPA is under significant pressure to deliver in respect of high-profile corruption cases emanating from the findings and recommendations of the Judicial Commission of Inquiry into State Capture. To ensure it can deliver, vacant positions need to be filled to support the structure and mandate of the NPA effectively. As part of building the state's capacity in the fight against crime and corruption, the President made a series of appointments in terms of section 13(1)(a) of the NPA to appoint Directors of Public Prosecutions which, *inter alia*, included the appointment of the fourth respondent.

33.6 An application such as this – which has poor prospects of success, and no compelling public interest – continues to threaten stability in the senior leadership of the NPA which will undermine service delivery. It is therefore not in the interest of justice for direct access to be granted.

## **COSTS**

34 As is well-known, a court of appeal interferes with the exercise of a true discretion – including a costs order – only in circumscribed circumstances.

Interference is only permissible where the decision is at odds with the law and the discretion was not judicially exercised<sup>25</sup>.

- 35 Therefore, the High Court's decision in respect of costs lies within a range of permissible actions and it exercised its discretion judicially.

#### **AD SERIATIM RESPONSE**

- 36 I now provide *ad seriatim* responses to selected paragraphs in the Applicant's founding affidavit to the extent that they are relevant to and call for a response for purposes of the application for leave to appeal and direct access.

- 37 To the extent that I do not expressly admit an allegation in the answering affidavit, or to the extent that such allegation is inconsistent with the balance of this Affidavit, it is denied.

#### **AD PARAGRAPHS 1 AND 2**

- 38 Save to deny that the facts in this Affidavit are true and correct, I note the remainder of this paragraph.

#### **AD PARAGRAPH 3**

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<sup>25</sup> Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) at para 31; Treco Construction v IDC & Another 2015 (5) SA 245 (CC) paras 85 – 89.

39 These paragraphs are denied insofar as they contradict what is stated above. The Applicant's alleged appointment was not unlawfully revoked by President Ramaphosa as the Applicant was never appointed.

40 I admit that the Applicant's challenge to President Ramaphosa's decision not to finalise his appointment was dismissed by the High Court and the Supreme Court of Appeal.

#### **AD PARAGRAPHS 4 TO 6**

41 I deny that the Applicant is the lawful incumbent and that there was a valid appointment. The lawful incumbent is the fourth respondent.

42 The interdict sought by the Applicant to interdict the fourth respondent was struck off the roll by the Honourable Ladyship Judge Mokose for lack of urgency.

43 I note that the Applicant seeks leave to appeal against the decision of Fourie J and direct access under Rule 18 of this Court's Rules to review and set aside the fourth respondent, but I deny that applications have prospects of success. They must be dismissed for lack of reasonable prospects.

#### **AD PARAGRAPHS 7 TO 15**

44 I note these paragraphs. I also note that the order of Mokose J on 31 March 2022 is not attached to the founding affidavit.

**AD PARAGRAPHS 16 TO 18**

45 I deny that there are substantial constitutional issues at stake.

46 The decision of the High Court is based on sound and well-established legal principles pronounced by this Court as well as the SCA.

46.1 The requirement for notification in the form of an overt act is based on settled law, including this Court's decision in SARFU.

46.2 The SCA has in *Plover's Nest Investment v De Haan*<sup>26</sup> reiterated the importance of public notification made by the repository of power as found in SARFU.

47 President Ramaphosa was not *functus officio* as the decision was not final. Moreover, sections 12(6) read with section 14(3) of the NPA Act are not applicable.

**AD PARAGRAPH 19**

48 I deny this paragraph for the reasons set out above.

**AD PARAGRAPHS 20 TO 23**

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<sup>26</sup> *Plover's Nest Investment v De Haan* (20590/2014) [2015] ZASCA 193.

49 I deny what the Applicant states is his "core argument" that Fourie J interposed the additional requirement of publication. I deny that the decision to appoint the Applicant becomes final when all the formalities were complied with, at least in the sense implicit in the Applicant's contention. The High Court held that the purported appointment was not final as public notification is a necessary requirement and forms part of the appointment process.<sup>27</sup>

50 I deny that the High Court "read in" publication as an additional requirement. It was a necessary part of the appointment process and was based on well-established legal principles.

51 The High Court held that the President's decision was not finalised, and it was open to the President to change his mind.<sup>28</sup> I point out that the President did not at any stage inform the Applicant that he was appointed. The High Court also found that the President's decision was exercised lawfully, rationally and in a manner consistent with the Constitution.<sup>29</sup>

#### **AD PARAGRAPHS 24 TO 28**

52 I deny these paragraphs insofar as they contradict what is set out above.

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<sup>27</sup> High Court judgment para 51,

<sup>28</sup> High Court judgment para 43.

<sup>29</sup> High Court judgment para 64.

**AD PARAGRAPH 29**

53 I deny these paragraphs insofar as they contradict what is stated above and what is stated in Dr Lubisi's answering affidavit filed in the Court below.

54 The Applicant omits to mention that Dr Lubisi stated the following regarding the publication of the minute:

54.1 In or about early February 2018, the emails of the Presidency stopped working and as such, there is no record of the minute having been emailed back to the Department. There is no formal record in the Presidency showing how (if at all) the minutes were transmitted to the Department.

54.2 Shortly after the signature of the minutes, *“former President Zuma instructed Minister Masutha to stay the implementation of the minutes pending consultative steps that the Presidency was required to undertake and an announcement by the Presidency of the appointments in order to make the decision final and taking legal effect.”* (Lubisi answering affidavit para 23.2)

54.3 It is highly unusual for appointees of the President to be furnished with the presidential minute. The minute is an internal formal record of the President's decisions and is not ordinarily released into the public domain.

54.4 The alleged appointment appears to have been informally communicated to the Applicant even though no authorisation had been granted by the Office of the Presidency to do so. The Office of the Presidency had no knowledge that such communication with Adv Abrahams had taken place by "WhatsApp" or telephonically.

54.5 Despite the informal communication, the Applicant makes clear that he was informed that *"the issue pertaining to [the Applicant] commencing with [his] duties and the logistics related thereto shall be communicated to [the Applicant] by the office of the incoming President who will announce my appointment together with the former NDPP and the second respondent."* (Dr Lubisi's answering affidavit in the Court below paragraphs 25 to 27).

#### **AD PARAGRAPHS 30 TO 37**

55 I deny these paragraphs for the reasons set out above. The *Oudekraal* principle does not apply in this application because the purported decision never became final in effect. The High Court did not read in the requirement of public announcement - it held that it was a necessary requirement for the appointment process.

56 These allegations are addressed above where I deal with the question of whether the President was *functus officio*. In short, I reiterate that the High Court correctly held that the President was not *functus officio* as the decision was incomplete



and the doctrine only applies to final decisions.

57 The Applicant's reliance on *Sneller* and *Primedia* are completely misplaced. Both decisions pertain to when an administrative decision is ripe for challenge in a court not when an executive decision becomes final in effect and binding.

58 The President's decision to appoint only takes effect once it is translated into an overt act, through public notification. Before then, the President was entitled to change his mind.<sup>30</sup> This is a well-established legal principle.

#### AD PARAGRAPHS 38 TO 40

59 I deny these paragraphs. In short, the public announcement accords with the nature of the executive action, the importance of the role of the DPP and transparency and accountability in the exercise of public power.

60 The hypothetical example given by the Applicant is mischievous and is inapplicable and irrelevant. No authorisation was given by the Office of the Presidency to announce the appointments<sup>31</sup>, in particular, to inform the Applicant that he was appointed. The announcement was also not authorised under the Constitution or statute. I venture that it is in recognition of the fact that he lacked the authority to inform the Applicant that he was appointed that Adv Abrahams

<sup>30</sup> High Court judgment para 43.

<sup>31</sup> Dr Lubisi's affidavit in the High Court para 26.

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informed the Applicant that he would have to await an announcement from the Presidency.

**AD PARAGRAPHS 41 AND 42**

61 I deny these paragraphs for the reasons set out above.

**AD PARAGRAPHS 43 TO 44**

62 The Applicant accepts that following the appointment of the fourth respondent, this matter has become moot. The Applicant does not advance any substantial reasons or exceptional circumstances why this Court should exercise its discretion to hear this matter. The Applicant's case has poor prospects of success, if at all. The law applied by Fourie J follows this Court and the SCA's well-established judgments, and the case will have no bearing on any issue beyond the Applicant.

63 It is in the interests of justice for this case to be dismissed.

**AD PARAGRAPHS 45 TO 47**

64 I deny these paragraphs. The decision of the court *a quo* in respect of costs lies within a range of permissible actions. We submit that this Court should not set aside and substitute this order with an order that the parties shall bear their own

costs. The Applicant has not set out grounds why this Court should interfere with the exercise of a true discretion by the High Court.

65 I deny that the appointment of the fourth respondent flows from this matter for the reasons set out above.

### CONCLUSION

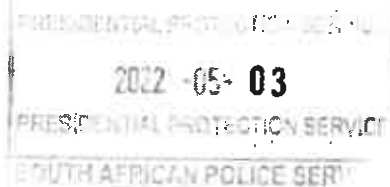
66 In the circumstances, I respectfully submit that the Applicant has not made out a case for leave to appeal and direct access to the Constitutional Court. The application should be dismissed with costs, including the costs of two counsel.

*Ratou*

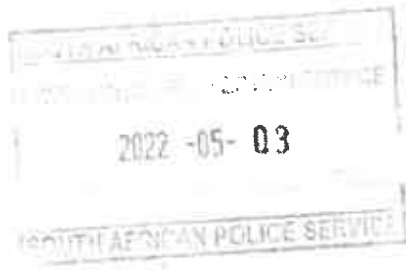
**DEPONENT**

SIGNED AND SWORN to before me on <sup>03 May.</sup> April 2022 at \_\_\_\_\_ the deponent *BR*  
having acknowledged that he knows and understands the contents of this affidavit, the regulations contained in Government Notice R1258 of 21 July 1972, as amended, and Government Notice R1648 of 19 August 1977, as amended, having been complied with.

*[Signature]*  
**COMMISSIONER OF OATHS**



*McM* *BR*



Title: WARRANT OFFICER.

Full Names: MESUMA MASHI.

Address: Umele Residence  
600 Avenue.  
Pretoria.

**Chowe Isaac**

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**From:** Chowe Isaac  
**Sent:** Friday, 06 May 2022 09:26  
**To:** Antoinette Booysen (litigation4@ehlersinc.co.za)  
**Cc:** 'nkosithembinkosi7@gmail.com'; Malobola Johanna; Dhulam Vijay; Louw Delano  
**Subject:** RE: ADV R MNCWABE // THE PRESIDENT AND OTHERS: CCT 102/22  
**Attachments:** FIRST RESP. ANSWEING AFFI..pdf

Dear Madam,

We send herewith the first respondent's answering affidavit.

Please acknowledge receipt.

Regards,

Mr KI Chowe  
Deputy State Attorney, Pretoria  
SALU BUIDLING  
316 THABO SEHUME STREET  
PRETORIA  
Tel: 012 309 1562  
Fax: 086 507 2194  
Cell: 083 527 8921  
Email: [KChowe@justice.gov.za](mailto:KChowe@justice.gov.za)

Mr KI Chowe  
Deputy State Attorney, Pretoria  
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## **Chowe Isaac**

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**From:** Chowe Isaac  
**Sent:** Friday, 06 May 2022 09:34  
**To:** SAKATA Livingstone (NPA Contact)  
**Subject:** FW: RE: ADV R MNCWABE // THE PRESIDENT AND OTHERS: CCT 102/22  
**Attachments:** FIRST RESP. ANSWERING AFFI..pdf

Dear Adv,

We send herewith the first respondent's answering affidavit.

Please acknowledge receipt.

Regards,

Mr KI Chowe  
Deputy State Attorney, Pretoria  
SALUBUILDING  
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