THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 263/11

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

Neutral citation: *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 (1 December 2011)

CORAM: Navsa, Heher, Mhlantla, Majiedt JJA and Plasket AJA

HEARD: 31 October 2011

DELIVERED: 1 December 2011

SUMMARY: Appointment of National Director of Public Prosecutions in terms of s 179 of the Constitution read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 – purpose of empowering provisions is to safeguard prosecutorial independence – requirement that candidate for position must be a fit and proper person with due regard to his or her experience, conscientiousness and integrity and must, having regard to the importance of the office be properly scrutinised by the President of the Republic of South Africa who has the power

to make the appointment – qualities required of candidate are jurisdictional facts that must exist before an appointment can be made – have to be objectively assessed – importance of prosecutorial independence discussed with reference to constitutional scheme and comparable jurisdictions.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Van der Byl AJ sitting as court of first instance):

1 The appeal succeeds and the first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of three counsel;

2 The order of the court below is set aside and substituted as follows:

'a. It is declared that the decision of the President of the Republic of South Africa, the First Respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of section 179 of the Constitution of the Republic of South Africa (the Constitution), read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid;

b. The appointment is reviewed and set aside;

c. The first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of two counsel.'

JUDGMENT

NAVSA JA (HEHER, MHLANTLA, MAJIEDT JJA and PLASKET AJA concurring)

The issue

[1] This appeal is a matter of national and constitutional importance. It involves an institution integral to the preservation and maintenance of the rule of law, namely the National Prosecuting Authority (the NPA), which consists of the National Director at the head of prosecutorial offices, located at high courts, and further comprises Deputy National Directors, Directors and prosecutors.[1] This case is about whether the fourth respondent, Mr Menzi Simelane, was properly appointed as National Director of Public Prosecutions (NDPP) by the first respondent, Mr Jacob Zuma, the President of the Republic of South Africa (the President). Put simply, the question for decision is whether the President, in appointing Mr Simelane on 25 November 2009, complied with the prescripts of the Constitution and s 9(1)*(b)* of the National Prosecuting Authority Act 32 of 1998 (the Act). I will in due course deal with the wording of that section read against constitutional provisions, values and norms and in conjunction with related provisions of the Act.

The background

[2] The litigation culminating in the present appeal was launched in December 2009 in the North Gauteng High Court, Pretoria, by the appellant, the Democratic Alliance (the DA), a registered political party, which is also the official opposition in Parliament.

[3] The high court was approached on an urgent basis for an order declaring that the President's decision, purportedly taken in terms of s 179 of the Constitution read with ss 9 and 10 of the Act, was inconsistent with the Constitution and invalid. The high court was asked to review and set aside the appointment. The Minister of Justice and

[1]See s 179 of the Constitution and ss 2, 3, 4, 5 and 6 of the National Prosecuting Authority Act 32 of 1998.

Constitutional Development was cited as second respondent, for such interest as he might have in the matter, being the Cabinet member responsible for the administration of justice and the Act and because of his alleged conduct in relation to the fourth respondent's appointment. The NDPP, in his official capacity, was added as the third respondent. As already stated, that post is currently held by the fourth respondent. The third respondent chose to abide the court's decision. The other respondents all opposed the relief sought by the DA.

[4] The primary challenge to the appointment of Mr Simelane is that he was appointed contrary to the requirement of s 9(1) of the Act, which provides:

'(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

(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.'

More specifically, the DA's case is that Mr Simelane is not a fit and proper person within the meaning of that expression in s 9(1)*(b)* of the Act, alternatively, when the President made the appointment he did not, as he was required to, properly interrogate Mr Simelane's fitness for office in the manner contemplated in the subsection. It is uncontested that Mr Simelane meets the requirements of s 9(1)*(a)*. Furthermore, as required by s 9(2) of the Act, he is a South African citizen.

[5] In its founding affidavit the main factual foundation on which the DA's case is built is the 'misleading and untruthful evidence' given by Mr Simelane, during 2008, before an official enquiry into the fitness for office of his predecessor, Mr Vusumzi Patrick Pikoli. The Ginwala Enquiry (the GE) was conducted in terms of s 12 of the Act,[2] subsequent to Mr Pikoli's suspension from office on 23 September 2007 by the then President of South Africa, Mr Thabo Mbeki.[3] The DA also submitted that regard should be had to the provisions of s 179(4) of the Constitution, which requires the NPA to

[2] Section 12 of the Act provides that the President may provisionally suspend the National Director of Public Prosecutions from office pending an enquiry into his or her fitness for office.

execute its duties without fear or favour. Having regard to Mr Simelane's lack of integrity, so it was contended, it is an obligation the NPA through him cannot discharge. In a supplementary affidavit the DA alleged that the only document that was before President Zuma when he made his decision to appoint Mr Simelane was the latter's CV, fortifying its view that the former did not properly apply his mind in compliance with s 9(1)*(b)* of the Act. In his opposing affidavit President Zuma's response to this point is as follows:

'I have made it clear that I did not rely exclusively on Adv Simelane's *curriculum vitae* in deciding to appoint him. In addition to his *curriculum vitae*, I had personal knowledge of him and I received information from the Minister. I based my decision on the totality of the information, written and oral, that I had received.'

[6] The full extent and nature of the exchanges between President Zuma and the second respondent, Minister Radebe, concerning Mr Simelane's appointment, as alleged by them, will be dealt with later in this judgment.

[7] In its supplementary affidavit the DA pointed out that when it suited President Motlanthe, President Zuma's predecessor, he used the GE's minor criticisms of Mr Pikoli to remove him from office and that when it suited President Zuma he ignored the GE's trenchant criticism of Mr Simelane.

[8] Furthermore, the DA was critical of President Zuma's decision to appoint Mr Simelane to such an important position on the basis that he was only 38 years old at the time of his appointment, had practiced for only two years as an advocate and had only held positions at the Competition Commission and at the Department of Justice, neither of which could have involved court work or the investigation and prosecution of crime. The DA pointed out that Mr Simelane had only served the NPA for about six weeks as one of four Deputy National Directors of Public Prosecutions and thus had extremely limited experience.

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[3]Mr Pikoli had been appointed National Director of Public Prosecutions by President Mbeki on 1 February 2005.

[9] A further basis of attack by the DA on Mr Simelane's fitness for appointment as the NDPP is that his CV was shoddily prepared and was littered with incorrect spelling and errors. This is an aspect in respect of which I do not intend to expend any further energy or thought.

[10] In its supplementary affidavit the DA contended that if President Zuma had properly interrogated Mr Simelane's performance during his tenure as Competition Commissioner he would have discovered the criticism of Mr Simelane's conduct by this court in *Pretoria Portland Cement Co Ltd & another v Competition Commission & others* 2003 (2) SA 385 (SCA). At paras 62 and 63 of that judgment this court was critical of the manner in which the Commission went about its business and in particular it was critical of Mr Simelane, who had participated in the Commission's activities:

'I can only conclude that the Commission was intent on advertising itself, with no regard to the harm it might do to its suspects. Not all firms suspected of monopolistic practices are guilty of them and it must be remembered that the innocent among the suspects might be harmed, or even put out of business by bad publicity, with consequences not only for the shareholders but also the workers, and indeed the public at large.

The impression of publicity-seeking is reinforced by Simelane's uninvited media interview held in PPC's own car park. There is another aspect of his conduct that deserves comment. In his replying affidavit Gommersall stated that the book kept at the entrance gate reflected that at 12:40 Simelane had signed and stated in the "Whom visited" column, "MD". Gommersall added that it was simply untrue for Simelane to have said that he intended visiting the managing director. And we know from one of the Commission's witnesses that the meeting in the car park was pre-arranged. Now it is true that Simelane had no right or duty to answer this allegation, made in reply, but I would have expected him to offer to do so if Gommersall's imputation of dishonesty were false.'

[11] During December 2008, Minister Radebe's predecessor, Minister Surty, had asked the Public Service Commission[4] (the PSC) to investigate, evaluate and to advise

[4]The Public Service Commission is created by s 196 of the Commission. Its function, amongst others, is to propose measures to ensure effective and efficient performance within the public service, to give directions aimed at ensuring that personnel procedures related to recruitment, transfers, promotions and

on the criticisms of Mr Simelane in the GE report. On 6 April 2009 the PSC furnished its report to Minister Surty, recommending a disciplinary enquiry into Mr Simelane's conduct. On the same day the then acting NDPP, Advocate Mpshe, announced that the NPA was dropping corruption charges against Mr Zuma. President Zuma was inaugurated on 9 May 2009. Thereafter Minister Radebe succeeded Mr Surty.

[12] On 4 June 2009 counsel for Mr Simelane made written submissions to the Minister about the PSC's recommended action. On 15 July 2009 Mr Pikoli was informed that President Zuma was now intending to appoint a new NDPP. On 11 August 2009 the North Gauteng High Court granted Mr Pikoli an interdict against the appointment of a new NDPP. Mr Pikoli's main application to have his removal as NDPP set aside was due to be heard on 23 November 2009. On 11 October 2009, President Zuma announced the appointment of Mr Simelane as a Deputy NDPP. Meanwhile, on 9 October 2009, Minister Radebe wrote to the PSC asking for its assessment of the submissions made on behalf of Mr Simelane and requested that it hear evidence from Mr Simelane. On 19 October 2009 the PSC replied that it had already presented its report and that it was for Minister Radebe to decide whether to proceed with disciplinary action against Mr Simelane. On Saturday 21 November 2009 the Government and Mr Pikoli reached a settlement in terms of which he was paid R7.5 million. Two days later, on Monday 23 November 2009, Minister Radebe announced that he was rejecting the PSC's recommendations and would not order a disciplinary enquiry into Mr Simelane's conduct. As stated above, on 25 November 2009, President Zuma appointed Mr Simelane as the NDPP. The DA contended that the President ought himself to have considered the relevant parts of the transcript of GE proceedings, its report and the PSC's recommendations, and ought not to have relied solely on the Minister's assurances about Mr Simelane's fitness for office. The DA contends that these events and circumstances and all the others that will be dealt with in detail in later paragraphs show that the President and Minister were single-mindedly intent on installing Mr

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dismissals comply with the constitutional values set out in s 195 of the Constitution.

Simelane as someone through which they could 'tame and control' the NPA.[5] Thus, the DA contended, the appointment was made for an ulterior purpose.

[13] The three (linked) legal bases on which the DA relied in the court below are as follows:

(a) The statutory requirement that the appointee to the position must be 'a fit and proper person' has to be objectively assessed, taking into account that he or she must discharge professional duties without fear or favour. Whether the President's power is classified as executive or administrative or otherwise, it must be exercised lawfully, which it is submitted was not done in the present case, in that the President failed to make a proper objective assessment of Mr Simelane's fitness for office;

(b) The decision by the President to appoint an NDPP constitutes administrative action, subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000, and because the President did not make an objective assessment of Mr Simelane's fitness for office, his decision falls to be reviewed and set aside;

(c) To the extent that the President's decision constituted executive action as contemplated by s 85(2)(e) of the Constitution, it falls to be set aside on the basis that it was unlawful, irrational, arbitrary, biased, based on a ulterior motive and inconsistent with the Constitution. The significance of s 85(2)(e) of the Constitution will become evident later in this judgment.

[14] The North Gauteng High Court (Van der Byl AJ) held that there was no basis on which to interfere with President Zuma's decision to appoint Mr Simelane as NDPP. It dismissed the DA's application and made no order as to costs. The appeal is before us with the leave of that court. The material findings and conclusions of the court below are dealt with extensively later in this judgment.

Further details

[5] That this is the DA's case is particularly clear from para 149.4 of its founding affidavit.

[15] At this stage, it is necessary to set out further details so as to provide as full a picture as possible against which the questions that arise in this appeal can be answered. Mr Simelane was appointed Director-General of the Department of Justice during June 2005. During his time as Director-General a dispute arose with Mr Pikoli, the then NDPP, concerning the degree of accountability of the NPA to the department. Mr Pikoli saw the exchanges between them as an attempt to intrude upon prosecutorial independence. Mr Simelane saw it differently. In his view, as appears from his admitted testimony before the GE, the NPA was ultimately accountable to the Ministry and not only in respect of finances. One of the criticisms levelled by the DA against Mr Simelane is that his evidence before the GE clearly shows his lack of proper regard for the level of independence of the NPA as guaranteed by the Constitution and the Act. All the respondents adopted the view that the difference between Mr Simelane and Mr Pikoli, and Mr Simelane and the DA, is to be found in their interpretations of constitutional and legislative provisions concerning interaction between the NPA, the legislature and the executive.

[16] During Mr Simelane's tenure as Director-General of the Department of Justice and Constitutional Development, Mr Pikoli, as NDPP, contemplated the arrest of the then Commissioner of Police, Mr Jackie Selebi, on charges of corruption. A letter, in relation to the arrest and prosecution of the Commissioner, drafted by Mr Simelane for the Minister of Justice and Constitutional Development at the time, Ms Bridget Mabandla, dated 18 September 2007, was sent to Mr Pikoli. In the letter Minister Mabandla required Mr Pikoli to furnish her with all the information on which he was relying for the proposed arrest and charges. She also instructed him not to proceed with the arrest until she had satisfied herself that the public interest would be served and that sufficient evidence existed for the arrest and the charges. Mr Pikoli's response was that the Minister was not entitled to give him such an instruction. He did, however, furnish her with the information sought. There had been meetings and exchanges between Mr Pikoli and President Mbeki concerning the arrest of Commissioner Selebi and related search warrants. These were about the time required by the President to

make security and other arrangements in preparation for the arrest and execution of the warrants. The Commissioner was arrested and the search warrants were executed against the background of developing tensions between the South African Police Services and the office of the NDPP.

[17] On 23 September 2007, Minister Mabandla asked Mr Pikoli to resign. He refused to do so. Later that day President Mbeki informed Mr Pikoli that he would suspend him if he did not resign. Mr Pikoli refused to resign, whereupon he was suspended by President Mbeki, purportedly in terms of s 12 of the Act. Advocate Mpshe was appointed acting NDPP shortly thereafter.

[18] On 3 October 2007 President Mbeki appointed Dr Frene Ginwala to chair an enquiry into Mr Pikoli's fitness to hold office. On 18 October 2007 the Government filed its submissions with the GE, setting out the grounds of Mr Pikoli's lack of fitness for the post he held. It is uncontested that Mr Simelane played a leading role in drafting those submissions. He, in fact, led the Government's team.

[19] At the same time, political power was shifting within the African National Congress, the ruling party in Parliament. During December 2007, at the annual conference of the African National Congress, Mr Jacob Zuma ousted President Mbeki as president of the African National Congress.

[20] In April 2008 the GE directed that oral evidence be heard in relation to Mr Pikoli's fitness to hold office as NDPP. Evidence was led during May and June 2008. Both Mr Pikoli and Mr Simelane testified and were cross-examined.

[21] On 25 September 2008 Mr Kgalema Motlanthe succeeded President Mbeki as President of South Africa. At that stage the NDPP was still pursuing corruption charges against Mr Zuma. Mr Surty replaced Ms Mabandla as Minister of Justice.

[22] The GE issued its report on 4 November 2008 and although criticizing Mr Pikoli for not being sensitive enough in relation to matters of national security, it found that most of the charges against Mr Pikoli were unsubstantiated and recommended his reinstatement. It found positively that he was a fit and proper person. That notwithstanding, President Motlanthe took a decision to remove Mr Pikoli as NDPP.

[23] In para 15 of the executive summary of the report, the following appears:

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

[24] The following parts of the GE report (paras 320-322) criticised Mr Simelane:

'I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation. These complaints related to matters such as the performance agreements between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA.

All these complaints against Adv Pikoli were spurious, and are rejected [as being] without substance, and may have been motivated by personal issues.

With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects on the DG: Justice's disregard and lack of appreciation and respect for the import for an Enquiry established by the President.'

[25] It was submitted on behalf of the DA that in its written submissions to the GE, which were prepared by Mr Simelane, relevant documentation was deliberately omitted. In this regard it was submitted that the submissions were misleading. The DA contended that Mr Simelane's explanations for their omission during cross-examination

were simply not credible. A further point of criticism against Mr Simelane was his evidence at the GE, about whether he had taken legal opinions in relation to the powers of the DG as opposed to those of the NDPP. It was pointed out that initially, during cross-examination, he had denied taking legal opinions on the issue but later conceded that he had done so when he saw the cross-examiner turn to a document. Furthermore, so the DA submitted, Mr Simelane agreed, that in part, the opinions supported Mr Pikoli and refuted his own views, but he could not provide an explanation as to why he had not shared those opinions to reach common ground. He had not disclosed these opinions to the GE as part of government's submissions.

[26] In its supplementary affidavit, the DA pointed out that if the President had properly scrutinised Mr Simelane in considering his worthiness for appointment as NDPP he would have discovered that in each of the financial years of Mr Simelane's tenure as DG, the Department of Justice had received a qualified audit from the Auditor-General. It listed the details of the deficiencies in the financial management within the Department.

[27] The DA pointed out that if President Zuma had been truly intent on fulfilling his statutory and constitutional obligation to properly scrutinise Mr Simelane's fitness as head of the NDPP he could quite easily have had regard to a plethora of documentation, including annual performance agreements in relation to his tenure as DG, and reports by the Auditor-General concerning the Department of Justice and Constitutional Development, in respect of which Mr Simelane was the accounting officer. Similarly, documentation must have been available concerning his performance as a commissioner with the Competition Commission.

[28] In its founding affidavit, the DA referred to the fact that the General Council of the Bar (GCB) had launched a probe into Mr Simelane's fitness as an advocate and appointed three senior counsel to investigate the complaint. In its replying affidavit, the DA states that it has come to its attention that the complaints made to the GCB relate,

not only to matters arising from the GE, but also include an allegation that Mr Simelane had made a deliberately misleading affidavit in proceedings before the Constitutional Court in the matter of *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), in relation to his knowledge about whether the cabinet had made a decision to dissolve a special investigative unit, the Scorpions. *Glenister* was an application to set aside the dissolution of the Scorpions, a special investigation unit. On 29 April 2008, Mr Simelane had made an affidavit stating that no decision had been taken by Cabinet to do so, yet the very next day Cabinet approved the draft legislation to dissolve the Scorpions. According to the DA during the hearing in the Constitutional Court, Mr Simelane was rebuked by Justices O'Regan and Yacoob for not complying with the Government's obligation to respond fully, frankly and openly.

[29] The events and circumstances set out in the preceding paragraphs sparked public interest and debate and generated controversy. There was speculation that Mr Pikoli had been removed from office because he had been instrumental in the prosecution of Commissioner Selebi, whose appeal against a subsequent conviction on charges of corruption was coincidentally heard in this court this term. There were accusations against the Government of political interference in the prosecutorial process and it was therefore unsurprising that the appointment of Mr Simelane, subsequent to Mr Pikoli's removal, was mired in controversy.

[30] In his answering affidavit Mr Simelane was emphatic that his formal qualifications, his two-year stint at the Johannesburg Bar, his employment for approximately a year by the Competition Commission as Chief Legal Counsel, his five-year tenure as Commissioner of the Competition Commission ─ as its Chief Executive and Accounting Officer ─ his five-year period of service as DG of the Department of Justice and Constitutional Development and the short period that he served as Deputy National Director of Public Prosecutions proved his suitability and qualifications for appointment as NDPP. He pointed out that throughout his ten-year period of public service there had never been a complaint that he lacked experience, conscientiousness

and integrity or that he had failed to act independently and without fear, favour or prejudice. According to Mr Simelane, during his period of public service he had received accolades for being conscientious. Mr Simelane accepted that aspersions were cast on his integrity by the GE report. He denied that his evidence was incorrect, misleading and untruthful. He accepted further that in some instances he had made incorrect statements and made concessions in that regard. He denied making those statements deliberately with full knowledge of the incorrectness thereof.

[31] In respect of the *Pretoria Portland Cement* and *Glenister* cases, Mr Simelane adopted the attitude that the criticism by the court was on some of the activities carried out by the Commission and in some instances on his own conduct in execution of the work of a commissioner and that the criticisms by the courts were not directed at his integrity.

[32] As stated earlier, insofar as the DA attacked his evidence at the GE, as showing a mindset that was opposed to prosecutorial independence, Mr Simelane responded by stating that he accepted that the NPA is constitutionally guaranteed prosecutorial independence but that it is not institutionally independent because it was part of the Department of Justice and Constitutional Development. Mr Simelane was emphatic that he is committed to serving the NPA and asserting its independence.

[33] Mr Simelane denied that he holds the view that the Minister of Justice and Constitutional Development has the power to determine whether a particular prosecution is in the public interest and should proceed. He contended that the letter he drafted on behalf of the Minister and referred to above has to be read together with President Mbeki's security concerns, to which Mr Pikoli was insensitive. According to Mr Simelane his evidence before the GE is in conformity with this explanation.

[34] In Minister Radebe's opposing affidavit he stated the following at the outset:

'[I], as Minister of Justice and Constitutional Development, gave advice in the form of a full briefing to the President on the appointment of Simelane to the position of Deputy NDPP. In November 2009 when the President sought to appoint Simelane as NDPP, I once again gave him my views on Simelane's eligibility and told him that I supported his choice of Simelane as NDPP. I stand by the views expressed to the President at the time.'

Minister Radebe stated emphatically that Mr Simelane is the most appropriate person to assume the responsibility of the NPA. Minister Radebe stated that he did not share the view that the GE's report concerning Mr Simelane disqualified him for appointment as NDPP. The Minister was adamant that the GE was a 'fact finding exercise', established to assist the President to take a decision on whether Mr Pikoli was a fit and proper person to hold the office of the NDPP and that it was not a judicial commission of enquiry into the conduct of Mr Simelane, the then Director-General of his Department.

[35] It is important to have regard to Minister Radebe's account of his discussions with President Zuma about Mr Simelane's appointment as NDPP. Notably, the very first part of that account reads as follows:

'When the President asked to speak to me about his view that Simelane was the right person to appoint to the position of NDPP, he indicated that though *he had firm views* on appointing Simelane, he wished to obtain an opinion from me.' (My emphasis.)

[36] Minister Radebe stated that even before he had been appointed Minister of Justice and Constitutional Development, Mr Simelane had impressed him as someone who was diligent and tirelessly dedicated to duty. Minister Radebe gained 'firsthand information' of Mr Simelane's work ethic and character during his (the Minister's) tenure as a member of Cabinet. According to the Minister, when President Zuma approached him during November 2009, for his view on Mr Simelane's track record and abilities, he did not hesitate in assuring him that Mr Simelane was more than capable of executing the functions attendant on being the NDPP without fear, favour or prejudice.

[37] The paragraphs set out below are significant:

'The President specifically sought my views on the findings and recommendations of the Ginwala Enquiry Report. This was a report that was not only tabled before Cabinet in 2009, but one that I had reason to

study as part of familiarising myself with the intricacies of the relationship between the national prosecuting authority and my office, and the manner in which the discharge of our separate and collective constitutional obligations were tabled in Parliament.

On the occasion when, in November 2009, the President spoke with me regarding Simelane's appropriateness for the position of NDPP, I had a good sense of Cabinet's views on the Ginwala Enquiry Report, including the criticisms of Simelane that were noted in that report. I was able to share these views fully with the President.'

[38] In respect of the investigative process that Minister Surty had requested the PSC to undertake, Minister Radebe acknowledged that in his request his predecessor had stated that he regarded the remarks or findings of the GE in a serious light. Minister Radebe considered that on its own version the PSC had conducted a desktop investigation by assessing only the record of proceedings of the GE and its report. Minister Radebe thought it critical that the PSC had not provided Mr Simelane with an opportunity to present his views and to this end submitted a document prepared by Mr Simelane to the PSC, with a request that it consider and reflect on the possibility of taking oral evidence from Mr Simelane. The PSC having already made recommendations to the Minister considered itself to be *functus officio*. Consequently, Minister Radebe took the view that there was no purpose to be served in presenting the PSC's findings to the President and advised the President accordingly.

[39] A refrain in Minister Radebe's opposing affidavit is that the GE had not been concerned with the conduct or the activities of Mr Simelane but rather with those of Mr Pikoli.

[40] The following paragraph of Minister Radebe's affidavit is instructive:

'I continue to hold the view that Simelane is a fit and proper person to provide leadership at the national prosecuting authority. On discussing my views with the President, he appeared satisfied that I had applied my mind to the issues regarding Simelane's fitness for office raised by me, and expressed his appreciation of my candour.'

[41] In the present case, central to the dispute between the Government and the DA is the submission in the opposing affidavit by Minister Radebe that, whilst the President may consult with the national executive, the final decision on whom to appoint as NDPP is his and his alone. The DA's position is that it is not a power that is untrammelled and it submitted that the power to appoint must be made in accordance with the law and is subject to scrutiny by a court. The parties differ about whether constitutional and statutory prescripts were met when Mr Simelane was appointed NDPP.

[42] In President Zuma's opposing affidavit he describes how, when he took office as President of the Republic of South Africa, the office of the NDPP was already under government consideration. At that time, Mr Pikoli's court challenge was pending. The President appreciated that in the event of government's opposition to Mr Pikoli succeeding he would have to make an appointment to that office. According to the President he had time to consult and consider such an appointment.

[43] The first point made by President Zuma is that when, on 6 October 2009, he had appointed Mr Simelane as Deputy National Director of Public Prosecutions, the same considerations applied as those involving the appointment of the NDPP and that the prior appointment has not been challenged ─ based on the DA's present case it should have been.

[44] According to President Zuma, the requirement that the person considered for appointment must be a fit and proper person, with regard to his or her experience, conscientiousness and integrity to be entrusted with the responsibility of the NDPP, is a subjective requirement and that it is his subjective decision that is called for. He stated as follows:

'I am the person, as the President of the Republic, to be satisfied that the person is fit and proper. In so doing I have to take cognizance of his/her experience, conscientiousness and integrity.'

This attitude is indicative of the distinctive approaches of the parties.

[45] President Zuma stated that he took into account that the NDPP must, in complying with his or her statutory obligations, act without fear, favour or prejudice. Like Minister Radebe, President Zuma stated that he has known Mr Simelane for a number of years, both as a member of the Competition Commission and as DG of Minister Radebe's department. He stated that whilst he consulted Minister Radebe and the Acting National Director of Public Prosecutions about Mr Simelane's appointment, he alone took the decision to appoint Mr Simelane. The following eleven paragraphs of

President Zuma's affidavit are sufficiently important to quote in their entirety:

'I discussed the issue of the Ginwala Report with the Minister of Justice. The Minister of Justice conveyed to me that Adv Simelane was, in his view, a person of integrity and competence. I understood the Ginwala Enquiry to be a fact-finding exercise established to assist the President to take a decision on whether Adv Pikoli was a fit and proper person to hold the office of National Director of Public Prosecutions. It was not a judicial commission of enquiry into the conduct of Adv Simelane as the Director General of Justice. The testimony of Adv Simelane was required at that enquiry because of the relationship between the NPA and the Justice Department.

I considered the Ginwala Enquiry's views on Adv Simelane as a note or precaution to the national executive, the NPA and Parliament to streamline the relationship between all of them. It was not a report intended to have Adv Simelane disqualified for future appointments. The Minister of Justice also expressed his satisfaction that Adv Simelane was fit and proper to be appointed as the Deputy National Director of Public Prosecutions.

After taking into account the experience of Adv Simelane as I perceived it, his conscientiousness and integrity and having regard to the discussions with the Minister of Justice, I concluded that Adv Simelana is fit and proper to be entrusted with responsibilities of the office of the Deputy National Director of Public Prosecutions.

When the litigation that had been instituted by the former National Director of Public Prosecutions, Adv Pikoli came to an end, I was required to make an appointment in terms of s 10 of the NPA Act. I again considered the *curriculum vitae* of Adv Simelane, my personal knowledge and the input I had received from the Minister of Justice. I conferred again with the Minister of Justice as to whether there were other issues that he wished to bring to my attention. I also discussed the issue of the Public Service Commission ("PSC") with the Minister. The Minister confirmed that he had decided not to institute disciplinary proceedings against Adv Simelane.

He explained that the PSC had not provided Adv Simelane with the opportunity to inform it of his views on the matters under investigation. In his view, the PSC did not give any weight to the fact that the

Ginwala Enquiry was a fact-finding exercise commissioned by the President in terms of s 12(6) of the NPA Act and that the individual under scrutiny was not Adv Simelane but Adv Pikoli. Adv Simelane gave the Minister a document expressing his views. The Minister gave it to the PSC with a request that the PSC consider and reflect on the possibility of taking oral evidence from Adv Simelane, amongst others, in order to properly ventilate the allegations that had been made in the Ginwala Report. The PSC, it appears, declined to adopt this course, and advised that in essence, having reported on their investigation and made recommendations to the Minister of Justice, they considered themselves to have completed their task. The Minister took no further action, be it in the form of a disciplinary enquiry or any other investigation into the conduct of Adv Simelane. It would have been wrong for me, in these circumstances to draw any adverse inferences against Adv Simelane's standing.

The Minister further expressed his views on the interpretation that the Ginwala Enquiry and the courts have given to the terms of s 85(2) and s 92 read with s 179 of the Constitution, with special emphasis on subsections (1), (2), (4), (5) and (6) thereof. His views were the NDPP should have the appropriate skills necessary to fulfil the obligations of that office. The skills would, necessarily, include professional competence and managerial ability. The NDPP should have a clear insight into the important role to be performed by his/her office in our Constitutional and political environment and should have insight into the inter-relationship which necessarily arises from the interaction between his/her office and the other arms of government. The Minister expressed to me that despite the complete independence of the NDPP with regard to decisions to prosecute or terminate a pending prosecution, the Minister is entitled to be kept informed of all relevant decisions taken by the NDPP.

I was satisfied with the reasons and views that the Minister gave for his decision.

The Minister further assured me that under the leadership of Adv Simelane, he would continue to have a healthy professional relationship with the NPA founded on the provisions of the Constitution and the law.

I made a decision that Adv Simelane was fit and proper with due regard to his experience, conscientiousness and integrity to be entrusted with the responsibilities of the office of the National Director of Public Prosecutions. I duly appointed him.

In the premises, I submit that the decision to appoint Adv Simelane is lawful and in accordance with the Constitution.

In considering the appointment of Adv Simelane as the NDPP, I did not have regard to the transcripts of the Ginwala Enquiry. The DA has annexed the transcript of Adv Simelane's evidence. I have considered those excerpts that the DA makes reference to for purposes of responding to the allegations made by the DA and have not had regard to the entire testimony. I submit that I am not required to go behind the Ginwala Report and interrogate the testimony led in the Enquiry, moreover as my attention is drawn only to parts of the testimony and not all the evidence put before the Enquiry. To do so, I submit, would be to undermine the Enquiry which was appointed by the President to comprehensively consider all

facts and evidence and on the basis thereof submit a report on the fitness of the former NDPP to continue to hold office. I am not required, I submit for purposes of my decision to appoint Adv Simelane, to read and reflect on the entire transcript of testimony, its import and inferences.

Having considered the relevant excerpts of the transcript I remain of the firm view that the appointment of Adv Simelane is lawful and in accordance with the Constitution and the provisions of the NPA Act.'

The reasoning of the court below

[46] The court below had regard to the Constitution and relevant provisions of the Act and recorded in its judgment that the parties differed on whether the requirement of 'fit and proper person' as expressed in s 9(1)*(b)* of the Act had to be assessed objectively. It was submitted on behalf of the President, the Minister and Mr Simelane that the assessment is one within the subjective discretion of the President. It does not appear from the judgment that Van der Byl AJ reached any conclusion in that regard. The learned acting judge went on to consider the DA's 'formidable onslaught' against Mr Simelane's fitness and propriety for appointment as NDPP. Insofar as the merits of that attack is concerned the court below was of the view that the question to be addressed was whether it could 'on the papers' hold on a balance of probabilities that the President's decision is, on any of the grounds raised, inconsistent either individually or cumulatively with s 179 of the Constitution and with ss 9 and 10 of the Act.

[47] On its path to answering that question the court below commenced by stating the following:

'In order to come to such a conclusion on the papers is an extremely difficult task.'

Van der Byl AJ thought that his task was made more difficult because no statutory process was prescribed for the President to follow in appointing an NDPP.

[48] The court below listed the DA's criticisms against Mr Simelane's evidence before the GE. Van der Byl AJ considered the letter drafted by Mr Simelane for Minister Mabandla, in which Mr Pikoli was instructed to halt his intended arrest and prosecution of Commissioner Selebi, pending a decision by her. The DA had submitted that this proved that Mr Simelane had no regard for prosecutorial independence. The court below had regard to Mr Simelane's explanation before the GE that the letter was only intended to convey a message that the arrest, search and seizure should not go ahead until the Minister was in possession of information so as to be able to advise President Mbeki on how best to handle the situation. The court below was sceptical and asked why, if this was so, it would have been necessary for Mr Pikoli to be asked to resign. On this aspect the court concluded as follows:

'Although the criticism levelled at [Mr Simelane] in this regard may be justified, I find myself unable to hold that he is not a fit and proper person to hold the position of NDPP.'

Van der Byl AJ took into account, in favour of Mr Simelane, that it now appeared that he believed in the independence of the office of the NDPP and must upon his appointment have taken an oath to uphold and protect the Constitution and to enforce the law without fear, favour or prejudice.

[49] Van der Byl AJ went on to consider the challenge to Mr Simelane's integrity on the basis of non-disclosure of information and documents to the GE and to Mr Pikoli's attorneys ─ the court had regard to the fact that this aspect had evoked negative comments in the GE's report. On this point the following conclusion was reached:

'Although the criticism levelled at Mr Simelane in this regard may to a certain extent be justified, I also find myself here unable, even if it is considered in context with the aforegoing criticism, to hold him to be a person that is unfit to hold the position of NDPP.'

[50] Insofar as the recommendations of the PSC are concerned the court below said the following:

'I fail to see, except to note that the PSC was of the view that Mr Simelane's conduct justifies disciplinary proceedings, how any inference, other than the one that I have drawn from the Ginwala Report, can be drawn from those recommendations. As a matter of fact Mr Simelane cannot be blamed for the fact that the Minister refused to accept those recommendations.'

[51] Turning to this court's criticism of Mr Simelane in the *Pretoria Portland Cement* case, about the manner in which he had conducted himself when he was employed at the Competition Commission, the court below held that it demonstrated 'perhaps an over-eagerness on his part, albeit an ill-considered one to draw attention to the Commission's role and function but I fail to see how his actions in this regard disqualified him as a fit and proper person to hold the position of NDPP'.

[52] As far as the DA's criticisms about Mr Simelane's actions in the *Glenister* matter was concerned, Van der Byl AJ said the following:

'[I]t is not clear to me whether Mr Simelane knew that the issue of the Scorpions would be considered by the Cabinet the day after he deposed to his affidavit or whether he was free to anticipate decisions to be taken by Cabinet.'

[53] In respect of the intended GCB probe into Mr Simelane's conduct the court below said the following:

'The fact that a probe has been or was about to be launched by the GCB or the Bar Council was not relevant at the time of his appointment. It does not appear that the GCB or Bar Council has at any stage evaluated any complaints against him or has formulated any charges against him and, I doubt whether it can be said that he was facing any complaints of unprofessional conduct.'

[54] Having reached these conclusions on whether, as a fact, Mr Simelane had the standard of integrity required, the court below went on to consider the process followed by President Zuma in appointing Mr Simelane. As a starting point Van der Byl AJ observed that there is no competitive selection process prescribed by the Constitution or the Act. The learned acting judge had regard to the President's position as head of the executive authority of the Republic of South Africa who appointed Mr Simelane after consultation with the Minister of Justice and Constitutional Development. The following observation by the court below about the degree of consultation is noteworthy:

'In doing so, he, albeit, as I have already indicated *somewhat superficially*, made enquiries on the occurrences at the Ginwala Enquiry and on the recommendations of the PSC and took into consideration the facts set out in his *curriculum vitae* from which it appears that he practised for two years as an

advocate, that he was a commissioner of the Competition Commission and the Director-General of the Department of Justice and Constitutional Development.' (My emphasis.)

[55] The court dealt very cursorily with the DA's charge that the President acted with an ulterior or improper purpose on the basis that this ground is linked to the other grounds of challenge on which he had already made the findings referred to above.

[56] Interestingly, in para 100 of the judgment of the court below, the following appears:

'I am not persuaded that, if regard is had to all the averments made in the papers, that he is not a controversial person and one with an unblemished background or that he is one of the most experienced persons who could have been taken into consideration for appointment.'

Conclusions

[57] In order to fully appreciate the importance of the NPA and the NDPP in our constitutional democracy it is necessary first, to bear in mind that the Constitution empowers those who govern and imposes limits on their power and second, to consider the wider constitutional scheme in which both the institution and the individual are dealt with. A good starting place is an examination of the founding provisions of the Constitution. Section 1(c) of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded amongst other values on the supremacy of the Constitution and the rule of law. Section 1(d), commits government to democracy and to accountability, responsiveness and openness. Section 2 of the Constitution reaffirms that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. Thus, every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation.

[58] The constitutional scheme is deliberate. Chapter 1 sets out the founding provisions and deals with founding values, citizenship, the national anthem, the national

flag and languages. Chapter 2 states that the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The State is obliged to respect, protect, promote and fulfil the rights referred to in the Bill of Rights. Chapter 3 of the Constitution deals with co-operative government and dictates that all spheres of government must adhere to constitutional principles in this regard and must conduct their activities within constitutional parameters. Chapter 4 sets out the composition of Parliament and its legislative authority. Section 48 provides that before members of the National Assembly begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution. Section 62(6) provides that before permanent delegates to the National Council of Provinces begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. Chapter 5, which is of importance to the present case, deals with the President and the National Executive. Section 83 of the Constitution provides:

'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 sets out powers and functions of the President. Section 85 provides:

'(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;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

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

[59] Section 87 of the Constitution provides that within five days of his election the President must assume office by swearing or affirming faithfulness to the Republic and

obedience to the Constitution. In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 65, Kriegler J said of the relationship between the President and the Constitution:

'Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands.'

[60] Chapter 6 deals with the provinces and their legislative authority. Before members of a provincial legislature begin their functions they too must swear or affirm faithfulness to the Republic and obedience to the Constitution. Section 118 of the Constitution obliges a provincial legislature to facilitate public involvement in the legislative process. Section 127 sets out the powers and functions of Premiers who also must swear or affirm faithfulness to the Republic and obedience to the Constitution. Members of an Executive Council of a province are collectively and individually accountable to the legislature for the exercise of their powers and the performance of their functions and can only act in accordance with the Constitution. Section 140 provides that a decision by a Premier of a province must be in writing if it is taken in terms of legislation or has legal consequences.

[61] Chapter 7 of the Constitution deals with local government. In terms of s 151 of the Constitution a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution. Section 152 deals with the objects of local government and provides, amongst others, that local government must provide democratic and accountable government for local communities. I shall deal with Chapter 8, which deals with courts and the administration of justice, including providing for a National Prosecuting Authority, last. Chapter 9 sets out which state institutions are supportive of our constitutional democracy. They include the office of the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Section 181(2) states:

‘These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.’

Section 181(3) obliges other organs of state, through legislative and other measures, to assist and protect these institutions to ensure their independence and impartiality, dignity and effectiveness. The listed institutions are all accountable to the National Assembly and must report on the activities and the performance of their functions to the Assembly at least once a year.

[62] Chapter 10 deals with Public Administration. Section 195(1) dictates that public administration must be governed by the democratic values enshrined in the Constitution. Section 195(1)(f) provides that public administration must be accountable. The PSC, referred to earlier in this judgment, is established by s 196 of the Constitution. It is required to be independent and impartial and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The PSC is also accountable to the National Assembly and is required to report to it at least once a year.

[63] Chapter 11 deals with security services. Section 198 sets out the governing principles and states, amongst others, that national security must be pursued in compliance with the law, including international law. National security is subject to the authority of Parliament and the National Executive. Chapter 11 contains provisions dealing with the defence force, the police and the intelligence services.

[64] Chapter 12 of the Constitution recognises the status and role of traditional leaders according to customary law, subject to the Constitution. Chapter 13 deals with treasury control and financial matters, including the remuneration of persons holding public office. It also establishes a Financial and Fiscal Commission which, in terms of s 220(2), is required to be independent and impartial and subject only to the Constitution and the law.

[65] Chapter 14 contains general provisions and embraces subjects such as international agreements, the application of international law, funding for political parties and transitional arrangements.

[66] Before dealing with Chapter 8 of the Constitution, which contains the provisions that relate to the courts and the administration of justice, including the NPA, it is necessary to consider the full and necessary import of the Chapters and provisions of the Constitution referred to in the preceding paragraphs. All the institutions, organs of state and public office bearers referred to are essential for the functioning of our constitutional democracy. The rule of law is a central and founding value. No-one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal prescripts. Accountability, responsiveness and openness are constitutional watchwords. It can rightly be said that the individuals that occupy positions in organs of state or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure. To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.

[67] As we look back on 17 years of existence as a constitutional democracy and as we view what the constitutional compact means, we must all as a nation breathe more easily in the knowledge that we have truly broken with an authoritarian past in which government served the interests of a few and was unresponsive to the needs of the majority of its citizens and where no safeguards existed to ensure that power was not abused. See *S v Makwanyane* 1995 (3) SA 391 (CC) para 262. Professor Mureinik explained (in the context of the interim Constitution) the fundamental change brought about because of a shift from a ‘culture of authority’ to a ‘culture of justification’. He described it as ‘a culture in which every exercise of power is expected to be justified; in

which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command'.[6]

[68] It is now necessary to turn to consider that Chapter of the Constitution dealing with the administration of justice and which encompasses, not only judicial authority, but also the NPA. Section 165, which is located in Chapter 8 of the Constitution, provides that the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Importantly, organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The hierarchy of courts is established and listed in this chapter. Section 174(1) provides that any appropriately qualified woman or man who 'is a fit and proper person' may be appointed as a judicial officer.

[69] Section 179 deals with the NPA. It is necessary to quote it in full:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) 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).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(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;

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[6] Etienne Mureinik 'A Bridge to Where? Introducing the Bill of Rights' (1994) 10 *SAJHR* 31 at 32.

(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.

(ii) The complainant.

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

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.'

[70] As can be seen the same theme that suffuses all the other Chapters of the Constitution permeates Chapter 8 as well, namely, that institutions of state integral to the well-being of a functioning democracy have to be above reproach, have to be independent and have to serve the people without fear, favour or prejudice.

[71] The national legislation envisaged in s 179(3) of the Constitution is the Act. That fact is expressly recognised in the preamble to the Act. Section 2 of the Act provides for a single national prosecuting authority, as envisaged in s 179(3) of the Constitution. Section 3 sets out the structure of the prosecuting authority, namely, the office of the National Director and the offices of the prosecuting authority at the seat of each high court, established in terms of s 6. Section 5 establishes the National Office of the prosecuting authority which consists of the National Director, who is the head of and controls the office, Deputy National Directors and other members of the prosecuting authority appointed at or assigned to the office. Section 10 states that the President 'must' in accordance with section 179 of the Constitution appoint the NDPP. The crucial section for present purposes is s 9(1) of the Act, which sets out the qualifications for appointment of the NDPP. Section 12 of the Act provides a fixed non-renewable period of ten years for a National Director to hold office. Section 12(5) can rightly be viewed as a protective provision to guard against political interference. It provides that a National

Director cannot be suspended or removed from office, except in accordance with the provisions of subsections 6, 7 and 8.

[72] To understand the importance of the office of the NDPP and the power that he or she wields, regard should be had first, to the provisions of s 179(2) of the Constitution, set out in para 68 above. The prosecuting authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings. This power is echoed in s 20(1) of the Act. Section 20(1)*(c)* of the Act gives the prosecuting authority the power to discontinue criminal proceedings. It hardly needs stating that these are awesome powers and that it is central to the preservation of the rule of law that they be exercised with the utmost integrity. That must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice.

[73] Section 22(1) of the Act provides:

'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.'

[74] Section 22(2) gives the National Director the power to determine prosecution policy and to issue policy directives. It enables him or her to intervene in any prosecution process when policy directives are not complied with. In terms of s 22(2)*(c)* the National Director may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations of an accused person, a complainant or any other relevant party.

[75] Section 22(3) gives the National Director the power to direct that investigations and criminal proceedings in respect of an offence be moved territorially, within the Republic. Section 22(4) empowers a National Director to conduct any investigation he or she may deem necessary in respect of a prosecution or prosecution process, or directives, directions or guidelines issued by a director. Section 22(4)*(a)*(iii) provides that

the National Director may advise the Minister of Justice and Constitutional Development on all matters relating to the administration of justice.

[76] It is against that constitutional and statutory background that s 9(1)*(b)* of the Act ultimately has to be construed. Before turning to those provisions it is necessary for a brief conspectus of views on prosecutorial independence in comparable jurisdictions.

[77] Addressing the Portuguese Prosecutors Association, Jessica de Grazia, a prosecutor in the Manhattan District Attorneys' Office and a former New York chief-assistant District Attorney, said the following:

'Prosecutorial independence is both difficult to establish and difficult to maintain. It is under greatest threat when civil society is weak, justice institutions fragile, when countries are experiencing or emerging from security crises, when a single political party is dominant, when a country is poor, jobs are few, out-migration high, when a free media is suppressed, or when prosecutors target the top tier of economic or organized crime and there is a nexus to members of the political elite.'[7]

Ms de Grazia rightly observed that every democracy has its own ways of insulating prosecutors from political pressure.

[78] In a seminar organised by The European Commission for Democracy Through Law (Venice Commission), conducted at Trieste, Italy, between 28 February and 3 March 2011, under the title 'The Independence of Judges and Prosecutors: Perspectives and Challenges', Mr James Hamilton, a substitute member of the Venice Commission and Director of Public Prosecutions, Ireland, noted that in common law systems the prosecution is invariably a part of the executive, in some civil law systems it is part of the executive and in others it is part of the judiciary. Under the subheading 'Responsibilities of Public Prosecutors in ensuring due process and the rule of law' Mr Hamilton stated the following:[8]

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[7]Keynote address delivered at the Conference on Combating Crime in Europe, organised by the Sindicato dos Magistrados do Ministerio Publico (SMMP), Lisbon Portugal, May 2010.

[8] Hamilton p 4.

‘It is clear that a prosecutor’s office which displays a respect for fair procedures will operate as a bulwark against human rights abuses, whereas a prosecutor’s office which is not concerned with such matters will make it more likely that the rule of law will not be observed. In this connection it should be noted that the prosecutor not only acts on behalf of the people as a whole, but also has duties to particular individual citizens.’

[79] The following part of the paper presented by Mr Hamilton is apposite:[9]

‘The Venice Commission Report on the independence of the prosecution service also lays emphasis on the qualities of prosecutors, in particular at paragraphs 14 to 19 of the Report. Having referred to the importance of the prosecutor acting to a higher standard than a litigant in a civil matter because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, and having referred to duties to act fairly and impartially, as well as the duty to disclose all relevant evidence to the accused, the Commission points to the necessity to employ as prosecutors suitable persons of high standing and good character, having qualities similar to those required of a judge, and they require that suitable procedures for appointment and promotion are in place.’

[80] Two paragraphs later Mr Hamilton states:[10]

‘The Venice Commission goes on to talk about political interference in prosecution. The Report points out that if modern western Europe has largely avoided the problem of abusive prosecution in recent times this is largely because mechanisms have been adopted to ensure that improper political pressure is not brought to bear in the matter of criminal prosecution. The Commission points out that in totalitarian states or in modern dictatorships criminal prosecution has been and continues to be used as a tool of repression and corruption.’

[81] Mr Hamilton pointed out that procedures to guarantee a proper selection of prosecutors and to prevent their arbitrary dismissal are very important in safeguarding prosecutorial independence. In this regard he referred to an opinion by the Venice Commission on the regulatory concept of the Constitution of the Hungarian Republic:[11]

‘It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for the

[9] Hamilton p 6.

[10] Hamilton p 6.

[11] Hamilton p 9.

government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government.'

[82] In his conclusion Mr Hamilton stated the following:[12]

'Despite the variety of arrangements in prosecutor's offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor's duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.'

[83] Writing on prosecutorial independence in the (2001) 45 *Criminal Law Quarterly* 272*,* Bruce A MacFarlane QC, the then Deputy Attorney General for the Province of Manitoba, Canada, considered models intended to ensure independence in England, Australia, New Zealand, the USA and Canada. He states:[13]

'[I]rrespective of the laws or structures in place in a jurisdiction, principles of independence ultimately depend upon the integrity of the person occupying the office of Attorney General.'

[84] Mr MacFarlane postulates that there are many paths to prosecutorial independence. Some countries, he noted, have chosen, with varying degrees of success, a legislatively-based structural model. That approach he states has in some cases 'led to questions concerning public accountability, if not overzealousness, on the part of the prosecuting authority.'[14] On this aspect he concludes as follows:[15]

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[12] Hamilton p 13.

[13] B A MacFarlane 'Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency' (2001) 45 *Criminal Law Quarterly* 272 at 278.

[14] MacFarlane p 274.

[15] MacFarlane p 274.

'In the end, each nation needs to develop an approach to independence that makes sense in the context of its own legislative and constitutional framework, as well as the traditions, practices and history of its legal system.'

[85] In *Sharma v Brown-Antoine* [2006] UKPC 57 the Privy Council said, with reference to prosecutorial independence, that the maintenance of public confidence in the administration of justice required that it be, and is seen to be, even handed.

[86] In *Krieger v Law Society of Alberta* [2002] 3 SCR 372 the Supreme Court of Canada said that the gravity of the power to bring, manage and terminate prosecutions, which lay at the heart of the Attorney-General's role, had given rise to an expectation that he would in this respect be fully independent from political pressures of the government.

[87] In *Imbler v Pachtman* 424 US 409 (1976) at 423-424 the Supreme Court of the United States of America spoke of the 'fearless and impartial policy' which should characterise the prosecutorial service and 'the independence of judgment required by his public trust'.

[88] In dealing with the powers and functions of the Namibian Attorney General and Prosecutor General, respectively, the Namibian Supreme Court said the following:

'In the light of what I have said earlier in this judgment, on my understanding of the aspirations, expectations and the ethos of the Namibian people, it seems to me that one must interpret the Constitution in the most beneficial way giving it the full amplitude of the powers which are given to the prosecutor-general. Thus interpreted, the office, appointed by an independent body, should be regarded as truly independent subject only to the duty of the prosecutor-general to keep the attorney-general properly informed so that the latter may be able to exercise ultimate responsibility for the office. . . .On this view of the matter the Constitution creates on the one hand an independent prosecutor-general while at the same it enables the attorney-general to the exercise final responsibility for the office of the prosecutor-general. The notions are not incompatible. Indeed, it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates

their values, their ideals and their aspirations. It also is entirely in accordance with the "uniquely caring and humanitarian quality of the Constitution".'[16]

[89] In *Pikoli v The President* 2010 (1) SA 400 (GNP) Du Plessis J (at 406E-F) said the following:

'As the head of the [NPA] the NDPP has a duty to ensure that this prosecutorial independence is maintained. It follows that a person who is fit and proper to be the NDPP will be able to live out, and will live out in practice, the requirements of prosecutorial independence. That he or she must do without fear, favour or prejudice.'

[90] In the *Certification* judgment of the Constitutional Court[17] the objection to the President having the power to appoint the NDPP, on the basis that it threatened prosecutorial independence, was rejected. Importantly, however, the Constitutional Court, considering s 179(4) of the Constitution stated (para 146):

'[Section] 179(4) provides that the national legislation *must ensure* that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts. In the circumstances, the objection to [s] 179 must be rejected.'
(My emphasis.)

[91] It is to the relevant part of the national legislation that I now turn. The provisions of Section 9(1)(b) appear 86 paragraphs earlier in this judgment. I consider it necessary to restate it here:

'(1) Any person to be appointed as National Director, Deputy National Director or Director must-

. . .

(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.'

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[16] *Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS) at 1089.

[17] *Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC), para 141.

[92] In affidavits filed on its behalf in the court below the DA had asserted that in exercising his power in terms of s 10 of the NPA, to appoint the NDPP, the President performed an administrative act. That contention was rightly not persisted in before us. In this regard, counsel for the respondents are correct, when they point out that the President's original power to appoint the NDPP is sourced in s 179(1)(a) of the Constitution, which provides in express terms that the NDPP is appointed by the President, 'as head of the National Executive'. The act of appointment is thus clearly executive action. See also *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) which dealt with the President's power to appoint and terminate the services of the head of the National Intelligence Agency. Also of relevance is s 85(2)(e) of the Constitution which states that the President exercises executive authority together with other members of the Cabinet by 'performing any other executive function provided for in the Constitution or in national legislation'.

[93] That does not mean that the President's decision to appoint an NDPP is beyond judicial scrutiny. In *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para 84-85 the following is stated:

'In *S v Makwanyane* Ackermann J characterised the new constitutional order in the following terms:

"We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order."

Similarly, in *Prinsloo v Van der Linde and Another* this Court held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in the rational manner:

"In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State."

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows

that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

[94] *In Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) the Constitutional Court, referring to *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458) para 58, stated the following (para 49):

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

[95] In *Masetlha*, para 81, in dealing with the power of the President to dismiss the head of the National Intelligence Agency and implicitly with the power to appoint, the Constitutional Court said:

'It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'

[96] Following the template provided by these pronouncements, the question to be answered is what does s 9(1)*(b)* require of the President in the appointment process. It was accepted by all the parties that the President must at the very least consider whether the person he has in mind for appointment as the NDPP has the qualities described in this subsection.

[97] The parties differ about how the President should go about considering the suitability of the person he contemplates appointing. The DA submitted that, having

regard to the purpose of the power, namely, to secure for South Africa a head of the prosecution authority with the experience and ability to lead the institution in an independent way which will command broad public confidence in the administration of criminal justice, not only the decision must be rationally related to that purpose but also the process of reaching it must be so.

[98] It was contended by the DA that a rational process would generally entail at least the following:

(a) obtaining sufficient and reliable information about the candidate's past work experience and performance;

(b) obtaining sufficient and reliable information about the candidate's integrity and independence; and

(c) in cases where the candidate is the subject of allegations calling his fitness to hold office into question, a satisfactory process to determine the veracity of the allegations in a reliable and credible fashion.

[99] Relying on *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) it was submitted on behalf of the President that members of the Executive have a wide discretion in selecting means to achieve constitutionally permissible objectives and that courts may not interfere with the means selected simply because they do not like them or because there are other appropriate means that could have been selected. It was submitted that studying Mr Simelane's CV and consulting the Minister was sufficient.

[100] It was submitted on behalf of Mr Simelane that having regard to constitutional provisions, including s 85, which provides that the President exercises executive authority together with other members of the Cabinet, the consultation with the Minister was sufficient as no other processes are prescribed. It was also submitted that since the Minister and the President stated that Mr Simelane was appointed with due regard to his experience, integrity and conscientiousness their statements in this regard cannot

be scrutinised any further. The Minister's briefing on the GE and the PSC's involvement was, so it was contended, adequate and the President therefore acted in accordance with legal prescripts.

[101] Submissions on behalf of the Minister on this aspect were in line with the submissions on behalf of the President and Mr Simelane.

[102] Insofar as s 9(1)*(b)* prescribes that the NDPP should be a fit and proper person, with due regard to the qualities listed therein, the DA submitted that each of the qualities is stated in objective terms. It was contended that the absence of the words 'in the President's opinion' is indicative that the fitness for office of a candidate is to be determined objectively. Put differently, these are jurisdictional requirements, so it was contended, that have to exist as an objective fact. It was submitted further that the President may not reason that even though there are question marks as to a candidate's fitness, the adverse allegations have not been positively proved and therefore the candidate is entitled to the benefit of the doubt. The Act requires, so it was argued, that the President must properly and transparently determine whether those qualities exist in a candidate.

[103] On behalf of the President it was submitted, with reference to the decision of this court in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA), that in determining the fitness of a candidate for appointment as NDPP, the President exercised a value judgment which translates into a subjective assessment of whether the candidate has the qualities prescribed by s 9(1)*(b)*. The following part of the heads of argument in this regard is important:

'Value judgment is based upon or reflecting one's personal moral and aesthetic value, a subjective evaluation.'

[104] The following part of the heads of argument on behalf of the President bears quoting:

‘The President is the choice of the people. The Constitution vests in him the power to apply his value judgment and appoint a NDPP who meets the objective criteria and is a fit and proper person to hold such office.’

[105] On behalf of the Minister, it was submitted that the flaw in the DA’s argument on this aspect is that the NDPP must conform to a standard defined by it rather than by the President.

[106] Relying on the decision in this court in *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C), it was submitted that the jurisdictional facts necessary to be satisfied before an appointment can be made fall into the category where the President is the repository of the power and has the sole and exclusive function to determine whether the prescribed fact or state of affairs existed.

[107] It is true that no process is prescribed, either by the Constitution or by any provision of the Act, for the President to follow in assessing a candidate’s fitness for the position of NDPP. As stated in the dictum from the *Certification* judgment, referred to in para 90 above, the national legislation envisaged *must* ensure that the NPA exercises its functions without fear, favour or prejudice. That is the primary purpose of the Act. It will falter at the starting post if it is not insistent about the qualities the head of the institution must possess in order to lead the NPA on its constitutional path. Section 9(1)*(b)* must consequently be construed to achieve that purpose. Thus, I agree with the submission on behalf of the DA, set out in para 98 above. There has to be a real and earnest engagement with the requirements of s 9(1)*(b)*. Having regard to what is stated in earlier paragraphs about the importance of the NPA and the office of the NDPP it is the least that ‘we the people’ can expect and that s 9(1)*(b)* demands.

[108] Whether the requirements for appointment in terms of s 9(1)*(b)* of the Act are a matter of subjective discretion or of objective jurisdictional facts, it was accepted by the parties that the President, in considering the appointment of an NDPP, must at the very least have regard to relevant factors that are brought to his knowledge, or that can

reasonably be ascertained by him. In the present case, if regard is had to what is stated by the Minister, as described in para 34 above, the starting point was wrong. The Minister stated that the President told him, at the outset, before asking for his input, that he (the President) had 'firm views' on appointing Mr Simelane as NDPP. Section 9(1)*(b)* does not allow for a firm view before a consideration of the qualities referred to therein. It does not assist the President that he knew Mr Simelane long before he was called upon to apply s 9(1)*(b)* in considering him for appointment as NDPP. The President himself said that his approach to determining Mr Simelane's fitness for office was this:

'Absent any evidence to the contrary I have no basis to conclude that he is not fit and proper.'

This is a wrong approach.

[109] But that is not the only problem faced by the respondents. It is common cause that the President sought the Minister's views on the GE. The President did not disclose exactly why he made the enquiry, or exactly what his concerns were. A fundamental problem for the Minister and the President is that they both considered that the GE report was irrelevant or, based on a rigid view that the GE enquired into Mr Pikoli's fitness for office and did not concern Mr Simelane's integrity. It is clear from the President's account of the discussion with the Minister and from his description of his mindset, as set out in para 45 above, that he took the view that the GE report, insofar as it related to Mr Simelane, was a note of precaution to the National Executive, the NPA and Parliament and that it was not a report intended to have Mr Simelane disqualified for future appointments. The President and the Minister wrongly discounted Minister Surty's serious concerns about the Ginwala report and its impact on Mr Simelane. So too they were too easily dismissive of the PSC's attitude in this regard. It ought also to have been a matter of concern that the GCB had been poised to enquire into Mr Simelane's conduct ─ it is a matter that would directly affect public perception about his candidacy. It is not unlikely that the GCB probe ground to a halt because of the ensuing litigation.

[110] It is clear that what is said in the GE report, referred to in paragraph 24 above, about Mr Simelane, is directly relevant to the questions required to be addressed in the appointment process. They bring his integrity directly into question. They were issues of serious concern to Minister Surty, with whom the PSC agreed. There may well be answers forthcoming from Mr Simelane on the issues raised by the GE report, but at the very least they required interrogation. The court below was correct when it described the enquiries made about the GE report as being superficial. More was required.

[111] Mr Simelane is of course incorrect when he states that the dicta referred to in the *Pretoria Portland Cement* case, set out in para 10 above, do not reflect on his integrity. Of course they do. This is particularly so of para 63 of the *Pretoria Portland Cement* case. Mr Simelane might of course have an explanation or some other response. But it is not necessary to deal with that case or the *Glenister* case any further. Based on the reasoning in relation to the GE alone the decision to appoint Mr Simelane should be set aside. The court below itself was concerned about Mr Simelane's conduct in relation to the Pikoli matter, but thought that it was not open to it to subject the decision to appoint him NDPP to further judicial scrutiny. In paras 48 and 49 above the view of the court belowthat Mr Simelane might justifiably be criticised is reflected. That court below adopted the attitude that this was not sufficient to enable the decision to be overturned.

[112] Thus the Minister and the President both made material errors of fact and law in the process leading up to the appointment of Mr Simelane. This speaks to both rationality and legality.[18] In *President of the RSA v SARFU* at 148, the Constitutional Court, in dealing with constraints on the President's executive powers stated that the President must act in good faith and must not misconstrue his powers. It does not avail

[18]See *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 47. As Cloete JA held that error of fact as a ground of review stems from the principle of legality, it applies not only to challenges to administrative actions. See also *Government Employees Pension Fund v Buitendag* 2007 (4) SA 2 (SCA).

the President to say that he subsequently read the transcripts of those parts of the GE's proceedings that the DA referred to in its application in the court below and that he would have arrived at the same conclusion. It was too late and must be assessed in the light of the President's persistent view that the GE did not concern Mr Simelane's integrity but was instituted to consider Mr Pikoli's fitness to continue in office. In failing to take the GE into account, the President took a decision in respect of which he ignored relevant considerations. By doing so he misconstrued his powers and acted irrationally.

[113] In *SA Defence and Aid Fund*, Corbett J held that, in the context of deciding whether to ban an organisation in terms of security legislation the President had to have 'before him some information relating to such matters as the aims and objects of the organisation in question, its membership, organisation and control, the nature and scope of its activities, what its purpose is and what it professes to be'. We have come a long way since that kind of security legislation. In this case he had less than scanty information on which to make the required decision. His own knowledge and interaction with the candidate and a brief CV was insufficient, particularly in the light of the concerns set out above. In these circumstances he could not have applied his mind properly.

[114] I accept that the President must have a multitude of daily duties and is a very busy man. However when he is dealing with an office as important as that of the NDPP, which is integral to the rule of law and to our success as a democracy, then time should be taken to get it right.

[115] Having regard to the conclusion already reached in this judgment it might appear that nothing remains for further adjudication. In my view it is necessary, to guide future action, to consider the submissions on behalf of the President, the Minister and Mr Simelane, that s 9(1)*(b)* provides for the President's subjective view to be brought to bear-his assessment subject to his morality and 'aesthetic value'. In the heads of argument filed on behalf of the President the following appears:

'The President is the choice of the people. The Constitution vests in him the power to apply his value judgment and appoint a NDPP who meets the objective criteria and is a fit and proper person to hold such office.'

That submission appears to conflate a subjective assessment with objective criteria. However, the first part of the statement is an aspect on which I shall comment later.

[116] I disagree with the view that in applying s 9(1)*(b)* of the Act the President is entitled to bring his subjective view to bear. First, the section does not use the expression 'in the President's view' or some other similar expression. Second, it is couched in imperative terms. The appointee 'must' be a fit and proper person. Third, I fail to see how qualities like 'integrity' are not to be objectively assessed. An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In *The Shorter Oxford English Dictionary on Historical Principles* (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' *Thesaurus* (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'

[117] Consistent honesty is either present in one's history or not, as are conscientiousness and experience. Conscientious is defined in the *Concise Oxford English Dictionary* (2002) 10 ed as: '1 wishing to do what is right. 2 relating to a person's conscience.' In my view, having regard to the purposes of the Act, served also by s 9(1)*(b)* of the Act, there can in my view be no doubt that it is not left to the subjective judgment of transient Presidents, but to be objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law. Take a notional President whose moral view is that a recent conviction of fraud of a notional candidate can be discounted because of an undertaking by the latter

not to do anything illegal in the future. The submission that it is the President's subjective view and assessment that is required to be brought to bear in terms of s 9(1) *(b)*, when viewed against this example is, in my view shown to be fallacious.

[118] Thus, the requirements of s 9(1)*(b)* of the Act are, in my view, jurisdictional facts the objective existence of which are a prelude to the appointment of the NDPP. In this regard the following dictum from *SA Defence and Aid Fund* (at 34H-35A) is apposite:

'Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional act as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist it may then declare invalid the purported exercise of the power (see eg *Kellerman v Minister of Interior* 1945 T.P.D. 179; *Tefu v Minister of Justice* 1953 (2) SA 61 (T).'

[119] Cases dealing with the admission or disbarment of attorneys, such as *Jasat,* in which the expression 'fit and proper person' is applied are unhelpful. The Attorneys' Act was amended in 1984 to convert the test of 'fit and proper person' into one for the trial court's discretion. Significantly, in a pre 1984 case, *Kudo v Cape Law Society* 1977 (4) SA 650 (A) the following is stated at 650-651:

'One of the basic criteria for admission, striking off or re-admission is therefore whether or not the person concerned is "fit and proper". In relation to admission that is a question of fact, as has been said above, and not of "discretion".'

[120] In any event, the question posed in this appeal was decided against a specific statutory provision, with due regard to its purpose and measured against constitutional values and norms.

[121] It is clear that the President did not undertake a proper enquiry of whether the objective requirements of s 9(1)*(b)* were satisfied. On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience.

[122] One further aspect requires brief attention. It will be recalled that in para 115 above a paragraph from the heads of argument on behalf of the President was quoted, in which it was submitted that, because the President is the people's choice, the Constitution vests the power in him to appoint an NDPP and that the power is exercised based on the President's value judgment. It is implicit in that submission that a court cannot scrutinise the President's exercise of a value judgment. I have already dealt with the power of courts to ensure compliance with the Constitution. It is necessary to say something about whether in doing so the popular will is subverted. Dealing with critics who suggest that the power vested in the judiciary to set aside the laws made by a legislature mandated by the popular will, itself constitutes a subversion of democracy, former Chief Justice Mahomed, in an address in Cape Town on 21 July 1998 to the International Commission of Jurists on the independence of the judiciary, stated the following:

'That argument is, I think, based on a demonstrable fallacy. The legislature has no mandate to make a law which transgresses the powers vesting in it in terms of the Constitution. Its mandate is to make only those laws permitted by the Constitution and to defer to the judgment of the court, in any conflict generated by an enactment challenged on constitutional grounds. If it does make laws which transgress its constitutional mandate or if it refuses to defer to the judgment of the court on any challenge to such laws, it is in breach of its own mandate. The court has a constitutional right and duty to say so and it protects the very essence of a constitutional democracy when it does. A democratic legislature does not have the option to ignore, defy or subvert the court. It has only two constitutionally permissible alternatives, it must either accept its judgment or seek an appropriate constitutional amendment if this can be done without subverting the basic foundations of the Constitution itself.'[19]

These statements are beyond criticism and apply equally when actions or decisions by the executive are set aside.

[123] Finally, it was submitted on behalf of the DA that the matter was one of sufficient importance and complexity to warrant the employment by it of three counsel. I agree.

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[19] I Mahomed 'The Independence of the Judiciary' (1998) 115 *SALJ* 658 at 662-663. See also *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras 96-99.

[124] For all the reasons set out above the following order is made:

1 The appeal succeeds and the first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of three counsel;

2 The order of the court below is set aside and substituted as follows:

'a. It is declared that the decision of the President of the Republic of South Africa, the First Respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of section 179 of the Constitution of the Republic of South Africa (the Constitution), read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid;

b. The appointment is reviewed and set aside;

c. The first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of two counsel.'

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M S NAVSA

JUDGE OF APPEAL

APPEARANCES:

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D Borgström

N Mayosi

Instructed by

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