IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**
(3) **REVISED**

2017.03.17 — **DATE**

J M Motlatsi — **SIGNATURE**

CASE NUMBER: 23199/16
DATE: 17 March 2017

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

V

THE MINISTER OF POLICE	First Respondent
MTHANDAZO BERNING NTLEMEZA	Second Respondent
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

JUDGMENT

MABUSE J: (Kollapen J and Baqwa J concurring)

[1] These are judicial review proceedings in terms of Rule 53 of the Uniform Rules of Court in relation to the decision of the Minister of Police, the first respondent ("the Minister"), of 10 September 2015, to appoint Mr Mthandazo Berning Ntlemeza ("Major General Ntlemeza") the second respondent, as the National Head of the Directorate for Priority Crimes Investigations ("DPCI").

[2] The first applicant, Helen Suzman Foundation was established in 1993 as a non-governmental organisation with primary objectives to defend the values in South Africa that underpin the liberal constitutional democracy and the promotion of respect for human rights. The second respondent is an organisation that is primarily concerned with the principles of democracy, constitutionalism and rule of law. The applicants bring this application in their interest and furthermore in the interest of the public. The applicants contend that by appointing Major General Ntlemeza as he did on 10 September 2015 as the National Head of DPCI, the Minister has acted unlawfully and irrationally and moreover has failed in his constitutional duty to protect the independence of the DPCI and to uphold the rule of law in South Africa.

[3] The applicants contend that all South African citizens have an interest in the rule of law, the requirements for a properly functioning constitutional democracy and in particular the urgent steps necessary to root out corruption and maladministration in our nascent democracy. The National Head Office role and functions mean that his actions have an impact on the administration of justice, the realisation of rights and the public at large. This is a high office which uses enormous power and is charged, as its co-mandate, with the combating of corruption and other priority offences, which are, by their very nature, of great public import and central to the administration of justice. Incidental to this mandate is the concomitant requirement that any incumbent of such office should not only be lawfully appointed and act lawfully but that the incumbent must also exhibit, and be seen to exhibit, with utmost independence, integrity and respect for the law. The lawfulness of the appointment of the National Head is thus a facet in which the public has a special interest and is pre-eminently a case where the applicant should, and do, act in the public interest.

[4] The first respondent is the Minister of Police ("the Minister"). He is cited in his official capacity as a servant of the State responsible for the administration of the South African Police Services Act 68 of 1995 ("the SAPS Act") and as the official who took the decision to appoint Major General Ntlemeza as the National Head. The second respondent, as already indicated *supra*, is Major General Ntlemeza, who is cited in this matter both in his personal and official capacity as the National Head of the DPCI.

[5] The third respondent is the DPCI established as such under s 17C of the Saps Act and is cited for its interest in the matter. The fourth respondent is the cabinet of this country established as such under s 91 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). The third respondent is cited for any interest it may have in this matter. It is important to point out at this stage that neither of the third and fourth respondents has filed any papers in this matter and accordingly these proceedings involve only on the one hand the first and the second applicants and on the other hand the first and second respondents. The target of this application is the Minister's decision though the impact thereof has consequences for the second respondent.

[6] In terms of the decision taken on or about 10 September 2015 the Minister appointed Major General Ntlemeza as the National Head of the DPCI. The applicants seek an order in terms of which that decision is reviewed and set aside.

[7] The decision is challenged mainly on four grounds, namely:

7.1 whether the Minister's decision to appoint Major General Ntlemeza as the head of DPCI was lawful, rational, procedurally fair and otherwise constitutional;

7.2 whether the Minister and the cabinet abused their statutory and constitutional discretion in respect of the appointment decision;

7.3 whether the Minister and cabinet took into account all the relevant considerations and facts in arriving at the appointment decision and whether they took into account irrelevant considerations and facts;

7.4 whether the Minister and the cabinet could lawfully conclude that Major General Ntlemeza was a fit and proper person to be appointed as the National Head.

[8] This application must be seen against the following background. On or about 10 September 2015 the Minister appointed Major General Ntlemeza as the National Head of the DPCI. After his appointment the first applicant addressed a letter dated 7 November 2015 to the Minister in which it requested to be furnished with full reasons for appointing Major General Ntlemeza as the National Head of the DPCI. Furthermore the first applicant requested to be furnished with:

8.1 evidence that the statutory requirements for his appointment have been complied with;

8.2 a copy of any documents and information on the basis of which the appointment of Major General Ntlemeza was made by the Minister; and

8.3 all the documents and information considered by the Minister in making the appointment.

[9] On 2 March 2016 the first applicant received, in response to its other letter dated 22 February 2016, a letter from the Minister which contained full written reasons for the appointment of

Major General Ntlemeza. According to the said letter, the documents that the Minister considered when Major General Ntlemeza was appointed were his curriculum vitae (CV) and the documents containing the recommendations to cabinet which, on the basis of privacy, were not disclosed to the first applicant. The applicant could not launch this application without the documents it had requested in its letter of 7 November 2015. The last paragraph of the letter dated 2 March 2016 reads as follows:

"You also requested documents and information that was considered in making the appointment. This will include the curriculum vitae (CV) of General Ntlemeza. Please note that the CV of General Ntlemeza contains his personal information that are prohibited in terms of section 23(1) of the Promotion of Access to Information 2000 from disclosing without his consent. In this regard, I do not have consent to disclose any personal information relating to General Ntlemeza."

This paragraph is the only one in the aforementioned letter that related directly to the documents that the first applicant sought from the Minister, as the documents that were considered before Major General Ntlemeza was appointed. Quite clearly no reference to the judgments of Matojane J. was made in the said letter.

THE MATOJANE JUDGMENTS

[10] It is alleged by the applicants that after he had been appointed as the Acting National Head of the DPCI in December 2014, in January 2015, Major General Ntlemeza suspended his

colleague, a certain Major General Sibiya for his involvement in the alleged illegal rendition of Zimbabwean prisoners in or about 2010. Major General Sibiya was unhappy with his suspension and did not leave it lying there. He launched an application in the Gauteng Division of the High Court in which he challenged his suspension. This application came before and was heard by Matojane J. In a written judgment handed down on 20 February 2015, he overturned the suspension of Major General Sibiya by Major General Ntlemeza. In his judgment ("the main judgment") Matojane J made the following remarks about Major General Ntlemeza:

"(31) In my view, there exists no basis in law or a fact for the Third Respondent to take the drastic measure of placing Applicant on precautionary suspension. I agree with the applicant that the decision by the Third Respondent was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates Applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair."

[11] Disgruntled by the said findings Major General Ntlemeza sought leave to appeal against the judgment. On 23 March 2015, Matojane J handed down a written judgment relating to Major General Ntlemeza's application for leave to appeal. In this judgment ("the application for leave to appeal judgment") the Judge made the following further remarks about Major General Ntlemeza.

"The third respondent elected to withhold from the Court the IPID report and the docket that was in its possession which could have enabled the Court to make a proper assessment of the strengths or otherwise of the case against the applicant. Yet, on the other hand, the third respondent argues opportunistically that the Court cannot ignore the seriousness of the allegations that are made against the applicant.

The third respondent, again, failed to take the Court into his confidence and thereby misled the Court by not mentioning that there are apparently conflicting reports on the applicant's alleged involvement in the illegal renditions. He does not mention the fact that one report implicates the applicant and that the other one vindicates the applicant. It is not clear why he seeks to rely on the one implicating applicant and not the latter especially as the first respondent has commissioned a top law firm to investigate the issue arising from the two reports and the investigation is still on going and no finding has yet been made.

In my view, the conduct of the third respondent shows that he is biased and dishonest. It further shows that the third respondent is dishonest and lacks integrity and honour, he made false statements under oath."

For purposes of convenience, we shall refer to both the main judgment and the judgment in the application for leave to appeal as "the judgments". .

[12] According to the Minister s 17 CA (1) of the SAPS Act empowers him, with the concurrence of the cabinet, to appoint the National Head of the DPCI. It provides that:

"(1) The Minister, with the concurrence of the Cabinet, shall appoint a person who is –

(a) a South African citizen;

(b) 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, as the National Head of the Directorate for a non-renewable fixed term of not shorter than 7 years and not exceeding 10 years."

Section 17CA (3) requires him, so his testimony continues, to report to Parliament on the appointment of the National Head of the DPCI. S 17CA (3) stipulates that:

"*The Minister shall report to Parliament on the appointment of the National Head of the Directorate within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.*"

He contends that in appointing Ntlemeza he complied with the provisions of section 17CA (1) and (3) of the SAPS Act inasmuch as the appointment was done with the concurrence of the Cabinet and having done so, he reported to Parliament.

[13] In his affidavit the Minister conceded that in his letter dated 2 March 2016 that he had addressed to the first applicant's attorneys, he refused to furnish them with the copies of certain documents that they had requested. There were two reasons on the basis of which he did so. Those reasons are firstly that such documents contained personal information of Major General Ntlemeza whose permission to disclose them he had not obtained while the second

reason was that the cabinet memorandum on the appointment of Major General Ntlemeza was still confidential.

[14] The Minister states in his answering affidavit dated 25 March 2016 in which he opposed Part A of this application that the appointment of the National Head of the DPCI in terms of s 17CA (1) is similar to the procedure for the appointment of the National Director of Public Prosecutions and other similar institutions such as Chapter 9 Institutions in the Constitution, in that there is no obligation to advertise the post and shortlist and interview the candidates. Notwithstanding the absence of any such obligation he decided, for the sake of transparency and competitiveness, to advertise the post, shortlist the candidates and constitute an Interview Panel which interviewed the candidates and made recommendations. The post was advertised in a national newspaper and Major General Ntlemeza was one of the candidates who were shortlisted and interviewed. According to the Minister, Major General Ntlemeza had submitted the following documents before he was interviewed and these are the only documents that were placed before the Minister and the Interview Panel:

14.1 His application form duly completed and signed by him;

14.2 Major General Ntlemeza's Curriculum Vitae;

14.3 his formal qualification documents; and

14.4 a document signed by him dealing with his disclosure about the judgments of Matojane J and the criticisms by the Judge in which he, Major General Ntlemeza, corrected the factual issues which informed the said Judge's criticisms.

14.5 The following further documents, delivered in terms of rule Rule 53 of the Uniform Rules of Court were also some of the documents placed before the Interview Panel during the interview of Major General Ntlemeza:

14.5.1 the advertisement for the position of the National Head;

14.5.2 typed list of applicants;

14.5.3 the CV of Major General Ntlemeza;

14.5.4 a two-page memorandum authored by Major General Ntlemeza which dealt with limited aspects of the main judgment and his application for leave to appeal against the judgment. He testified that in considering Major General Ntlemeza's application and the submissions he made in his documents, including his explanation on the judgments, the interview committee was unanimous in recommending Major General Ntlemeza to the post. The Minister himself approved his appointment after being satisfied about his fitness to hold office, his explanation thereof, his qualifications and experience that he was the best candidate for the job. The cabinet also concurred with the decision upon its consideration of the

same material. From the aforegoing it is clear that the judgments were not placed before the Interview Panel nor were they placed before the cabinet.

[15] In his answering affidavit to Part B of the proceedings the Minister testified, among others, as follows:

"63.1 This entire application is premised upon the remarks made in the Sibiya judgment. Those remarks are the basis upon which the applicants contend that the second respondent is not a fit and proper person to hold the office of National Head DPCI.

63.2 According to the applicants, the remarks in the Sibiya judgment were to serve as a bar in the appointment of a certain respondent. The applicants persist with this contention despite the fact that there has been no allegation pertaining to the second respondent not being a fit and proper person to hold the office of the National Head DPCI. The second respondent, as stated above, has not been provided any opportunity to deal with the aspect of his unfitness to office as such allegations do not exist.

63.3 Besides, the case of Sibiya did not deal with the issues pertaining to the fitness and propriety of the second respondent to hold office of the National Head of the DPCI. Consequently it would be irrational of me as the Minister to take a decision on a matter which has not been properly ventilated. I cannot rely on remarks made in the cause of judgment and in the exercise of my decision."

[16] In this answering affidavit the first step that the Minister did was to try and correct the factual errors that he had made in the answering affidavit in respect of Part 'A' of the application. In his second answering affidavit still the Minister does not state that copies of the judgments were placed before the Interview Panel although he has again listed some of the documents that the Interview Panel had insight into at the relevant time. To this end we are satisfied that the interview of Major General Ntlemeza continued without all the relevant documents having been placed before the Interview Panel.

[17] The semblance of the presence of the judgments that was placed before the Interview Panel was, according to the Minister, a signed memorandum by him (Major General Ntlemeza) disclosing the adverse remarks made by the Judge in his judgments in which he criticised Major General Ntlemeza. Then the Minister audaciously states that in considering Major General Ntlemeza's application and the submissions made in his documents, including the explanation on the judgments, the Interview Panel was unanimous in recommending Major General Ntlemeza to the post. Bravely he testified furthermore that he approved the appointment of Major General Ntlemeza after he had become satisfied about his fitness to hold office, his explanation, his qualifications and experience.

[18] It is plain that the Minister was content with the explanation that Major General Ntlemeza gave about the Judge's remarks. He states that what transpired from the explanation

provided by Major General Ntlemeza when interrogated on the remarks by the Judge by the Interview Panel was that the remarks were made without him having been afforded an opportunity by the Judge to address him in those issues which the Judge was concerned about. The Minister then continues and states that these were not matters which were canvased in the papers, in other words, at the material time the Judge made those remarks the Judge was not concerned with the fitness or propriety of Major General Ntlemeza. According to him these remarks came like a bolt from the blue.

[19] He states it quite explicitly that he and the Interview Panel afforded Major General Ntlemeza an opportunity to provide an explanation. He obliged and they were satisfied that the remarks made by the Judge were not findings and were also made in the circumstances where Major General Ntlemeza was not afforded an opportunity to provide him with an explanation. Mr. Mkhari, counsel for the Minister, advanced an argument that the remarks made by the Judge in the judgments were not findings and were therefore not binding. He contended that the remarks could not disqualify Major General Ntlemeza from being appointed to the National Head of the DPCI. These were, according to him, remarks that the Judges ordinarily make in writing judgments. He argued that the remarks did not originate from what the Judge was dealing with at the time he made them. At that particular time the Judge made them when he was dealing with an application for leave to appeal, so Mr. Mkhari submitted in his argument.

[20] This argument by Mr. Mkhari was encouraged by the remarks made by Tuchten J in the course of his unreported judgment in respect of Part A of this application about Matojane J's comments. Tuchten J remarked as follows in paragraph [66] of his judgment:

"[66] I do not think that in Sibiya, in relation to the application for leave to appeal and to put the order in operation pending appeal, I would have judged the second respondent as severely as did Matojane J. I think one must make some allowance for an aggrieved litigant. In addition the preposterous conclusion to which the second respondent came regarding the probity of the learned judge was probably fuelled by absurd legal advice. The second respondent, and probably one or more of his lawyers, jumped to a wholly unjustified conclusion. But that, as I see it, does not necessarily or even probably prove lack of integrity.

[67] There were other allegations in the applicants' papers designed to demonstrate that the second respondent lacked integrity. As, properly so, no reliance was placed on them, I have not dealt with them at all. I would only express hope that when and if this dispute goes further, the applicants will either back up their assertions with fact or withdraw them from the record of contention."

[21] It is to be noted that when Tuchten J made the aforegoing remarks he was not reviewing the proceedings, nor was he sitting in an appeal against, Matojane J's judgments. Any reference to the remarks by Tuchten J did not, even after he had made them, obliterate from the record

the criticisms Matojane J had levelled against Major General Ntlemeza. So the argument by Mr Mokhari is unhelpful to the Minister's case. Innocuous as these remarks seem to be, if left unchallenged they become an albatross around Major General Ntlemeza's neck. The Minister, and it is our considered opinion that he was ill-advised, chose to ignore the remarks made in the judgments. Instead he chose to accept and to rely entirely, without much ado, on an explanation, though inadequate for the purposes of the duties of the Interview Panel, of Major General Ntlemeza, and went on to assail the manner in which the Judge came to make those remarks.

[22] It was alleged specifically by the deponent to the founding affidavit that the decision to appoint Major General Ntlemeza was unlawful because the Minister had failed to take into account the relevant factors such as the judgments. The Minister acknowledged that he had read the judgments and that he was aware of the remarks the court had made in them about the character of Major General Ntlemeza. The Minister did not tender any evidence that copies of the judgments were part of the documents that were placed before the Interview Panel when Major General Ntlemeza was interviewed. By the 25th of March 2016 no mention was made of copies of the said judgments.

[23] It must be stressed that the purpose of the interview panel was to determine whether a candidate was fit and proper as envisaged by the provisions of s 17CA (1). In order to do so

it had to have all the relevant documents before it. The relevant documents in the circumstances of this case would have included copies of the judgments in question. The means to determine objectively whether Major General Ntlemeza was fit and proper must be rationally related to the objective sought to be achieved. Such objective cannot be achieved if not all the relevant documents are placed before the Interview Panel.

[24] The question now is whether failure by the Minister to place a copy of the judgments before the Interview Panel is rationally related to the objective sought to be achieved by the Interview Panel which is to recommend the appointment of someone who is fit and proper to occupy the position of a national head of the DPCI. It was not for the Minister, nor was it enough for the Minister, to read the said judgments and formulate his opinion without placing them before the Interview Panel. Both judgments had to be placed before the Interview Panel. This was a duty that fell equally upon the Minister's and Ntlemeza's shoulders to place the judgments before the panel so that the panel could make an independent and genuine opinion, without any outside influence, about Major General Ntlemeza. It was the duty of the interview panel to determine, through all the documents placed before it, whether Major General Ntlemeza was a fit and proper person. That was the proper approach. The report by Major General Ntlemeza alone was insufficient for the purposes of such a fact finding interview. The fitness and propriety of Ntlemeza was at the centre of the interview.

[25] Therefore, failure to put the judgments before the Interview Panel was to keep it ignorant regarding information of supreme relevance about Major General Ntlemeza. The question was not whether or not the Minister had read the judgments but whether or not the Interview Panel had had insight into them.

[26] The Minister was required to demonstrate that he had considered the full report of the judgments, considered any countervailing representations, properly weighed the opposing facts and reached a rational decision based upon such exercise and had assessed the merits and demerits surrounding Major General Ntlemeza's appointment. In appropriate circumstances, so it was argued by Mr Unterhalter, counsel for the applicants, he would have needed to make further investigations which included obtaining views of third parties.

[27] In paragraph [52] of the case of **Democratic Alliance v President of the Republic of South Africa and Others, 2013 (1) 248 CC,** ("the Simelane case"), which case is on point regarding the current case and which provides good guidance in this matter, the Court had the following to say about the findings that the Ginwala Commission had made in its report about Simelane:

"52. These extracts from the report of the Ginwala Commission ought to have been cause for great concern. Indeed, these comments represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's

appointment to the position of National Director. Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane's appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility."

Our well-considered view is that the case of **Walele v City of Cape Town and Others 2008(6) SA 129 CC** ("the Walele case") demonstrates the need for a decision maker to make sure that none of the disqualifying factors are present before, like in the present case, the appointment is made. For this reason it behoved the Minister to make sure that there were no disqualifying factors that prevented Major General Ntlemeza from being appointed. The Walele case dealt with the provisions of sections 6 and 7 of Building Standards Act 103 of 1977, which dealt with the power to approve building plans. In paragraph [56] at p 158 the Court made it clear that:

"[56] Indeed the construction that section 7(1)(b)(ii) requires that the decision-maker must be satisfied that none of the disqualifying factors will be triggered before approving plans, was adopted by the High Court in the instant matter and was supported by the parties before us. In its judgment, the High Court said:

"While the local authority is entrusted with the power to approve plans, it must, in a manner of speaking, act on behalf of the neighbours by ensuring that the disqualifying factors mentioned in s 7(1)(b) are not present before approving plans which otherwise comply with all applicable laws.""

According to this case, the Minister had a duty to make sure, and it was within his powers to do so, that nothing disqualified Major General Ntlemeza from being appointed. According to the court in Ex Parte Porritt 1991(3) S A 866 NPD, the Minister had to weigh up all that could be said for and against the appointment of Major General Ntlemeza and decide whether in his objective assessment he was worthy of being appointed. The Minister's decision not to take all these adverse factors into account amounted to a consent by him to approve the appointment of Major General Ntlemeza under polemic circumstances and was not a proper approach. Accordingly the Minister must get more kicks than halfpence. He could not have been satisfied that Major General Ntlemeza was a fit and proper person to be appointed as the national head of the DPCI if he did not consider all the relevant factors.

ESTABLISHMENT OF THE OFFICE OF THE DPCI

[28] The office of the DPCI is established in terms of the provisions of section 17C (1) of the SAPS Act. The SAPS Act provides in section 17C (1)(A) that the DPCI will consist of a national office and offices set up in each province. It is provided in section 17C (2) of the said Act that there will be a National Head who shall manage and direct the directorate and who shall be appointed by the Minister in concurrence with the cabinet. According to the provisions of s 17D (1) of the SAPS Act the functions of the DPCI are set out as follows:

"*(1) The functions of the Directorate are to prevent, combat and investigate-*

(a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate; subject to any policy guidelines issued by the Minister and approved by Parliament;

(aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004(Act 12 of 2004)"

[29] Section 17CA (1) of the SAPS Act prescribes the manner in which a national head of the DPCI must be appointed and the qualities that he must have. It provides as follows:

"(1) The Minister, with the concurrence of the cabinet shall appoint a person who is –

(a) a South African citizen;

(b) 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, as the National Head of the Directory."

[30] One should understand the meaning of the words *("fit and proper"*) within the context of section 9 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act") and the Simelane case. Substantially the requirements for the appointment of the National Director of Public Prosecutions in terms of the NPA Act are the same as the requirements for the appointment of the National Head of the DPCI. Section 9 of the NPA provides that:

"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."

[31] In the Simelane judgment the Court took the view that the appointment criteria the law maker has prescribed are objective; that they constitute essential jurisdictional facts and that consequently an appointee to the office of the National Director of Public Prosecution was required rationally and objectively to be fit for such office.

"[37] This conclusion addresses the differences that emerged in argument on whether the decision needs to be rational or whether the process resulting in the decision should also have been rational for an executive decision to stand. A related question, if the process is to be rationally related to the purpose for which the power has been conferred, is whether each step in the process must be so rationally related."

Referring to the matter of **Albutt v Centre for the State of Violence and Reconciliation and Others 2010(3) SA 293 (CC),** which was concerned with whether or not giving the victims or their families the opportunity to be heard, was rationally concerned with the governmental purpose in issue, the Court stated as follows in paragraph 34:

"[34] It follows that both the process by which the decision is made and the decision itself must be rational ... The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for the victims or the family members to be heard".

It continues in paragraph 36 at p.271A-C and states that:

"[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred"

One of the issues that the Constitutional Court had to traverse in the Simelane case was whether the process as well as the ultimate decision must be rational. The principle laid down in the Simelane case by the SCA is that if the process leading to the appointment is flawed, the appointment itself is irrational and invalid.

[32] It is an essential requirement of section 17CA (1) of the SAPS Act that the National Head of the DPCI be a fit and proper person with due regard to his or her experience, consciousness

and integrity, to be entrusted with the responsibilities of the office concerned as the National Head of the Directorate. The said section requires that a person who is to be appointed should be fit and proper considering the importance of the high office involved. The question becomes whether that person can be entrusted with the responsibilities of the office. By analogy certain criteria must be taken into consideration for instance, the experience, conscientiousness and integrity.

[33] In the Simelane case, the Constitutional Court accepted the approach of the Supreme Court of Appeal. In paragraph [14] of the said case this is what the Constitutional Court had to say:

"The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment."

Accordingly, even where the relevant decision maker has, in terms of the law, a discretion relating to the person to be appointed, the person who is ultimately appointed must be a fit and proper person. Section 17 (C) does not provide that the candidate must be fit and proper in the eyes of the Minister:

"[22] Second, and as the Supreme Court of Appeal correctly points out, the Act itself does not say that the candidate for appointment as National Director should be fit and proper

"in the President's view". The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as the Supreme Court of Appeal again pointed out, the section "is couched in imperative terms. The appointee 'must' be a fit and proper person."

IS LIEUTENANT GENERAL NTLEMEZA FIT AND PROPER TO HOLD THE OFFICE OF THE NATIONAL HEAD OF THE DPCI

[34] The SAPS Act empowers the Minister to appoint the Head of the DPCI. In doing so it requires of the Minister to appoint a person who satisfies objectively the criterion set forth in the relevant section 17CA (1), in other words, someone who is fit and proper; someone who can be entrusted with the responsibilities and duties that accompany the office of a National Head. The purpose of this is to ensure that the DPCI is in a position to carry out its mandate.

[35] To make sure that the relevant Minister appoints the relevant person, the legislature specifically limited the discretion that the Minister has in terms of section 17CA (1) to appoint the National Head. The legislature set out the qualities that such an appointee must have to be appointed as the head of the DPCI. To determine objectively whether a person is fit and proper, this Court would have to weigh up the conduct of the person against the conduct that is expected of a person occupying the office of that Head.

[36] The judgments are replete with the findings of dishonesty and mala fides against Major General Ntlemeza. These were judicial pronouncements. They therefore constitute direct evidence that Major General Ntlemeza lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as more important as that of the National Head of the DPCI, where independence, honesty and integrity are paramount to qualities. Currently no appeal lies against the findings of dishonesty and impropriety made by the Court in the judgments. Accordingly, such serious findings of fact in relation to Major General Ntlemeza, which go directly to Major General Ntlemeza's trustworthiness, his honesty and integrity, are definitive. Until such findings are appealed against successfully they shall remain as a lapidary against Lieutenant General Ntlemeza.

[37] The judicial pronouncements made in both the main judgment and the judgment in the application for leave to appeal are directly relevant to and in fact dispositive of the question whether Major General Ntlemeza was fit and proper if one considers his conscientiousness and integrity. Absent these requirements Lieutenant General Ntlemeza is disqualified from being appointed the National Head of the DPCI.

[38] In paragraph [51] of his unreported judgment that he handed down on the 18th of April 2016 relating to part A of his application Tuchten J had the following to say:

"Section 17CA (1) broadly requires two things; firstly that the Minister has followed a proper process in evaluating whether to make an appointment. All public power must be exercised rationally and for a proper purpose. So if the decision maker did not act capriciously or for a wrong motive or did not properly apply his mind to the question e.g. ignored relevant considerations, then in principle the manner in which the decision was arrived at would be inconsistent with the Constitution and therefore invalid. Then, secondly, the question requires that the person who is appointed be in good (i.e. not merely in the opinion, reasonable or otherwise of the decision maker) a fit and proper person with due regard to his experience, conscientiousness and integrity to be entrusted with the responsibilities of the office."

He continued in paragraph [52] and states as follows:

"Whereas here the character of a candidate for appointment to a position is relevant to the decision, the decision maker such as the Minister is not free to brush aside a considered opinion of a superior court which bears upon the very point. This observation arises not from judicial vanity but from the provisions of the Constitution. The core business of the Court is to decide dispute which can be resolved by application of the law."

There is no room to dispute Matojane J's findings.

[39] What has now come out quite clearly following the aforegoing remarks is that the Minister was aware of the remarks made in the judgments. He nevertheless took the view that they could be ignored in the exercise of his powers. The Minister simply brushed aside a considered

opinion of a superior court. The question here is not one of discretion but whether the person who has been described by such judicial pronouncement can be appointed in the face of such pronouncements. This was a quintessential example of the Minister completely ignoring and brushing aside remarks by a Court. Was the Minister entitled to ignore such judicial pronouncement? Once again one has to refer to the Simelane case. The issue in the Simelane case related to the appointment of Simelane as a director of the National Public Prosecution. The issue was whether the President's decision, in terms of which Simelane had been appointed into the office the NDPP could stand. Simelane had appeared as a witness in the Ginwala Commission. The Commission made unfavourable remarks about him. Those remarks had a direct impact on his character. In appointing him, the President had completely ignored such findings. The Constitutional Court found that those remarks that Ginwala had made in the Commission constituted evidence that was of supreme relevance to Simelane's credibility, honesty and integrity and conscientiousness. It found that ignoring such remarks nullified the ultimate decision.

[40] In the same Simelane matter the Constitutional Court stated at paragraph [6] page 257E-F that " *the Supreme Court Of Appeal SCA considered that the President erred in four respects and that those mistakes rendered the process by which the decision to appoint Simelane had been taken, and, consequently, the decision itself irrational and invalid.*" The second error was stated as follows:

"Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Mr Simelane was a fit and proper person for appointment justified the conclusion that he was indeed a fit and proper person. The correct approach, according to the Supreme Court of Appeal, was for the President to determine positively whether Mr Simelane was a fit and proper person. This the President did not do."

In his answering affidavit the Minister stated that there has been no allegation pertaining to the second respondent not being a fit and proper person to hold the office of the National Head of the DPCI. This was the evidence of the Minister in paragraph 63.3 of his answering affidavit. It is not clear what the basis of this statement was because the judgments depicted the qualities of General Ntlemeza in a different light.

[41] It is contended by the applicants that the Minister, in making a decision to appoint Ntlemeza as the National Head of the Directorate for Priority Crime Investigation, failed to take into account all the relevant factors, most notably the judicial pronouncements in the judgments that cast a serious doubt on the fitness and propriety of Major General Ntlemeza to hold public office. On that basis it is contended by the applicants that the appointment of Major General Ntlemeza was irrational and unlawful and falls to be set aside. The applicants submitted that the decision to appoint Major General Ntlemeza was irrational and unlawful on the basis that these findings of the Court were ignored or were not properly considered.

According to the applicants these judicial announcements establish that Major General Ntlemeza:

41.1 acted arbitrarily and in bad faith;

41.2 refused, alternatively failed, to take the Court into his confidence and provided true reasons for his decision in relation to Major General Sibiya;

41.3 violated constitutional rights in the process;

41.4 was biased, dishonest, lacked integrity and lacked honour;

41.5 had a contemptuous attitude towards the rule of law and the principle of legality and transparency; and

41.6 refused to abide by or implement orders of Court, which are binding.

The bedrock of the applicant's case is that none of these findings was properly scrutinised by the Minister or the cabinet and the serious doubts in the relation to the propriety for office of Major General Ntlemeza was thus not addressed.

[42] In the applicants' view the remarks by the Judge quite clearly show that the Major General Ntlemeza is not fit and proper to hold the office of the National Head. It would appear that the Minister failed to properly evaluate the remarks made in the judgments and to appreciate the serious doubt on his unfitness and impropriety to hold the office of the National Head of the DPCI.

[43] Three of the issues that this Court was called upon to decide were firstly whether or not the Minister and the Cabinet abused their statutory and constitutional discretion in respect of the appointment decision; secondly, whether the Minister and the Cabinet took into account all the relevant considerations and facts in arriving at the appointment decision, and thirdly, whether or not they took into account the relevant considerations and facts, and fourthly, whether the Minister and the Cabinet could lawfully conclude that Major General Ntlemeza was a fit and proper person to be appointed as the National Head. In order to determine what the role of the Cabinet was in the appointment of the National Head one merely has to have regard to the provisions of s 17CA (3). This section provides that:

"The Minister shall report to Parliament on the appointment of the National Head of the Directorate within fourteen days of the appointment if Parliament is then in session or, if Parliament is not in session, within fourteen days after the commencement of its next ensuing session."

As we indicated earlier, the Cabinet has not filed any papers.

[44] From the uncontested evidence of the Minister it is clear that the cabinet is not involved in the interview of any candidate. This duty falls squarely within the functions of the Minister and his Interview Panel. The applicants have not produced any evidence to show the extent of the Cabinet's involvement in the appointment of the National Head. That the Cabinet does not sit in the Interview Panel is evident from s 17CA (3) that requires the Minister to report to

Parliament. The Cabinet cannot sit in the interview panel, appoint with the Minister a National Head and thereafter report to Parliament. This is highly unlikely.

[45] Secondly, the uncontested evidence of the Minister is that he submitted the documents that the Interview Panel had before it when it interviewed Major General Ntlemeza to Cabinet. It is highly unlikely that Cabinet could sit on the Interview Panel and still receive, this time from the Minister, the same documents that they had during the interview of any candidate. Finally, there is no evidence to contradict the evidence of the Minister that he submitted all the documents which the interview panel had during the interview of Major General Ntlemeza to the Cabinet. The Minister did not testify that the judgments in question were among these documents. The applicants themselves did not produce any evidence that the Minister forwarded copies of the judgments to Cabinet. Finally, the applicants themselves seek to set aside a decision taken by the Minister and not the Cabinet. Accordingly, there is no merit in the accusations levelled against the Cabinet in this application.

[46] Finally, the application is granted and the following order is made:

1. The decision of the Minister of 10 September 2015 in terms of which Major General Ntlemeza was appointed the National Head of the Directorate of Priority Crimes Investigations is hereby reviewed and set aside.

2. The first and second respondents, in their official capacities, are hereby ordered to pay the applicant's costs, including the costs consequent upon the employment of two counsel, the one paying and the other to be absolved.

It is so ordered

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree

N. KOLLAPEN
JUDGE OF THE HIGH COURT

I agree

S.A.M. BAQWA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. DN Unterhalter (SC)*
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Counsel for the first respondent:	*Adv. WR Mokhari (SC)*
	Adv. TB Hutamo
Instructed by:	*The State Attorney*
Counsel for the second respondent:	*Adv. P. Seleka (SC)*
	Adv. R Tulk
Instructed by:	*Hogan Lovells (South Africa) Inc.*
Date Heard:	*6-7 December 2016*
Date of Judgment:	*17 March 2017*