

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: CCT120/2022

SCA Case No: 713/2021

High Court Case No: 31464/2019

In the condonation application of:

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA (THE HONOURABLE
CYRIL M. RAMAPHOSA N.O)**

First Respondent

In the matter between:

KHULEKANI RAYMOND MATHENJWA

Applicant

and

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA (THE HONOURABLE
CYRIL M. RAMAPHOSA N.O)**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS (ADV. SHAMILA BATOHI)**

Third Respondent

ADV. SHAUN ABRAHAMS

Fourth Respondent

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Fifth Respondent

NKEBE REBECCA KANYANE

Sixth Respondent

FILING NOTICE

DOCUMENTS: FIRST RESPONDENTS' ANSWERING AFFIDAVIT

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FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

1
NB (B)

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 this application in terms of Rules 18 and 19 of Constitutional Court Rules.
- 5 In this affidavit, I discuss the following:
 - 5.1 Chronology of the relevant facts.
 - 5.2 The constitutional and statutory framework.
 - 5.3 Was the appointment of the applicant complete?
 - 5.4 President Ramaphosa exercised his discretion rationally and for a legitimate purpose.

16-12

5.5 No grounds for direct access; and

5.6 *Ad seriatim* responses.

CHRONOLOGY OF THE RELEVANT FACTS

- 6 In the two weeks leading up to his resignation, former President Jacob Zuma ("President Zuma") 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"). This matter concerns one of a raft of those senior appointments.
- 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 Mpumalanga ("DPP: Mpumalanga"). The appointment was ostensibly made by former President Zuma on 1 February 2018, by signing a presidential minute.
- 9 The core facts which will form part of the record should this matter be set down are:
 - 9.1 In July 2017, the National Director of Public Prosecutions (Adv Shaun Abrahams SC) asked the Applicant to provide him with his *curriculum*

vitae (CV). No further word was heard by the Applicant from Mr Abrahams until 5 February 2018.

- 9.2. There was no further contact with the Applicant for approximately seven months.
- 9.3. In a memorandum that was approved for recommendation on 17 January 2018, Mr Abrahams recommended various candidates for appointment as Directors of Public Prosecution in various posts around the country, including the Applicant. The applicant was recommended for appointment without undergoing an interview.
- 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 The applicant as DPP of the Mpumalanga Division of the High Court in Mbombela.
 - 9.4.3 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 5 February 2018 – apparently during a discussion with Mr Abrahams concerning certain matters related to the Applicant's involvement as a member of the prosecution team advising on the prosecution of President Zuma and whether the charges ought to be withdrawn or not based on the representations made – Mr Abrahams informed the Applicant that he had been promoted by President Zuma to the office of DPP: Mpumalanga and that there was a Presidential Minute to this effect.
- 9.6 On 12 February 2018, the Applicant was informed that *"Abrahams [had] received a call from Masutha's office, informing him that the President had requested that Abrahams hold off on announcing to [the Applicant] and other appointments until the President had publicly announced same."*
- 9.7 Two days later on 14 February 2018, President Zuma resigned from office. At the time of resignation, President Zuma had not announced the Applicant's appointment publicly or at all.
- 10 On 15 February 2018, President Ramaphosa assumed office. The President was informed by the former Minister of Justice ("**Minister Masutha**") that:
- 10.1 There were proposed appointments of various Directors of Public Prosecutions, including Messrs Mncwabe and Mathenjwa, pending

before President Zuma.

10.2 The appointments were not finalised.

10.3 Discussions concerning the finalisation of the appointments continued in the ensuing weeks and months, with the then Minister of Justice and the then NDPP.

11 As such, in the weeks and months after President Ramaphosa assumed office, he engaged with the former Minister of Justice and with Mr Abrahams regarding these proposed appointments to seek to allay his concern that the senior NPA appointments may have been fast-tracked ahead of the former President'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.

12 On 11 March 2019 and following legal advice, the President decided not to make the appointments final and accordingly withdrew the Minute that purported to appoint the Applicant as the DPP: Mpumalanga.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

13 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.

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- 14 The NPA is given the power in section 179(2) to *"institute criminal proceedings on behalf of the state."*¹ 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 without fear, favour or prejudice."*² The National Prosecuting Authority, Act 32 of 1998 (NPA Act) is the legislation intended to secure the necessary independence for the NPA to act as it is constitutionally instructed to do so.
- 15 Section 13(1)(a) of the 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)."*
- 16 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.
- 17 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

¹ Section 179(1)(a) of the Constitution.

² Section 179(4) of the Constitution.

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.

18. 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?

- 19 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 Fourie J effectively amends the provisions in section 13(1)(a) by adding public notification as a requirement to the process for appointing a DPP.³ Further, the Applicant alleges that the appointment was final because he was notified of former President Zuma's decision.⁴
- 20 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

³ CC FA p13 para 40.

⁴ CC FA p18 para 51.

applicants had been told informally of their appointments.⁵ Simply, the main question was whether President Ramaphosa was *functus officio*.

21 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:

21.1 It is clear that the *functus officio* doctrine applies only to final decisions.⁶

21.2 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.⁷

21.3 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.⁸

21.4 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.⁹

21.5 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

⁵ High Court judgment para 38.
⁶ High Court judgment para 41.
⁷ High Court judgment para 47.
⁸ High Court judgment para 47.
⁹ High Court judgment para 49.

section 13(1) of the NPA Act.¹⁰

- 21.6 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.¹¹
- 22 This finding by the High Court is, with respect, based on sound and well-established legal principles pronounced by this Court and the SCA.
- 22.1 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*¹² ("SARFU").
- 22.2 The court *a quo* in this matter correctly relied on the SARFU judgment in concluding that:
- 22.2.1 The President's decision had to be translated into an overt act, through public notification;
- 22.2.2 The President would be entitled to change his mind at any time prior to the promulgation of the notice.¹³

¹⁰ High Court judgment para 50.

¹¹ High Court judgment para 51.

¹² 2000 (1) SA (1) (CC).

¹³ High Court judgment para 43.

22.3 The Supreme Court of Appeal ("SCA") also reiterated in *Plover's Nest Investment v De Haan*¹⁴ the importance of public notification made by the repository of power as found in SARFU.

- 23 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* are based on settled law. As such, the court *a quo* was correct in its findings and there is no sound basis to assume that another court would come to a different conclusion. On this basis alone, the application should be dismissed.
- 24 The Applicant says SARFU is distinguishable because "such powers have to be exercised with other Cabinet members, *in casu*, the relevant Minister, who countersigned and confirmed the appointment. Therefore, in terms of the Constitution, the President is not a sole repository of power to appoint a DPP"¹⁵
- 25 The flaw in this argument is apparent from the terms of the section.

"The President, after consultation with the Minister and the National Director—
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);

¹⁴ *Plover's Nest Investment v De Haan* (20590/2014) [2015] ZASCA 193.

¹⁵ CC FA p 17 para 49.

(a) shall, in respect of each *Investigating Directorate*, appoint a Director of Public Prosecutions as the head of such an *Investigating Directorate*; and

(b) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to 5 him or her by the President by proclamation in the *Gazette*.

26 The President exercises his decision to appoint after consultation with the Minister of Justice and NDPP, but the appointments remain the decisions of the President. Only the President is the sole repository of power to appoint a DPP. The court *a quo*'s reliance on *Plover's Nest Investment v De Haan*¹⁶ cannot be faulted.

27 Finally, the applicant attempts to make much of the difference between the appointment of an (ordinary) DPP under section 13(1)(a) of the NPA Act and the appointment of a special DPP under section 13(1)(b). The applicant fails to notice that section 13(1)(b) requires the gazetting of the duties and functions assigned to the special DPP. The reason for this is simple. A special DPP does not have their powers and duties set out in the NPA Act because they are intended to deal with a specific area allocated to them by the President at the discretion of the

¹⁶ *Plover's Nest Investment v De Haan* (20590/2014) [2015] ZASCA 193.

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President. The Act, therefore, requires that those powers and duties are then gazetted. The purpose of the gazetting requirement in section 13(1)(b) therefore serves an entirely different purpose aimed at delineating the powers and duties of the Special DPP.

- 28 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.
- 29 The High Court held that public notification is a necessary requirement and forms part of the appointment process. Without public notification, the appointment is incomplete and therefore not final.¹⁷ The High Court accepted that a media announcement would be sufficient to meet the public notification requirement.¹⁸
- 30 In light of this, the applicant's arguments that President Ramaphosa was *functus officio* are without any merit.

PRESIDENT RAMAPHOSA EXERCISED HIS DISCRETION RATIONALLY AND FOR A LEGITIMATE PURPOSE

- 31 The High Court correctly held that the President applied his mind to the proposed

¹⁷ High Court judgment para 51.

¹⁸ High Court judgment para 52.

appointments and considered the finalisation carefully especially considering the concerns raised in other cases involving the NPA.¹⁹

- 32 The President explained in his affidavit that he had a justifiable concern that the proposed appointments were hastily made and may have been subject to politicisation. While the former NDPP, Mr Abrahams, states that the process was started in early January 2017, it is clear from the documents that it gathered enormous steam in the weeks leading up to President Zuma's resignation in January 2018 which is when the approvals within the NPA and the Ministry of Justice were obtained. The fact that the appointment may have been fast-tracked was a legitimate and rational concern that President Ramaphosa sought to address with Mr Abrahams.
- 33 While no aspersions are made on the character and competence of the purported appointees, President Ramaphosa correctly applied his mind to these proposed appointments, especially in light of the many concerns raised in cases involving appointments to the National Prosecuting Authority. President Ramaphosa states that the *"uncertainty and instability in the leadership of the NPA was an issue of high priority that required serious and proper consideration, including appointments to these senior positions which were vacant."* As a result, the President took the legitimate view that these appointments should await a newly

¹⁹ High Court judgment para 63.

appointed NDPP who would identify the senior leadership that would help fulfil the NPA's constitutional mandate.

34 Further, the High Court correctly held that considering the facts and circumstances of the case, the President's discretion was exercised rationally and was exercised for purpose of ensuring the constitutionally protected functioning and integrity of the NPA.²⁰

35 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.²¹

36 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 an appeal.

²⁰ High Court judgment para 64.

²¹ High Court judgment para 57.

NO GROUNDS ESTABLISHED FOR DIRECT ACCESS

37. The Applicant seeks direct access to challenge the President's decision to appoint the sixth respondent as the DPP: Mpumalanga. This is on the factually and legally incorrect assertion by the Applicant that he is the lawful incumbent.
38. It is well-established that an application for direct access to this Court is an extraordinary procedure that ought to be followed only in exceptional circumstances.²² Persuasive and compelling reasons are required before this Court will exercise its discretion to grant direct access.²³ In *Mazibuko, Moseneke DCJ* noted that "[f]or the existence of exceptional circumstances there must, in addition to other factors, be sufficient urgency or public importance, and proof of prejudice to . . . the ends of justice . . . to justify such a procedure".²⁴ A further relevant consideration to a grant of direct access is whether an applicant can show that they have exhausted all other remedies and procedures that are available to them.²⁵
39. The Applicant fails to make out a case for why direct access should be granted.

²² *Mazibuko N.O. v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (*Mazibuko*) at para 35; *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4; *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4; *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice intervening)* [1996] ZACC 8; 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at para 6; and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11.

²³ *AParty v Minister of Home Affairs, Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30 and *Bruce* id at para 9.

²⁴ *Mazibuko* above at para 35.

²⁵ *Besserglik* above at para 6.

The Applicant simply alleges that the issues pertaining to the sixth respondent's appointment can be readily dealt with.

40 The Applicant has established no grounds for direct access. This is contrary to this Court's decisions which have emphasised the extraordinary nature of direct access and that it must be convinced that it should determine the application as a court of first and last instance.

40.1 First, the record pertaining to the legality of the appointment of the sixth respondent does not form part of the record of proceedings in this matter. Whether President Ramaphosa's appointment of the sixth 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.

40.2 Second, the sixth respondent has been lawfully appointed to a vacant post. 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.

40.3 Third, there is a need for finality in the appointments of senior leadership in the NPA. The DPP: MP position was vacant and recently occupied

2/13

by the sixth respondent. There needs to be stability in leadership, and the overdue appointment of the DPP: MP position was creating instability.

40.4 The NPA is under significant pressure to take action in respect of high-profile corruption cases emanating from the findings and recommendations of the "Zondo Commission". To ensure that this happens, 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.

40.5 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.

41 The application for direct access must fail.

AD SERIATIM RESPONSE

42 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.

43 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 TO 3

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

AD PARAGRAPHS 4 TO 10

45 I note the citation of the parties and the addition of the sixth respondent.

AD PARAGRAPHS 11 TO 17

46 I deny these paragraphs insofar as they conflict with what is stated above.

47 In particular, I deny that there are substantial constitutional issues at stake or that this matter is in the general public interest. The decision of the High Court is

21/30

based on sound and well-established legal principles pronounced by this Court as well as the SCA.

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

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

48 The allegation that the decision of Fourie J in the court *a quo* amounts to a legislative amendment is therefore without merit.

AD PARAGRAPH 18 TO 20

49 The applicant was never appointed as the DPP: Mpumalanga. The applicant's appointment was never finalised for the reasons set out above. Furthermore, I deny that the President was *functus officio*.

AD PARAGRAPHS 21 TO 30

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

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

3/12

AD PARAGRAPH 31

51 I admit that the President appointed the sixth respondent, Kanyane, as DPP: Mpumalanga with effect from 1 April 2022. I deny that Kanyane's appointment was unlawful. There was no legal impediment to the President making an appointment as the applicant was never appointed as the DPP: Mpumalanga.

AD PARAGRAPHS 32 TO 37

52 I note these paragraphs. I admit that all the Applicant's applications for leave to appeal have been dismissed.

AD PARAGRAPHS 38 TO 42

53 I deny that Fourie J's judgment was fundamentally wrong on the issue of public notification. I reiterate, the decision of the High Court is based on sound and well-established legal principles pronounced by this Court as well as the SCA. I refer to what is stated above.

AD PARAGRAPHS 43 TO 46

54 I deny these paragraphs for the reasons stated above.

55 The Applicant fails to appreciate the real purpose of the gazetting requirement in section 13(1)(b) of the NPA Act. Section 13 provides for the appointment of an

213

(ordinary) DPP under section 13(1)(a) of the NPA Act and the appointment of a special DPP under section 13(1)(b). What the Applicant fails to take notice of is that section 13(1)(b) requires the gazetting of the duties and functions assigned to the special DPP. The reason for this is simple. A special DPP does not have their powers and duties set out in the NPA Act because they are intended to deal with a specific area allocated to them by the President, there is a requirement in the NPA Act that those specific powers and duties are then gazetted. The purpose of the gazetting requirement in section 13(1)(b) therefore serves an entirely different purpose.

AD PARAGRAPHS 47 TO 57

- 56 I deny these paragraphs for the reasons set out above. The court *a quo* correctly found that the President was not *functus officio* as the decision was incomplete and the doctrine only applies to final decisions. The *Oudekraal* principle does not apply in this application because the purported decision never became final in effect.
- 57 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.²⁷ This is a well-established legal principle.

²⁷ High Court judgment para 43.

AD PARAGRAPHS 58 TO 62

- 58 The Applicant points to the fact that the Presidential Minute refers to section 13 of the NPA Act. He makes the assertion that where a functionary consciously opts to locate power in a wrong provision of the law, such a decision is invalid, misplaced and bad in law. The Applicant places reliance on **Minister of Education v Harris**.²⁸ That matter concerned a challenge to a policy enacted in terms of the National Education Policy Act 27 of 1996. The policy purported to determine the age at which children could first attend an independent school. Harris challenged the validity of the policy on the ground that the Minister did not have decision-making powers in terms of that Act. The court held that that Act only gave the Minister powers to determine policy and not to impose binding law. Whether or not the Minister had in fact had the power to impose a binding age requirement under the South African Schools Act did not have to be decided, since the Minister had clearly chosen to exercise his *powers under the National Education Policy Act*.
- 59 This case is distinguishable from the present case. The **Harris** case dealt with the powers to determine policy and not binding law. In that case, the Minister sought to create binding law. In the present matter, the President is not seeking to create any law or policy. The President is simply exercising his power to appoint.

²⁸ 2001 (4) SA 1297 (CC) – see item 21 in Mr Mathenjwa's bundle of authorities – case line pagination p 013 – 259.

60 President Zuma had not made a final decision in relation to the appointments. This means that the President could change his mind until the final decision was made. The President did not in terms of the law need to revoke the decision, but he did it out of caution. This caution cannot be said to have the effect that the decision can be set aside.

AD PARAGRAPHS 63 TO 70

- 61 The essence of the Applicant's complaint is that the President acted irrationally when determining what was in the best interests of the Directorate. I deny this allegation. President Ramaphosa explained that in his meeting with Mr Abrahams he indicated that he needed to apply his mind to the proposed appointment. The uncertainty and instability in the leadership of the NPA was an issue of high priority that required serious and proper consideration. When the President decided not to proceed with the appointments it was in this context and in light of the fact that he is the repository of power in terms of the NPA Act and it was in his discretion to proceed with the appointments or not.
- 62 Moreover, the court *a quo* correctly held that the principle of *audi alteram partem* do not necessarily apply when dealing with the exercise of executive powers. The Applicant is incorrect in his contention that *Masetlha* is distinguishable from this application.
- 63 The court *a quo* further correctly held that the President's decision not to confirm

the purported decision was exercised lawfully, rationally and in a manner consistent with the Constitution.²⁹

AD PARAGRAPHS 71 TO 76

64 I deny these paragraphs.

65 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.³⁰

66 The decision of the court *a quo* in respect of costs lies within a range of permissible actions. 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 court *a quo*.

AD PARAGRAPH 77 TO 81

67 I deny that the Applicant should be afforded direct access for the reasons set out above. I further deny that the Applicant has made out a case for the relief he seeks.

²⁹ High Court judgment para 64.

³⁰ *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 31; *Trenco Construction v IDC & Another* 2015 (5) SA 245 (CC) paras 85 – 89.

CONCLUSION

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

Jobeian

DEPONENT

SIGNED AND SWORN to before me on 09 June 2022 at CAPE TOWN. The deponent having acknowledged that she 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.

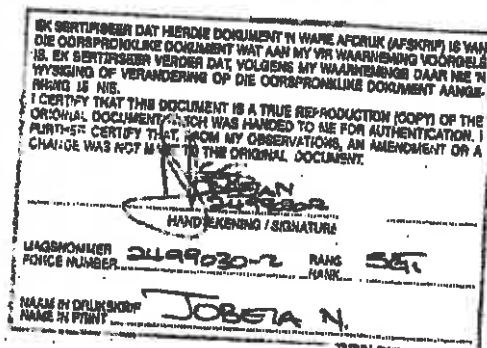
Jobeian
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COMMISSIONER OF OATHS

Title: MISS

Full Names: JOBEIA NOBUJAU

Address: 100 MAIN PARLIAMENT



Jobeian

Chowe Isaac

From: Chowe Isaac
Sent: Friday, 10 June 2022 16:06
To: 'Lisa Govender'
Cc: 'Donovan Reddy'; 'Malini Mahabeer'; 'Anisa Kessery'
Subject: RE: K R MATHENJWA // THE PRESIDENT AND FIVE OTHERS: CASE NO: CCT 120/22
Attachments: SKM_75822061015381.pdf

Dear Madam,

I forward herewith the First Respondent's Answering Affidavit for the purpose of service.

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

Chowe Isaac

From: Chowe Isaac
Sent: Friday, 10 June 2022 16:21
To: Molepo Dikeledi; De Kock Rodney (NPA Contact)
Subject: FW: K R MATHENJWA // THE PRESIDENT AND FIVE OTHERS: CASE NO: CCT 120/22
Attachments: SKM_75822061015381.pdf

Dear Colleagues,

I forward herewith the First Respondent's Answering Affidavit for the purpose of service.

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