CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 102/22

In the matter between:

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

Case CCT 120/22

In the matter between:

KHULEKANI RAYMOND MATHENJWA	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
SHAUN KEVIN ABRAHAMS	Fourth Respondent

NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA Fifth Respondent

NKEBE REBECCA KANYANE Sixth Respondent

Neutral citation: *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* [2023] ZACC 29

Coram: Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J

Judgments: Majiedt J (majority): [1] to [130]
Zondo CJ (minority): [131] to [225]

Heard on: 7 February 2023

Decided on: 24 August 2023

Summary: National Prosecuting Authority Act 32 of 1998 — sections 12, 13(1) and 14(3) — Appointments in National Prosecuting Authority — *Functus officio* doctrine

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The costs order of the High Court is set aside.

JUDGMENT

MAJIEDT J (Kollapen J, Mathopo J, Rogers J, Theron J and Potterill AJ concurring):

Introduction

[1] This Court has repeatedly emphasised the important role occupied by the National Prosecuting Authority in the administration of justice in our young democracy.[1] Axiomatically, the leadership of the National Prosecuting Authority at both national and provincial level is crucial in fulfilling this important role. The two cases, which were heard together, concern the appointment of two provincial Directors of Public Prosecutions (DPPs). The cases have the same legal issues, similar factual matrices and were also heard together in the High Court of South Africa, Gauteng Division, Pretoria, where substantially the same relief was sought by both applicants. This judgment relates to both cases. Leave to appeal is sought against the decisions of the High Court as well as the Supreme Court of Appeal dismissing the applicants'

[1] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at paras 13(e) and 26; *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Nxasana*) at para 19.

review applications.[2] In addition, there are also applications for direct access to review and set aside President Ramaphosa's decisions to fill the vacancies in the National Prosecuting Authority implicated by the two cases.

Parties

[2] The applicants are Mr Ron Simphiwe Mncwabe, an admitted advocate, employed as an Additional Magistrate at Tsakane Magistrate's Court, Ekurhuleni, and Mr Khulekani Raymond Mathenjwa, an admitted advocate and the Senior Deputy Director of Public Prosecutions in the National Prosecuting Authority, Gauteng Local Division.

[3] The common respondents are the President of the Republic of South Africa, the former Minister of Justice and Correctional Services and the National Director of Public Prosecutions (NDPP). They are the first, second and third respondents respectively.

[4] In the Mncwabe application, the fourth respondent is Mr Livingstone Mzukisi Sakata, the current DPP of the Northern Cape. Mr Sakata was appointed to that position by President Ramaphosa, with effect from 1 April 2022.

[5] In the Mathenjwa application, the fourth respondent is Mr Shaun Abrahams, a former NDPP. The fifth respondent is the National Prosecuting Authority. The sixth respondent is Ms Nkebe Rebecca Kanyane, the current DPP of Mpumalanga. Ms Kanyane was appointed to that position by President Ramaphosa, also with effect from 1 April 2022.

Background

[6] During the early part of 2018, prior to his resignation from office, former President Zuma took steps to appoint five senior National Prosecuting Authority

[2] *Mncwabe v President of the Republic of South Africa* [2021] ZAGPPHC 305 (High Court Judgment).

members as either DPPs or Special DPPs in various National Prosecuting Authority offices.[3] The appointments were recorded in official Presidential Minutes, all dated 1 February 2018. The news appears to have reached certain appointees, but, as will be discussed in detail later, not directly through former President Zuma or his office. The appointments were not announced to the public. On 14 February 2018, former President Zuma resigned from office and President Ramaphosa assumed office. Soon after taking office, President Ramaphosa directed his attention to these appointments.

[7] The applicants' appointments were recorded in the similarly worded Presidential Minutes 10 of 2018 (regarding Mr Mathenjwa) and 18 of 2018 (regarding Mr Mncwabe). During March 2019, in Presidential Minutes 67 and 69 of 2019 respectively, both dated 11 March 2019, President Ramaphosa decided to revoke,[4] amongst others, these two appointments. Aggrieved, the applicants separately approached the High Court to review and set aside President Ramaphosa's decision. As stated, the matters were heard together in the High Court.

[8] The central issue before the High Court was whether President Ramaphosa was entitled to reverse the initial decision of former President Zuma to appoint the applicants. That question entailed the *functus officio* principle.[5] It required a determination of two main issues: first, whether section 13(1)(a) of the National Prosecuting Authority Act[6] (NPA Act) was complied with prior to the notification of the appointments. Second, it required a determination whether personal notification, on its own, was sufficient or whether, in addition to personal notification, there had to be public notification.

[3] These were: Advocate M N Govender as DPP, Free State; Advocate K R Mathenjwa as DPP, Mpumalanga; Advocate R S Mncwabe as DPP, Northern Cape; Dr J P Pretorius SC as Special DPP, Priority Crimes Litigation Unit (PCLU); and Advocate B E Currie-Gamwo as Special DPP, Sexual Offences and Community Affairs (SOCA).

[4] As will appear later, it is debatable whether these were revocations, properly understood.

[5] This principle entails that once an official has taken a decision, it cannot be revisited.

[6] 32 of 1998.

[9] The High Court dismissed the review application. In holding that the *functus officio* principle does not apply, the High Court relied on *SARFU III*,[7] where it was held that the appointment of a commission of inquiry only takes place when the President's decision is translated into an overt act, through public notification. The High Court held that, absent public notification, the decision to appoint was not final and therefore President Zuma was not *functus officio* and he (or his successor) still had the right to change his mind regarding the appointment. In light of its conclusion on this score, the Court turned to the applicants' additional challenges.

[10] After analysing the arguments advanced, the High Court ruled against the applicants in respect of their further challenges against the impugned decision. These challenges were based on President Ramaphosa's alleged non-adherence to the *audi alteram partem* (hear the other side) principle and the alleged irrationality of the decision.

[11] The High Court further dismissed the applications for leave to appeal by both applicants as it took the view that there were no reasonable prospects that another court would come to a different conclusion.

[12] The Supreme Court of Appeal dismissed the applicants' leave to appeal applications on a similar ground and held that there was no further reason why an appeal should be heard. Their applications for reconsideration to the President of that Court in terms of section 17(2)(f) of the Superior Courts Act[8] met the same fate.

Factual matrix

[13] Further elucidation of the facts is required for a proper understanding of the central issues. During mid-2017, Mr Mncwabe received an unsolicited call from the personal assistant of Mr Shaun Abrahams, the then NDPP, requesting Mr Mncwabe's

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

[8] 10 of 2013.

curriculum vitae (CV). Mr Mncwabe complied with the request and promptly furnished his CV. Eight months after sending his CV, during or about February 2018, Mr Abrahams notified Mr Mncwabe, via a telephone call and WhatsApp message, that he had been appointed as the DPP for the Northern Cape. Mr Mncwabe was furnished with a copy of Presidential Minute 18 of 2018, which confirmed his appointment. A soft copy of the Minute was sent on the day of notification via WhatsApp and a hard copy was sent sometime in November 2018. The Minute reads:

> "Under section 13(1)(a), read with sections 6(2) and 9(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), I, **Jacob Gedleyihlekisa Zuma,** after consulting with the Minister for Justice and Correctional Services and the National Director of Public Prosecutions, hereby appoint **Adv Ron Simphiwe Mncwabe** as Director of Public Prosecutions: Northern Cape Division of the High Court, Kimberley, with effect from 1 February 2018. Given under my Hand at Pretoria on this 01 day of February Two Thousand and Eighteen."

[14] Mr Mncwabe was thus notified of his appointment during the same month that former President Zuma resigned from office. Following the notification received from the then NDPP, Mr Mncwabe's appointment was never publicly announced. On 13 August 2018, this Court in *Nxasana*[9] confirmed, among other things, a declaration that Mr Abrahams' appointment as NDPP was invalid without affecting the validity of past decisions and acts by Mr Abrahams in his official capacity. On 1 February 2019, Ms Shamila Batohi assumed office as the new NDPP. On 18 March 2019, Ms Batohi's office conveyed to Mr Mncwabe that his appointment had been revoked by President Ramaphosa.

[15] Mr Mncwabe took issue with this decision and approached the High Court for relief (Mncwabe application).

[9] *Nxasana* above n 1 at para 93.

[16] Mr Mathenjwa's narrative mirrors that of Mr Mncwabe. During June 2017, Mr Abrahams requested Mr Mathenjwa to furnish him with a copy of his CV. On 5 February 2018, Mr Abrahams informed Mr Mathenjwa that he had been promoted and elevated by former President Zuma to the office of DPP for Mpumalanga and that there was a Presidential Minute to confirm this appointment. Mr Mathenjwa's appointment was recorded in Presidential Minute 10 of 2018. Like Mr Mncwabe, Mr Mathenjwa's appointment was never publicly announced following the notification received from Mr Abrahams. On 12 March 2019, Mr Mathenjwa had a meeting with Ms Batohi, who advised him that the executive was of the view that his appointment was never finalised. On 19 March 2019, Mr Mathenjwa was informed by the then Minister of Justice that President Ramaphosa had revoked his appointment. This was done by Presidential Minute 67 of 2019. It reads the same as Presidential Minute 69 of 2019. Mr Mathenjwa also turned to the High Court seeking the relief adumbrated earlier (Mathenjwa application).

[17] In the High Court, Mr Abrahams filed an explanatory affidavit as the fourth respondent in the Mathenjwa application. He was not joined as a respondent in the Mncwabe application but, by informal agreement between the parties, that affidavit formed part of the papers in both the Mncwabe and Mathenjwa applications. The President's affidavit in answer to Mr Abrahams' explanatory affidavit was filed in the Mathenjwa application, but not in the Mncwabe application. Its admission in the latter application was opposed. After hearing argument, the High Court ruled that the President's affidavit would be part of the papers in both matters. The explanatory affidavit and the response thereto are of considerable importance in this matter.

Applicants' submissions in this Court

[18] It is convenient to summarise the applicants' submissions together, given their commonality. Where necessary, their submissions will be separately enunciated. In sum, the applicants' submissions on jurisdiction are that this Court's constitutional jurisdiction is engaged as the case concerns the executive powers of the President under the Constitution, namely sections 85(2)(e) and 101. In addition, the applicants contend

that the case raises an important point of law of general public importance because it deals with the interpretation and application of section 13(1)(a) of the NPA Act.

[19] The direct access applications concern the President's appointment of Mr Sakata and Ms Kanyane to the posts of DPP for the Northern Cape and Mpumalanga respectively, after the revocation of the appointments of Mr Mncwabe and Mr Mathenjwa to those posts. The applicants submit that they have made out a case for direct access to be granted. They argue that the applications concern only questions of law and that no evidence is required. Moreover, direct access is intertwined with the leave to appeal applications as a successful appeal would, in their submission, automatically render the later appointments irrational. In his submissions, Mr Mncwabe adds that this Court should consider his direct access application even though it might have been rendered moot after the appointment of Mr Sakata as Northern Cape DPP. It bears mention that this submission is not altogether correct because although the interdict initially sought may have been rendered moot, that is not the case with the question of whether Mr Sakata's appointment should be set aside. The latter remains a live issue.

[20] On the merits, the applicants submit that their appointments in Presidential Minutes 10 and 18 respectively became final when the decisions were communicated to them. Contrary to what the High Court held, public notification is not a requirement for finality: not under the tenets of the *functus officio* doctrine, the NPA Act, or the Constitution. In respect of *functus officio*, the applicants submit that a decision becomes final when "it is published, announced or otherwise conveyed to those affected by such decision".[10] The applicants further argue that section 13(1)(a) of the NPA Act does not impose a requirement of public notification in the case of the appointment of a DPP. Yet, so the argument goes, the NPA Act notably does so for the appointment of Special Directors under section 13(1)(c), which must be proclaimed in

[10] For this submission the applicants rely on Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 382. The applicants also cite *Plover's Nest Investment (Pty) Limited v de Haan* [2015] ZASCA 193 and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Limited* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

the Government Gazette. According to the applicants, the Legislature therefore did not envision public notification in the case of DPPs.

[21] The applicants also contend that the public notification requirement cannot be derived from the Constitution. They argue that sections 101 and 179 of the Constitution only require the decision to be in writing and countersigned, and the appointee to be qualified, yet remain silent on publication requirements. In the applicants' submission, the High Court has ignored this choice by the Legislature and impermissibly read a public notification requirement into section 13(1)(a) of the NPA Act, thus crossing the divide between interpretation and legislation. The High Court went astray on the public notification requirement as a result of its mistaken reliance on *SARFU III*, contend the applicants. That case, according to the applicants, is plainly distinguishable.

[22] The applicants contend that it was sufficient that they were notified personally. Such personal notification was validly attained when Mr Abrahams, as the then NDPP, communicated the appointments to them. A formal delegation from the President as the decision-maker to Mr Abrahams was not required for this personal notification as Mr Abrahams did not exercise any authority or discretion. He merely informed the applicants of former President Zuma's decision, having received the Presidential Minutes from the Department of Justice. This, they say, was in line with practice at the National Prosecuting Authority at the time and how Presidential Minutes were usually processed – namely through Mr Abrahams as the then NDPP. As a consequence, the doctrine of *functus officio* applied and barred the President from revoking the appointments at his discretion. Mr Mncwabe points out that, in addition to the two applicants, five other appointments had been made by the former President, two of whom are still in office. Hence, if the present two appointments were successfully challenged, a similar finding should be made regarding the other incumbent office holders.

[23] Further, Mr Mncwabe invoked principles of company law and labour law. It was argued that the *Turquand* rule[11] finds application. It was pointed out that in terms of that rule, the recipient of a message does not have to verify whether "the legal entity's internal requirements have been met". Under labour law, a written contract or letter of appointment is not required. Instead, offers of employment can be communicated, for example, via text message. Further, it is not necessary that the employee actually assumes his position. Lastly, Mr Mncwabe had a legitimate expectation that a contract had been concluded. During the oral hearing, however, Counsel for Mr Mncwabe expressly disavowed reliance on all these submissions.

[24] In the alternative, the applicants argue that, even if the President was not *functus officio*, the decision to revoke their appointments, as recorded in Presidential Minutes 67 and 69 respectively, must be set aside on grounds of legality, rationality and constitutionality. In brief, it is contended, first, that the President relied on the wrong provision of the NPA Act, namely section 13(1)(a), while in reality the removal of a DPP is regulated by section 14(3) read with section 12 of the NPA Act. This alone, according to the applicants, renders the decision illegal and invalid. Moreover, the appropriate statutory requirements for the removal of a DPP were not met, especially since the present NDPP was not consulted.

[25] Second, the applicants argue that executive action – contrary to the High Court's view – is subject to procedural fairness, namely the *audi alteram partem* rule, as well as administrative review in terms of the Promotion of Administrative Justice Act (PAJA).[12] They submit that executive decisions must at least be rational and the

[11] The *Turquand* rule emanates from *Royal British Bank v Turquand* (1856) 6 E & B 327 and protects persons from being affected by a company's non-compliance with an internal formality pertaining to the authority of its representatives: see *Merifon (Pty) Limited v Greater Letaba Municipality* [2022] ZACC 25; 2022 (9) BCLR 1090 (CC) at fn 12. This common law principle has been partially codified in section 20(7) of the Companies Act 71 of 2008. The rule "protects third parties, who are not aware of any of the internal irregularities affecting their contracts with a company, by entitling them to assume that all internal formalities, such as quorum requirements, notice periods, voting procedures and the like, have been complied with"; Seely *The protection afforded to third parties when contracting with companies: an analysis of the Turquand rule and doctrine of constructive notice* (LLM Dissertation, University of Pretoria, 2018) 5-6.

[12] 3 of 2000.

revocation decision was not. It was irrational in process, because the President did not give the applicants a chance to be heard, as is required by the *audi alteram partem* rule.

[26] Lastly, in respect of their direct access application, the applicants argue that, if this Court finds the revocation decision to be flawed, it must follow that the appointments of the present incumbents to the Northern Cape and Mpumalanga DPP offices stand to be declared constitutionally invalid. This is because an appointment is *ipso facto* (automatically) invalid if it is made to an office that was not validly vacated. The applicants rely on this Court's decision in *Nxasana*.[13] The equitable order that ought to be made is that the current incumbents vacate their offices and that the applicants be retroactively appointed.

[27] In respect of costs, the applicants argue that they should not have been mulcted with costs, because they enjoy *Biowatch*[14] protection.

President Ramaphosa's submissions in this Court

[28] The only respondent that participated in these proceedings is the first respondent, President Ramaphosa. The third respondent, Ms Shamila Batohi, filed a notice to oppose and an answering affidavit the day before the hearing in this Court. She sought condonation for the late filing of the notice to oppose and answering affidavit. The notice and the affidavit were almost two months late. The explanation proffered for the lateness was inadequate. Due to the degree of lateness and the inadequate explanation, condonation for the late filing is refused.

[29] The President does not dispute this Court's jurisdiction to hear this matter. However, he does oppose the applications for direct access to set aside the appointments of Ms Kanyane and Mr Sakata. He contends that absent exceptional circumstances, direct access is not warranted and is not in the interests of justice. In particular,

[13] *Nxasana* above n 1 at para 99.

[14] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-3.

the President contends that if there is any review of these appointments, it should be by the High Court in the first place, and not by this Court as a court of first and last instance. The President submits that the relief sought by the applicants will effectively install DPPs "who were not selected after careful deliberation by the current NDPP". This, he submits, would be prejudicial, not only to the National Prosecuting Authority itself, but to the wider criminal justice system.

[30] On the merits, the President argues that he was not *functus officio* when he came into office, since the disputed appointments were never finalised by his predecessor. Finalisation, he submits, is contingent on both public and personal notification. The argument on public notification was, however, expressly abandoned in the course of the hearing before us. It was submitted that, if this Court finds that personal notification is a sufficient condition to finalise the appointments, Mr Abrahams had no authority to notify the applicants. Therefore, the decision remained inchoate, and President Ramaphosa was at liberty to reverse it.

[31] Before proceeding to the analysis of jurisdiction and the merits, it is necessary to deal with two preliminary issues: the first issue is the length of the President's written submissions and the second is the issue of condonation of the late filing of the submissions.

[32] When these matters were set down, the parties were directed to file written submissions on a date set out in the directions. The respondents, including President Ramaphosa, were directed to file their written submissions on 13 December 2022. According to Practice Direction 4[15] in the Practice Directions made in terms of rule 32(2) of the rules of this Court, written submissions filed in this Court may not exceed 50 pages except with leave of the Court. Leave, according to the directions, can be sought by way of letter, but must be sought before filing the submissions. On 8 December 2022, President Ramaphosa addressed a letter to the

[15] Issued on 17 May 2010.

Court seeking leave to file submissions exceeding the maximum page length. On 20 December 2022, President Ramaphosa filed his submissions which were in excess of the page limit by approximately six pages.

[33] This Court, albeit in a different context, has repeatedly held that condonation will be granted if, regard being had to several factors, it is in the interests of justice to do so.[16] In this case, the relevant factors include: the extent to which the submissions are in excess of the usual limit; the reason or cause thereof; the effect on the administration of justice and other litigants; the importance of the issue to be decided in the matter; and the presence or absence of opposition.

[34] As indicated above, the extent of non-compliance is only six pages. This is minor. I think the administration of justice would be stymied if the submissions were rejected. This is particularly so, in this matter, because: (a) there is no opposition, (b) the issues for determination in this matter are of significant importance, (c) the issues are nuanced, (d) the Court would benefit greatly from full arguments from both sides, and (e) there is no prejudice to the parties. Should leave be refused, President Ramaphosa would suffer grave prejudice. In the premises, I think that it is in the interests of justice to grant President Ramaphosa leave to file submissions in excess of the page limit.

[35] On the issue of the late filing of the submissions, I am of the view that condonation should be granted. This is so because the submissions were late by no more than three days and the delay was caused by a combination of the conduct of the applicants and President Ramaphosa. Furthermore, neither of the applicants opposed the application nor did either of them suffer or allege any prejudice as a result of the three-day delay.

[16] *Booi v Amathole District Municipality* [2021] ZACC 36; (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC) at paras 26-7.

Jurisdiction and leave to appeal

[36] In order for this Court to entertain a matter it must meet two requirements. First, it must engage this Court's jurisdiction. For a matter to engage this Court's jurisdiction, it must raise a constitutional issue or an arguable point of law of general public importance, which ought to be considered by this Court.[17] The second requirement is that the interests of justice must warrant that leave to appeal be granted.[18]

[37] These applications plainly engage this Court's constitutional and extended jurisdiction. In the first instance, this matter engages this Court's constitutional jurisdiction because it concerns the interpretation and application of section 13(1) of the NPA Act which deals with the exercise of the presidential power to appoint DPPs. In *Lufil Packaging*, this Court held that "the interpretation and application of legislation which is specially mandated by the Constitution will inevitably be a constitutional matter".[19] As the NPA Act is legislation envisaged by the Constitution,[20] this matter concerns the exercise of public power, which engages this Court's constitutional jurisdiction.

[38] Furthermore, the question whether the appointment of a DPP must be announced by way of public notification before it becomes final, and the requirements for valid personal notification, are unquestionably arguable points of law of general public importance that this Court ought to consider.

[17] Sections 167(3)(b)(i) and (ii) of the Constitution.

[18] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912; 2001 (1) BCLR 36 at para 12.

[19] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* [2020] ZACC 7; (2020) 41 (ILJ) 1846 (CC); 2020 (6) BCLR 725 (CC) (*Lufil Packaging*) at para 27. See also *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at para 27 and *Snyders v De Jager* [2016] ZACC 55; 2017 (3) SA 545 (CC); 2017 (5) BCLR 614 (CC) at para 28.

[20] Section 179(7) of the Constitution.

[39] In deciding whether it is in the interests of justice to grant leave to appeal, this Court generally considers, amongst others, prospects of success, the importance of the issues raised and public interest in the issues raised.[21]

[40] To my mind, the issues in this case are arguable and the interpretations of section 13(1) of the NPA Act advanced by both sides are, on their face, meritorious and there are reasonable prospects of success. As regards the importance of the issues and the public interest in them, it is clear that the issues in this matter are of considerable importance, not only to the parties, but also to the general public. A DPP fulfils a very important role in our Republic's criminal justice system and in ensuring the well-being of our democracy. It is therefore in the interests of justice to grant leave to appeal.

[41] On the understanding that the direct access applications are contingent upon the applicants' success in their main applications, this Court should entertain them for the reasons that follow. In *Bruce*, this Court held that in granting an application for direct access, the interests of justice requirement will ordinarily be met only where exceptional circumstances exist.[22] For the existence of exceptional circumstances, there must, in addition to other factors, be sufficient urgency or public importance and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure.[23] In the present matter, I think that the two applications are sufficiently linked to justify a departure from the normal procedure. A decision on the first will inevitably affect the second. In addition, both matters concern decisions made in terms of section 13(1) of the NPA Act. As regards urgency, importance and prejudice to the public interest, I take the view that it is necessary to hear the applications for direct access, because a decision on both applications will bring finality to the matter and certainty and stability to the offices of the DPP in Mpumalanga and

[21] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 17.

[22] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 22.

[23] Id at para 19.

the Northern Cape. In the premises, I hold that, in the event that we do get there, direct access should be granted.

Merits

Functus officio

[42] As stated, this doctrine entails that once something is done, it cannot be undone, reversed or otherwise altered by the decision-maker. This is because the decision-maker would have exhausted her authority and relinquished her jurisdiction over the matter by taking a final decision.[24] The finality of a decision is central to the doctrine's operation. The doctrine promotes certainty and stability[25] and it ameliorates prejudice and injustice occasioned to those who would rely on otherwise wavering decisions.[26] The doctrine's relationship to the *Oudekraal* rule[27] is evident from this Court's judgment in *Kirland*.[28]

[43] In *Retail Motor Industry Organisation*, the Supreme Court of Appeal held with regard to the doctrine—

> "first, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural

[24] Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 372 and Hoexter and Penfold above n 10 at 381-2.

[25] *Kirland* above n 10 at para 103. See also *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 47; Hoexter and Penfold above n 10 at 381.

[26] Hoexter and Penfold above n 10 at 381.

[27] The rule laid down in *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) at para 26 holds that a decision must be treated as valid, that is, it exists in fact with legal consequences, by the decision-maker and affected parties until or unless reviewed and set aside. See *Kirland* above n 10 at para 90. See further: *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 44 and *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* [2019] ZACC 36; 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC) at paras 50-60.

[28] *Kirland* above n 10.

> fairness having been observed and any other conditions); fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation."[29]

[44] A useful exposition of the doctrine is advanced by Pretorius:

> "The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognisable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."[30]

[45] The parties accept the well-established legal principle that, save in special circumstances or where there is a provision in law to the contrary, a final decision can only be altered by way of appeal or review to the competent authority, even if that decision is illegal.[31] It is common cause that, if the incumbent President as the decision-maker at the time was *functus officio*, his successor could not undo the decisions taken (except through the proper procedure). The contentious issue is whether the decision-maker (President Zuma) became *functus officio*, binding his successor. This issue, in the first instance, compels us to enquire into the requirements of the doctrine and, in the second instance, the facts of the matter. For this, we must determine at which specific point in time a decision is considered final, and therefore, irreversible.

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[29] *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs* [2013] ZASCA 70; 2014 (3) SA 251 (SCA) at para 25.

[30] Pretorius "The origins of the *Functus Officio* Doctrine, with Specific Reference to its application in administrative law" (2005) 122(4) *SALJ* 832. See generally Van der Walt *The Functus Officio doctrine and invalid administrative action in South African Administrative Law* (LLM thesis, University of South Africa, 2019) at 55.

[31] The rule crystallised in *Oudekraal* above n 27 and other cases cited therein.

[46] Hoexter and Penfold posit: "[f]inality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it".[32] Finality plays an important role in this case as far as the *functus officio* principle is concerned. That is the topic that next bears consideration.

Finality

[47] Plainly the appointment decision lacked finality until it was properly communicated by or on behalf of the decision-maker, either to the world at large (public notification) or to the applicants (personal notification). It was only when such communication occurred that a party affected by a decision would acquire rights and benefits arising from it.[33]

[48] There is sound logic to that position: a decision-maker who has not communicated a decision is entitled to have a change of view and reverse the decision taken. There can be no prejudice to any other party as the decision has not been communicated. Thus, no one could be said to have acquired any rights or benefits from an uncommunicated decision or placed reliance on it. In this case, it means that if the appointment decision had been properly communicated, the point of finality would have been reached. If not, it was not final and therefore capable of being revisited.

[49] The facts and decision in *Kirland*[34] are instructive. There, the Superintendent-General and head of the Eastern Cape Province's Department of Health had taken a decision to refuse Kirland's applications to build private hospitals in the province. However, the Superintendent-General went on sick leave before signing the letter of refusal or communicating the decision to Kirland. On his return to work, the Superintendent-General discovered that (in his absence) the acting head of the

[32] Hoexter and Penfold above n 10 at 382.

[33] *MEC for Health, Province of Eastern Cape NO v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2013] ZASCA 58; 2014 (3) SA 219 (SCA) at para 15 states that "[t]he fact that the decisions were not communicated or otherwise made known has an important effect: because they were not final, they were subject to change without offending the *functus officio* principle".

[34] *Kirland* above n 10.

department had approved the applications and communicated her decision to Kirland. The Superintendent-General withdrew the approval. Relying on *SARFU III*, the Supreme Court of Appeal held that the initial refusal decision could be reversed by the acting head of the department because it had not yet been communicated. It held that the Superintendent-General had not been *functus officio* when he went on sick leave, because a decision is revocable before it is published or announced or otherwise conveyed to the affected person. This Court held that the refusal "was never signed off or communicated to Kirland"; only the approval was.[35] Accordingly, as the approval was communicated to Kirland it was "a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat".[36]

[50] Equally edifying is *Mohamed*, a decision of the Full Court in the Western Cape.[37] An asylum seeker's application for asylum was rejected by a Refugee Status Determination Officer on the basis that the application was manifestly unfounded. The applicant was informed of the Officer's rejection and advised that he could make further submissions, which he did. During this time, the Standing Committee of Refugee Affairs reviewed the Officer's rejection and upheld it on 28 October 2011. The Standing Committee immediately informed the Officer. However, the applicant was only informed of the Standing Committee's decision on 4 February 2013.

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[35] Id at para 69.

[36] Id at para 105.

[37] *Mohamed v Minister of Home Affairs* [2016] ZAWCHC 13. Compare *Manok Family Trust v Blue Horizon Investment 10 (Pty) Ltd* [2014] ZASCA 92; 2014 (5) SA 503 (SCA) at paras 14 and 17, where the Supreme Court of Appeal held that a decision taken under section 11(4) of the Restitution of Land Rights Act 22 of 1994 that a land claim failed to meet the requirements of the Act, was final and the decision-maker was *functus officio* because the decision had been conveyed to the affected party, namely the applicant who claimed restitution. See also *Tahilram v Trustees of the Lukamber Trust* [2021] ZASCA 173; 2022 (2) SA 436 (SCA) at para 27, where the same Court held:

> "[W]henever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them. The valuer is then *functus officio* insofar as the valuation and matters pertaining thereto are concerned. That being so, the valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it. Only a court has the power to interfere with the valuer's decision in review proceedings."

The Standing Committee declined to consider the applicant's further submissions which had been made on legal advice.[38]

[51] A single Judge held that the Standing Committee was *functus officio* after it had upheld the Officer's decision and therefore correctly declined to entertain the applicant's submissions. On appeal, the Full Court reversed that decision. With reference to the position in South African, English and Australian law, the Full Court held that "the flexibility to alter a decision remains until the decision has been communicated to the affected person".[39] Accordingly, the Standing Committee was not *functus officio* because the Officer had failed to inform the applicant about the decision before the applicant's late written submissions were delivered.[40]

[52] As *Mohamed* demonstrates, the legal position here is the same in England[41] and Australia.[42] In respect of the status of a decision by a tribunal, Wade and Forsyth explain it thus—

> "[i]n the absence of special circumstances the tribunal's decision is irrevocable *as soon as it has been communicated to the parties*, even though orally and even though the reasons for it remain to be given later."[43] (Emphasis added.)

[53] The law is therefore clear that communication of a decision to an affected party is central to the finality of that decision. But is there a requirement for public notification as well?

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[38] *Mohamed* id at para 15.

[39] Id at para 29.

[40] Id at para 57.

[41] See Wade and Forsyth *Administrative Law* (LexisNexis, London 2021) at 192 as quoted in *Mohamed* id at para 26; *Re: 56 Denton Road Twickenham* [1953] Ch 51.

[42] *Seminugus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240 at para 21; *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 13 at para 29; and *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104 at paras 102 and 104.

[43] Wade and Forsyth above n 41.

Public notification

[54] I deal with this aspect rather perfunctorily, given the jettisoning of this point by Counsel for the President at the hearing. Generally, the requirement of public notification for the appointment of public officials must be sourced in the Constitution, legislation or the common law. As a general proposition, the issue of publication, be it public or private, is closely linked to the importance of the post concerned, particularly in a constitutional setting. This was also one of the main bases for the High Court holding that public notification is required. That Court based its holding: (a) on the fact that only the President may appoint a DPP; (b) the significance of the DPPs' responsibilities and the statutory requirements for their qualification; (c) the importance of the DPP in South African society; and (d) the public interest in their appointment. Importantly, the President, as the sole repository of power in terms of the NPA Act, is an essential part of the final decision to appoint a DPP. Such an appointment, in the view of the High Court, only takes place when the President's decision is translated into an overt act, through public notification.

[55] I have explicated the public importance of these posts. I can do no better than to cite this Court's dictum in *Nxasana*, in addressing the *raison d'être* underpinning the constitutional guarantee of the independence of the National Prosecuting Authority:

> "The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may – as CASAC submitted – 'be pressured . . . into pursuing prosecutions to advance a political agenda'. All this is antithetical to the rule of law, a founding value of the Republic. Also, malleability, corruption and dysfunctionality are at odds with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA'. At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. . . .

> If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself."[44]

[56] But the importance of a public post in and of itself does not establish a public notification requirement. Our law has no requirement of universal application obliging functionaries to communicate decisions to the public at large in order to finalise them. The Constitution only requires that decisions of the President that have legal consequence or are taken in terms of legislation, be in writing and accessible to the public.[45] It does not impose a public notification requirement.

[57] On behalf of the President, much reliance was initially placed on *SARFU III*[46] in seeking to buttress the contention that public notification of the appointments was an essential requirement in this instance. That reliance is misconceived, as was the High Court's reliance on the case for its holding that these appointments had to be announced publicly for them to take effect. *SARFU III* must be understood within the factual setting of the establishment of a commission of inquiry. The case related to the appointment of a commission of inquiry by former President Mandela into the administration of rugby in South Africa. The South African Rugby and Football Union

[44] *Nxasana* above n 1 at paras 19-20.

[45] Section 101 of the Constitution, which reads:

> "(1) A decision by the President must be in writing if it—
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> (a) is taken in terms of legislation; or
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> (b) has legal consequences.
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> (2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.
>
> (3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
>
> (4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
>
> (a) tabled in Parliament; and
>
> (b) approved by Parliament."

[46] *SARFU III* above n 7.

(SARFU) applied to the Transvaal High Court for an order against the President setting aside the notice to appoint the inquiry. The matter made its way to this Court.[47]

[58] One of the challenges levelled against the President by SARFU, which was upheld in the High Court, was that the President had abdicated his power to appoint the commission to the Minister of Sport at a meeting in August 1997. Additionally, this abdication of power rendered the appointment of the commission a nullity. This is because the appointment of commissions of inquiry is the exclusive prerogative of the President, pursuant to section 84(2)(f) of the Constitution.[48]

[59] As was held by this Court in *Hugo*,[49] the President's exercise of public power in terms of section 84(2) of the Constitution rests on the President as head of state where he is the sole repository of the power.[50] Consequently, had SARFU proven that the President had abdicated his power in the appointment of the commission of inquiry, the commission would have been void ab initio.

[60] Plainly, in *SARFU III*, this Court was concerned with conditions attaching to appointments of commissions of inquiry and limited itself accordingly.[51] *SARFU III* is no authority for a more general proposition that public notification is a requirement for a functionary to be *functus officio*. Self-evidently, a commission, once established, wields wide-ranging powers affecting the general public and its very establishment is usually for the investigation of matters concerning and affecting the general public. Thus, publication in the Government Gazette, proclaiming that the extensive powers set out in the Commissions Act[52] would apply to the commission, is understandable. But neither the Constitution nor that Act requires public notification of the commission's

[47] Id at paras 2-3.

[48] Id at para 24.

[49] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1; 1997 (6) BCLR 708 at para 8.

[50] *SARFU III* above n 7 at paras 144-5.

[51] Id at paras 30-1.

[52] 8 of 1947.

establishment. The establishment of a commission of inquiry does not purport to confer benefits or rights to anyone. It thus makes sense that the only way of communicating the decision in a way that gives rise to finality is by public communication. This Court said that the method "usually employed" to publicly communicate the establishment of a commission is by way of promulgation in the Government Gazette.[53] One must assume that there was evidence before the Court of this practice, or that the Court took judicial notice of it. For all these reasons, *SARFU III* is distinguishable.

[61] Lastly, under this rubric, it is necessary to dispel two misconceptions regarding public notification in the Government Gazette. The first is the role that the Commissions Act plays in relation to commissions of inquiry. That Act does not, as was argued, require that its establishment be proclaimed in the Government Gazette. Instead, all it says is that if the powers set out in that Act are to apply to a particular commission, that fact must be proclaimed in the Government Gazette.[54]

[62] The second misconception concerns section 13(1)(c) of the NPA Act. That section reads:

> "The President, after consultation with the Minister and the National Director—
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> . . .
>
> (c) 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 him or her by the President by proclamation in the *Gazette*."

[63] The requirement in section 13(1)(c) is not that the appointment of a Special DPP must be published in the Government Gazette, as was submitted on behalf of the applicants in seeking to distinguish the appointment of a Special DPP from that of an ordinary DPP. This distinction was aimed at buttressing the contention that a public

[53] *SARFU III* above n 7 at para 44.

[54] Section 1(a).

notification requirement is expressly excluded in the case of an ordinary DPP's appointment through the application of the *inclusio unius est exclusio alterius* (inclusion of one excludes the other) principle. The submission is fallacious. What must be proclaimed in the Government Gazette is not the appointment itself, but the specific powers of a Special DPP, since she is appointed for a special function, with special powers to fulfil that function.

Personal notification

[64] What bears consideration next is the important issue of personal notification. It must be repeated that a DPP unquestionably occupies a very important position within the NPA which, in turn, fulfils a very important role in South Africa's constitutional democracy. It is of no trifling significance that section 13(1) vests the power of appointment in the President, a fact eloquently elucidated by this Court in *EFF*:

> "The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. . . . *[A]lmost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him.*"[55] (Emphasis added.)

[65] Apart from section 101 of the Constitution – read together with section 12 of the NPA Act[56] – there are no express rules regulating the procedural aspects of DPP appointments.

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[55] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 20.

[56] Section 12 reads:

> "(1) The National Director shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.
>
> (2) A Deputy National Director shall vacate his or her office at the age of 65.
>
> (3) If the National Director or a Deputy National Director attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and—

(a) the National Director or Deputy National Director wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue, the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director' s term of office shall not exceed 10 years.

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

(8) (a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to

[66] Having regard to the purpose of the *functus officio* doctrine, the law is plain that personal notification to the appointed person is necessary for a decision to attain the status of finality. That aspect has already been considered above. Personal notification will most often be sufficient, as it realises a primary goal of the *functus officio* doctrine: to enable those affected by the decision to gain certainty and to plan their affairs accordingly. The signing of the Presidential Minutes – in accordance with section 101 of the Constitution – could not, in and of itself, be sufficient to finalise the appointments; there had to be personal notification to those affected by the decision. Even though the Presidential Minute is an indispensable step in the decision-making process, it does not on its own constitute a final decision. Therefore, the mere fact that the former President's decision was reduced to writing by way of Presidential Minutes does not necessarily render President Ramaphosa *functus officio*.

[67] The proposition that, at the very least, an appointee must personally receive notification of the appointment for it to be effective, appears to be uncontentious. The applicants appear not to take issue with this concept and their argument followed suit. It appears to me to have become common cause that communication of the

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vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the National Director or a Deputy National Director—

(i) vacates his or her office in terms of paragraph (a)(i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or

(ii) vacates his or her office in terms of paragraph (a) (ii), he or she shall be deemed to have been retired in terms of section 16 (4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.

(9) If the National Director or a Deputy National Director, immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of this Act or the Public Service Act do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the National Director , or a Deputy National Director and if at that date he or she has not reached the age at which he or she would in terms of the Public Service Act have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post."

appointments must have been "authorised" in some form. Since the communication by Mr Abrahams itself is undisputed, and since he was the only person who ever communicated the appointments to the applicants, the outcome of the application depends entirely on the question of whether this communication met the requirement of "authorisation". In any event, insofar as it may still be in issue, I hold that for the reasons advanced, in this instance personal notification was required before these appointments could take effect. That notification could be in writing or oral. The crucial issue as to whether Mr Abrahams had the requisite authority to notify the applicants, is what I next consider.

Did Mr Abrahams have the requisite authority to notify the applicants?

[68] On behalf of the President, it is argued that absent an official direction from the Justice Ministry, or the Presidency itself, Mr Abrahams took the initial, unauthorised step of contacting the applicants in a bid to finalise President Zuma's appointments prematurely. The central question is who, if anyone, authorised Mr Abrahams to communicate with the applicants? It appears useful in this case to explain and draw a distinction between original power and conferred authority to notify.[57] The former would refer to any power that Mr Abrahams had as the NDPP at that time and which is sourced in his office as such. The latter would refer to any power that Mr Abrahams did not have himself, but could have been conferred by President Zuma through authorisation. For the announcement to be valid, Mr Abrahams needed either one of the two kinds of authority.

Original power to notify as NDPP

[69] The obvious person, then, who can state where the power or authorisation came from is Mr Abrahams himself. His affidavit, however, is somewhat short on details:

[57] A similar distinction, albeit in a different context, was apparently drawn by Voet with regard to the office of deputy lieutenant (*legatus*). It was disputed whether his jurisdiction was to be considered as original (*propria*) or derived (*mandata*), see Translator's Note to Voet *Commentary on the Pandects* Vol 1, Book 1, Title 16.

> "As head of the National Prosecuting Authority, and having authority over the exercising of all my powers, and the performance of all my duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, the NPA Act or any other law, I immediately informed each candidate of their respective appointments and congratulated them."

[70] This statement is no more than a bare assertion on the part of Mr Abrahams. He does not cite a specific legislative provision, nor could he, as there is nothing in the Constitution or the NPA Act to lend legitimacy to his claim. Even more revealing is his blanket invocation of "any other law" as justification for his actions. Mr Abrahams' affidavit does not explain what law he is referring to.

[71] It appears equally dubious that the power to notify could be an implied power of the office of the NDPP. In *AmaBhungane*,[58] this Court explicated the content of implied powers:

> "A distinction must be drawn between an implied primary power and an ancillary implied power. I consider it necessary to draw this distinction because quite often discussions of implied powers entail ancillary implied powers, and not primary implied powers. The distinction will be better understood if I first discuss the well-known concept, the ancillary implied power. An ancillary implied power arises where a primary power – whether express or implied – conferred by an Act cannot be exercised if the ancillary implied power does not also exist. . . .
>
> What I refer to as an ancillary power arises in the context of one power being necessary in order for an unquestionably existing power to be exercised. . . . Coming to an implied primary power, an antecedent question is: what do I mean by a primary power? A primary power is a power to do something required to be done in terms of an Act and which does not owe its existence to, or whose existence is not pegged on, some other power; it exists all on its own. That is what makes it primary, and not ancillary. If it owed its existence to another primary power, then it would be an ancillary power. A primary power may be express or implied. It is express if it is specifically provided for

[58] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

> . . . . The primary power is implied if it is not expressly provided for. It is implied from a reading of the Act and a consideration of all that must be factored in the interpretative exercise. It owes its existence to provisions of the Act and everything that is relevant to the interpretative exercise. The fact that provisions of the Act, including provisions conferring other primary powers, may shed light on whether an implied primary power exists does not mean the implied primary power derives its existence from these provisions. These provisions and all that must be factored in determining whether a primary implied power exists serve as interpretative tools that point to its existence. As we now know, the Constitution plays a crucial role in that interpretative exercise. . . . So, the interpretative exercise is not confined to the four corners of a statute. The answer to the question whether an implied primary power exists is yielded by the usual interpretative exercise that seeks to establish what a statute or a provision in it means. There is nothing unusual about this."[59]

[72] Implied powers are the exception, not the rule. These powers only come into existence when they are reasonably necessary to give practical effect to the express powers laid down in legislation.[60] Axiomatically, an implied power must draw from an enabling legislative provision. An implied power is ordinarily less likely to be found where the legislation is aimed at certainty. When one compares the implied powers recognised in *Masetlha*[61] to those now asserted by Mr Abrahams, plainly in that case the President relied on an express legislative provision, section 209(2) of the Constitution, which conferred the appointment power. Mr Abrahams can make no such claim, since the statutory power to appoint DPPs vests exclusively in the President – not the NDPP. The President may have an obligation to consult with Mr Abrahams, but this is hardly a basis to assert an implied right for the NDPP to finalise the appointments. It may well be practical for Mr Abrahams to notify the successful candidates. But

[59] Id at paras 63-71. See also Hoexter and Penfold above n 10 at 59-60; De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban, 2005) at 108; and Baxter above n 24 at 404-5.

[60] *Matatiele Municipality v President of the Republic of South Africa I* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 50.

[61] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 68.

practicality is not the legal standard. The decisive factor for the existence of an implied power is necessity.[62]

[73] I accept, though, that the President's express power to make the appointment is coupled with the implied power to communicate it. I also accept that we are not dealing here with an implied power vesting directly in either the Minister or the NDPP. What we are concerned with is whether, factually, President Zuma released the minutes on the basis that the decisions were to be communicated to the appointees forthwith. That being the case, he was simply allowing the Minister, or someone delegated by the Minister, to perform the mechanical act of communication on behalf of the President.

[74] If President Zuma desired the communication of the appointments, I can see no legal objection to that happening through a conduit. In these circumstances, Mr Abrahams would be a messenger, not a decision-maker. It is hardly necessary for Mr Abrahams to be the one to communicate the final appointment to the applicants – even though it may be convenient. This power remains with the President. Without an instruction to make the notification on the President's behalf, Mr Abrahams had no authority to finalise the appointments, nor can he assert implied authority.

[75] Save as set out, as a mere messenger or conduit, it follows that the former NDPP had no statutory authority or implied power to inform the applicants. The averments in his affidavit outlined earlier can be understood to arrogate such a power to himself "as head of the National Prosecuting Authority". However, the original power to notify, for the reasons enunciated, plainly lay with the President. The question of authorisation must ultimately be determined by possible conferred authority through authorisation and the form that such authorisation must take.

[62] *Lekhari v Johannesburg City Counc*il 1956 (1) SA 552 (A) at 567B.

Conferred authority to notify

[76] There then remain only two bases upon which Mr Abrahams could have acted. The first is direct authorisation from the President, either expressly or tacitly, to perform the mechanical act of communication. This would ordinarily take the form of an instruction. The second is if the President left it to the Minister to notify the appointees, and if the Minister, in turn, gave the Minutes to Mr Abrahams to carry out the mechanical act. They will be addressed presently.

[77] The first issue for consideration is which form of authorisation was necessary and whether the communication was merely a mechanical act by Mr Abrahams. An ancillary aspect is whether there was, on the facts, an instruction by someone in authority for Mr Abrahams to communicate to the applicants their appointment to the vacant posts. There is self-evidently a distinction between delegation and an instruction.[63] Delegation connotes the transfer of power from one person to another. The delegatee stands in the shoes of the delegator and has real autonomy and discretion about whether and how to exercise the delegated power – just as the delegator would had she not delegated the power. On the other hand, someone who is asked to

[63] *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1987 (4) SA 155 (W) at 165B-E:

> "I was referred to Wiechers – that is the English translation – *Administrative Law* at 51-6, where the distinction between the concepts of deconcentration and decentralisation of power is dealt with *in extenso*. Mr *Henning*, who did the reply on behalf of the applicant, referred me to Baxter *Administrative Law* to what appears to be the first edition published in 1984 at 436 n 317. In this footnote the author refers to Wiechers' book and the pages I have referred to and comments as follows:
>
> > 'In order to express the varying degrees of devolution, Professor Wiechers has delineated the three-fold distinction between mandate, deconcentration and decentralisation. (*Wiechers* at 52-62.) *Mandate refers to an authorisation to perform a purely mechanical act or give effect to a decision already taken.* Deconcentration is where the sub-delegee is given limited discretionary powers but exercises them in the name of the delegator (*delegans*), who can withdraw them at any time and who retains full authority over and responsibility for the acts of the delegee, and decentralisation occurs where there is a full delegation of power and the sub-delegee becomes fully responsible for the exercise of the power.
> >
> > These distinctions have been approved and applied on at least one occasion. (*Naidoo Johannesburg City Council* 1979 (4) SA 893 (W) at 897-8) But it should be remembered that they will retain their use only so long as the categories are employed as means of expressing various degrees of devolution and are not treated as fixed concepts.'" (Emphasis added.)

communicate a decision has no real autonomy or discretion about whether and how to communicate the decision – it is a mechanical task.[64] The person thus instructed must comply fully with the instructions about how, when and to whom communication of the decision must be made. As I see it, the form of authorisation can then be express (written or oral) or tacit. The latter could include authorisation through a standing practice.

[78] Neither Mr Abrahams nor the applicants lay claim to an express instruction from President Zuma. There is also no evidence of any such express instruction. Express authorisation appears, to me, not to have come from the President or his office. It is of no assistance at all for the applicants to aver that President Ramaphosa did not object when he discovered that the appointment decisions had been communicated to the applicants. Mr Abrahams claims in his affidavit that former President Zuma and Minister Masutha did not object or take issue with his communication of the appointments. The only reasonable inference from this statement is that they did not authorise him to do so. This falls far short of the requirements of tacit authorisation. Moreover, President Ramaphosa is adamant in the answering affidavit filed in this Court that no authorisation or instructions were given to Mr Abrahams. And, as will become clear later, Mr Abrahams' claim that President Ramaphosa did not react is contested.

[79] In the present instance, absent a reliance by Mr Abrahams on either express or tacitly direct or delegated (including sub-delegated) authorisation, the only possible outcome is that Mr Abrahams had to have been instructed to communicate the appointments to the applicants. But by whom was he so instructed? Mr Abrahams does not tell us this. It is conceivable that President Zuma could have delegated to the then Minister, Minister Masutha, the task of communicating the decision to the applicants. Minister Masutha could in turn have instructed Mr Abrahams, as head of the National Prosecuting Authority at the time and the applicants' ultimate supervisor, to

[64] Id.

communicate that decision. There was no legal impediment to that scenario. Counsel for President Ramaphosa, in oral argument correctly conceded that the President could instruct someone to communicate the decision. Moreover, President Ramaphosa caused the impugned revocation decisions to be communicated in a similar way, by expressly instructing the current NDPP, Ms Batohi, to convey the revocation decisions to the applicants. But, on the facts, that is not what happened in respect of the appointments. There is no evidence, at all, of a delegation from former President Zuma to Minister Masutha and an instruction from the latter to Mr Abrahams.

[80] Mr Abrahams does, however, explain how he came into possession of the Minutes:

> "These signed Presidential Minutes, were subsequently handed to me by the Ministry of Justice during early February 2018, whilst I was in Cape Town on official business so as to enable me to communicate to the individuals concerned, which I duly did upon my return from Cape Town, providing them each with copies of the Presidential Minutes, *confirming the then President's acquiescence to the vacating of their respective offices, to them*. The signed Presidential Minutes were contained in their original customary red folders in which they were initially submitted to the Ministry, and subsequently, the Presidency, together with the respective signed Memoranda." (Emphasis added.)

[81] This passage must be understood in its proper context. In this and the preceding paragraph, Mr Abrahams refers to the Minutes recording the decision to allow Ms Xolisile Khanyile and Ms Thoko Majokweni to vacate their positions as DPP Free State and Special DPP SOCA respectively (vacating Minutes). Ms Khanyile was to be appointed as the Director of the Financial Intelligence Centre and Ms Majokweni as South Africa's ambassador to Eritrea. Their positions would thus become vacant after the then President granted official approval that they may vacate their offices. Therefore, in the paragraph quoted above, Mr Abrahams is alluding to President Zuma's

"acquiescence to the vacating of [Ms Khanyile and Ms Majokweni's] respective offices".[65]

[82] The next paragraph in Mr Abrahams' affidavit then deals with the five further Minutes containing the decision to appoint five new DPPs/Special DPPs (appointing Minutes). Mr Abrahams does not say that the appointing Minutes were handed to him to enable him to communicate the appointments as the second judgment appears to hold. Mr Abrahams deals first with the two vacating Minutes in stating that he was to communicate to Ms Khanyile and Ms Majokweni the fact that they had to vacate their positions. Mr Abrahams proceeds to deal separately with the five appointing Minutes, but importantly does not allege that they had been given to him to enable him to communicate the appointment decisions.

[83] The passage quoted above cannot be invoked, as the applicants sought to do, as support for the proposition that Mr Abrahams had the requisite authority to communicate the appointment decisions. On Mr Abrahams' own version, the five appointing Minutes were not handed to him by the Ministry as some or other token of his authority to communicate the appointment decision to, amongst others, the applicants. A careful reading of these paragraphs in his affidavit reveals that Mr Abrahams, at the most, held the view (mistakenly, as I see it) that, in the ordinary course of events and by virtue of his position as NDPP, he had the requisite authority to communicate to the applicants their appointment by President Zuma.

[84] In the oral proceedings, Counsel for the applicants contended that this passage from Mr Abrahams' affidavit is evidence of an instruction from the Ministry for Mr Abrahams to finalise the appointments. I disagree. When read in context and holistically with other relevant extracts from that affidavit, the only possible

[65] In his affidavit, Mr Abrahams, at para 49 declares:

> "The then President subsequently signed Presidential Minute[s] 6 and 7 on 1 February 2018, allowing Adv Khanyile and Adv Majokweni to vacate their respective offices."

Mr Abrahams attaches copies of these Minutes to his affidavit.

interpretation is the one I incline to. Thus, for example, in paragraphs 56 and 57, the following appears:

> "I am advised that, ordinarily, once the President has signed the Presidential Minute and Proclamation, [the] same is submitted to the Ministry concerned, in this instance the Ministry of Justice for the administrative processing of the Presidential Minutes and/or publication of the Proclamations.
>
> As head of the National Prosecuting Authority and having authority over the exercising of all my powers, and the performance of all my duties and functions conferred or imposed on or assigned to any member of the prosecuting by the Constitution, the NPA Act or any other law, I immediately informed each candidate of their respective appointments and congratulated them."

[85] These facts cannot sustain the applicants' case that Mr Abrahams was tacitly authorised to inform the applicants of their appointments and to hand over the Presidential Minutes to communicate their appointments in writing.

[86] Even though tacit authorisation through a standing practice is sufficient, the applicants have not demonstrated that such a practice did indeed exist. The applicants merely allege such a practice, but do not describe it in detail or adduce evidence as to its existence. They cite the example of a letter sent to Adv M I Thenga, the present DPP for Limpopo. That analogy is misconceived. Adv Thenga was transferred from DPP Northern Cape to DPP Limpopo and she was informed of this decision by Mr Abrahams. The analogy, therefore, goes nowhere in assisting the applicants' case. The second judgment, authored by the Chief Justice, finds this analogy apposite. It is not. As stated, Adv Thenga's matter entailed a transfer from the head of one provincial DPP office (Northern Cape) to another (Limpopo), not a new appointment as is the case here. In any event, the letter the applicants rely on is a mere draft. This draft is not even dated. In other words, there is no indication whatsoever that this letter ever left Mr Abrahams' office, even less that it made its way to the intended recipient, Adv Thenga. Accordingly, this single letter (undated, unsigned and still in draft format)

cannot, by itself, serve as evidence of a long-standing practice in the National Prosecuting Authority.

[87] Can an instruction then be inferred? On these facts, I think not. The argument that an instruction must be inferred from the averments that the signed Presidential Minutes were handed to Mr Abrahams by "the Ministry of Justice" during early February 2018 in Cape Town so as to enable him "to communicate to the individuals concerned" is fallacious. Mr Abrahams' emphasis that the "signed Presidential Minutes were contained in their original customary red folders in which they were initially submitted to the Ministry, and subsequently, the Presidency, together with the respective signed Memoranda" is neither here nor there.[66] As I have explained, he does not say that they were handed to him as authority to communicate the appointments. In these circumstances, I do not see how an instruction can be inferred. And, crucially, there is no evidence at all, not even any hint or suggestion, as to how the "Ministry" came to be seized with the power from the decision-maker, President Zuma, to instruct Mr Abrahams to communicate the decision. For these reasons, I find that there was no such express or tacit instruction from President Zuma to Minister Masutha and by the latter to Mr Abrahams.

[88] The second judgment places substantial store in what Dr Lubisi says in his affidavit. But what must not be lost sight of, is that Dr Lubisi also categorically declares that "there is no formal record in the Presidency showing how (if at all) the minutes [signed by President Zuma] may have been transmitted to the Department". This statement must be understood in light of Dr Lubisi's averment that it is highly unusual for appointees to be given a Presidential Minute: "The minute is an internal formal record of the President's decisions and is not ordinarily released into the public domain". (Emphasis added.)

[66] See [80].

[89] On behalf of Mr Mathenjwa, *Jeewa*[67] was invoked as a basis for the contention that Mr Abrahams was vested with the requisite authority to finalise the appointments. That reliance is misplaced. *Jeewa* is distinguishable – it concerned a purely administrative function that was capable of being delegated. The decision to appoint a DPP is plainly an executive decision entrusted to the President after consultation with the Minister and the NDPP. That distinction was made clear in *Jeewa* where the Appellate Division held:

> "It is clear that the power conferred by sec. 22 of the Act is conferred upon *the Minister himself and cannot be delegated,* and that the act of deeming by which a person is deemed to be an undesirable inhabitant of the Union *must be the Minister's own act and not the act of any other person*."[68] (Emphasis added.)

[90] The second judgment lays much emphasis on the starkly different versions of events adduced by Mr Abrahams on the one hand and President Ramaphosa and Dr Lubisi on the other. The irreconcilable differences and inconsistencies in these versions are a fact. The second judgment appears to endorse Mr Abrahams' account in its entirety, without reference to the other account advanced by the President. Much reliance is placed in the second judgment on what is termed a "courtesy meeting" between Presidents Zuma and Ramaphosa. However, viewing the evidence holistically, it is not at all clear whether this meeting happened. President Ramaphosa, in categorical terms, says he has "no knowledge" of any meeting, courtesy or otherwise, where President Zuma supposedly informed him about the appointments:

> "I have no knowledge of the briefings referred to in these paragraphs. I have never held a meeting with Adv Abrahams and the former President at which I was advised of these 'appointments' 'as a matter of courtesy', or a briefing where the former President informed me that these 'appointments' within the NPA had been made. Despite Adv Abrahams' allegation that the former President undertook that he would announce

[67] *Jeewa v Dönges* 1950 (3) SA 414 (A).

[68] Id at 420.

> these 'appointments' and facilitate the proclamation of the relevant appointments, this was not in fact done."

[91] The only indication that the meeting was planned is to be found in Mr Abrahams' hearsay statement:

> "In conversation with the then President during the course of the same week, the then President took it upon himself to inform me of the briefing to Mr Ramaphosa, the new President of the ANC, on the appointments he had made in the NPA on 1 February 2018."

[92] In light of these inconsistencies, the correct approach is to tread lightly with respect to Mr Abrahams' evidence, and not to uncritically endorse it.

[93] It is necessary to deal with the startling proposition advanced by Counsel for Mr Mncwabe that notification to Mr Abrahams would be adequate since he is "an affected person". This appears to be a last resort clutching-at-straws point and can be given short shrift. Mr Abrahams was patently not an "affected person" within the meaning of the *functus officio* doctrine. The doctrine should be understood to refer only to persons affected in law and not to persons who are affected merely factually. A person is affected in law if the decision gives rise to rights or obligations for that person. On the other hand, a person is merely factually affected if the decision does not confer rights or obligations or otherwise changes the legal status of the person and only the practical implementation of the decision would affect them. A useful analogy is *Mohamed*[69] to which I have alluded.

[94] Although reliance on the applicability of the *Turquand* rule was expressly abandoned at the hearing, it is necessary to say something in brief about an analogous principle, the possible applicability of the maxim *omnia praesumuntur rite esse acta* (it is generally presumed that acts or events which occur regularly or routinely have

[69] *Mohamed* above n 37.

followed a regular or routine course).[70] That is because the burden of proof has gained significant importance here, due to the troubling dearth of evidence from both sides. In this regard, the second judgment places great emphasis on the lack of evidence from the respondents' side and they are criticised for it.[71] That criticism loses sight of the issue of the burden of proof, an important issue -- if not the deciding issue in this matter. The onus is on the applicants, as the alleging parties, to establish a prima facie case for the respondents to answer. The key question is whether there is sufficient evidence adduced to establish a prima facie case that their claims are correct. If at the conclusion of the case, their evidence is inconclusive or the probabilities are evenly balanced, the applicants cannot succeed with their claims, as they would not have discharged the onus resting on them.[72]

[95] As stated, there is a disturbing lack of evidence from both parties. The second judgment holds this fact to be adverse to the respondents' case. It bears repetition that this approach is unsound because it does not take into account that the burden of proof is on the applicants. In applying the *Plascon-Evans* approach, absent a basis to reject the President's allegations or denials as palpably false, far-fetched, or clearly untenable, the applicants are only entitled to a final order if the facts averred in their affidavits which have been admitted by the President, together with the facts alleged by him, justify such an order.[73] That is not the case here. The only instance where Mr Abrahams asserts an instruction to transmit the Presidential Minutes is in the passage I have quoted earlier.[74] And yet as stated, Mr Abrahams only had instructions in respect of Minutes 6 and 7. At no point does he assert an instruction to transmit Minutes 10 and 18, which form the basis of the applicants' appointments here.

[70] The maxim was applied in *Kirland* above n 10 at fn 75.

[71] Second judgment at [60].

[72] *Van Wyk v Lewis* 1924 AD 438 at 444.

[73] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5.

[74] At [80] above.

[96] Much is also made in the second judgment of the failure of Minister Masutha, as then Minister, to file an affidavit contradicting Mr Abrahams' claims.[75] But this applies to both sides – if the President could have called for these affidavits, so could the applicants. And since they bear the onus, the criticism is more warranted in their case. In *Elgin Fireclays*, Watermeyer CJ stated:

> "With regard to this request, it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. . . . But the inference is only a proper one if the evidence is available and if it would elucidate the facts."[76]

[97] Of course, the principle enunciated in *Elgin Fireclays* is not an inflexible one and whether such an inference is to be drawn will depend on the facts peculiar to the case in which the question arises.[77] At best for the applicants, this is a neutral factor, not one to be held against the respondents as the second judgment seeks to do. As the parties on whom the onus rests, it is rather a factor that ought to redound to the detriment of the applicants. Since the onus to make out a prima facie case rests on the applicants, President Ramaphosa had no obligation to put up affidavits from President Zuma and Minister Masutha, and no adverse inference can be drawn against him on this issue.

[98] The same, however, cannot be said for the applicants, who had to prove their case on a balance of probabilities. The applicants do not explain why they did not seek affidavits from former President Zuma and Minister Masutha. They were material witnesses for the applicants' version of events, having played central roles. Only they could explain whether they had instructed Mr Abrahams to communicate the Presidential Minutes. Further, former President Zuma, who signed the Minutes, had a direct and substantial interest in his instructions being executed, since at the relevant time he was the sole depository of the statutory power to appoint DPPs. The same

[75] See the second judgment at [197].

[76] *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 749-50.

[77] *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624B-F.

applies to Minister Masutha, who would be able to say which functionary from "the Ministry" gave Mr Abrahams the Minutes.

[99] The applicants have not adduced any evidence that Mr Abrahams received express or implied authorisation from the President and no evidence that there was indeed a practice as described. President Ramaphosa, on the other hand, also has no explanation for how Mr Abrahams received the information on the appointments and the related Minutes. Apart from the bare contention in President Ramaphosa's written submissions that Mr Abrahams took an "unauthorised step", there is only a denial that Mr Abrahams was instructed to communicate with the candidates. There is even less evidence regarding the allegation that the information at Mr Abrahams' disposal was leaked. In summary, neither of the parties has made out a clear case. This Court does not know what exactly transpired. It must either speculate and decide the case on circumstantial evidence or accept that the case is unclear and must be decided on the basis of the burden of proof. In the latter instance, the *omnia praesumuntur* maxim becomes relevant, since it could shift the burden of proof from the applicants to the respondents or at least impose a duty to rebut onto the respondents.

[100] The maxim is described by Van der Merwe thus:

> "There is a general presumption that acts or events which occur regularly or routinely have followed a regular or routine course: *omnia praesumuntur rite esse acta*. It is based upon the statistical probability of regularity in an organised community. The presumption is usually one of fact, though in certain manifestations it appears to have hardened into one of law. There are too many varieties for a complete classification, but obviously it will only operate in circumstances where regularity is normally encountered. One of the most fertile fields of application is that of official acts. It is presumed that any condition precedent to the validity of an official act has been complied with and, more particularly, that the official (or body of officials) was qualified to perform the act in question and complied with the necessary formalities.

> *This presumption does not, however, go so far as to permit the broad assumption that whatever any official does is lawful*."[78] (Emphasis added.)

[101] In *Byers*,[79] the Appellate Division explained the maxim with reference to the following passage from Wigmore on Evidence 4ed:

> "The general experience that a rule of official duty, or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise occasionally to a presumption of due performance. This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions: first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability."[80]

[102] The exact nature of the maxim is not clear. One ambiguity in particular concerns the question whether the maxim amounts to a rebuttable presumption of law or only one of fact. A presumption of law will shift the onus or give rise to a duty to rebut. A presumption of fact only allows the court to make the inference that what usually happens has probably also happened in the case before it.

[103] Schwikkard explains that three different effects of the maxim can be observed:

> 'The presumption of regularity is based on the maxim *omnia praesumuntur rite esse acta*. Zeffertt, Paizes & Skeen, noting that the presumption is ill-defined, describe it in the following terms:

[78] Van der Merwe "Evidence" in *LAWSA* 3 ed (2015) vol 18 at para 242.

[79] *Byers v Chin* 1928 AD 322.

[80] Id at 332.

> "In some cases it appears to be no more than an ordinary inference, based upon the assumption that what regularly happens is likely to have happened again. In other cases it is treated as a presumption of law, sometimes placing an onus upon the opposing party and sometimes creating only a duty to adduce contrary evidence. It has been applied in a wide variety of cases which are impossible to catalogue exhaustively."'[81] (Emphasis added.)

[104] The difference between a mere inference or presumption of fact and a presumption of law is also explained by Schwikkard:

> "A distinction must be drawn between three different kinds of 'presumption'. There is a so-called 'presumption of fact' which is merely an inference drawn from evidence. There are also so-called 'irrebuttable presumptions of law' which are really rules of substantive law [irrelevant for our case]. The only true presumption is the rebuttable presumption of law in terms of which an assumption which is demanded by law, must be accepted in the absence of evidence or proof to the contrary."[82]

[105] The difference between a presumption of law that places an onus on the opposing party and one that only creates a duty to adduce contrary evidence appears to be the following: in the former case (placing an onus), the opposing party always needs to disprove the presumption, lest the applicants succeed. If the presumption leads only to a duty to adduce contrary evidence, the case likely is not yet conclusive, but only made prima facie. In this situation, the court could, regarding "all the circumstances", disregard the prima facie case, even if the opposing party does not adduce contrary evidence.[83]

[106] In *Byers*, the Appellate Division appears to have regarded the maxim as a presumption of law—

[81] Schwikkard and Van der Merwe *Principles of Evidence* 4 ed (Juta, Cape Town, 2016) at 548.

[82] Id at 25.

[83] Id at 625.

> "[t]hus, as the burden of rebutting the presumption was on the respondents, on the evidence in the record they have not, in my judgment, discharged it."[84]

[107] The Appellate Division did not consider whether to draw an inference or not, but assumed a burden on the respondents. However, the principles from Wigmore, cited in *Byers*, also require that there must be "some element of probability" in "the circumstances of the particular case".[85] This points to a presumption of fact since presumptions of law are usually independent of the individual facts and circumstances of the case.

[108] Five years later, however, in *Cape Coast Exploration*,[86] the Appellate Division said:

> "Absolute proof is well nigh impossible where the frail recollection of men is a factor, and [this is especially] the case when we have to deal with *the recollection of officials who almost automatically do much of their routine work*. Hence the importance of the maxim *omnia praesumuntur rite esse acta*. See *Byers v Chinn* (1928 AD at p 332). *We must presume that an official will carry out the ordinary routine work of his office, for in our experience this is what usually occurs*.
>
> . . .
>
> It is here, and on all the facts of this case that the maxim *omnia praesumuntur rite esse acta* assists us. *The maxim itself rests upon probabilities, and obviously it could never be legitimately applied in a case where, viewing the question in issue from a reasonable standpoint, the probabilities did not, to some extent, support the presumption*."[87] (Emphasis added.)

[109] Again, this points strongly towards a presumption of fact, rather than law. Schmidt and Rademeyer also see the maxim primarily as a presumption of fact:

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[84] *Byers v Chin* above n 79 at 334.

[85] Id at 332.

[86] *Cape Coast Exploration Ltd v Scholtz* 1933 AD 56.

[87] Id at 76 and 84.

> "The rule *omnia praesumuntur rite esse acta*, like the presumption of continuance, has a wide field of application. Where its use has, through precedent, become compulsory in certain factual situations, it operates as a presumption of law, *but for the rest it is often used as a presumption of fact in the sense that a court draws an inference on the basis of accepting that matters have taken their regular course.*
>
> . . .
>
> It has often been emphasised that the presumption [especially with regard to the validity of official acts] relates to formalities and procedure rather than to material requirements (the second condition), and also that there must be an element of probability. *The latter condition indicates that the presumption is a presumption of fact, because, as already indicated, a presumption of law must be applied despite the probability in the particular case, while a presumption of fact by its very nature depends on probability.*
>
> . . .
>
> *There is as yet no unanimity on where the burden of proof rests when the presumption of regularity comes into operation. Some decisions place the burden of proof on the party opposing the presumption; others, especially those relating to postal articles, require only evidence in rebuttal – mainly because the presumption is usually applied as a presumption of fact. The latter view is preferable.*"[88] (Emphasis added.)

[110] Likewise, Pretorius, commenting on the Supreme Court of Appeal's referral to the maxim in *Oudekraal*, explains:

> [T]he presumption is only applicable where there is general evidence of acts having been legally and regularly done. It cannot be applied where, viewed reasonably, the probabilities (in the sense of what is known usually to occur) do not support the presumption. *As such, the maxim gives expression to a factual presumption, not a legal rule; it is a mere inference of probability which a court may draw if, on all the evidence, it appears to be appropriate. Where it is not applicable because the abovementioned preconditions are absent, direct evidence must be adduced to prove that the relevant statutory requirements were satisfied*."[89] (Emphasis added.)

[88] Schmidt and Rademeyer *Law of Evidence* (LexisNexis, Durban 2022) at 5-21 and 5-24-5.

[89] Pretorius "The status and force of defective administrative decisions pending judicial pronouncement" (2009) 3 *SALJ* 537 at 563.

[111] As stated, the exact nature of the maxim remains unclear and courts have sometimes described it in words that make it appear as a rebuttable presumption of law (as in *Byers*). As demonstrated, there is a significant body of jurisprudence with compelling reasoning that treats the maxim as a mere presumption of fact. For the reasons that follow, I am of the opinion that the better view is that the maxim is a rebuttable presumption of fact.

[112] The nature of the maxim should be determined with regard to its character and purpose. The question is this: Does it only give expression to a statistical probability that officials usually act diligently? Or does it also have a normative aspect to it, protecting the validity of state action and citizens' trust in it? With regard to this, Zeffertt et al state:

> "Ultimately, it is submitted, the scope of the presumption depends on considerations of fairness and public policy as to how much a party seeking to uphold official action should be required to prove.
>
> The effect of the presumption is also unclear. For instance, it has been said by some authorities that it places an "onus" or "a burden of rebuttal", but other authorities seem to indicate that it merely imposes an evidentiary burden which strengthens the case of the party bearing the onus. But why should it not be seen as creating a prima facie case that imposes an evidential burden which, in the absence of rebuttal, becomes proof?"[90] (Emphasis added.)

[113] Thus, Zeffertt et al argue that the maxim should be seen as a presumption of law because "considerations of fairness and public policy" would demand that "a party seeking to uphold official action" should not be required to fully prove it.[91] According to them, there are good reasons for this stance. From the viewpoint of the state, a presumption of law will often help uphold important and consequential public decisions which might otherwise fail based on minor procedural or formal issues. From the

[90] Zeffertt et al *Essential Evidence* 2 ed (LexisNexis, Johannesburg 2020) at 72.

[91] Id.

viewpoint of a citizen, they might have justified trust in an official decision affecting them, which a presumption of law would protect.

[114] In sum then, there is an argument that can be made that the maxim is merely a presumption of fact or inference because its role is only to decide unclear cases based on experience and probability. Thus, "there is a 'statistical probability of regularity'".[92] On the other hand, it is said that the maxim is a presumption of law because its purpose is one of fairness and protecting a citizen's trust in state decisions. Dictates of fairness and preferences of policy are underlying considerations of the legal concept of presumptions.[93]

[115] It seems to me on the authorities cited and given the character and purpose of the maxim that it is a rebuttable presumption of fact and not law. This means that in this instance there is no reversal of the burden of proof to the detriment of the respondents. Instead, we are at liberty to draw a factual inference if there is a basis to do so. An important consideration here is that the appointment of a DPP is not a routine affair, but an exceptional one that occurs rather infrequently. There is no evidence before us that would evince routine or regular proceedings. Since the maxim at its core is a factual presumption of regularity, it does not apply because there is no regularity here. The statistical probabilities necessary to make a factual inference are not present.

[116] To summarise: there is nothing in Mr Abrahams' affidavit that suggests that he was authorised to communicate the decision and that he did not simply take it upon himself to do so because he believed it was his duty. It appears that it may have been the latter consideration that moved him to inform the applicants of the Presidential Minutes and the decision. If he was authorised then he would simply have said so – he does not. That leaves the assertion that he did so because he believed it was his duty to do so. This was an incorrect belief. Mr Abrahams was not responsible

[92] Van der Merwe above n 78 at 242.

[93] Schwikkard and Van der Merwe above n 81 at 537; *Pillay v Krishna* 1946 AD 946 at 953-4.

for the appointment – he may have been a part of the process leading up to it, but the decision was not his by any measure. That being the case, there is nothing before us that points in the direction of Mr Abrahams having the authority to do what he did.

[117] Mr Abrahams' coming into possession of the Presidential Minutes, and his subsequent intimation to Mr Zuma that he informed the applicants, do not and cannot support any conclusion that at the time he informed the applicants he had the authority to do so. If that is the case, then there was no lawful communication of the decision, and the decision was thus incomplete and open to revisiting. To hold otherwise would mean that the unauthorised communication of any decision that is still internal would render the decision a final one. That would have a chilling effect on the efficacy of government. Mr Abrahams' proximity to the process cannot translate into him being an authorised person in the absence of any evidence to that effect. In this regard, we are compelled to rely on what Mr Abrahams says, and on his version, he had no authority. He does not even dare suggest that he was authorised to do so. That is fatal to the applicants' case.

[118] On the facts and in applying the applicable law then, there was no official notification of the appointment to the applicants by the decision-maker, the President, or by his duly authorised delegatee. The decision to appoint made by the previous President was preliminary only, thus subject to reconsideration (the notion of a "revocation" is misguided but not fatal in the present instance) and the principle of *functus officio* finds no application here. The last aspects for consideration are the alternative legality, rationality and constitutionality grounds.

Was the President's decision to "revoke" the appointments constitutionally and legally sound?

[119] It will be recalled that the applicants contended that if this Court finds that the President was not *functus officio*, executive action – contrary to the High Court's view – is subject to procedural fairness, as reflected in the *audi alteram partem* rule, as well as administrative review in terms of PAJA. It must be said that the submission was

made rather faintly in oral argument, although extensive argument was set out in the written submissions. The argument is unsustainable in law.

[120] In *Motau*, this Court outlined four factors to determine whether a decision constitutes executive or administrative action. They are:

(a) the nature of the function, as opposed to the position of the functionary;
(b) the source of the power being exercised;
(c) the degree of discretion afforded to the functionary; and
(d) the degree of scrutiny that is appropriate to apply to the decision through judicial review (that is, whether the court should apply the more exacting standards of PAJA, or the more lenient standards of legality).[94]

[121] Measured against these four factors, the President's decision was clearly executive and not administrative in nature. The decision relating to the appointment of a DPP is not the mere "conduct of the bureaucracy . . . carrying out the daily functions of the state",[95] but an obvious policy choice, one that speaks directly to the composition of the National Prosecuting Authority and the wider administration of the criminal justice system in the country.

[122] Second, the source of this power is derived from the Constitution and the NPA Act, both of which confer on the President exclusive discretion to make the appointments.

[123] Third, the power is restrained only by the doctrine of legality and the rule of law. The President does not have to satisfy "a list of jurisdictional requirements" to make a

[94] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at paras 35-44.

[95] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at para 24.

DPP appointment.[96] He simply has to appoint. He may need to "consult" with the Justice Minister, but even so, the final decision remains his own.

[124] Since this decision: (a) concerns a clear policy objective (the proper administration of criminal justice); (b) concerns an exceptional power entrusted exclusively to the President; and (c) affords the sole repository of that power wide discretion, it is clear that the exacting standards of PAJA are inappropriate for judicial review in this context. And, if PAJA does not apply, neither do its standards of reasonableness and procedural fairness. The question then becomes what legality would require under the circumstances.

[125] Legality applies to all exercises of public power.[97] It requires that the exercise of public power be lawful and rational.[98] This Court's decision in *Masetlha* confirmed that "procedural fairness is not a requirement of legality"[99]; but the rationality of the process is.[100] This Court held that the power to dismiss—

> "[being a corollary of the power to appoint] is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security."[101]

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[96] Id at para 50.

[97] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 56. See also *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 54.

[98] Hoexter and Penfold above n 10 at 159-60. *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* [2021] ZACC 21; 2023 (1) SA 1 (CC); 2021 (10) BCLR 1152 (CC) at para 49.

[99] *Masetlha* above n 61 at para 78.

[100] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 49-50; *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) at para 64.

[101] *Masetlha* n 61 at para 77.

[126] *Masetlha* sets a high threshold for judicial interference with the President's exclusive appointment powers. Since the NPA Act confers a wide discretion on the President to appoint and dismiss, there was no requirement for him to obtain the views of the applicants when reversing the inchoate decision of his predecessor, President Zuma.

[127] The decisions to appoint the applicants and to revoke those appointments – given that they were purportedly communicated, even if the communication is being impugned – are in their impact sufficiently final and ripe for review. The decisions exist in fact – even if potentially not in law – and have legal consequences.

[128] Since President Zuma's appointments were not final decisions, President Ramaphosa was not obliged to treat them as having any legal effect at all. If President Zuma was not *functus officio*, it was as if no decision at all had been taken. President Ramaphosa had to act rationally in appointing the people he did to the position of DPP, but there was no obligation on him to explain why he did not give preference to the persons whom his predecessor wanted to appoint.

Conclusion

[129] As stated, leave to appeal must be granted. However, for the reasons advanced, the appeal falls to be dismissed. That has the effect of rendering the direct access applications academic. The applicants asserted their constitutional rights and are therefore entitled to *Biowatch*[102] protection in respect of costs. That was also the case in the High Court and the costs order made there ought to be set aside.

Order

[130] The following order is made in respect of both applications:

1. Leave to appeal is granted.

[102] *Biowatch* above n 14.

2. The appeal is dismissed.
3. The costs order of the High Court is set aside.

ZONDO CJ (Madlanga J and Makgoka AJ concurring):

Introduction

[131] I have had the benefit of reading the first judgment, prepared by my Colleague, Majiedt J. As reflected in the first judgment, these are two applications raising the same issues. The one was brought by Mr Ron Simphiwe Mncwabe and the other by Mr Khulekani Raymond Mathenjwa. Accordingly, Mr Mncwabe and Mr Mathenjwa are applicants in their respective applications. I shall refer to them as the applicants except where it is necessary to use their names. The applicants apply for leave to appeal against a judgment of the Gauteng Division of the High Court which dismissed their respective applications in which they challenged the first respondent's decisions to revoke their respective appointments as Directors of Public Prosecutions of the Northern Cape Division of the High Court and the Mpumalanga Division of the High Court. That was Fourie J's judgment.

[132] In each case the first respondent is the President of the Republic, Mr Cyril Ramaphosa, the second respondent, the Minister of Justice and Correctional Services and the third respondent, the National Director of Public Prosecutions. In the application brought by Mr Mncwabe the fourth respondent is Mr Livingstone Mzukisi Sakata. Mr Sakata was appointed as the Director of Public Prosecutions of the Northern Cape Division of the High Court while this litigation was continuing. In the application brought by Mr Mathenjwa the fourth respondent is Mr Shaun Abrahams who was the National Director of Public Prosecutions from some time in 2015 to August 2018. Mr Mathenjwa has cited the National Prosecuting Authority of South Africa as the fifth respondent and Ms Nkebe Rebecca Kanyane as the sixth respondent. Ms Kanyane was appointed by

the first respondent as the Director of Public Prosecutions of the Mpumalanga Division of the High Court while this litigation was continuing. Mr Mncwabe also applies for direct access to this Court to challenge the validity of the first respondent's decisions to appoint Mr Sakata as the Director of Public Prosecutions of the Northern Cape Division of the High Court. Mr Mathenjwa applies for direct access to this Court to challenge the validity of the first respondent's decision to appoint Ms Kanyane as the Director of Public Prosecutions of the Mpumalanga Division of the High Court. Only the first respondent opposed the applicants' applications in the courts below and only the first respondent opposes the applicants' applications in this Court.

[133] While I agree with the first judgment that this Court has jurisdiction in this matter and that leave to appeal should be granted, I am unable to agree with its conclusion that the first respondent was entitled to revoke or withdraw the applicants' respective appointments and that the applicants' appeals should be dismissed. In my view, the first respondent was not entitled to revoke or withdraw the applicants' appointments. Accordingly, the two appeals should be upheld with costs, leave for direct access should be granted and the appointments of Mr Sakata and Ms Kanyane in the positions to which the applicants had been appointed must be declared unlawful and invalid and should be set aside. I will elaborate on jurisdiction and leave to appeal later.

Broad background

[134] The first judgment has provided the factual background to this matter. However, there are certain features of the background which are not covered in the first judgment that, in my view, are important for the proper determination of these matters. For that reason, I will give a broad factual background at this stage and include some of those features. However, I will leave some of the features of the background for later in this judgment and will deal with them together with my analysis of the facts and issues in these appeals.

[135] The relevant facts in these matters can be stated briefly. From some time in 2015 to August 2018 Mr Shaun Abrahams was the National Director of Public Prosecutions

and head of the National Prosecuting Authority. During the second half of 2017 Mr Abrahams approached the then Minister of Justice and Correctional Services, Mr Michael Masutha, both in meetings and by way of correspondence and memoranda and asked him to recommend to President Jacob Zuma that the latter appoint certain persons to certain positions within the National Prosecuting Authority.

[136] There were five persons that Mr Abrahams asked Minister Masutha to recommend to President Zuma for appointment as Directors of Public Prosecutions and Special Directors of Public Prosecutions. Two of these were Mr Mncwabe and Mr Mathenjwa. Mr Mncwabe holds B.Iuris and LLB degrees and was serving as an Additional Magistrate at the Tembisa Magistrate's Court, Gauteng, at all relevant times. As of February 2018 he had served as a Magistrate, initially, in an acting capacity and, later, as an Additional Magistrate, for about five years. Prior to appointment as an Additional Magistrate he had served as a public prosecutor at different levels from 1999 to 2012 which is about 13 years. Mr Mathenjwa was a Deputy Director of Public Prosecutions in Gauteng. He holds four degrees, namely, B.Iuris, LLB, LLM and LLM. He had 23 years' experience as a public prosecutor at that time.

[137] Mr Abrahams recommended that Mr Mncwabe be appointed as the Director of Public Prosecutions of the Northern Cape Division of the High Court and Mr Mathenjwa as the Director of Public Prosecutions of the Mpumalanga Division of the High Court. To this end Mr Abrahams prepared Ministerial Minutes (which were to be signed by President Zuma if he agreed to make the appointments) and memoranda which he was to send to Minister Masutha who, in turn, would send them to President Zuma if he was happy with them. These memoranda provided motivation for the appointment of the people that Mr Abrahams was recommending for appointment. Minister Masutha agreed to make the recommendations to President Zuma that Mr Abrahams had asked him to make. He then passed the draft Presidential Minutes and memoranda on to President Zuma together with a letter requesting President Zuma to make the appointments.

[138] On 1 February 2018 President Zuma decided to appoint five Directors of Public Prosecutions and Special Directors of Public Prosecutions with effect from the same day. Mr Mncwabe and Mr Mathenjwa were some of those who were appointed by President Zuma on that day. Mr Mncwabe was appointed as the Director of Public Prosecutions of the Northern Cape Division of the High Court and Mr Mathenjwa as the Director of Public Prosecutions of the Mpumalanga Division of the High Court. In making the appointments President Zuma would have satisfied himself that each one of the applicants satisfied all the statutory requirements for appointment as Director of Public Prosecutions including having integrity, being a fit and proper person, having the right to practise in all the courts and having the requisite experience.

[139] After President Zuma had made the appointments and signed the relevant Presidential Minutes in which his decisions were recorded, the Presidential Minutes and memoranda accompanying the Presidential Minutes were sent back to the Department of Justice and Correctional Services. It is not clear from the record whether Minister Masutha counter-signed the Presidential Minutes before they left the Presidency or after the Presidency had returned them to the Department of Justice and Correctional Services. However, this is neither here nor there. What is material is that he did counter-sign the Presidential Minutes.

[140] The Ministry of Justice and Correctional services handed the Presidential Minutes and memoranda over to Mr Abrahams early in February 2018 when Mr Abrahams was in Cape Town on official business. Upon his return to Gauteng, Mr Abrahams immediately informed all the individuals who had been appointed by President Zuma that they had been appointed to the respective positions to which they had been appointed. Before the individuals concerned could assume duty in their new positions, they were informed that they had to wait for an announcement of their appointments by President Zuma. However, President Zuma resigned as President of the country on 14 February 2018 before he could make the announcements.

[141] President Cyril Ramaphosa succeeded President Zuma as President of the country on 15 February 2018. The first respondent had a meeting with Mr Abrahams about these appointments towards the end of February 2018. In that meeting he sought clarification from Mr Abrahams whether these appointments had been fast-tracked before President Zuma resigned. Mr Abrahams assured the first respondent that the appointments had not been fast-tracked. The persons who had been appointed, including the applicants, were left in the dark for a whole year from about the end of February 2018 on why they were not being allowed to assume duty in their new positions. Mr Mncwabe addressed a number of emails to both Minister Masutha and the first respondent in 2018 asking why he was not being allowed to take up his new position but neither Minister Masutha nor the first respondent responded. Some excerpts from Mr Mncwabe's correspondence will be referred to and quoted later in this judgment. Mr Mathenjwa directed similar enquiries to the senior management of the National Prosecuting Authority. Generally, he was told that the matter of his appointment was with the first respondent.

[142] Early in March 2019 – following a legal opinion obtained by the Department of Justice and Correctional Services – the first respondent revoked President Zuma's decisions to appoint the five persons, including the applicants. The first respondent said that, since the appointments had not been announced publicly, President Zuma's decisions were not final and that, for that reason, he was entitled to revoke them. The applicants disputed this and contended that their appointments did not need to have been announced publicly before they could be final or before they could have legal effect. They contended that, when Mr Abrahams informed them of their respective appointments, their appointments became final and took legal effect. They contended that, thereafter, the first respondent had no right to revoke their appointments. This is what the litigation that ensued was about. Indeed, this is the main issue before this Court.

High Court

[143] The applicants challenged the first respondent's decisions to revoke their respective appointments in the High Court. They challenged them on various grounds. However, the first respondent defended his decisions on the basis that President Zuma's decisions to appoint the applicants as Directors of Public Prosecutions had not become final by the time President Zuma resigned and that, as long as they were not final, he was entitled to revoke or withdraw them. The basis he advanced as to why he contended that President Zuma's decisions had not become final was that, for those appointments to be final, it was an essential requirement that they should have been announced publicly. The first respondent contended that, as those decisions had not been announced publicly, they did not become final and could still be revoked.

[144] The applicants disputed this contention. They argued that there was no legal requirement that these appointments be announced publicly before they could be effective in law or before they could be final. They submitted that they had been informed of their respective appointments by Mr Abrahams early in February 2018 and that, therefore, the appointments had become final by the time President Zuma resigned. The first respondent contended that Mr Abrahams had no authority to inform the individuals concerned, including the applicants, of their respective appointments. The first respondent argued that the fact that Mr Abrahams had informed the individuals concerned of their respective appointments did not render their appointments final since he was not authorised to inform them.

[145] The two applications came before Fourie J in the High Court. The High Court concluded that a public announcement of the appointments was a legal requirement for the appointments to be final. It held that, as there had been no public announcement of the appointments, the applicants' appointments had not become final when the first respondent revoked them and he was entitled to revoke them.

[146] The High Court said that the *functus officio* principle states that, once a decision-maker had rendered a final decision, he became *functus officio* and could not change

the decision. In support of this, the High Court referred to the cases of *Retail Motor Industry Organisation*[103] and *Milnerton Lagoon Mouth Development*.[104]

[147] The High Court then said:

> "The principle referred to in the *Milnerton Lagoon* case has been explained by the Constitutional Court in *President of the Republic of South Africa v The South African Rugby Football Union* (*SARFU*) 2000 (1) SA 1 (CC) at para 44 as follows:
>
> > 'In law, the appointment of a Commission only takes place when the President's decision is translated into an overt act, through public notification. Section 84(2)(f) does not prescribe the mode of public notification in the case of appointment of a commission of inquiry, but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.'"[105]

[148] The High Court then made a statement that, based on the dicta to which it had referred in the *Milnerton Lagoon* case and *SARFU* case, it was clear that the *functus officio* principle applied only to final decisions. The High Court quoted the following passage from Hoexter *Administrative Law in South Africa*:

> "In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when a decision is published, announced or otherwise conveyed to those affected by it."[106]

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[103] *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs* [2013] ZASCA 70; 2014 (3) SA 251 (SCA) at para 23.

[104] *Milnerton Lagoon Mouth Development (Pty) Ltd v The Municipality of George* 2004 JDR 0258 (C) at para 12.

[105] High Court judgment at para 42.

[106] Hoexter *Administrative Law in South Africa* 2 ed (Juta, Cape Town 2017) at 278.

[149] Fourie J went on to say:

> "I think there may be some merit, generally speaking, in the submission that in some cases finality is a point arrived at when the decision is conveyed to those affected by it, without a public announcement. This raises the question whether in this case the decision taken by former President Zuma, and the notification thereof by Abrahams to both the applicants, are sufficient to meet the requirement of finality."[107]

[150] The High Court concluded that, as there had never been a public announcement of President Zuma's decisions to appoint the applicants, his decisions to appoint them had not become final when he resigned and that, therefore, the President was entitled to revoke them or not to give effect to them. The High Court considered other contentions advanced by the applicants but rejected them. The High Court dismissed the applicants' respective applications with costs including the costs of two Counsel where two Counsel were employed.

In this Court

Jurisdiction

[151] The main issue for determination in this matter is whether the President had power to revoke or withdraw the decisions that had been made by the former President, Mr Jacob Zuma, in terms of which the latter had appointed Mr Mathenjwa as the Director of Public Prosecutions for the Mpumalanga Division of the High Court and Mr Mncwabe as the Director of Public Prosecutions for the Northern Cape Division of the High Court. The President is the President of the country and, as such, can only exercise power that is conferred upon him by the Constitution and the law. He may not do anything that the law does not give him power to do. If he purports to exercise power that he does not have, he acts unconstitutionally as that would be in breach of the rule of law which is one of our foundational values.

[107] High Court judgment at para 45.

[152] In *Fedsure*[108] this Court said through Chaskalson P:

> "These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law to the extent at least that it expresses this principle of legality is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions."

Later on, Chaskalson P also said:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."[109]

Accordingly, this matter raises a constitutional issue.

[153] In *Pharmaceutical Manufacturers* Chaskalson P had this to say for a unanimous Court:

> "[18] In effect the finding of the Full Bench was that the President had acted unlawfully in bringing the Act into force and that his decision to do so should accordingly be set aside. The first question, which the Full Bench was not called upon to decide, is whether this is a finding on a constitutional matter. There can be no doubt that it is.
>
> [19] Section 2 of the Constitution lays the foundation for the control of public power. It provides:
>
> > '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.'

[108] *Fedsure* above n 97 at para 56.

[109] Id at para 58.

> Consistent with this, section 44(4) of the Constitution provides that in the exercise of its legislative authority Parliament 'must act in accordance with, and within the limits of, the Constitution.' The same applies to members of the Cabinet who are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. They too are required to act in accordance with the Constitution.
>
> [20] The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution."[110]

[154] Furthermore, the applicants have brought a review application to have the first respondent's decisions to appoint Ms Kanyane as the Director of Public Prosecutions for the Mpumalanga Division of the High Court and Mr Sakata as the Director of Public Prosecutions for the Northern Cape Division of the High Court reviewed and set aside. As a review application that application also raises a constitutional issue. In so far as the applicants may argue that the first respondent's decisions to appoint Ms Kanyane and Mr Sakata were irrational since the posts to which they were appointed were not vacant, that is a constitutional issue. Accordingly, this Court has jurisdiction.

Leave to appeal

[155] The first judgment concludes that leave to appeal should be granted. I agree. A decision on whether the public announcement of an appointment of a Director of Public Prosecutions is an essential requirement for such appointment is an important issue that will affect the appointment of all Directors of Public Prosecutions in the future. It is certainly an important issue for the applicants, the National Prosecuting

[110] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.

Authority and the first respondent. Furthermore, as will be shown below, there are reasonable prospects of success.

Application for direct access

[156] The applicants have also applied for leave to bring certain applications directly to this Court. Section 167(6)(a) of the Constitution provides that national legislation or the rules of this Court should allow a person, when it is in the interests of justice and with the leave of this Court, to bring a matter directly to this Court. This is what is referred to as an application for direct access. This Court only grants leave for a matter to be brought directly to it when it is in the interests of justice to do so.

[157] The matter that Mr Mncwabe applies for leave to bring directly to this Court is his application for an order declaring the first respondent's decision to appoint Mr Sakata as the Director of Public Prosecutions of the Northern Cape Division of the High Court invalid and reviewing and setting it aside. The matter that Mr Mathenjwa applies for leave to bring directly to this Court is his application for an order declaring the first respondent's decision to appoint Ms Kanyane as the Director of Public Prosecutions of the Mpumalanga Division of the High Court invalid and reviewing and setting it aside.

[158] The first respondent opposes these applications on the basis that it is not in the interests of justice that the matters be brought directly to this Court. I do not understand the first respondent's basis for opposing that these two applications be brought directly to this Court. It obviously makes perfect sense that, if the validity of the first respondent's decisions to appoint Mr Sakata and Ms Kanyane are to be challenged in any court, they should be challenged in the same court and proceedings in which the validity of the revocations of the applicants' appointments is being challenged. This is so because the validity of the appointments of Mr Sakata and Ms Kanyane is linked to the validity of the first respondent's decisions to revoke the appointments of the applicants.

[159] This means that, if this Court were to conclude that the revocations of the applicants' appointments were invalid and should be set aside, that will affect the validity of the first respondents' decisions to appoint Mr Sakata and Ms Kanyane. This will be because, if the revocations were invalid, the posts were not vacant and, therefore, Mr Sakata and Ms Kanyane could not be validly appointed to those posts. Therefore, in such an event their appointments would be invalid. It is, obviously, in the interests of justice that all these matters be dealt with by this Court at the same time. Accordingly, the applicants should be granted leave to bring these matters directly to this Court.

The appeals

[160] The issue for determination in these two appeals is whether the first respondent was entitled to revoke or withdraw the applicants' respective appointments. The answer to that question will depend on whether it is an essential requirement that such appointments be announced publicly before they can be said to be final or before they can have legal effect and, if that is not an essential requirement, whether the appointments became final when Mr Abrahams informed the applicants of their respective appointments. The applicants contend that, if the appointments did not become final earlier, they at least became final when Mr Abrahams informed them of their appointments.

[161] Counsel for the first respondent did not advance the argument that a public announcement of the appointments was an essential requirement for the appointments to be final or to take legal effect. She submitted that President Zuma himself had to inform the applicants of their respective appointments or, alternatively, the Minister of Justice and Correctional Services had to do so in order for the appointments to be final. She submitted that the fact that Mr Abrahams had informed the applicants of their appointments did not render the appointments final because Mr Abrahams had not been authorised to inform them. Counsel for the first respondent submitted that, therefore, the revocations were valid. This would mean that the appointments of Mr Sakata and Ms Kanyane were valid. If this Court concludes that the revocations of the applicants'

appointments are invalid, it will follow that the appointments of Mr Sakata and Ms Kanyane by the first respondent are also invalid.

[162] It is necessary to refer briefly to the constitutional and statutory framework within which this matter needs to be determined.

Relevant constitutional and statutory framework

[163] Section 83(a), (b) and (c) of the Constitution reads:

> "The President—
>
> (a) is the Head of State and head of the national executive;
>
> (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
>
> (c) promotes the unity of the nation and that which will advance the Republic."

Section 84(1) and (2)(e) of the Constitution reads:

> "Powers and functions of the President
>
> (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for—
>
> . . .
>
> (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive"

Section 85 deals with the executive authority of the Republic. In so far as it is relevant, it reads:

> "Executive authority of the Republic
>
> "(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

. . .

(e) performing any other executive function provided for in the Constitution or in national legislation."

[164] Section 179(1) of the Constitution establishes a single National Prosecuting Authority. In terms of that provision the Prosecuting Authority, structured in terms of an Act of Parliament, consists 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."

[165] Section 179(3) reads:

"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)"[111]

[111] Section 179(5) of the Constitution reads:

"(5) The National Director of Public Prosecutions—

(a) 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;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) 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.

[166] Section 179(6) provides that "[t]he Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority". Section 179(7) provides that "[a]ll other matters concerning the prosecuting authority must be determined by national legislation".

[167] Section 4 of the NPA Act deals with the composition of the National Prosecuting Authority. It provides that the National Prosecuting Authority comprises the National Director, Deputy National Directors, Directors, Deputy Directors and prosecutors. Section 5 of the NPA Act establishes the Office of the National Director of Public Prosecutions. Section 6(1) establishes an Office for the Prosecuting Authority at the seat of each Division of the High Court. In terms of section 6(2) such an Office consists of the head of the Office who is required to be a Director or Deputy Director and who controls the Office, Deputy Directors, prosecutors, persons contemplated in section 38(1) and administrative staff. Section 6(3) provides that, if a Deputy Director is appointed as the head of an Office established by section 6(1), he or she shall exercise his or her functions subject to the control and directions of a Director designated in writing by the National Director of Public Prosecutions.

[168] Section 9 of the NPA Act deals with the qualifications for appointment as National Director, Deputy National Director or Director. In the NPA Act the word "Director" is defined as a Director of Public Prosecutions. Section 9 reads:

> "(1) Any person to be appointed as National Director, 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

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(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant."

(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."

[169] Section 13 of the NPA Act governs the appointment of Directors and Acting Directors and states as follows:

"13 Appointment of Directors and Acting Directors

(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);

(b) shall, in respect of any Investigating Directorate established in terms of section 7(1A), appoint a Director of Public Prosecutions as the head of such an Investigating Directorate; and

(c) 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 him or her by the President by proclamation in the *Gazette*.

(2) If a vacancy occurs in the office of a Director the President shall, subject to section 9, as soon as possible, appoint another person to that office.

(3) The Minister may from time to time, but subject to the laws governing the public service and after consultation with the National Director, from the ranks of the Deputy Directors or persons who qualify to be appointed as Deputy Director as contemplated in section 15(2), appoint an acting Director to discharge the duties of a Director whenever the Director concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the office of Director is pending."

[170] Section 20(1) to (3) of the NPA Act provides:

"(1) The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to—

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

(2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.

(3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of—

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director."

[171] Section 22(1) reads:

"22 Powers, duties and functions of National Director

(1) The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law."

[172] It will have been seen above that section 13(1)(a) of the NPA Act confers on the President the power to appoint a Director of Public Prosecutions in respect of an Office of the Prosecuting Authority established by section 6(1) of the NPA Act. The question for determination is whether such an appointment requires to be announced publicly in order for it to take legal effect or to be final or whether it will take effect or be final if it is brought to the attention of the person appointed as Director of Public Prosecutions by the right person even if it is not announced publicly. In this regard it is to be noted that section 13 does not anywhere expressly refer to a public announcement nor to any

notice being given to the person appointed as Director of Public Prosecutions. Indeed, it also does not expressly provide for the need for the acceptance of the appointment by the person appointed as Director of Public Prosecutions by the President. That, however, is not the end of the matter and I shall revert to this issue later.

[173] At this stage it is important to set out the role of a Presidential Minute and the processes relating to dealing with it before and after a President has made a decision that must be entered therein and has signed it. Understanding this is important because President Zuma's decisions to appoint the applicants were contained in Presidential Minutes. In fact, the President's decisions revoking the applicants' appointments were also contained in the Presidential Minutes.

Presidential Minutes' *role and processes: before and after a Presidential decision*

[174] Mr Abrahams and Dr Lubisi, who was the Director-General in the Presidency as of February 2018 when President Zuma made the appointments in issue here, have dealt with the role of a Presidential Minute and the processes surrounding Presidential Minutes in their affidavits. There are two processes involved here. The one is the pre-Presidential decision process that a government entity or Department follows when it requests the President to make those decisions that need to be recorded in Presidential Minutes. The other is the post-Presidential decision process. This is the process that is followed after the President has made the required decision and has entered it in a Presidential Minute which process leads to the implementation of the President's decision. This latter process can also be referred to as the Presidential Minute implementation process. The applicants also mention one or two things about Presidential Minutes in their affidavits. It is convenient to deal with such processes here.

Dr Lubisi's evidence

[175] One of the headings in Dr Lubisi's affidavit reads: "The presidential minute was never finalised and transmitted for implementation". The first two paragraphs under that heading are paragraphs 19 and 20. They read:

> "The purpose of this section is to describe for this Court the process that ought to be followed when dealing with a valid presidential minute.
>
> Appointments by the President are noted in a presidential minute with the countersignature of the Minister. This is in accordance with section 101 of the Constitution. *Given the nature and importance of the President's office and the significance of the decisions that the President is entrusted with by the Constitution and statute, there is a process that is followed in recording and storing such decision taken by the President.*" (Emphasis added.)

[176] In paragraph 19 of his affidavit, Dr Lubisi sets out what he describes as "the process *that ought to be followed when dealing with a valid presidential minute*". That obviously means the process that must be followed by various people or officials or functionaries, including the President, the Ministers, government departments and other government agencies "*when dealing with a valid presidential minute*". Dr Lubisi introduces this process thus at the beginning of paragraph 21: "The standard procedure in administering a presidential minute is as follows" and then he sets out the process that ought to be followed when dealing with a valid Presidential Minute. That procedure is the one set out below:

(a) Dr Lubisi does not deal with the journey of a Presidential Minute prior to it reaching the Presidency but Mr Abrahams deals with that journey in his affidavit as well as what happens when a draft Presidential Minute has reached the Presidency.

(b) In a case where the National Prosecuting Authority desires the President to make a certain decision relating to the National Prosecuting Authority which requires to be entered in a Presidential Minute, the National Prosecuting Authority prepares a Presidential Minute by filling in all that needs to be filled in so

as to enable the President to simply append his signature if he agrees to make the decision requested of him.

(c) Once the National Prosecuting Authority has prepared a Presidential Minute and relevant memoranda, it sends the Presidential Minute and memorandum over to the Ministry of Justice and Correctional Services and requests the Minister to recommend to the President that he makes the desired decision. If the Minister of Justice and Correctional Services is happy with the Presidential Minute and happy to recommend to the President that the National Prosecuting Authority's request be granted, he passes the Presidential Minute with the relevant memorandum to the Presidency together with a letter requesting the President to make the decision requested by the National Prosecuting Authority.

(d) Dr Lubisi begins his evidence with regard to "the process that ought to be followed when dealing with a valid presidential minute" when such a minute is received in the Presidency. In the Presidency a Presidential Minute and accompanying correspondence will be received by the Administrative Secretary of the Legal and Executive Services Unit (LES). The process or procedure that follows thereafter is as set out below.

(e) The Administrative Secretary of LES will register the Presidential Minute in the database of the Executive Acts of the President and the Presidential Minute will then be allocated a unique number. LES will then review the Presidential Minute for statutory compliance and advice. If errors are found, it is directed back to the line function Department concerned for corrections.

(f) After a Presidential Minute has been cleared by LES, it is considered by the Legal Advisor to the President. Thereafter, the Presidential Minute is sent to:

i. the Chief Director in the Private Office of the President responsible for Personal Support Services;

ii. the Deputy Director-General for the Private Office of the President; and,

iii. the Director-General in the Presidency for review and approval by each one of them.

(g) Once the Director-General has approved the Presidential Minute, it is sent back to the Private Office of the President for final routing to the President for his signature. *Once the President has signed the Presidential Minute, it is routed back to LES which will send it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter*. (Emphasis added.)

[177] In paragraph 44.3 of his replying affidavit Mr Mathenjwa said:

> "It is also clear that it is the internal process that the *Legal and Executive Services Unit would send the Presidential Minute back to the line function department for implementation being the National Prosecuting Authority in this case*." (Emphasis added.)

[178] With regard to how the Presidential Minutes relating to the National Prosecuting Authority appointments made by President Zuma on 1 February 2018 were handled, Dr Lubisi said that—

(a) on 16 January 2018 draft Presidential Minutes were received by LES from the Department of Justice and Correctional Services and were registered;

(b) the Presidential Minutes were reviewed and approved by the legal advisor to President Zuma, by the Chief Director in the Private Office responsible for Personal Support Services and by the Chief Operations Officer;

(c) in or about late January 2018 the Presidential Minutes were routed from the Chief Operations Officer to the Private Office of President Zuma for final routing to President Zuma for signature; and

(d) on 1 February 2018 the emails of the Presidency stopped working and, as such, there is no record of the Minutes having been emailed back to the Department of Justice and Correctional Services.

[179] Dr Lubisi then says that it is possible that hard copies of the Presidential Minutes were collected by officials in the Department of Justice and Correctional Services but says that there is no formal record in the Presidency showing how (if at all) the Presidential Minutes may have been transmitted to the Department of Justice and Correctional Services. He also does not say that normally a formal record would be kept.

[180] At this stage I wish to deal with Dr Lubisi's statement that there is no record in the Presidency as to how the Presidential Minutes were transmitted to the Department of Justice and Correctional Services and that it was possible that hard copies of the Presidential Minutes were collected by officials of the Department of Justice and Correctional Services. In terms of the procedure that Dr Lubisi set out in his affidavit of the "journey" that a Presidential Minute travels after it has reached the Presidency, he made it clear that, once a Presidential Minute has been signed by the President, it is sent back to the line function Department for the implementation of the President's decision by a public announcement and/or an appointment letter.

[181] In this case we know that from the Presidency the Presidential Minutes went to the Department of Justice and Correctional Services which was the correct route for them after the Presidency. Although Dr Lubisi says that there is no record of the Presidential Minutes having been electronically transmitted from the Presidency to the Ministry of Justice and Correctional Services, he concedes that officials from the Department of Justice and Correctional Services may have gone to the Presidency to

collect the Presidential Minutes and other documents manually. If this is what happened, there would have been nothing wrong. We also know that the Ministry of Justice and Correctional Services handed the Presidential Minutes and memoranda over to Mr Abrahams.

[182] For what purpose did the Ministry give Mr Abrahams the Presidential Minutes? It must be borne in mind that it was Mr Abrahams who had asked that these appointments be made. Indeed, it was the National Prosecuting Authority which had prepared the Presidential Minutes and memoranda in support of such appointments and sent them to the Ministry. The Ministry then sent them to President Zuma and recommended that President Zuma make the recommended appointments. Accordingly, it was only natural that President Zuma's decisions be communicated to Mr Abrahams.

[183] Given Dr Lubisi's evidence about the process that ought to be followed in dealing with a valid Presidential Minute, the purpose could only have been to inform Mr Abrahams of the appointments and to enable him or the National Prosecuting Authority to implement President Zuma's decisions. Mr Abrahams or the National Prosecuting Authority could not implement President Zuma's decisions without informing the individuals concerned of their respective appointments. In terms of that procedure or process Mr Abrahams or the National Prosecuting Authority was required to implement President Zuma's decision by announcing the appointments publicly and/or by writing appointment letters to the individuals concerned. That is the correct route that the Presidential Minutes were supposed to follow after President Zuma had signed them.

[184] While one must accept that the emails in the Presidency stopped working sometime early in February 2018, there is no reason why, if the President or Dr Lubisi wanted to know how the Presidential Minutes had left the Presidency and got delivered to the Department of Justice and Correctional Services, they would not have asked those officials or employees in the Presidency who would normally have been the last ones

to handle the signed Presidential Minutes how these Presidential Minutes were delivered to the Department of Justice and Correctional Services and asked them to depose to affidavits which would have been filed in Court to inform the Court of what happened.

[185] There is also no reason why Dr Lubisi or the President could not have enquired through the Director-General of the Department of Justice and Correctional Services or the Minister of Justice and Correctional Services as to who had received the Presidential Minutes from the Presidency as well as who had handed them over to Mr Abrahams and asked them to depose to affidavits which could have been filed at court to inform the Court of what happened. Neither Dr Lubisi nor the President provide an explanation as to why this basic investigation was not undertaken so as to ensure that there was no speculation on how the Presidential Minutes had left the Presidency, how they had reached the Department of Justice and Correctional Services and how they had reached Mr Abrahams. Neither Minister Masutha nor the Director-General have elected to depose to affidavits to inform the Court of what happened.

[186] The furthest Minister Masutha was prepared to go in a memorandum to the President was to say that the Presidential Minutes may have been leaked. This was pure speculation. For about a year since he had learnt that Mr Abrahams had received the Presidential Minutes from the Ministry of Justice, Minister Masutha apparently did not cause any investigation to be undertaken in his Department to establish how the Presidential Minutes had left his Department to reach Mr Abrahams. That must have been because he did not think that there was any irregularity in how the Presidential Minutes had left his Department and reached Mr Abrahams. This matter must be decided on the basis that the Presidential Minutes and memoranda left the Presidency lawfully and properly, were delivered to the Department of Justice and Correctional Services lawfully and properly and were handed over to Mr Abrahams by the Ministry of Justice lawfully and properly.

[187] With regard to Dr Lubisi's evidence on the implementation process of a President's decision contained in a Presidential Minute referred to above, two features of Dr Lubisi's evidence need to be highlighted. The one is that Dr Lubisi says that, when the Presidency returns a Presidential Minute through LES to the line function Department, the purpose thereof is "*the implementation of the President's decision by public announcement and/or appointment letter*". This means that the implementation of the President's decision is the responsibility of the line function Department. In particular, this means that the making of a public announcement and/or the writing and sending of an appointment letter to the individuals concerned is the responsibility of the line function Department concerned. The other feature is that the implementation is done by way of a public announcement and/or appointment letter.

[188] It is now convenient to deal with Mr Abrahams' evidence with regard to how he got the Presidential Minutes and memoranda and what happened from there up to about the end of February 2018.

Mr Abrahams' evidence

[189] Mr Abrahams says that, when he was in Cape Town on official business early in February 2018, the Ministry of Justice handed him Presidential Minutes and memoranda relating to Ms Khanyile and Ms Majokweni and the five persons who were appointed by President Zuma as Directors of Public Prosecutions which included the applicants. Mr Abrahams expressly states that the Ministry of Justice handed him the Presidential Minutes relating to Ms Khanyile and Ms Majokweni to enable him to communicate to the individuals concerned but does not expressly say that the Ministry of Justice handed him the Presidential Minutes and memoranda relating to the newly appointed Directors of Public Prosecutions to enable him to communicate to the individuals concerned. Mr Abrahams does not say in his affidavit that the Ministry told or instructed or asked him not to communicate President Zuma's decisions to the newly appointed Directors of Public Prosecutions. Nobody from the Ministry of Justice and Correctional Services has deposed to an affidavit and said that Mr Abrahams' evidence in this regard is not true or accurate or does not give a complete picture.

[190] It is difficult to understand why, in handing to Mr Abrahams the Presidential Minutes and memoranda relating to Ms Khanyile and Ms Majokweni, the Ministry of Justice and Correctional Services would have had the intention that Mr Abrahams should communicate with Ms Khanyile and Ms Majokweni but would not have had the intention that Mr Abrahams should also communicate with the newly-appointed Directors of Public Prosecutions when it gave him simultaneously the Presidential Minutes and memoranda relating to the five newly-appointed Directors of Public Prosecutions. What would have been expected and what would have been natural and logical is that, if the Ministry of Justice wanted Mr Abrahams to inform Ms Khanyile and Ms Majokweni what decisions President Zuma had taken concerning them but did not want Mr Abrahams to inform the newly-appointed Directors of Public Prosecutions what decisions President Zuma had taken concerning them, the Ministry would have expressly instructed or asked Mr Abrahams not to inform the newly-appointed Directors of Public Prosecutions but the fact of the matter is that the Ministry did not ask or instruct Mr Abrahams not to inform them of their appointments.

[191] Given Dr Lubisi's evidence about the process that ought to be followed when dealing with a valid Presidential Minute, as dealt with above, the fact that the Ministry may not have said to Mr Abrahams that it was giving him the Presidential Minutes relating to the five newly-appointed Directors of Public Prosecutions so that he could communicate with them is neither here nor there. What is significant is that the Ministry did not ask or instruct Mr Abrahams not to inform the newly-appointed Directors of Public Prosecutions of their appointments. That being the case, the Ministry's purpose in giving the Presidential Minutes and memoranda relating to the newly-appointed Directors of Public Prosecutions to Mr Abrahams is governed by "the process that ought to be followed when dealing with a valid presidential minute" that Dr Lubisi talked about in his affidavit.

[192] According to Dr Lubisi, when the President has signed a Presidential Minute, it "is routed back to LES who will send it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter". Accordingly, the purpose on the part of the Ministry in giving Mr Abrahams the Presidential Minutes and memoranda relating to the newly-appointed Directors of Public Prosecutions was also to enable Mr Abrahams or the National Prosecuting Authority, as the line function Department in this case, to implement President Zuma's decisions by, among others, informing them of their respective appointments. Those decisions could not have been implemented without Mr Abrahams or the National Prosecuting Authority informing the newly-appointed Directors of Public Prosecutions that President Zuma had appointed them. In any event, Dr Lubisi's evidence is quite clear that one way of implementing such a decision is by way of an appointment letter. If the National Prosecuting Authority or Mr Abrahams was entitled to write the five Directors of Public Prosecutions' appointment letters, it or he could also inform them of their new appointments.

[193] Furthermore, there is no evidence on the record that reflects that there was any intention or plan on the part of President Zuma or the Ministry of Justice and Correctional Services between early February and 14 February 2019 to inform the five newly-appointed Directors of Public Prosecutions that President Zuma had appointed them. The reason why the record does not reflect such a plan or intention is that both President Zuma and Minister Masutha expected Mr Abrahams to inform them of their appointments.

[194] There are various features in what happened in this case between 1 and 14 February 2018 which support the proposition that Mr Abrahams' understanding was that he was the one required or expected to inform the individuals concerned of their appointments, or which support the proposition that neither President Zuma nor Minister Masutha thought that Mr Abrahams had done anything wrong or

anything unauthorised by informing the newly appointed Directors of Public Prosecutions of their appointments Some of them are the following:

(a) Mr Abrahams told not only Ms Khanyile and Ms Majokweni what President Zuma had decided about them, but he did the same in relation to the five newly-appointed Directors of Public Prosecutions. This is an indication that Mr Abrahams had never understood the position to be that the Ministry wanted him to tell only Ms Khanyile and Ms Majokweni and not the five Directors of Public Prosecutions what President Zuma had decided regarding them;

(b) after Mr Abrahams had told all the individuals concerned what decisions President Zuma had made which related to them, he told Minister Masutha's Chief of Staff, Minister Masutha and President Zuma that he had told all the individuals concerned what President Zuma had decided about them; it is unlikely that he would have told them this if his understanding was that Minister Masutha and President Zuma had not wanted him to tell the newly-appointed Directors of Public Prosecutions that President Zuma had appointed them;

(c) Minister Masutha's reaction to the news that Mr Abrahams had told all the individuals concerned what President Zuma had decided in relation to them is inconsistent with the proposition that the Ministry may not have wanted Mr Abrahams to tell the Directors of Public Prosecutions of President Zuma's decisions that related to them;

(d) President Zuma's reaction to the news that Mr Abrahams had informed all the individuals concerned of his decisions that related to them is inconsistent with the proposition that President Zuma might not have wanted Mr Abrahams to tell the individuals concerned of his decisions that related to them; and

(e) any suggestion that the Minister or President Zuma did not want Mr Abrahams to tell the individuals concerned about President Zuma's decisions that related to them is not supported by any objective facts between 1 and 14 February 2018.

[195] Mr Abrahams was criticised by Counsel for the President and he is criticised in the first judgment for not giving more details about the handing over of the Presidential Minutes and memoranda to him by the Ministry including who exactly in the Ministry handed him the Presidential Minutes and memoranda. That criticism is unjustified because nobody has disputed his evidence that he received the Presidential Minutes from the Ministry of Justice and Correctional Services. Minister Masutha has not deposed to an affidavit and said that he never authorised anybody from his Ministry to hand the Presidential Minutes over to Mr Abrahams. Nor has the Director-General of the Department done so. Indeed, no official from the Ministry has deposed to any affidavit to suggest that the Presidential Minutes were not properly and regularly released to Mr Abrahams.

[196] Mr Abrahams says that, after returning from Cape Town where he had been handed the Presidential Minutes, he "immediately informed each candidate of their respective appointments and congratulated them." He says that he told them that he would "revert to them regarding the date on which each should take up their newfound respective responsibilities/offices." Although Mr Abrahams does not give the dates when he informed the applicants of their respective appointments, Mr Mathenjwa said that Mr Abrahams informed him on 5 February 2018 and Mr Mncwabe said that Mr Abrahams informed him on 7 February 2018. None of this evidence has been disputed. Mr Abrahams then says that, before requesting his spokesperson to "craft an internal communication to announce the new appointments internally within the NPA," he "contacted the Ministry to establish whether the Ministry, the then President or [he] would make a media announcement". He then says: "I informed the Ministry that I had already informed all the appointees of their appointments. The Chief of Staff of the then Minister, Mr Kagiso Moleme, advised me to go ahead and make the necessary announcements."

[197] Mr Abrahams states that, when Minister Masutha's Chief of Staff told him that he should go ahead and make the announcements, he remembered that, when

Adv M I Thenga was appointed as the Director of Public Prosecutions of the Limpopo Division of the High Court in January 2016, he had personally informed her of her appointment. Mr Abrahams states that this was immediately after President Zuma had signed the Presidential Minute to appoint her. In support of this, Mr Abrahams attached to his affidavit copies of the relevant correspondence. Nobody from either the Ministry of Justice and Correctional Services or the Presidency has deposed to an affidavit disputing this or saying that this was an exception and not the norm.

[198] Mr Moleme's response to Mr Abraham's inquiry about who would make the public announcement of the decisions is telling. He said that Mr Abrahams should go ahead and make the necessary announcement. To the extent that he may have said this without having first checked with Minister Masutha, this reflects that his understanding was that it was normal or to be expected that the National Director of Public Prosecutions would make media announcements in relation to NPA matters. He did not say to Mr Abrahams: But you know that such announcements are made by the President or the Minister! Nor did he ask Mr Abrahams why he had notified the individuals concerned because it was the President or Minister Masutha who would normally inform the individuals concerned of their appointments. Mr Moleme's conduct in telling Mr Abrahams what he told him does not reflect that it was Mr Moleme's expectation or understanding that the Minister or the President was the one who would normally inform individuals of their appointments. His statement that Mr Abrahams should make the announcement may be an indication that he was aware of the "process that ought to be followed when dealing with a valid presidential minute" as dealt with in Dr Lubisi's affidavit.

[199] Mr Abrahams then says that, notwithstanding the Ministry's position as articulated by the Minister's Chief of Staff – namely that he should go ahead and make the necessary announcements – he advised Mr Moleme to discuss the issue of a public announcement of the appointments with Minister Masutha and the Presidency to seek clarification. It must be noted that Mr Abrahams makes it clear that he was seeking

clarification about a public announcement and not about informing the individuals concerned of their appointments. He then says that he also held back announcing the appointments internally.

[200] Mr Abrahams points out that Minister Masutha's Chief of Staff subsequently reverted to him and told him that the Minister was asking him to "hold off" on the internal announcement of the appointments "as the then Minister agreed with the then President that he would make the necessary media announcement". Mr Abrahams then says Minister Masutha's Chief of Staff requested him to be on standby as Minister Masutha required him to attend a meeting between him and President Zuma and also said that Minister Masutha would call him shortly.

[201] Mr Abrahams states that, after his conversation with Minister Masutha's Chief of Staff, Minister Masutha called him. It must be recalled that by now Minister Masutha would have been told by his Chief of Staff that he (i.e. Mr Abrahams) had said that he had already informed all the individuals of their respective appointments. Mr Abrahams says that in that telephone conversation Minister Masutha said that he had spoken to President Zuma who had requested that he and Mr Abrahams attend a meeting with President Zuma and Mr Ramaphosa who was the new President of the African National Congress "as the then President, as a matter of courtesy, wanted to brief the new President of the ANC on the recent resignations from the NPA along with the new appointments that he had effected in the NPA on 1 February 2018". This is what Mr Abrahams says Minister Masutha told him in that conversation on the telephone and former Minister Masutha has not denied it.

[202] Mr Abrahams states that in that telephone conversation he told Minister Masutha that he had informed all the individuals concerned of their respective appointments. Minister Masutha has not deposed to an affidavit and denied this or said that it is taken out of context. Mr Abrahams does not say that Minister Masutha expressed surprise or shock or disapproval that he had informed the individuals concerned of their respective appointments. Former Minister Masutha has also not deposed to an affidavit to explain

why he did not say anything to show disapproval if in fact Mr Abrahams had done what he was not authorised or expected to do.

[203] If Mr Abrahams had effectively usurped President Zuma's function or Minister Masutha's function in informing the individuals concerned of President Zuma's decisions to appoint them, Minister Masutha would have expressed disapproval of Mr Abrahams' conduct. He would not have just kept quiet. He would also have filed an affidavit to say that what Mr Abrahams had done was unauthorised and unacceptable as it was the President's or his function to inform the individuals of their appointments. He did not depose to an affidavit to make that point. All of this reaction by Minister Masutha suggests strongly that, by informing the individuals of their respective appointments, Mr Abrahams was seen by Minister Masutha as having done what was expected of him. If one links Minister Masutha's reaction to the reaction of his Chief of Staff when Mr Abrahams told him that he had informed the individuals – which was also like that of Minister Masutha – it gives rise to a strong inference that Minister Masutha all along expected Mr Abrahams to tell the individuals of their respective appointments.

[204] Mr Abrahams states that in the same week in which he had a conversation on the phone with Minister Masutha he also had a conversation with President Zuma. He says that in that conversation President Zuma "took it upon himself to inform [him] of the briefing to Mr Ramaphosa, the new president of the ANC, on the appointments he had made in the NPA on 1 February 2018". It is important to state that by now President Zuma would probably have been made aware by Minister Masutha that Mr Abrahams had informed the individuals concerned of their appointments. Mr Abrahams states:

> "The then President emphasised that it was merely as a matter of courtesy to the new President of the ANC and that he would cause the appointments to be publicly announced immediately after the meeting. My understanding from the then President was that the Ministry would administratively facilitate the publication of the Proclamations."

[205] It must be noted that on Mr Abrahams' version – which is an undisputed version – President Zuma only intended to make a public announcement. He never said that he intended informing the individuals concerned of their respective appointments himself. I can see no reason why he would have spoken only about a public announcement and not also about his intention to inform the individuals personally if he intended to also inform the individuals concerned himself. If President Zuma also intended to personally inform the individuals of their respective appointments, he would have indicated his intention to Mr Abrahams in one way or another but he never did.

[206] Mr Abrahams says that he then told President Zuma that he had informed the individuals concerned of their appointments. Here is how Mr Abrahams puts it in his affidavit and President Zuma's reaction to this news:

> "I took the opportunity to inform the then President that the then Minister had briefed me and that I had already communicated the appointments to each appointee and had informed them of the delay in them assuming their new positions.
>
> At no stage did the then President directly or indirectly give me any indication that there was a problem with any of the appointments he had signed off on **1 February 2018**, nor that he wanted to rescind any of the appointments.
>
> *It is evident that both of the then Minister and then President were fully aware that the appointments had been communicated to the respective parties concerned. Neither the then Minister nor the then President took issue therewith nor did they object thereto. I understood both the then Minister and the then President to be pleased that the candidates appreciated the reason for the delay in them taking up their new position*." (Emphasis added.)

First respondent's evidence

[207] In paragraph 12 of his affidavit the President said that, after President Zuma had signed the Presidential Minutes on 1 February 2018, "no further steps were taken by the Presidency or the Ministry of Justice *to finalise the appointments by announcing them in public*."

[208] In paragraph 18 of his affidavit the President says:

> "In or about January 2019, Advocate Wim Trengove SC was briefed, on instructions from the Ministry of Justice, to advise on whether the purported appointments of individuals who included Advocates Pretorius, Mathenjwa and Mncwabe, by the former President, were valid and binding. In an opinion dated 30 January 2019 Advocate Trengove SC advised that the decisions to appoint the five DPPs never became final in law. This was because they had not been announced in the public domain. They accordingly *never became legally effective, or binding on the former President or me as his successor. I have since acted pursuant to that advice*." (Emphasis added.)

[209] In paragraph 19 of his affidavit the President then says:

> "I was thus at liberty to decide whether or not to give effect to those purported *appointments by ratifying and announcing them in public*, and, to the extent necessary, to retract or amend the purported appointments." (Emphasis added.)

[210] In paragraph 30.4 the President states that Mr Abrahams fails to address in his affidavit the statement by Mr Pretorius in his affidavit that, after Mr Abrahams had given Mr Pretorius a letter of appointment, he (i.e. Mr Abrahams) demanded it back within minutes and informed Mr Pretorius to instead await an announcement from the Presidency or Ministry. He then says in paragraph 30.5: "*That conduct, I submit, is consistent with the legal requirement for a public announcement before such an appointment takes legal effect*". In paragraph 28.2, 28.3 and 28.4 of his affidavit, the President effectively makes the same points in relation to Mr Mathenjwa. In paragraph 28.4 he says:

> "Again, this is consistent *with the position that such appointments only take legal effect once announced in public*." (Emphasis added.)

[211] In paragraph 29.4 the President makes the same points in relation to Mr Mncwabe. He says:

> "Again, this has not been disputed by Adv Abrahams. *It is consistent with our stance that such appointments could not take legal effect in the absence of a public announcement*." (Emphasis added.)

[212] In paragraph 45 the President says:

> "I deny that Advocate Abrahams was entitled to furnish the individual applicants with copies of the respective signed Presidential Minutes when it had been made clear to him that the Presidency and/or the Ministry would deal with *the finalisation of the appointments. That, as he should have been aware, required at least a public announcement*." (Emphasis added.)

I pause here to point out that, to the extent that the President suggests that it was made clear to Mr Abrahams, before he informed the individuals concerned of their appointments by President Zuma, that the Presidency and/or the Ministry would deal with the finalisation of the appointments, that is not true. Indeed, there is no shred of evidence to support the suggestion. Why would the Presidency and the Ministry have handed all the documentation, including Presidential Minutes and memoranda, back to the National Prosecuting Authority and Mr Abrahams if they had not yet finalised the appointments? In my view, they did this because they knew that they had no further role to play.

[213] The President's case before this Court is that President Zuma's decisions to appoint the applicants were not final because they had not been announced publicly. His case is that a public announcement of such a decision was an essential requirement before the decision could be final. That this is the President's case before this Court is to be gathered from the answering affidavit of Ms Phindile Baleni, the Director-General in the Presidency, who deposed to that affidavit on behalf of the President.

Ms Phindile Baleni's evidence

[214] Ms Phindile Baleni records in her affidavit that the High Court found that President Zuma's decisions were not final. She goes on to say that the High Court found that:

> "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*." (Emphasis added.)

[215] Ms Baleni also says that the High Court found that:

> "*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*." (Emphasis added.)

[216] In another part of her affidavit, Ms Baleni says:

> "The President's decision *had to be translated into an overt act, through public notification*;
>
> *The President would be entitled to change his mind at any time prior to the promulgation of the notice*." (Emphasis added.)

[217] In putting the President's defence in the terms in which she put it in her affidavit as reflected above, Ms Baleni accurately captured the President's defence. This is how the President had also put it in his affidavit in the High Court. This was the answering affidavit that the President filed in opposition to Adv PJ Pretorius SC's application challenging the President's decision to revoke President Zuma's decision to appoint Adv Pretorius as a Special Director of Public Prosecutions. Adv Pretorius was one of the five persons who were appointed by President Zuma to various positions in the National Prosecuting Authority on 1 February 2018, which the President purported to revoke early in March 2019. Mr Chowe, from the State Attorney's office, the

President's attorney, deposed to an affidavit and said that that affidavit of the President was also intended to be used in opposition of the applicants' applications. In other words, the President wanted to use the same defence in Mr Pretorius', Mr Mathenjwa's and Mr Mncwabe's applications. The President also said that the reason why he contended that President Zuma's decisions to appoint the five Directors of Public Prosecutions were not final was that they had not been announced publicly.

[218] The parties argued whether President Zuma's decision in each case was final. The President contended that President Zuma's decision was not final and that, as a result, he was entitled to revoke each one of those decisions. The applicants disputed that contention and argued that President Zuma's decisions were final and that the President was not entitled to revoke President Zuma's two decisions.

Was the President entitled to revoke or withdraw President Zuma's decisions appointing the applicants as Directors of Public Prosecutions?

[219] Was the President entitled to revoke or withdraw President Zuma's decisions in terms of which President Zuma had appointed the applicants as Directors of Public Prosecutions? This is the main question that this Court is required to decide. The High Court held that the President was entitled to withdraw President Zuma's decisions because they had not become final when President Zuma resigned as President of the country since they had not been announced publicly.

[220] Before us, Counsel for the President did not pursue this contention and, in my view, correctly so. There is no legal requirement either in the Constitution or in the NPA Act that the President's decision to appoint someone as a Director of Public Prosecutions should be announced publicly. Indeed, this Court's judgment in *SARFU*[112] provides no authority for such a proposition. Nothing more needs to be said in substantiation of the conclusion that the public announcement of a decision to appoint a Director of Public Prosecutions is not a legal requirement for the validity or

[112] *SARFU III* above n 7.

effectiveness of such a decision. There is no express provision nor is there a basis to suggest that such a requirement is implied either in section 179 of the Constitution or in section 13 of the NPA Act.

[221] Ultimately, the real issue that was argued between the parties was whether the fact that Mr Abrahams had told the applicants of their respective appointments by President Zuma meant that the President could no longer revoke the appointments. Counsel for the President submitted that the applicants needed to have been informed by President Zuma or Minister Masutha, as the delegated executive authority, of their respective appointments in order for their appointments to have been final. She contended that Mr Abrahams was not authorised to inform the individuals concerned of President Zuma's decisions to appoint them and, because of that, the fact that he told them was not effective nor did it make their appointments final.

[222] Counsel for the applicants submitted that, if President Zuma's decisions to appoint the applicants did not become final earlier than when they were informed by Mr Abrahams of their respective appointments, they became final when Mr Abrahams informed them. All Counsel for the applicants submitted that, therefore, the President had no power to revoke or withdraw the appointments as President Zuma, his predecessor, had become *functus officio* before he resigned as President of the country. They submitted that, if President Zuma had become *functus officio*, the President, too, was *functus officio* and could not revoke the appointments.

[223] It seems to me that, in considering the question whether Mr Abrahams was entitled or authorised to inform the applicants and others of their appointments, the evidence of Dr Lubisi which has been referred to above in regard to the role of Presidential Minutes and "the processes that ought to be followed when dealing with a valid Presidential Minute", is critically important. It is appropriate to refer to that evidence again. Dr Lubisi said that, when a Presidential Minute has been signed by the President, it is routed back to LES in the Presidency which would send it back to the line function Department for the implementation of the President's decision by public

announcement and/or appointment letter. Here is how Dr Lubisi puts this in his affidavit:

> "After signature by the President, the presidential minute is routed back to LES who will send it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter."

[224] At this stage, I pause to point out that in his affidavit in which the President responds to Mr Abrahams' affidavit, he confirms that he had authorised Dr Lubisi to depose to the affidavit referred herein on his behalf. The President says:

> "I have read the answering affidavit of Cassius Reginald Lubisi in this matter served on or about 19 September 2019. I confirm that he was authorised to depose to this affidavit on my behalf and I confirm the contents thereof insofar as they relate to me."

[225] In other words, in giving the evidence that he gave in his affidavit about, inter alia, how a valid Presidential Minute has to be dealt with after the President has signed it, Dr Lubisi was doing so on behalf of the President as his witness.

[226] It is common cause that Mr Abrahams told the applicants and the other individuals that President Zuma had appointed them as Directors of Public Prosecutions. Did that render the appointments final or legally effective? The prior question is whether, if the applicants were informed by the right person or official or functionary, the appointments would be final or would take legal effect with the result that the President could no longer revoke them. Counsel for the President accepted that, if the applicants were informed of their appointments, the appointments would be final provided that they were informed by President Zuma or Minister Masutha or someone who was authorised to inform them.

[227] As stated earlier, section 13 of the NPA Act confers on the President the power to appoint a Director of Public Prosecutions.[113] Although section 13 of the NPA Act does not expressly make provision for the notification of a person appointed as a Director of Public Prosecutions, it is, in my view, necessarily implied that the appointment has to be communicated to the person concerned and he or she must accept the appointment before it can take legal effect. It cannot be otherwise because an appointment as a Director of Public Prosecutions confers certain rights, powers and obligations on the person so appointed and that person can obviously not begin to exercise those rights and powers or carry out those obligations unless he or she knows of the appointment and has accepted it. Obviously, a person appointed as Director of Public Prosecutions may reject the appointment when it is communicated to him or her and, in such a case, the appointment will not take legal effect. So, notification to the person who is appointed and his or her acceptance of the appointment is essential. The acceptance or rejection can be express or implied. In the present cases, we know that both applicants accepted their appointments and conveyed their acceptance to Mr Abrahams.

[228] Dr Lubisi's evidence that, after the President has signed a Presidential Minute, the Presidential Minute is routed back to the LES which then sends it back "to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter" is in line with the purpose for which Mr Abrahams says in his affidavit the Ministry of Justice and Correctional Services handed to him the Presidential Minutes relating to Ms Khanyile and Ms Majokweni. Mr Abrahams puts this in these terms in his affidavit:

> "These signed Presidential Minutes, were subsequently handed to me by the Ministry of Justice during early February 2018, whilst I was in Cape Town on official business *so as to enable me to communicate to the individuals concerned, which I duly did upon my return from Cape Town, providing them each with copies of the*

[113] See [172].

Presidential Minutes, confirming the then President's acquiescence to the vacating of their respective offices, to them." (Emphasis added.)

[229] With regard to Dr Lubisi's evidence that, when the President has signed a Presidential Minute, it is routed back to the LES which in turn sends it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter, Mr Mathenjwa said in his replying affidavit:

"It is also clear that it is the internal process that the Legal and Executive Services Unit would send the Presidential Minute back to the line function department for implementation being the National Prosecuting Authority in this case. As Adv Abrahams confirms in his explanatory affidavit:

44.3.1 the Presidential Minutes were delivered to him by the Ministry of Justice and Correctional Services whilst he was in Cape Town on business;

44.3.2 on his return to his office in Pretoria, he advised all of the appointees of their appointments, thereby implementing the President's decision and making it a final decision which was of full force and effect."

[230] It seems to me, therefore that, in the context of Presidential decisions that relate to the National Prosecuting Authority, as Mr Mathenjwa says, the line function Department is the National Prosecuting Authority. Accordingly, the National Prosecuting Authority was obliged to implement President Zuma's decisions by public announcement and/or appointment letter. If the National Prosecuting Authority was obliged to implement President Zuma's decisions once it had received the Presidential Minutes back, Mr Abrahams would have been the National Prosecuting Authority official who had the obligation to ensure that the National Prosecuting Authority implemented President Zuma's decisions by public announcement and/or appointment letter. This is also in line with the fact that, according to Mr Abrahams, Minister Masutha's Chief of Staff said to Mr Abrahams that he should make the public announcement in respect of the appointments.

[231] Mr Mncwabe also points out in his replying affidavit that "[i]f one looks at the sequence of communication herein, "*it is quite clear that once the President's Minute has been countersigned by the 1st and 2nd Respondents, same is then sent to the employer, being the NDPP, and the latter is then tasked with communicating the decision to the appointee*". The reference to the first and second respondents in this sentence is a reference to the President and the Minister of Justice and Correctional Services. In this sentence Mr Mncwabe says that, after a Presidential Minute has been signed by the President and the Minister of Justice and Correctional Services it is sent to the employer, which was the National Prosecuting Authority as represented by the National Director of Public Prosecutions in this case. In his replying affidavit, Mr Mncwabe added this:

> "As per what I have just stated and clearly outlined under paragraph 77 above, *the established norm is that once the appointment has been confirmed and countersigned by the 2nd Respondent, same is then sent to the employer (3rd Respondent herein) and the latter is tasked with the duty of informing or communicating to the appointee his/her/their appointment, accordingly, if such appointment is that of the DPP, DDPP, SDPP and/or an ordinary prosecutor*." (Emphasis added.)

The reference in this excerpt to the second respondent is a reference to the Minister of Justice and Correctional Services and the reference to the third respondent is a reference to the National Director of Public Prosecutions. Mr Mncwabe's evidence referred to in this paragraph is to the same effect as Mr Mathenjwa's evidence to which I have already referred above, namely that, after the President and the Minister have signed a Presidential Minute relating to the National Prosecuting Authority, the Presidential Minute is sent to the National Prosecuting Authority for the implementation of the President's decision.

[232] It is important to point out that Mr Mncwabe was not making the above point for the first time in his replying affidavit of April 2019. He had already made the same point in an email he addressed to the Ministry of Justice and Correctional Services on

1 October 2018 – long before this litigation started. In that email he, among other things, said:

> "[Dr Rainaite, then Acting NDPP] *informed me that you informed him that this matter is in the office of the President receiving attention, which I should mention, surprised me, because the office of the former President made the appointment, signed, passed them to your honourable self, you signed and you passed it to the NPA for implementation*." (Emphasis added.)

I pause here to refer back to what Dr Lubisi said as reflected above. He said that, when the President has signed a Presidential Minute, the Presidential Minute is routed back to the LES within the Presidency "*who will send it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter*". Now we see that Mr Mncwabe had said the same thing to Minister Masutha on 1 October 2018.

[233] In that email of 1 October 2018 Mr Mncwabe also said to Minister Masutha:

> "*The question in my mind*, for another day of course, if justified, which again I am hopeful there will be no need, depending on your response and what follows thereafter, *is why our appointments went back to your office and then to that of the state President as our appointments were finalised, and they were even given to the office of the NDPP for implementation and the former NDPP formerly informed me about my appointment*, the President's Minute herein attached serving a proof." (Emphasis added.)

In another email to Minister Masutha dated 22 October 2018 Mr Mncwabe, inter alia, said:

> "My understanding, amplified by these pieces of legislation, is *that the only procedure left now after my appointment was signed by the former President, in his executive capacity, and co-signed by your honourable self, is none other than implementation, nothing more and nothing less*." (Emphasis added.)

The importance of what Mr Mncwabe said in these excerpts from his emails of 1 and 22 October 2018 is that it coincides with what Dr Lubisi said in his affidavit in which he addressed the procedure relating to the implementation of Presidential Minutes.

[234] In a November 2018 email to the President – again long before this litigation started – Mr Mncwabe once again made the point that he had made in his emails to Minister Masutha. He wrote in the email to the President:

> "The current Acting NDPP told me that the Minister told him that you are having our appointments and that we will be informed in due course as to when we have to start working at our posts as per the finalised appointments. That also is very surprising and very disturbing as these appointments were finalised by the office of the President (sinc, former) and the Minister co-signing. The only process that has to follow is none other than the administrative process of implementation at the NPA human resource department." (Emphasis added.)

I draw attention to the reference in this excerpt to "the administrative process of implementation at the NPA human resource department."

[235] What has emerged from the above is this: Dr Lubisi talked about the implementation of the President's decision by the line function Department which I have said above must mean, in the context of this case, the National Prosecuting Authority. In the above excerpt Mr Mncwabe wrote to the President in November 2018 that "once the President and Minister have signed the Presidential Minute", "the only process that has to follow is none other than the *administrative process of implementation at the NPA human resources department*". Therefore, the implementation of President Zuma's decisions to which both Dr Lubisi and Mr Mncwabe referred would happen at the National Prosecuting Authority and Dr Lubisi says that implementation occurs through the public announcement and/or appointment letter. Anyone who is entitled to make a public announcement of an appointment and/or

to write an appointment letter would also be entitled to inform the individuals concerned of their respective appointments.

[236] In my view, there is overwhelming evidence that, once the President has signed a Presidential Minute containing a decision relating to the National Prosecuting Authority, the Presidency sends that Presidential Minute back to the line function Department for the implementation of the President's decision by public announcement or appointment letter (if it is a decision to appoint somebody) and the line function Department in such a case is the National Prosecuting Authority. First, it was Mr Mncwabe who made it clear, in his emails of 1 and 22 October 2018 to Minister Masutha and his email of November 2018 to the President, that, after the Presidential Minutes had been signed by the President and Minister Masutha, the process was that the President's decision was to be communicated to the appointees by the National Prosecuting Authority. Then came Mr Abrahams in his explanatory affidavit in which he said that the Ministry had given him the Presidential Minutes relating to Ms Khanyile and Ms Majokweni in order to enable him to communicate President Zuma's decisions to them. Then it was Dr Lubisi who gave evidence by way of his affidavit that effectively corroborated what Mr Mncwabe had said in his emails to Minister Masutha and the President in October and November 2018 respectively. In reply to Dr Lubisi's affidavit both Mr Mncwabe and Mr Mathenjwa said in their replying affidavits in effect that, indeed, they agreed that, when the President has signed a Presidential Minute that relates to the National Prosecuting Authority, it is sent back to the line function Department, which is the National Prosecuting Authority in this case, for the implementation of the President's decision which includes the communication of the President's decision to the individuals concerned.

[237] Dr Lubisi's evidence that the implementation procedure for a President's decision contained in a Presidential Minute is that, after the President has signed the Presidential Minute, it is routed back to the LES which would send it back to the line function Department for the implementation of the President's decision by public

announcement or appointment letter is fatal to the proposition that Mr Abrahams was not authorised to inform the applicants of their appointments.

[238] I have said that Dr Lubisi's evidence on "the process which ought to be followed when dealing with a valid presidential minute" means that the National Prosecuting Authority was authorised or was required or obliged to implement President Zuma's decisions by informing the individuals concerned of their appointments. I have also said that, if the National Prosecuting Authority was required or obliged or authorised to inform the individuals concerned, then Mr Abrahams, as the head of the National Prosecuting Authority, was definitely authorised or required or obliged to inform the applicants of their appointments. The first judgment does not suggest that a different meaning should be given to Dr Lubisi's evidence. Indeed, the first judgment does not address the point I make that Dr Lubisi's evidence means that the National Prosecuting Authority and, therefore, Mr Abrahams, was not only authorised but obliged to inform the individuals concerned of their appointments. This was so because informing them was part of the implementation of President Zuma's decisions. It just continues to maintain that Mr Abrahams was not authorised to inform the applicants without explaining how that proposition can be sustained in the face of Dr Lubisi's clear and unequivocal evidence which is consistent with Mr Mncwabe's and Mr Mathenjwa's evidence. In my view, the proposition that Mr Abrahams was not authorised to inform the applicants of their appointments is simply unsustainable in the light of the overwhelming evidence to the contrary.

[239] The first judgment suggests that this judgment relies on tacit authority for the conclusion that Mr Abrahams was authorised or obliged or entitled to inform the applicants of their appointments. That is not correct. This judgment relies on Dr Lubisi's evidence on the procedure for the implementation of a President's decision contained in a Presidential Minute. It also relies on Mr Mncwabe's express evidence as well as Mr Mathenjwa's evidence.

[240] The first judgment also expresses the view that the applicants could have obtained affidavits from Minister Masutha and President Zuma about whether the Presidential Minutes had left the Presidency and the Department of Justice and Correctional Services regularly or lawfully or properly. It must be remembered that the President and Dr Lubisi have not stated that the Presidential Minutes were removed unlawfully or irregularly from the Presidency or from the Department of Justice and Correctional Services. All that they do is speculate that the Presidential Minutes may have been leaked. The applicants do not ask this Court to conclude that the Presidential Minutes were released irregularly. If the President seeks such a conclusion, the onus was on him to place evidence of such irregularity before the Court. He did not do so.

[241] In the light of the above I conclude that the procedure for dealing with Presidential Minutes – which is sanctioned by the Presidency – authorised the National Prosecuting Authority and, therefore, Mr Abrahams as head of the National Prosecuting Authority, to inform the applicants of their appointments. If the National Prosecuting Authority or Mr Abrahams was entitled to inform the individuals concerned of their appointments by a public announcement or by letters of appointment, it or he was equally entitled to inform them of their appointments verbally or by phone. Indeed, I say that that procedure obliged Mr Abrahams to inform the individuals concerned, including the applicants, of their appointments. To the extent that the appointments had not become final, they became final when Mr Abrahams told the applicants of their appointments. Accordingly, the appointments became effective in law when Mr Abrahams told the applicants about their appointments.

[242] The result of the conclusion that Mr Abrahams was entitled/obliged and authorised to inform the applicants of their respective appointments and that the applicants' appointments became final when Mr Abrahams told them of their appointments is that the President had no power or right to revoke or withdraw their appointments. Accordingly, his decisions to revoke or withdraw their appointments were unlawful and invalid.

[243] Without Dr Lubisi's evidence relating to the procedure for the implementation of Presidential Minutes, it would be difficult to understand Minister Masutha's and President Zuma's reactions to the news that Mr Abrahams had told all the individuals of their appointments. That is, if the position was that Mr Abrahams was not authorised to inform the individuals concerned, including the applicants, of their respective appointments because only President Zuma or Minister Masutha was meant to tell them. Neither Minister Masutha nor President Zuma expressed his objection or displeasure or surprise when Mr Abrahams told them that he had informed the individuals of their appointments.

[244] The explanation has been provided by Dr Lubisi's evidence which says that the line function Department bears the responsibility to make the public announcement or to do the appointment letters. In this case, that is the National Prosecuting Authority. Therefore, that is why Minister Masutha and President Zuma had no problem with the fact that Mr Abrahams had informed the applicants and others of their respective appointments. That is also why, as Mr Abrahams says in his affidavit, Minister Masutha and President Zuma were simply happy that the individuals concerned understood why they needed to wait a bit before they could assume duty in their new positions. That is also why Minister Masutha's Chief of Staff said to Mr Abrahams that he should go ahead and make the announcements. They all knew that in terms of the Presidential Minute implementation procedure/process the National Prosecuting Authority was supposed to inform the individuals concerned of their respective appointments.

[245] What happened in this case is simply that, after President Zuma had made these valid appointments, the President sought to reverse them when there was no basis in law for those decisions to be reversed. I accept that, given how President Zuma abused his powers in, for example, how he sought to push Mr Mxolisi Nxasana out of office as the National Director of Public Prosecutions as reflected in the judgment of this Court

in *Corruption Watch*,[114] the President was not unreasonable in seeking to satisfy himself that President Zuma had not made these appointments corruptly or for ulterior motives before he resigned from office. However, establishing that could simply not have taken a whole year. A month, or, at the most, two months should have been enough to establish that. In terms of section 13(2) of the NPA Act, the President was obliged not to do anything that unduly delayed the filling of these two very important positions. The President has not advanced any justification for the year long delay before he took the decision on the appointments. Decisions such as these should be made without any undue delay. It is not acceptable that there were these kinds of delays before such decisions were made.

[246] A further consequence of the conclusion that Mr Abrahams was entitled or authorised or obliged to inform the applicants of their appointments and that, therefore, the revocation of their appointments was unlawful and invalid is that the President's conduct in appointing Mr Sakata as the Director of Public Prosecutions for the Northern Cape Division of the High Court and Ms Kanyane as the Director of Public Prosecutions for the Mpumalanga Division of the High Court while this litigation was going on were also unlawful and invalid. The President may not competently appoint anybody to a position that is not vacant. In law these posts were not vacant after February 2018.

Remedy

[247] In *Steenkamp*[115] this Court stated: "That a dismissal is invalid and of no force and effect means that it is not recognised as having happened".[116] In the same way one can also say that that a withdrawal or revocation of an appointment is invalid and of no force and effect means that in law it is not recognised as having happened. In *Corruption Watch* this Court accepted that the declaration of invalidity of Mr Nxasana's

[114] *Nxasana* above n 1 at para 88.

[115] *Steenkamp v Edcon Limited* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC).

[116] Id at para 189.

removal as National Director of Public Prosecutions meant that "Mr Nxasana [was] ordinarily entitled to resume office as the default legal position".[117] In the context of the present case it can also be said that the conclusion that the revocation of the applicants' appointments is invalid means that ordinarily the applicants are entitled to assume office as the Directors of Public Prosecutions for the Northern Cape and the Mpumalanga Division of the High Court. This is the default legal position in a case in which section 172 of the Constitution applies.

[248] I accept that the conclusion that the revocations of the applicants' appointments were invalid would ordinarily entitle the applicants to assume their positions. This is the default position. There is one qualification to the default position. The qualification arises from the fact that we are here dealing with a constitutional matter and the provisions of section 172 of the Constitution apply. Section 172 confers upon a court dealing with a constitutional matter the power to declare any law or conduct including the conduct of the President invalid when it is inconsistent with the Constitution and to make any order that is just and equitable. This means that the Court may depart from the default legal position when it deals with a matter to which section 172 applies and if it is just and equitable to do so.

[249] Should this Court allow the default position to prevail or should it depart from the default position? This is the question that I now need to consider. The applicants were approached by Mr Abrahams and asked to provide their CVs and Mr Abrahams used those to recommend that they be appointed as Directors of Public Prosecutions. Minister Masutha recommended their respective appointments to President Zuma. President Zuma agreed to appoint them and did actually appoint them. Mr Abrahams, having received the Presidential Minutes reflecting that, indeed, President Zuma had appointed the applicants and Minister Masutha had co-signed the Presidential Minutes, informed the applicants that they had been appointed as Directors of Public Prosecutions and congratulated them.

[117] *Nxasana* above n 1 at para 75.

[250] The applicants accepted their respective appointments and were excited about them. Unfortunately, their excitement was short-lived. This was because they were subsequently told that they could not assume duty in their new positions since President Zuma needed to announce the appointments publicly or needed to consult the then Deputy President, Mr Ramaphosa, the President, as a matter of courtesy but what was to follow was a whole year in which both Minister Masutha and the President left the applicants and others in limbo. During that period Mr Mncwabe wrote to both Minister Masutha and to the President to find out what the hold-up was about but nobody bothered to respond to him substantively. Mr Mathenjwa wrote to the National Prosecuting Authority senior management as well and asked them to find out what the delay was about and he expressed his frustration at the delay. No explanation has been given by the President as to why the applicants were left in the dark for a whole year. No apology has been extended to them for not even responding to their correspondence.

[251] The President filled the positions to which the applicants had been appointed while this litigation was going on. In doing so he knew that there was a risk that the applicants could succeed but, nevertheless, went ahead and filled the positions. The applicants went to court in an attempt to interdict the appointment of anybody to the positions to which they had been appointed. The President opposed that application successfully. The President sought to justify the appointment of other people into the positions to which the applicants had been appointed while the litigation in this matter was still continuing on the basis of seeking to ensure that there were permanently appointed persons in those positions ahead of the release of the Report of the State Capture Commission. [118]

[252] This explanation cannot be accepted. The President did not even put up information to suggest that there were many cases relating to the

[118] The full name of the State Capture Commission is "The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State."

Northern Cape Province and the Mpumalanga Province that the State Capture Commission was investigating. The President did not even furnish the Court with any information on whether there were state capture or corruption cases that the State Capture Commission was investigating that were expected to be dealt with in its Report. In any event the National Executive had allowed the post of Director of Public Prosecutions of the Northern Cape Provincial Division of the High Court to remain vacant for over a year before February 2018. Mr Abrahams said that it had been vacant since 2016.

[253] As if that was not enough, the President took about a year from February 2018 to March 2019 to apply his mind to whether he would give effect to the applicants' appointments by President Zuma or he would withdraw or revoke their appointments. He must have known how he would handle the situation if the applicants ultimately succeeded. It seems to me that the applicants were caught in a political storm surrounding the recalling of President Zuma and his replacement by President Ramaphosa. They have suffered a great deal over the years in the process. It is necessary to ensure that justice is not only done but is also seen to be done in this case.

[254] In *Corruption Watch* this Court found that exceptional circumstances existed which justified a departure from the default legal position.[119] Are there exceptional circumstances in this case? In my view, there are no exceptional circumstances justifying a departure from the default legal position in the present case. Accordingly, the applicants are entitled to assume duty in their new positions. It seems to me that it is just and equitable that the applicants be allowed to assume their duties. Since the applicants were prevented from assuming their duties as Directors of Public Prosecutions and beginning to earn the remuneration and benefits that attach to the positions to which they had been validly appointed because the President still

[119] *Nxasana* above n 1 at para 86.

wanted to apply his mind to their appointments, they are entitled to all such benefits of office, including the difference in remuneration, as they would have been paid and would have enjoyed if they had been allowed to assume duty on 1 March 2018 until they assume duty in those positions after the handing down of this judgment.

[255] In the circumstances I would have made the following order:

1. Leave to appeal is granted in both applications for leave to appeal.
2. Leave for direct access is granted in the two applications for leave for direct access.
3. The appeals in both cases are upheld.
4. The President is ordered to pay costs, including the costs of two Counsel where two Counsel were employed, in respect of the applications for leave to appeal, applications for direct access and in respect of both appeals.
5. The order of the Supreme Court of Appeal in respect of Mr Mncwabe's application and the orders of the High Court in respect of both Mr Mncwabe's application and Mr Mathenjwa's application are set aside and in the place of the two orders of the High Court the following order is made:
   (a) The conduct of the President in purporting to revoke or withdraw the applicants' respective appointments as Director of Public Prosecutions of the Northern Cape Division of the High Court and the Mpumalanga Division of the High Court, respectively, was unlawful and invalid and is hereby reviewed and set aside.
   (b) The conduct of the President in appointing Mr Livingstone Mzukisi Sakata as Director of Public Prosecutions for the Northern Cape Division of the High Court and Ms Nkebe Rebecca Kanyane as Director of Public Prosecutions for the Mpumalanga Division of the

High Court is unlawful and invalid and is hereby reviewed and set aside.

(c) No decision taken by Mr Livingstone Mzukisi Sakata as Director of Public Prosecutions of the Northern Cape Division of the High Court and no decision taken by Ms Nkebe Rebecca Kanyane as Director of Public Prosecutions of the Mpumalanga Division of the High Court from the date of their respective appointments to those positions and fourteen (14) calendar days from the date of this judgment shall be rendered invalid by this judgment.

(d) The applicants must be allowed to assume their duties as Directors of Public Prosecutions of the Northern Cape Division of the High Court and the Mpumalanga Division of the High Court, respectively, within thirty (30) calendar days from the date of this judgment.

(e) The President is ordered to pay the applicants' costs including the costs consequent upon the employment of two Counsel.

(f) The President shall pay the applicants' costs in regard to the proceedings in the Supreme Court of Appeal.

For the Applicant in CCT 102/22:	G Madonsela SC, M Tsele and N Cele instructed by Ehlers Fakude Incorporated
For the First and Third Respondents in CCT 102/22:	S M Baloyi SC, L Zikalala and S A Karim instructed by the State Attorney
For the Applicant in CCT 120/22:	T F Mathibedi SC, Z Minty, P Mmutle and A Kessery instructed by Biccari Bollo Mariano Incorporated
For the First Respondent in CCT 120/22:	S M Baloyi SC, L Zikalala and S A Karim instructed by the State Attorney