IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

DATE 19/11/15 SIGNATURE

CASE NO: 89849/2015

DATE: 19/11/2015

IN THE MATTER BETWEEN

FREEDOM UNDER LAW (RF) NPC	APPLICANT
AND	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	2ND RESPONDENT
NOMGCOBO JIBA	3RD RESPONDENT
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	4TH RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	5TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] Before me was what can essentially be described as an urgent application for interim relief (the so-called Part A portion of the notice of motion) to interdict two very senior members of the National Prosecuting Authority from discharging any function or duty in their mentioned official capacities pending the final determination of the Part B section of the application, which is for final relief, in this case aimed at reviewing and setting aside a certain decision taken by the first respondent, and also the reviewing and setting aside of the failure by the fifth respondent (the State President) to take certain decisions. There is ancillary relief sought in the form of a *mandamus* to compel the fifth respondent to institute enquiries, in terms of the National Prosecuting Authority Act, no 32 of 1998 ("the NPA Act"), into the fitness of these two senior officials, the third and the sixth respondents, to hold office.

The parties

[2] The applicant is Freedom Under Law (RF) NPC (also described as "FUL"), a non-profit organisation incorporated and registered in the Republic of South Africa in accordance with the provisions of section 21 of the Companies Act, 1973, now section 10 of the Companies Act, 2008. The applicant was created for the purposes of "promoting democracy under law and to advance the understanding of and respect for the rule of law and the principle of legality".

[3] The applicant approaches the court, firstly, in its own interest as an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law.

[4] Secondly, the applicant approaches the court in the public interest. The applicant alleges, correctly, that all South Africans have an interest in upholding the rule of law, the requirement for a properly functioning constitutional democracy and, in particular, urgent steps necessary to root out impropriety and corruption within constitutionally imperative institutions which were created, *inter alia*, to protect this young and developing democracy.

[5] The first respondent is the National Director of Public Prosecutions ("NDPP"). The incumbent of that office is Mr Shaun Abrahams. The first respondent is joined in these proceedings by virtue of the fact that he is the head of the NPA and that he, alternatively, he and the second respondent, took a decision on 18 August 2015 ("the 18 August 2015 decision") in terms of which he declined to continue with a prosecution against the third respondent on charges of fraud and perjury, and decided to withdraw those charges.

[6] The second respondent is the Regional Head: Specialised Commercial Crime Unit of the NPA. The incumbent of that office is Mr Marshall Mokgatle. The second respondent is joined in these proceedings by the applicant by virtue of the fact that he, together with the first respondent, took the 18 August 2015 decision.

[7] The third respondent is Ms Nomgcobo Jiba ("Jiba") cited in her personal capacity and official capacity as the Deputy National Director of Public Prosecutions ("DNDPP"). The 18 August 2015 decision relates directly to the third respondent and her conduct which gave rise to findings of serious impropriety in, *inter alia*, certain judicial findings expressed in reported judgments, to which I will refer hereunder.

[8] The fourth respondent is the Minister of Justice and Correctional Services and is cited in his capacity as the Member of Cabinet responsible for the NPA. He is joined in these proceedings by virtue of the fact that section 179(6) of the Constitution provides that "the cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority".

[9] The fifth respondent is the President of the Republic of South Africa (also at times referred to as "the President"). He is joined in these proceedings by virtue of the fact that the applicant challenges failures by him to exercise his powers under section 12 of the NPA Act and the fact that aspects of the relief sought in the notice of motion, if granted, will require the President to give effect to such relief.

[10] The sixth respondent is Lawrence Mrwebi cited in his personal capacity and in his capacity as Head: Specialised Commercial Crime Unit and Special Director of Public Prosecutions within the NPA, appointed as such on 25 November 2011. The 18 August 2015 decision and the President's alleged failures relate directly to the sixth respondent and his conduct which gave rise to findings of serious impropriety as described in some of the reported judgments which will be mentioned later.

[11] Before me for decision in the urgent court two days ago was only the Part A section dealing with the interim interdicts against the third respondent ("no 3") and the sixth respondent ("no 6"). The matter has a long and tortuous history. If one has to sum up the situation in a sentence or two, it could be this: a number of our courts, in reported judgments, have expressed reservations, to put it lightly, about the conduct of no 3 and

no 6 while executing their official duties, and expressed reservations, at least by implication, about their fitness for office. This, and other developments and observations from various sources, inspired the applicant, true to its noble objectives, to launch these proceedings. It is not logistically possible, nor necessary for that matter, in the busy urgent court, to give a detailed overview of the history of the case which, no doubt, is one of national importance which has made headlines in the media now for a number of years.

[12] A few brief remarks will suffice: the cases in which the conduct of no 3 and no 6 came under scrutiny and evoked severe criticism include the following: *Freedom Under Law v National Director of Public Prosecutions and others* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions and others v Freedom Under Law* 2014 4 SA 298 (SCA) (these two judgments deal with decisions by certain members (including no 3 and no 6) of the NPA to withdraw criminal charges against Lieutenant-General Richard Mdluli, Head of Crime Intelligence in the South African Police Service, and the subsequent finding of both these courts that the charges had to be reinstated. I was told from the Bar by Mr Epstein SC, who appeared with Mr Osborne and Mr Mabuda for the first, second, fourth and fifth respondents, that the charges were in fact reinstated, and that the matter is pending. Where necessary, I will refer to these two cases as "the Mdluli judgments"); *Booysen v Acting National Director of Public Prosecutions and others* [2014] 2 All SA 391 (KZD) ("the Booysen application"). This matter deals with what was found to be groundless charges laid by no 3, in her official capacity, against Major General Booysen of the SAPS. Booysen successfully applied to have the decision by no 3 to charge him reviewed and set aside. It was in the course of this judgment, that the learned Judge, Gorven J, severely

criticised no 3. This judgment forms the basis upon which fraud and perjury charges were instituted against no 3 by the erstwhile NDPP, Mr Mxolisi Nxasana. The latter was relieved from his position by the President, who then appointed Mr Abrahams (first respondent) who, as I indicated, took the 18 August 2015 decision (perhaps in consultation with the second respondent) to decline to prosecute no 3 (this was on the eve of the criminal trial against her) and to withdraw the charges.

The fourth and last judgment which I need refer to, for present purposes, is that of *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA) involving the so-called "spy tapes" which featured in the decision to withdraw criminal charges against Mr Zuma, opening the door for him to later become the State President.

[13] What inspired the applicant to launch these proceedings, is described as follows on behalf of the applicant by the deponent to the founding affidavit:

> "5. This urgent application is brought on the information collated by the applicant from judicial findings in various High Court and Supreme Court of Appeal ('SCA') judgments (as mentioned); the annual report submitted on behalf of the NPA by the former NDPP, Mr Mxolisi Nxasana, for the year 2014/2015 in terms of section 35(2) of the NPA Act ('the NPA report'); media reports; and correspondence between the applicant's attorneys and the first and fifth respondents.
>
> 6. The applicant also relies on a report compiled by former Constitutional Court Justice Z M Yacoob ('the Yacoob report') into allegations of serious impropriety within the NPA, particularly on the part of the third and sixth respondents. Despite repeated requests, including a formal

request under the Promotion of Access to Information Act 2000 ('PAIA') and an internal appeal, the applicant has been denied access to the Yacoob report by the fifth respondent.

7. The applicant has, within the past week, obtained a copy of the Yacoob report from the replying affidavit filed on behalf of the General Council of the Bar on 18 August 2015. The findings in the Yacoob report are startling and show that there is a firm basis for the third and sixth respondents' immediate suspension and institution of disciplinary and other proceedings against them."

[14] With regard to the last mentioned remark about the Yacoob report and when the applicant came into possession thereof, I have to add that this is an important aspect of the argument which came before me as to whether or not the matter should be heard as one of urgency: as can be seen from the passage quoted, it is suggested by the applicant that the Yacoob report contains "startling" findings justifying the "immediate suspension and institution of disciplinary and other proceedings" against no 3 and no 6. It was argued before me on behalf of the applicant that when the latter finally obtained a copy of the Yacoob report on 26 October 2015, the contents thereof inspired the applicant to launch the application on an urgent basis. On the other hand, the respondents, contending that no case for urgency had been made out, argued that the Yacoob report is, to a large extent, based on the judicial findings mentioned in the reported judgments and I was also invited to take notice of the following passage from the Yacoob report:

"Our inability to compel witnesses meant that this report has been compiled without access to all possible versions. In particular, certain persons about

whom our courts have made comments that cause concern did not come to explain their position and respond to us in person to the comments of the courts. It is mainly for this reason that this report is not conclusive."

It is common cause that no 3, for example, did not testify before the Yacoob Commission, and the same applies to no 6. It was also argued on behalf of the respondents that the Yacoob report was already in the public domain long before 26 October 2015 and, as stated on behalf of the applicant itself, it was attached to the replying affidavit of the General Council of the Bar in proceedings to have no 3 and no 6 removed from the roll of advocates, as long ago as 18 August 2015. I will later briefly revert to this subject.

[15] I now turn to the matter at hand, namely the applicant's decision to launch this application on an urgent basis.

[16] The notice of motion is dated 6 November 2015 and service was effected on all the parties on the same day. It was a Friday.

[17] The application was enrolled for hearing before me on 17 November 2017.

[18] Only six clear court days elapsed between Friday 6 November when the application was launched and the papers served, and Tuesday 17 November when it was on the roll for hearing in the urgent court.

[19] In terms of the strictly enforced practice manual governing the running of the urgent courts in this Division, the roll for this week closed on Thursday, 12 November, at 12:00, three clear court days after the application was launched and the papers served.

[20] In terms of the notice of motion, the respondents were directed to file their notices of intention to defend, if any, by 9 November, which was the Monday after the Friday launch, and their opposing affidavits before 17:00 on Wednesday 11 November, some two and a half court days after launch and service and the day before the 12:00 Thursday deadline.

[21] No provision is made in the notice of motion for the filing of a replying affidavit by the applicant, obviously because the applicant left no time, on these drastic deadlines, for itself to do so.

[22] The founding papers run into some 212 pages. The founding affidavit is a lengthy, finally printed affair of 56 pages brimming with complex, factual and legal detail.

[23] Against this background, I did not find it at all surprising that not one of the respondents, with the exception of no 6, managed to file a complete answering affidavit, addressing all the issues raised in the founding affidavit, by Wednesday 11 November. I was informed by Mr Ramawele, for no 6, that the fact that a more complete answering affidavit was filed by his client, does not mean that proper justice was done to the task and that no 6 was not prejudiced because of the extremely short time period allowed.

[24] In the time at their disposal, counsel for nos 1, 2, 4 and 5 and Mr Arendse SC, who appeared for no 3, only managed to file opposing affidavits dealing with the question of urgency. No 6 also challenged the question whether a proper case for urgency had been made out by the applicant.

[25] The affidavit on urgency of no 1 was sworn to by the deponent before a Commissioner of Oaths at 09:00 on 12 November, after the 11 November deadline, and a few hours before the roll was scheduled to close at midday. It does not appear as if it was filed timeously before the roll was closed, and properly bound and paginated as part of the full set of papers as required by the Practice Directive, to which I will shortly refer. I make this observation because the index prepared by the applicant, dated 12 November, makes no provision for any of the opposing affidavits.

[26] Mr Abrahams, in his affidavit styled "first respondent's answering affidavit in respect of urgency", illustrates the dilemma, and obvious prejudice, caused to him because of the short period allowed in the notice of motion:

> "I was booked to leave for Europe on official business on Saturday evening, 7 November 2015. My involvement was essential in preparing an answering affidavit within the drastically curtailed time periods incorporated by the applicant in its notice of motion. Due to the gravity of the relief sought and the serious consequences which may flow therefrom if such relief were ever to be granted, I cancelled my trip to Europe a few hours prior to my scheduled departure. This was on the advice of counsel that extensive consultation with me would be essential. Counsel immediately set to work on preparing an answering affidavit and worked at a furious pace in an endeavour to meet the

unilaterally imposed time lines. However, despite every endeavour, which included working well into the night, it transpired that it was not feasible to prepare the comprehensive required response to this application."

The "gravity of the relief sought and the serious consequences which may flow therefrom" is evident from the prayers in the Part A portion of the notice of motion:

"2. Pending the final determination of the relief sought in Part B below, interdicting the third respondent from discharging any function or duty as a member of the National Prosecuting Authority, including as Deputy Director of Public Prosecutions.

3. Pending the final determination of the relief sought in Part B below, interdicting the 6th respondent from discharging any function or duty as a member of the National Prosecuting Authority, including as Head: Specialised Commercial Crime Unit."

It is not possible to anticipate when the Part B relief will be "finally determined" and whether this "final determination" will only result from an appeal process some years into the future. The impact of such relief, if it were to be granted, on the lives and careers of no 3 and no 6, let alone the NPA, is obvious. It appears to me that this is a factor which the applicant, when determining the time frames for the notice of motion, ought to have taken into account, with other relevant factors such as the provisions of the strictly applied and enforced Practice Directive, to which I will turn shortly.

[27] In his affidavit, Mr Abrahams (also "no 1" or "the NDPP") offered, as a first argument *in limine*, the attack on the question of urgency and, in addition, a second argument

in limine on the basis that because the relief sought in Part B concerns the conduct of no 5 (the President) the Constitutional Court enjoys exclusive jurisdiction over the subject-matter. A third argument *in limine* is in the nature of one based on *lis alibi pendens* on the basis that substantially similar issues of law and fact fall to be considered by this court in an application brought by the General Council of the Bar (case no 23576/15) ("the GCB application") and by the Western Cape Division of the High Court in a matter brought by the Democratic Alliance (case no 17782/15) (the "Democratic Alliance application").

I was informed that neither of these two applications are scheduled to proceed on an urgent basis neither are they coupled with urgent interim relief applications aimed at interdicting or suspending no 3 and no 6 pending the outcome of those main applications.

I was informed from the Bar that the Democratic Alliance application is scheduled to be heard early in February 2016 and counsel in the GCB application (which no doubt will include Mr Arendse and Mr Ramawele because the GCB seeks to have their clients, nos 3 and 6, struck from the roll of advocates) are scheduled to meet the Deputy Judge-President next week with the view to obtaining an allocation of a date for the hearing, presumably early in 2016.

There are some points of similarity between the relief sought in the present case and that contended for in the Democratic Alliance application: that applicant seeks reviewing and setting aside of the President's decision, taken on 1 September 2015 in terms of section 12 of the NPA Act, not to suspend no 3 (who is the fourth respondent

in that case) and institute an enquiry into her alleged misconduct and her fitness to hold office. Secondly, the Democratic Alliance seeks an order substituting the President's decision aforesaid with the decision to establish an enquiry to determine whether no 3 (there the fourth respondent) is guilty of misconduct and remains fit to hold the office of Deputy Director of National Prosecutions; and to suspend her pending the outcome of that enquiry.

It also appears, from a general reading of the papers, that the GCB, in its application, will also rely on the same grounds that feature in this and other applications (eg critical observations by the courts, charges of fraud and perjury and so on) in its quest to remove no 3 and no 6 from the roll of advocates. Success for the GCB will, in any event, overtake the present proceedings because such a result will mean that no 3 and no 6 are in any event unfit to continue in their positions.

[28] In the hearing before me, I was not called upon to pronounce on the second and third arguments *in limine*.

[29] In his answering affidavit in respect of urgency, dated 11 November, the second respondent also states that he was unable, due to the short time at his disposal, to deal fully with the contentions in the founding affidavit but he also attacks the applicant's case for urgency, and associates himself with the submissions made by no 1.

[30] The answering affidavit of no 3 was only served on the applicant's attorneys on 12 November and only reached my office on 13 November. For the reasons I have

mentioned, it was obviously not included in the bundle of documents submitted by the applicant before the roll closed at noon on 12 November.

[31] This affidavit was not deposed to by no 3 herself, but by her attorney who says the following in the affidavit which is dated 12 November:

> "The third respondent is currently travelling abroad on official NPA business and at the time of deposing to this affidavit she is in Russia. She left South Africa on 7 November 2015 and returns to the country on Sunday, 15 November 2015. This is also in the public domain and was widely reported in various media."

He also states:

> "In the circumstances it has been impossible for counsel and myself to consult with the third respondent, take full instructions and draft a substantive answering affidavit on her behalf. Despite having requested the applicant to agree to a reasonable time table for the further conduct of this matter, the parties have been unable to reach agreement, and the applicant persists with moving its application on an urgent basis. We had also attempted to reach an agreement with the applicant regarding extended time lines, however, as we understand, that also fell through due to the disagreement therewith by other respondents. That notwithstanding, we had always contended that the matter is not urgent at all."
>
> (The emphasis is that of the deponent.)

[32] Significantly, attached to this affidavit of the attorney for no 3, is a lengthy letter which he wrote to the applicant's attorney on 9 November, the Monday after the Friday launch of the application. In the letter he reminds his counter part of the other two applications of the GCB and the Democratic Alliance, featuring substantially the same issues for determination, and he also records that his client was travelling abroad at the time.

The attorney then states:

> "In the circumstances the curtailed time line set out in the notice of motion is completely unreasonable and unnecessary.
>
> Without in any way admitting the urgency or the merits of the application, we invite you to agree to a reasonable time line for the further conduct and hearing of this matter in consultation with all parties involved ..."

[33] Equally significantly, the applicant's attorney answers this letter on 10 November 2015 and proposes a revised time line in respect of the Part A relief in the following terms:

> "5.1 The respondents file their answering affidavits at or before 17:00 on Monday 16 November 2015;
>
> 5.2 the applicant will file its replying affidavit, if necessary, at or before 17:00 on Friday, 20 November 2015; and
>
> 5.3 the matter is heard on an expedited basis on the merits as a special motion to be allocated by the Honourable Deputy Judge-President, as soon as possible after 20 November 2015."

It is difficult not to see this as an acknowledgment on the part of the applicant's attorney that the time-limits he had set in the notice of motion were inappropriate.

On the other hand, this conclusion of mine may be gainsaid by the following further statement by the applicant's attorney:

> "The revised time-table for the relief sought in Part A of the application must, of course, be agreed by all the respondents involved in this application, and the respondents are to provide us with an indication in writing as to their agreement with the revised time-table, at or before 09:00 on Thursday 12 November 2015, failing which, our client will proceed with the hearing of this matter as set out in the application on Tuesday 17 November 2015."

He also asks for all respondents to respond to his proposal by 09:00 on 12 November.

During the lengthy hearing before me, I was informed from the Bar that, in the end, no agreement could be reached on the proposed revised time lines which led to the applicant, true to its word, proceeding with the urgent application before me on 17 November.

It remains for me to add that, in the Practice Directive to which I will shortly turn, there is clear provision for litigants in an application akin to the present one, to approach the Deputy Judge-President for a special allocation such as the one which the applicant's attorney presumably had in mind when he mentioned it. In my view, he may have been well advised to follow this route in the first place.

[34] For the sake of detail, I add that the senior assistant State Attorney, Mr Baloyi, also deposed to an affidavit which came before the Commissioner of Oaths at 19:30 on 12 November 2015 which was after the roll had closed. The learned State Attorney mentions that he relies to a large extent on the submissions made by no 1 in respect of the urgency issue and he confirms that he acts for the first, second, fourth and fifth respondents. He says that in the afternoon of Friday 6 November, after receipt of the papers, he got in touch with senior counsel and placed junior counsel on brief the next morning. He confirms that the first respondent had been booked to leave for Europe on Saturday night 7 November, but had to cancel the trip. He says that despite best endeavours, there was not sufficient time within the curtailed time frame to deal with the merits of the case.

He records that, at the time of him deposing to the affidavit, the President (fifth respondent) was on an official visit to Germany and the fourth respondent, the Minister, was attending to ministerial duties in Cape Town. It was not possible to consult with either of these persons. Upon the return of the President an attempt will be made to arrange a consultation bearing in mind that the President has a very heavy schedule. He was also informed that the Minister was scheduled to travel overseas on official business on 16 November.

[35] I have already mentioned that no 6, in his affidavit, also disputed the alleged urgency of the application. For the sake of brevity, I do not propose dealing with the arguments advanced by no 6.

[36] As a general proposition, I do not accept that there ought to be recognition of a situation whereby a court, and particularly an urgent court, can be held to ransom, in a way, by the travelling arrangements of the participating litigants. Nevertheless, it seems to me that each matter must be considered on its own merits. This case, involving busy senior officials of State, appears to have special characteristics which, as I have said, are not irrelevant when it comes to deciding on a time frame to be included in a notice of motion.

The provisions of the Practice Directive

[37] It is well known that a detailed Practice Directive governing the procedure in the urgent motion court in this Division, is strictly applied in order to avoid abuse of the process by practitioners. The Practice Directive has been in place for some eight years, since February 2007 and is also fully published in Erasmus, *Superior Court Practice*, 2nd ed, volume 3 from H2-134.

[38] In paragraph [8], at H2-138, the following is stated:

> "If an applicant anticipates that the application will be opposed it is essential that the respondent and the applicant be allowed reasonable times for the filing of answering and replying affidavits before the roll closes at 12:00 on Thursday. If these affidavits are not able to be filed in time and the matter cannot be heard at the time indicated in the notice of motion the procedure is abused. In every case the court will decide whether reasonable time has been allowed in the light of the circumstances revealed in the affidavits. If reasonable times have been allowed the respondent will not be allowed to delay the process."

[39] In the present case, I have come to the conclusion, and I find, that the applicant did not allow a reasonable time in the light of the circumstances revealed in the affidavits.

The facts are self-explanatory: barring no 6, not one of the respondents was able to deal fully, in the prescribed time, with the issues in the founding affidavit. Some of the respondents were away overseas.

When the roll closed at 12:00 on Thursday, only the founding papers, as I read the index, were available to be lodged with the Registrar. This flies in the face of the provisions of the Practice Directive. Answering affidavits, dealing, in the main, only with the issue of urgency, were only filed after the roll closed.

Moreover, as I have already pointed out, the applicant did not even provide, in the notice of motion, as prescribed in the Practice Directive, for the filing of a replying affidavit. I took this up with Mr Du Plessis, who, with Mr MacKenzie, appeared for the applicant, and, if I understood him correctly, he conceded that it was a mistake not to do so. He valiantly argued that, had the answers been filed by Wednesday, the applicant might still have been able to file a replying affidavit before noon on Thursday. This does not cure the defect in the notice of motion and the failure to comply with the Practice Directive.

The applicant's position is worsened by the fact that it, nevertheless, took the liberty to file a "provisional replying affidavit" totally out of time, on 13 November, well after the closing of the roll.

[40] Because of the time frames prescribed by the applicant, which I have found not to comply with the Practice Directive in this particular instance, the matter was obviously not ripe for hearing, on all the issues, barring urgency, on 17 November when it was enrolled for.

[41] In the circumstances, the process was abused, and the application, for that reason alone, falls to be struck from the roll.

[42] For the sake of detail, I add that it is stipulated in paragraph [4](1) of the Practice Directive that "all urgent applications must be enrolled by 12:00 on the previous Thursday for hearing at 10:00 on Tuesday unless they are covered by the other three degrees of ascending urgency referred to in *Luna Meubelvervaardigers*". This is a reference to the case of *Luna Meubelvervaardigers (Edms) Bpk v Makin and another (t/a Makins Furniture Manufacturers)* 1977 4 SA 135 (W) where provision is made for further abridgement of the prescribed times in exceptionally urgent cases. In my debate with Mr Du Plessis, he agreed, quite properly, that this is not one of those cases which qualify for special abridgement as intended in *Luna Meubelvervaardigers*.

[43] I debated the provisions of the Practice Directive, at some length, with Mr Du Plessis asking him, *inter alia*, to explain why it was imperative for the matter to be heard this week, and on such strict time lines. Despite a valiant effort by Mr Du Plessis, I was not persuaded that he was able to come up with a satisfactory explanation.

I add that the issue relating to the strict provisions of the Practice Directive was also not addressed in the founding affidavit under the "urgency heading". The main thrust of the argument for urgency appears to be that there is a strong case for the proposition that no 3 and no 6 are not fit to hold the high offices which they currently occupy "and their continued performance of their official duties jeopardises dozens of critical prosecutions and investigations daily – and brings the law into disrepute and makes a mockery of those offices". It is not for me to pronounce on the merits of these broad statements, and no details of such alleged transgressions which jeopardise "dozens of critical prosecutions and investigations daily" have been disclosed in the founding or other papers. It is not for me, in this urgent court, to pronounce on the merits of the case. This will be dealt with by the courts hearing the main applications in due course.

However, the fact remains that there are strict rules to be complied with by a litigant moving an urgent application and, as I have found, the applicant failed to do so. As indicated, the application falls to be struck off for that reason alone.

Self-created urgency

[44] This, it seems to me, is another subject militating in favour of a conclusion that the plaintiff failed to make out a case for moving the application on the extremely tight time lines contained in the notice of motion.

[45] The main thrust of this argument, offered by various counsel, is that the circumstances relied upon by the applicant as the basis for the application, have been present for a long time and the application could have been moved earlier, perhaps in the normal

course, so that the decision to suddenly, at a late stage, launch under these extremely urgent circumstances, ought not to be countenanced.

[46] I was referred to a number of cases where the courts declined to treat the matter as one of urgency due to tardiness on the part of the applicant to proceed at an earlier stage. One such case is that of *Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en andere* 1971 1 SA (PH F11) (T) where the learned Judge said the following:

> "Volgens die gegewens voor die hof wil dit vir my voorkom dat die applikant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen nou beswaar gemaak word. Die geleentheid het slegs dringend geword omdat die applikant getalm het ... maar dit was geensins nodig vir doeleindes van hierdie aansoek ... om so lank te wag om die hof te nader nie.
>
> Al hierdie omstandighede in ag genome, is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandigheid, nie bereid nie om af te sien van die gewone voorskrifte van reël 6."

A number of other, and more recent, decisions were quoted by counsel in their comprehensive heads of argument. For the sake of brevity, I do not consider it necessary to deal with those decisions as well. The principle has been crystalised for some time.

[47] Against this background, I was referred to a letter which the applicant's attorney already wrote to the President on 1 June 2015, in which the main features of the issues raised in the present application are canvassed. Reference is made to the two Mdluli decisions, as well as the Booysen decision. The learned attorney then goes on to write as follows to the President:

> "We are advised that, despite numerous calls to do so from several public interest and civic organisations, you have, to date, neglected or refused to make a decision as to whether disciplinary proceedings will be instituted against Ms Jiba and whether she should be suspended from office. It is of the essence that you make these decisions without any further delay, so that the administration of justice is not further imperilled.
>
> If you fail to make these decisions and to communicate them to our client, together with full written reasons, by no later than 30 June 2015, our client will be forced to launch proceedings to compel you to make a decision or to substitute your failure to make a decision with, *inter alia*, a decision to institute the disciplinary proceedings/enquiry."

The learned attorney then follows up this threat of legal action with a reminder that the Yacoob report has not yet been received by the applicant. He does so in the following terms:

> "Moreover, the Yacoob report has yet to be released. We, on behalf of our client, request access to the Yacoob report in terms of section 9(c) of section 46 of PAIA. We attach a formal PAIA request in this regard. We tender payment of all amounts due in relation to this request, having regard to the

> prescribed fees stipulated in the presidency's PAIA manual. To this end, please let us know how much is due and we shall make payment as soon as possible."

I debated this letter with Mr Du Plessis. I suggested to him that a general reading of the letter leads one to the conclusion that the attorney of the applicant already felt comfortable to threaten the President with legal action, of the type now under debate in the present case, by no later than 30 June 2015 without the Yacoob report which was only mentioned, perhaps even as a afterthought, after the threat of litigation was made. I, with respect, cannot agree with the argument by Mr Du Plessis that it was the ultimate receipt of the Yacoob report, allegedly only on 26 October, that triggered the decision to move the application on such an urgent basis. I said as much to Mr Du Plessis during my debate with him.

There was a response on behalf of the President, dated 25 July 2015, to the effect that the President was considering the letter of the applicant's attorney, and also the request for the Yacoob report, and stating, on behalf of the President, that he did not task Justice Yacoob to investigate any matter whatsoever relating to the NPA. The letter states that the President is waiting for information of the facts and circumstances which gave rise to a consideration of the suspension of Adv Jiba and concludes with an indication that the President will, after applying his mind, "take whatever action he deems necessary, having regard to the law, the institution and the individual concerned". There is no indication that the President would comply with the requests of the applicant or respond to the threats of litigation. On behalf of the respondents, it was argued, that under these circumstances the applicant could, if it was so inclined,

have proceeded already with this application by the end of July 2015. To delay these proceedings for more than three months after that, and then to move very suddenly on strict time lines which fly in the face of the Practice Directive, would appear to bring this matter within the ambit of those cases found to have featured "self-created urgency".

Moreover, the 15 August decision, also attacked in this review application, was already taken two and a half months ago and it appears that the Yacoob report was already in the public domain much earlier and lodged with the GCB's replying affidavit in die middle of August.

[48] Under these circumstances, it seems that, also on the basis of so-called self-created urgency, this application ought not to be entertained as one of urgency on these particular time lines.

The costs

[49] Counsel for the respondents argued that the normal rule should apply, and the costs should follow the result, in the event of the application being struck from the roll, so that the applicant should pay the costs of the respondents. On behalf of the first, second, fourth and fifth respondents it was also argued that, given the flagrant abuse of the rules, costs should be awarded on the punitive scale.

[50] During the hearing, I also debated with counsel the significance of the decision in *Biowatch Trust v Registrar Genetic Resources and others* 2009 6 SA 232 (CC). In that case, at 245C-I, the learned Judge, also referring to the case of *Affordable*

Medicines Trust and others v Minister of Health and others 2006 3 SA 247 (CC), stated that:

> "This court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs."

The relevant passage from *Affordable Medicines,* referred to by the learned Judge, stipulates:

> "One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The *rationale* for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious ..."

After the hearing, I was also presented, by the applicant's attorney, with a copy of another judgment, handed down in this Division, where an application was struck off for lack of urgency but no costs were awarded on the strength of *Biowatch.* Comments on this judgment by counsel for the respondents were also referred to me and duly considered.

[51] In this case, the issues are of a constitutional nature, and of national importance. The issues which the applicant seeks to ventilate, affect the interests of the public at large, and not only those of the litigants concerned.

[52] After due reflection, I have come to the conclusion that there was nothing "frivolous or vexatious" about the conduct of the applicant and that the principles as laid laid in *Biowatch* ought to be applied.

The order

[53] I make the following order:

1. The application is struck from the roll.
2. Each party is ordered to pay his or her own costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

89849/2015

HEARD ON: 17 NOVEMBER 2015
FOR THE APPLICANT: M DU PLESSIS WITH A MacKENZIE
INSTRUCTED BY: WEBBER WENTZEL
FOR THE 1ST, 2ND, 4TH AND 5TH RESPONDENTS: H EPSTEIN SC WITH M OSBORNE AND T MABUDA
INSTRUCTED BY: STATE ATTORNEY
FOR THE 3RD RESPONDENT: N ARENDSE SC
INSTRUCTED BY: MAJAVU INC
FOR THE 6TH RESPONDENT: R RAMAWELE
INSTRUCTED BY: A M VILAKAZI TAU ATTORNEYS