



**REPORT OF THE ENQUIRY INTO THE FITNESS OF  
ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF  
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**NOVEMBER 2008**

# REPORT OF ENQUIRY INTO NDPP

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JULY 2008

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JULY 2008

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## **References to Members of the Executive**

In this Report where reference is made to the 'President', it is a reference to former President Thabo Mbeki; where reference is made to the Minister, it is a reference to the former Minister of Justice and Constitutional Development, Ms Brigitte Mabandla; and where reference is made to the Minister of Safety and Security, it is a reference to the former Minister of Safety and Security, Mr Charles Nqakula.

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## **EXECUTIVE SUMMARY**

1 This Enquiry was established in terms of s. 12(6)(a) of the National Prosecuting Authority Act No 32 of 1998 ("the Act"), following the suspension of Adv Vusi Pikoli ("Adv Pikoli") from office as the National Director of Public Prosecutions ("NDPP") by the President on 23rd September 2007.

2 The terms of reference dated 3 October 2007 identified the issues to be determined by the Enquiry as:

*"2.1 The fitness of Advocate V Pikoli, to hold the office of National Director. In particular:*

*"2.1.1 Whether he, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic.*

*"2.1.2 Whether he, in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the*

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*national security interests of the Republic, as contemplated in section 198 of the Constitution, as well as the Prosecution Policy.*

*"2.2 Whether the relationship between the National Director and the Minister has irretrievably broken down. In particular,*

*"2.2.1 Whether he failed to appreciate the nature and extent of the Constitutional and legal oversight powers of the Minister over the prosecuting authority;*

*"and such other matters as may relate to the fitness and propriety of the National Director to hold office."*

- 3 Whilst the suspension or removal of the NDPP from office is statutorily regulated, the Act does not provide any guidance on the nature of such an enquiry. Being the first such enquiry conducted under the Act and there being no precedent to follow, I determined rules and procedures in the context of the Act and the terms of reference, after consulting the parties. The intention was that the process should be investigative and inquisitorial rather than adversarial and accusatorial. Nevertheless some

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aspects of a judicial process did feature in this Enquiry. We also endeavoured to make the work of the Enquiry as open and transparent as possible. The rules of the Enquiry were framed in a way that severely limited the classification of submissions and documents, and enabled the hearings to be largely conducted in public.

- 4 The Rules provided for the submission of written documentation by the parties covering the matters raised in the terms of reference. The Enquiry received Government's original submission in October 2007, and further and replying submissions in January and February 2008 respectively. The submissions included affidavits from the Honourable Minister of Justice and Constitutional Development, Ms Mabandla; the Honourable Deputy Minister of Justice and Constitutional Development, De Lange; the Director General in the Presidency, Rev Chikane; the advisor to the Presidency, Adv Gumbi; the Director General of the Department of Justice and Constitutional Development, Adv Simelane; the Director General of the National Intelligence Agency, Mr Manzini; the Deputy Director General of the National Intelligence Agency, Mr Fraser; the Deputy National Commissioner

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of Police, Mr Williams; and the Assistant Commissioner in the South African Police Service, Mr Jacobs.

5 Adv Pikoli filed his submission to the Enquiry in February 2008. His submission included his sworn statement as well as affidavits from the Regional Head of the Directorate of Special Operations ("DSO"), Gauteng, Adv Nel; the Investigating Director of the DSO, Adv Mngwengwe; a Deputy National Director of Public Prosecutions, Mr Ramaite; a Deputy Director of Public Prosecutions, Mr Pretorius; the Special Director of Public Prosecutions, Ms Pillay; the Director of Public Prosecutions, Witwatersrand Local Division, Adv de Beer; and Mr Small-Smith, an attorney. Adv Pikoli also submitted correspondence and documents related to the issues raised in the Enquiry.

6 An assessment of the submissions from the parties, together with their responses to some specific queries that subsequently I raised with them, convinced me that there were disputes of fact that could not be resolved on the papers alone. Government maintained that the disputes of fact were not material to any finding I was required to make under

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the terms of reference. It was nevertheless determined that there should be hearings at which oral evidence be presented. Given the level of public interest in this Enquiry I also decided that the hearings be held in public, unless the evidence to be tendered concerned matters which were *sub judice*, pending before our courts, otherwise protected from public disclosure or which may impact on national security.

- 7 The hearings were conducted on eleven days between 7 May 2008 and 1 August 2008 in Johannesburg. Evidence was tendered by seven witnesses, and both parties presented closing arguments to the Enquiry. The witnesses for Government were the Honourable Deputy Minister of Justice and Constitutional Development, Hon De Lange; the Director General in the Presidency, Rev Chikane; the Director General of the Department of Justice and Constitutional Development, Adv Simelane; the Director General of the National Intelligence Agency, Mr Manzini; and the Deputy Director General of the National Intelligence Agency, Mr Fraser.
- 8 Adv Pikoli gave evidence and also called the evidence of the Regional Head of the DSO, Gauteng, Adv Nel.

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9 In its written submissions and the oral evidence given by its witnesses Government made a wide range of allegations against Adv Piloli to demonstrate that he is no longer a fit and proper person to hold office as the NDPP. Some of these allegations are quite tangential to the terms of reference as well as the reasons for the suspension articulated in Adv Pikoli's letter of suspension. These allegations are often also far removed in time from the date of the suspension. The nature and content of the allegations against Adv Pikoli also changed during the course of the Enquiry.

10 In considering the allegations and complaints against Adv Pikoli, the Enquiry duly considered the concept of fit and proper with regard to the attributes specifically required of an NDPP; the concepts of the final responsibility of the Minister and its relationship with the prosecutorial independence of the NDPP; and the imperative of co-operative government within the context of our constitutional dispensation as articulated in s.41 of the Constitution.

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11 Government's allegations with regard to Adv Pikoli's conduct and the findings that have been made are as follows:

11.1 Government alleged that the relationship between the Minister and Adv Pikoli had broken down irretrievably.

This allegation has not been proven.

11.2 It was alleged that Adv Pikoli should not have authorised plea and sentence agreements with the persons implicated in the alleged murder of Mr Brett Kebble and should rather have prosecuted all suspects.

Government did not show that Adv Pikoli, in exercising his discretion of whether or not to prosecute, did not take heed of the threat posed by organised crime to national security.

11.3 Government alleged that Adv Pikoli should not have concluded plea and sentence agreements with some of the alleged Equatorial Guinea mercenaries, and should not have authorised the prosecution of the other alleged Equatorial Guinea mercenaries. It was alleged that the plea and sentence agreements with Mr Agliotti and Mr Nassif did not take due account

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of the prosecution policy and particularly the public interest and the national security interests of the Republic.

Government failed to produce evidence to show that the cases of plea and sentence agreements it cited had contravened the prosecution policy.

- 11.4 Government alleged that Adv Pikoli sought to pursue the listing of the DSO as a public entity under the Public Finance Management Act ("PFMA") despite the Minister's concerns that it was a policy matter that required discussion by Cabinet.

Adv Pikoli was legally obliged to inform Treasury that the DSO was not listed as a public entity, but he should have informed the Minister before doing so.

- 11.5 Government complained that Adv Pikoli failed to account to the Director General of the Department of Justice and Constitutional Development, and thereby prevented the latter from executing his accounting responsibilities.

Adv Pikoli was not obliged to account to the DG: Justice in the manner alleged by

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Government.

11.6 Government alleged that Adv Pikoli failed to inform the Minister of the information that came into the possession of the DSO and led to the preparation of the Browse Mole Report, and also that he failed to stop the DSO from pursuing a matter that was outside its mandate.

Adv Pikoli was obliged to inform the Minister of the information that emerged from the Browse Mole investigation in March 2006, and he should have ordered the DSO to stop any further involvement in the matter.

11.7 Government complained that Adv Pikoli failed to inform the Minister of the alleged conspiracy to assassinate the Malawian President, and that the involvement of the DSO in the Malawian investigation constituted intelligence gathering and fell outside its mandate.

Adv Pikoli was obliged to inform the Minister of the plot to assassinate the Malawian President as soon as he became aware of it. The NPA dealt with the matter in terms of the law, and did not investigate an intelligence matter

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outside its mandate.

- 11.8 Government alleged that Adv Pikoli did not prevent a member of the DSO from engaging in unregulated contact with foreign intelligence services.

Adv Pikoli could not be held responsible for interaction by members of the DSO with foreign intelligence services that occurred before he took office or of which he was unaware through no fault on his part.

- 11.9 Government alleged that Adv Pikoli should have informed the Minister before applying for search and seizure warrants at the Union Buildings and Tuynhuys, and should have ensured that adequate measures were in place to prevent any security breaches during the execution of the warrants.

Adv Pikoli failed to inform the Minister and the President prior to applying for the search and seizure warrants at the Union Buildings and Tuynhuys in August 2005, and failed to ensure that proper security measures were followed during this operation.

- 11.10 Government complained that Adv Pikoli failed to inform the Minister and the President prior to

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applying for the warrants of arrest and search and seizure against the National Commissioner of Police, and that he failed to exhaust the options for accessing information from the SAPS put in place by the Presidency, which information was required by the DSO for its investigation of Operation "Bad Guys".

Adv Pikoli should have informed the Minister before applying for arrest and search and seizure warrants against the National Commissioner of Police. He also failed to exhaust all the options available through the facilitation of the Presidency to access information held by SAPS.

12 Adv Pikoli asserted that the reason for his suspension was to stop the prosecution of the National Commissioner of Police. This view could not be sustained on the evidence before the Enquiry.

13 I have found that Government has failed to prove many of these allegations and has not demonstrated that Adv Pikoli is no longer fit and proper to hold office as the NDPP. The grounds advanced by Government for

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the suspension of Adv Pikoli have not been established before the Enquiry.

14 I am not of the opinion that there has been an irretrievable breakdown in the relationship between the Minister and Adv Pikoli. However, their interaction has been marred by differences in understanding of the respective duties and responsibilities of each office with regard to the prosecuting authority. These differences can be overcome though collegial discussion and the establishment of formal channels of communication on operational and policy matters. Moreover, I find it probable that the differences in their respective understandings were precipitated by the DG: Justice's misconception of his authority over the NPA, which influenced his reports to the Minister.

15 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

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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.

16 I have also found issues of concern in the capacity and understanding of Adv Pikoli to carry out the responsibilities of the office of NDPP. These relate primarily to his understanding of issues pertaining to national security and his lack of appreciation of the sensitivities of the political environment in which the NPA needs to operate, which sensitivity would not be incompatible with his prosecutorial independence.

17 My most serious concerns arise from the evidence of the discussions between the President and Adv Pikoli at their meetings just prior to Adv Pikoli's suspension. Adv Pikoli also did not give due consideration to the actions the President might need to take in order to defuse a potential security crisis and instability and to preserve the country's international reputation. He did not take seriously the President's concerns about the mood of the SAPS and their possible reaction to the arrest of the National Commissioner; and even challenged the President's assessment of the time he would require

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to manage the situation. Had this been presented as a reason for the suspension, when his conduct would have held a real risk of undermining national security, I would not have hesitated to find the reason to be legitimate. However, these were not among the reasons put forward by Government before this Enquiry.

18 The recommendations that I make are aimed at facilitating a more co-operative approach between the NDPP and the Minister of Justice and Constitutional Development as the political head with final responsibility over the national prosecuting authority. It is to be hoped that the implementation of these measures will create a more harmonious relationship between the offices of the NDPP and that of the Minister, and enhance the capacity of the prosecuting authority to execute its functions.

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## INTRODUCTION

1 Advocate VP Pikoli was suspended as the National Director of Public Prosecutions (NDPP) with immediate effect by President's Act No 302 dated 23 September 2007.

2 The National Prosecuting Authority Act No 32 of 1998 ("the Act") Section 12(6)(a), empowers the President to suspend the NDPP from office pending an enquiry into his fitness or otherwise to hold office.

3 I was appointed by President Thabo Mbeki to conduct such an Enquiry (into the fitness or otherwise of the National Director of Public Prosecutions to hold office) by President's Act No 312 dated 28 September 2007.

4 The terms of reference dated 3 October 2007 identified the issues to be determined by the Enquiry as:

*"2.1 The fitness of Advocate V Pikoli, to hold the office of National Director. In particular:*

*"2.1.1 Whether he, in exercising his discretion to prosecute offenders, had sufficient regard to the*

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*nature and extent of the threat posed by organised crime to the national security of the Republic.*

*"2.1.2 Whether he, in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the national security interests of the Republic, as contemplated in section 198 of the Constitution, as well as the Prosecution Policy.*

*"2.2 Whether the relationship between the National Director and the Minister has irretrievably broken down. In particular,*

*"2.2.1 Whether he failed to appreciate the nature and extent of the Constitutional and legal oversight powers of the Minister over the prosecuting authority;*

*"and such other matters as may relate to the fitness and propriety of the National Director to hold office."*

- 5 I was appointed to conduct the Enquiry; to determine the rules of the enquiry; to determine the seat of

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the Enquiry and to submit a report which report is to be submitted with all the documents that were filed with the Enquiry. This is the report.

6 I attach under a separate cover all the documents that were submitted to the Enquiry - these include the various written submissions from the parties as well as third parties.

7 To facilitate the reading of the report I have also elected to use a style that is reader-friendly and for that reason I refer in a separate addendum to all the provisions of the Constitution, various legal statutes and legal authorities which I have referenced in the compilation of the report.

8 On 6 October 2008 I appointed Adv Ishmael Semanya SC and Mr Dines Gihwala, Chairman of Cliffe Dekker Hofmeyr, as legal advisors to the Enquiry. I had previously appointed Mr Kasper Hahndiek and Mr Lawson Naidoo as Secretary and Deputy Secretary to the Enquiry respectively. I am greatly indebted to these colleagues for the assistance I have received from them.

9 I was informed of the appointment of Deneys Reitz Inc. as Adv Pikoli's legal representatives by letter

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from Deneys Reitz dated 16 October 2007, and this was confirmed by letter dated 22 October 2007 from Adv Pikoli to the Secretary to the Enquiry. We were subsequently advised by Deneys Reitz that Advocates Wim Trengove SC, Tim Bruinders SC and Benny Makola were also retained to advise and to represent Adv Pikoli. It was brought to my attention that the Department of Justice and Constitutional Development having initially agreed to cover the costs of three counsel for Adv Pikoli, subsequently informed Adv Pikoli that they would only cover the costs of one Senior Counsel and one junior. Following my intervention with the Minister it was agreed that the costs of three counsel (two Senior Counsel and one junior) would be met by the state.

10 On 14 November 2007 Government appointed the State Attorney, Johannesburg, as its legal representative. The State Attorney retained the services of Advocates Kgomotso Moroka SC, Seth Nthai SC, Horace Shozi and Mahlape Sello to advise and to represent the Government.

11 I take this opportunity to express my gratitude to the legal teams that represented the Government and Adv Pikoli in this Enquiry. Their co-operation and

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submissions were invaluable in helping me to discharge my mandate. I must also express my appreciation and thanks to the Mayor of Johannesburg for making available a venue for the public hearings, and the staff at the City of Johannesburg who provided exceptional service during the hearings.

### **The Nature of the Enquiry**

12 The suspension or removal of the NDPP from office is statutorily regulated. While protecting the independence of the prosecuting authority, the Act gives the President the power to provisionally suspend the NDPP from his or her office pending an enquiry into his or her fitness to hold such office. Save that the President has the power to have such enquiry in a manner that he or she deems fit, the Act is silent as to the process or procedure that such an enquiry is to follow.

13 This is the first enquiry conducted in terms of the NPA Act, and there are no precedents for the procedures or rules. Hence I had to consider what the Act and terms of reference required and the implications in determining the rules and procedures.

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14 Clearly it is not an enquiry governed by the Commissions Act No. 8 of 1947 nor is it a judicial enquiry in the general sense in which that notion is used or understood. For instance, I did not have power to subpoena witnesses and to compel their attendance or their assistance to the enquiry. I also did not find myself bound to apply the rules of evidence integral to a judicial process. My stated intention was to have an open and transparent process. To this end, I made sure that the parties were treated as fairly as possible and were given an opportunity to present their evidence and submissions as best as they wanted. It was also important, in my view, to conduct the enquiry in a manner that was open to public scrutiny except where the interest of national security would be imperilled by such a course.

15 Nor was the enquiry simply a disciplinary hearing. The reading of the relevant provisions of the Act relating to the provisional suspension of the NDPP pending an enquiry reveals a unique process. There are elements of the process, however conceived, that point to a disciplinary type enquiry when one reads the bases provided in the Act to justify the

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suspension and removal of the NDPP from office.

Section 12(6) (a) of the Act provides:

*"The president may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-*

*(i) for misconduct;*

*(ii) on account of ill-health;*

*(iii) on account of incapacity to carry out his or her duties of office efficiently; or*

*(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."*

16 However, the terms of reference as framed exclude any probe into the question whether the NDPP is or may be guilty of misconduct. Excluded also from the enquiry is an investigation whether the NDPP stands to be removed on account of continued ill health or on

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account of incapacity to carry out his duties of office efficiently.

17 The narrow area of investigation identified in the terms of reference required a *sui generis* enquiry to consider whether the incumbent National Director remained "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". (The Act, section 9(1)(b))

18 This required that the Enquiry would need to consider the specific qualities required of the NDPP. One could not simply apply the criteria used for admission of advocates in terms of the Admission of Advocates Act No 74 of 1964 as both parties did in their submissions to me.

19 The process needed to be investigative: a fact-finding exercise which was neither accusatorial nor adversarial. Hence it could not simply be confined to issues raised as argued by the parties.

20 I had to determine how to conduct the Enquiry based on this understanding. However, while charting new territory, it was necessary that the process followed was guided by the principles enshrined in the

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Constitution, the tenets of natural justice and fairness, and was open and transparent taking into account both the public interest and national security. As the process developed it was always discussed with and agreed by both parties.

21 Initially, I succumbed to the pattern of judicial procedures, with parties making submissions and calling witnesses, rather than the Enquiry identifying issues on which clarification was required. This trend was identified at a stage when it was impossible to reverse in fairness to both parties.

22 As a result there were aspects of this Enquiry that may have taken an adversarial complexion - for instance, I allowed the parties to prepare and present evidence of their witnesses, cross-examine "opposing" witnesses and received "closing" argument. However the intention was always to have a process that was inquisitorial and investigative in nature rather than accusatorial and adversarial.

### **The Process of the Enquiry**

23 I initially requested Government to submit a report to me detailing the circumstances and events leading

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up to the suspension of Adv Pikoli. This report was submitted to me on 18 October 2007 and was immediately made available to Adv Pikoli.

24 There then followed extensive correspondence between and with the parties in which Adv Pikoli sought further particulars in respect of some of the allegations and averments made in the Government submission. I also requested additional information from Government on some matters. Understandably Adv Pikoli advised me that he would not be in a position to finalise his response to the Government submission until he received the additional information that had been requested from Government. These exchanges marked the beginning of the delays in the work of the Enquiry.

25 I called a Pre-Enquiry meeting with both parties on 26 November 2007 to discuss rules, processes and timeframes for the Enquiry. I invited the parties to make proposals on these rules, processes and timeframes prior to the meeting. Having considered their proposals I tabled draft rules and timeframes for consideration at the meeting. These were developed in accordance with the principles enshrined in the Constitution and the rules of natural justice

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to allow for a fair, equitable and impartial enquiry. I also proposed that the process should be transparent and open subject only to any prevailing interests of national security as may arise. The final Rules and Timeframes were then circulated to the parties on 11 December 2007, and to the media.

- 26 The Rules provided inter alia that submissions:
- 26.1 Should include statements on oath by persons who are able to depose to any factual allegations made in the submissions; and
- 26.2 Should be separated into sections for those parts which are deemed Confidential, Secret or Classified, and the basis for such classification.
- 27 Government had classified its original submission dated 18 October 2007 as "secret" without providing the basis on which such classification was determined. By letter of 7 February 2008, Government conceded that all documents filed in its submissions were unclassified except for the affidavit by the Director General of the National Intelligence Agency (NIA) which was classified as "Top Secret".
- 28 The Rules made further provision that after receipt of the submissions, the Chairperson was authorised to

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call for oral evidence on any relevant aspect of the terms of reference, and call upon any compellable person to give evidence.

29 Initially the Timeframes were set as follows:

15 January 2008	Government to file its submissions
31 January 2008	Adv Pikoli to file his submission
31 January 2008	Third parties to file submissions
12 February 2008	Government's submission in reply
25 Feb-7 Mar 2008	Hearings, if any.

30 On the day before the Government's submissions were due the State Attorney requested an extension of time to deliver this further submission. Having expressed my dissatisfaction that the request for an extension was made at the last minute, I reluctantly granted an extension until 25 January 2008. In the event Government delivered its submissions on 16 and 17 January 2008.

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31 The timeframes for the Enquiry were accordingly revised:

15 February            Adv Pikoli to file his submission

25 February            Government's replying submission

32 I invited submissions from specific third parties requesting them to address the terms of reference and particularly:

32.1 the exercise of discretion by the NDPP to prosecute offenders, enter into plea bargain arrangements or grant immunity from prosecution to suspects allegedly involved in organised crime, with particular regard to the public interest and the national security interests of the Republic; and

32.2 the role and status of the National Prosecuting Authority and the NDPP, and the relationship between the Minister of Justice and Constitutional Development and the NDPP, in the context of the legislative and constitutional obligations placed on the Minister and the NDPP.

33 Responses were received from the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) and Mr. Mervyn

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Bennun, Honorary Research Associate at the University of Cape Town (UCT). The International Association of Prosecutors (IAP) asked to make a submission to the Enquiry and I acceded to their request.

34 All submissions from the parties were duly received by 25 February 2008. Having considered these, on 3 March 2008 I directed the parties to forward further written clarification in respect of three specific issues as follows:

34.1 whether Adv Pikoli informed the Minister or the President of the NPA's intention to apply for the warrant of arrest against the National Commissioner of Police;

34.2 the literal meaning of the letter dated 18 September 2007 from the Minister to Adv Pikoli [VP12]; and

34.3 if the investigation and the production of the Browse Mole Report are outside the mandate of the DSO, what are the implications for Adv Pikoli's fitness to hold office.

35 In a Notice dated 13 March 2008 I informed the parties that their written submissions revealed that there were disputes of fact, and indicated to the

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parties that in the event that any such matters are decisive in any of the determinations I am required to make under the terms of reference, I may call for further clarification or oral evidence.

36 I considered it appropriate to hold hearings to enable the parties to present oral argument of their cases and to generally address me on the issues raised by the terms of reference. I therefore convened a meeting of the parties on 19 March 2008 at which the Rules, Format and Procedure for the hearings were finalised. I consciously decided to limit the hearings to the presentation of argument by the parties rather than the leading of evidence. The Government had maintained that there were no material disputes of fact. In view of the public interest in the work of the Enquiry both parties agreed to public hearings. Government and Adv Pikoli then submitted their heads of argument on 4 and 11 April 2008 respectively.

37 After reviewing all the submissions, including the parties' heads of argument, it became evident that some of the material facts remained in dispute. In my directions to the parties dated 23 April 2008 I advised the parties that I was of the view that these

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disputes could not be resolved without the hearing of oral evidence and that they should present such evidence at the hearings. I therefore determined that the hearings would include testimony from witnesses as well as legal argument.

38 I indicated that the parties should address the following disputes of fact during the hearings:

38.1 whether the relationship between the Minister and Adv Pikoli has irretrievably broken down;

38.2 whether the reason for the suspension of Adv Pikoli was informed by his decision to arrest and prosecute the National Commissioner of Police;

38.3 whether the plea and sentence agreements with the alleged Equatorial Guinea mercenaries were proper;

38.4 whether the prosecution of some of the alleged Equatorial Guinea mercenaries was proper;

38.5 whether the plea and sentence agreement with Mr Agliotti was proper;

38.6 whether the plea and sentence agreement with Mr Nassif was proper;

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- 38.7 whether the plea and sentence agreements with the persons implicated in the Brett Kebble murder were proper;
- 38.8 whether Adv Pikoli was obliged to inform the Minister and the President that he intended to apply for the warrant of arrest for the National Commissioner of Police;
- 38.9 whether Adv Pikoli was obliged to inform the Minister and the President that he intended to apply for the search and seizure warrants at the Union Buildings and Tuynhuys;
- 38.10 whether persons without security clearance were used in the execution of the search and seizure warrants at the Union Buildings and Tuynhuys;
- 38.11 whether Adv Pikoli is obliged to account to the Director General of the Department of Justice and Constitutional Development;
- 38.12 whether Adv Pikoli failed to heed the Minister's instruction not to pursue the listing of the DSO as a public entity under the PFMA;
- 38.13 whether the involvement of the DSO in the Malawian investigation was proper; and

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38.14 whether the involvement of the DSO in conducting the Browse Mole investigation was proper.

39 I also directed a letter to the State Attorney on 27 June 2008 requesting that either the DG: NIA or his Deputy address, during the hearings, the nature of the environmental assessment that needs to be conducted in respect of the arrest and / or search of high profile persons.

40 I invited the parties to indicate which witnesses would be called at the hearings to address these disputed aspects of the evidence. I pointed out to the parties that in the event a fact remained in dispute and no oral evidence was led in respect of that issue, the party seeking to assert that fact would stand at risk to have an adverse finding made against it on that point.

41 I must emphasise that the analysis of the evidence was not done on the basis of any onus. I approached the evidence on whether any aspect relevant to the terms of reference had been established or not without reference to any party bearing the onus to establish any aspect. Where the objective facts supported a particular conclusion relevant to any

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particular term of reference, I have gone ahead to make that finding. I have given due weight to the evidence of the witnesses that elected to provide oral evidence and be cross-examined in relation to a contested assertion made on affidavit by a person who had elected not to testify. I have also accepted where appropriate the uncontested evidence tendered on affidavit relevant to any finding that I made.

42 In general terms, therefore, I have looked at each and every complaint; analysed how each complaint was framed in the written submissions; how the complaint was answered; whether there was any reply; what oral evidence was given in each instance; what each of the respective parties argued were proper findings to be made on each term of reference; and finally made a determination on whether or not the probabilities could support a particular finding.

43 I assessed the evidence presented to me through the prism of what would reasonably be expected from someone occupying the position of NDPP and how in particular that individual should carry out those responsibilities. In this regard I would focus on the responsibilities to apply strict security measures by implementing government protocols such as the Minimum

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Information Security Standards (MISS) to the NPA; being aware of the broader public interest and national security concerns in the exercise of the functions of the office; and his awareness of the ramifications of the actions of the NPA particularly where the conduct of the NPA would impact on other organs of state in their execution.

### **Public Access to Submissions by the Parties**

44 The Enquiry was initially approached on 24 October 2007 by Independent Newspapers, represented by attorneys Webber Wentzel Bowens, in terms of the Promotion of Access to Information Act No 2 of 2000 ("PAIA") to make available a copy of the Government's original submission. I adopted the position that the Enquiry was not a public or private body within the meaning of PAIA and could therefore not entertain the request. I was also of the view that the submissions were the property of the party making the submission and that the request should be addressed to that party. I advised the parties that they must themselves decide if they wished to disseminate their submissions and cautioned them to take into consideration issues relating to matters that may be *sub judice*, pending in our courts or by law not open

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to public disclosure. The parties took differing positions in respect of making their submissions public. Shortly after the commencement of the public hearings Adv Pikoli made available to the media most of his submissions, excising those portions that concerned matters that are *sub judice* or which may impact on national security. Government did not make available any of its submissions to the media.

**PROSECUTORIAL INDEPENDENCE & MINISTERIAL  
OVERSIGHT**

45 The Constitution in S. 179) (1) provides:

*"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; ..."*

46 Hence the prosecuting authority is empowered to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings. Whilst leaving it to national legislation to flesh out how that power is to be exercised, S. 179(4) of the Constitution requires that *"national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice"*.

47 The reading of the Constitution and the Act as well as the writing of scholars shows that the prosecuting authority, despite being part of the executive, is

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designed to be protected against any outside influence. For instance, whereas the appointment of the NDPP is made by the President acting as head of the National Executive, his removal from office has been statutorily regulated as outlined elsewhere in the report. The fact that the President cannot remove the NDPP from office without the concurrence of Parliament is one indication that the Constitution and the Act have insulated the NDPP from wanton partisan, political or corrupting influence or manipulation by anyone. The bases for the removal of the NDPP from office have been circumscribed to those grounds outlined in the Act. Unless there is a justification for the removal of the NDPP from office on any of the specified grounds the position of the NDPP is beyond any impeachment. The Act also provides a guaranteed tenure of office for the NDPP, namely ten years. The remuneration, allowances and other terms and conditions of service and service benefits of the NDPP are, in terms of the Act, determined by the President. The Act provides that the salary of the NDPP shall not be less than the salary of a Judge of the High Court. The Act further makes it a criminal offence to interfere with, hinder or obstruct the prosecuting authority or any member

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thereof in the performance of their functions [s. 32(1)(b)]. The Legislature has provided that obstructing, hindering or interfering with the prosecuting authority in the performance of its functions is an offence punishable by an unlimited fine, imprisonment for up to 10 years, or both.

48 The strictures that the Constitution and the Act place on everyone not to interfere, hinder or obstruct the exercise of the powers entrusted to the prosecuting authority clearly indicate that our constitutional democracy has placed a special emphasis on the prosecuting authority to be able to exercise its functions without any fear, favour or prejudice.

49 I did not find any resistance by either party in these proceedings to the notion that the prosecuting authority enjoys, under our law, the independence to exercise its powers and to perform its functions without fear, favour or prejudice. The legislation governing the judicial review of administrative actions and decisions specifically exempts any decision to prosecute or not to prosecute from judicial review. This must mean that the discretion of the NDPP to prosecute or not to prosecute is one

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that must be exercised by him or her without any hindrance.

50 At the same time s. 179(6) of the Constitution provides that "*the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority*". This duty and power is echoed in the Act with a qualification that the exercise of the final responsibility over the prosecuting authority must be in accordance with the provisions of the Act [s.33]. Suggestions that there is no relationship or role for the Minister in relation to the National Prosecuting Authority are mischievous or at best ill informed. However, the notion of "final responsibility" is not defined in the Act.

51 Much of the focus of South African scholars, jurists and media has been on prosecutorial independence. Sufficient attention has not been paid to the requirement of democratic accountability of the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability. Further, scant attention has been paid to the nature, content and ambit of the

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"final responsibility" of the Minister, and even less to the relationship between this responsibility and the prosecutorial independence of the NDPP.

52 The challenge is to reconcile prosecutorial independence with the constitutional provision that a Cabinet Minister must "*exercise final responsibility over the prosecuting authority*". In order to arrive at an understanding of what this would involve in practice, I start from the premise that the Constitution locates the prosecuting authority as part of the executive. It does not have the distinct status accorded to the judiciary or that provided to the Chapter 9 State Institutions Supporting Constitutional Democracy. One cannot be "independent" of an arm of government of which one is a part and under whose political authority one falls. The independence of the prosecuting authority is limited to the execution of its functions, importantly, of deciding whether to prosecute or not to prosecute a particular offender.

53 Neither the Constitution nor the Act use the term "independence" to refer to the exercise of the functions of the prosecuting authority, but the Constitutional Court in the *Certification case* stated

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in paragraph 146 of its judgment that clause 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".

54 The Hon. Deputy Minister of Justice, De Lange was the Chairperson of the Portfolio Committee of the National Assembly that processed the NPA Bill before it was enacted. In his affidavit submitted to the Enquiry he says:

*"Whilst recognising that the NPA constituted part of the Executive, the model adopted guaranteed a measure of autonomy for the NPA. However, this model does not accord the NPA the independence the Constitution guarantees the judiciary and other Chapter 9 institutions. Hence section 179 of the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions 'without fear, favour or prejudice'.*

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*"This distinction is of paramount importance and must not be overlooked. It is on this basis that the relationship between the Minister and the NDPP must be understood. The same applies to the context, the nature and the extent of the concept of prosecutorial independence within the South African constitutional framework.*

*"The Minister is given overall constitutional and political responsibilities to account to the executive, legislature and public on the activities of the prosecuting authority. This constitutional scheme envisages that the NPA and Executive will work hand in hand."*

I am moved to accept this thinking to be correct.

55 In the apartheid era, legislation gave the Minister of Justice complete control over the Attorneys-General. The Attorneys-General exercised their authority and performed their functions subject to the control and directions of the Minister. The Minister's power extended to overriding any decision arrived at by an Attorney-General. In anticipation of a democratic constitutional order, in 1992 the legislation was changed and political control over

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prosecutorial decision-making was taken away from the Minister. However, under the new democratic order the two instruments, the Constitution and the Act, have provided for a member of Cabinet to exercise final responsibility over the National Prosecuting Authority. The dilemma is how the Minister exercises this responsibility without infringing on the constitutionally guaranteed independence of the prosecutorial authority.

56 South Africa is not unique in confronting this challenge. In many countries there have been discussions and new arrangements designed to ensure that prosecutorial decision-making is protected from outside interference while at the same time providing for effective democratic public and political accountability. I did not undertake an exhaustive review of international practice. It is clear however that there is no universal or common model, and it appears there are very few countries in which there is absolutely no political role in the prosecutorial arena. Some of the debates may assist in understanding the South African situation.

57 In recent years there have been extensive debates in many countries on how to manage the dual objectives

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of prosecutorial independence and democratic and public non-partisan political accountability and to provide appropriate institutional arrangements.

58 The Office of the Attorney-General originating as early as the mid-15th century in England has been adapted in the many countries to which it spread together with the common law, mainly within the Commonwealth but also in the United States and Israel. In Australia, Canada and New Zealand the Attorney-General is an elected member of the legislature as well as a member of the Cabinet. In Israel and Ireland the Attorney-General is not a politician, but a public servant. In some other countries while the ultimate responsibility remains with the Attorney-General (politician), the responsibility for day to day prosecutions has been devolved to a public servant such as a Director of Public Prosecutions, or a Solicitor-General. In some jurisdictions the prosecution of, and/or the application for warrants relating to officials or persons at a particular level of seniority requires the prior approval of the head of executive.

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59 A leading British academic, Professor Phillip Stenning of the Centre for Criminological Research at Keele University argues that:

*"the political independence of the office [of Attorney-General] with respect to prosecutorial decision-making and effective democratic and political accountability for it are, at least officially considered desirable objectives to be achieved through institutional arrangements and established practices. It may be argued however, that the various different arrangements in different countries reflect not only different views as to how these two objectives may be achieved, but also different views as to the relative importance of the two objectives. Thus for example, it might be thought that in those countries in which the Attorney-General is an appointed independent public servant, rather than an elected politician, the objective of actual and perceived political independence is the paramount consideration and is given priority over effective political accountability; whereas in those jurisdictions in which the Attorney-General is an elected politician, a member of the legislature and*

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*the Cabinet, the objective of effective political accountability is considered just as important as (or perhaps even more important than) the objective of effective (and perceived) political independence".*

60 However, the South African Constitution requires both, providing that legislation must "ensure that the prosecuting authority exercises its functions without fear or favour or prejudice" [s. 179(4)]. In the same section, the Constitution provides that "The Cabinet Member responsible for the administration of justice must exercise final responsibility over the prosecuting authority" [s. 179 (6)].

61 Historically the Attorney-General served as the principal law officer and legal adviser of the Crown as well as the protector and guardian of the public interest. It would appear that in the South African constitutional framework these various functions have been divided: the Chief State Law Adviser is an appointed public servant; the role of guardian and protector of the public interest has been retained for the Minister; and the function of initiating and pursuing criminal prosecutions has been allocated to the National Prosecuting Authority.

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62 It is clear that the Minister cannot interfere with a specific prosecutorial decision of the National Director. However, in independently exercising the discretion to prosecute or not, the NDPP would have to consider the national interest in seeing justice is done, and community expectations that criminals are brought to justice are met, and the policy guidelines followed.

63 The legislation provides that one indication of what "final responsibility" must include is the fact that the prosecuting authority determines the prosecution policy with the concurrence of the Minister. In effect this means that the Minister exercises a veto over the prosecution policy. This provision in the Act provides the executive with an opportunity to impact on what the prosecuting authority does at this level. The policy should reflect the government's priorities relating to which offences are of concern to government and the public interest that is sought to be promoted and protected when the prosecuting authority exercises its powers to prosecute offences on behalf of the state.

64 The other indication of the content of the notion of "final responsibility" that the Minister exercises

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over the prosecuting authority, is the duty that is placed on the NDPP in s. 35(2)(a) of the Act to submit an annual report to the Minister which report must then be tabled by the Minister in Parliament. The NDPP is also obliged to furnish the Minister with information or a report with regard to any case, matter or subject that is dealt with by the NPA in the exercise of its powers, the carrying out of its duties and the performance of its functions. The NDPP must also provide the Minister with reasons for any decisions taken by him or her in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions. The NDPP must also arrange meetings between the Minister and members of the prosecuting authority. This would provide an on-going opportunity for explaining and developing an understanding of government perspectives and priorities and also facilitate an exchange of views. Whilst the duty is on the NDPP to provide reports, this should not be seen to be a one-way channel of communication. Such reports should give rise to discussions between the Minister and the NDPP.

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65 The fact that the NDPP is obliged to furnish the Minister with a report, upon her request, is expressly provided for in the Act. The parties accepted, correctly so in my view, that the corollary must apply, namely, that the NDPP has the responsibility to inform the Minister in respect of any material case, matter or subject that is dealt with by the NPA in the exercise of its powers, duties or functions. Such an interpretation gives meaning to the intention of the legislature. A meaningful reading of the Act necessitates a conclusion that where the NDPP has information that is of importance relating to any significant case, matter or subject pertaining to the work of the prosecuting authority, the NDPP would be obliged in law to bring such case, matter or subject to the attention of the Minister. It is more so pertaining to matters that may impact on national security.

66 It is not my understanding that the duty placed on the NDPP to inform the Minister with regard to any significant case, matter or subject in the performance of the functions of the prosecutorial authority is to be done purely for information-passing sake. The legislature must have intended

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that the Minister would bring to the consideration of the NDPP such matters as government may find to be relevant in respect of such case, matter or subject. I should not be understood to mean that the NDPP would be bound by any input made by the Minister with regard to the exercise of his or her powers, the carrying out of his or her duties and the performance of his or her functions. The powers, functions and duties are those of the NDPP and should be exercised without fear, favour or prejudice. The legislature must intend that the information exchanged between the NDPP and the Minister must serve to enhance the constitutional goal of enabling the prosecuting authority to achieve its mandate to institute criminal proceedings on behalf of the state and for the Minister to exercise final responsibility over the prosecuting authority within the policy guidelines.

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### **FIT AND PROPER**

67 The Constitution gives the President as the head of the national executive the power to appoint the NDPP. This is a political appointment at the discretion of the President, meaning that the NDPP is not appointed following an open call for applications and a competitive process of interviews and such related employment recruitment matters. The uncontested evidence of the Minister, on affidavit, is that the NDPP was appointed on her recommendation for, amongst others, his understanding and background on matters of national security, having previously chaired the security cluster of Directors-General in his capacity as the DG: Justice and Constitutional Development.

68 The Constitution requires that the NDPP must be appropriately qualified to be so appointed. The Act defines appropriate qualification as somebody who is a South Africa citizen, possesses legal qualifications that would entitle him or her to practice in all Courts in the Republic and who must be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity to be

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entrusted with the responsibilities of the office concerned.

69 The notion of fit and proper has been judicially defined but remains a notion that is fact-specific. Whether one is fit and proper to practice as a lawyer or any other discipline will depend on the context in which that notion is used. It is evident from the reading of the Act that legal qualification is not the only criterion for fitness to hold office as an NDPP. What the Act also envisages is that the incumbent must be a person of experience, integrity and conscientiousness to be entrusted with the responsibilities of the office of the NDPP.

70 The parties did not resist the conclusion that the experience referred to in the Act that the NDPP must have, would refer to legal experience in matters in respect of which that the Act places responsibilities on the office of the NDPP. However there is a broader experience that must also be contemplated. It cannot be a sufficient qualification that the NDPP has appropriate legal experience. To execute the responsibilities of the office of the NDPP, the incumbent must also have managerial and leadership skills and qualities. He or she sits at the apex of a

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complex organisation that employs large numbers of people, bringing together various elements of the criminal justice system. He or she must also possess an understanding of the socio-political climate that prevails as well as the policy programme of the government.

71 The notion of integrity is one that does not attract much debate in this case. The notion relates to the character of a person - honesty, reliability, truthfulness and uprightness. Conscientiousness, on the other hand, addresses something related but different. It relates to the manner of application to one's task or duty - thoroughness, care, meticulousness, diligence and assiduousness. In its submission to the Enquiry the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) suggested that:

*"Conscientiousness can be said to mean professionalism - the willingness and ability to perform with the required skill and the necessary diligence. Integrity is remaining honest - not lying, stealing or otherwise acting corruptly".*

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72 The element of fitness for the office of the NDPP that requires the person to be fit and proper to be "entrusted with the responsibilities of the office concerned" is not defined in the Act nor has it been judicially defined. I do not propose to define the concept except to say that, amongst others, the person must possess an understanding of the responsibilities of such an office. There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority. To that must be added an appreciation for and sensitivity to matters of national security.

73 The Constitution makes it obligatory that all spheres of government and all organs of state (including the national prosecuting authority over which the NDPP is head) must, amongst others, preserve the peace, national unity and the indivisibility of the Republic as well as to secure the well-being of the people of the Republic.

74 There is a broader onus on such senior state officials which includes executing one's duties,

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powers and functions and generally acting in a manner that safeguards the national security of the Republic and promotes and protects the rights of citizens as recognised in the Constitution.

75 In addition, it must be required of any senior state official to consistently and diligently apply the security norms and standards set out in the Cabinet approved policy entitled 'Minimum Information Security Standards' ("MISS") with regard to information security. The objectives of MISS are to promote the socio-economic development of the country and protect national interests. It is only through sound adherence to these policy measures that information sensitive to national security can be protected from interests hostile to government.

**PRINCIPLES OF CO-OPERATIVE GOVERNMENT**

76 It will be useful to read the report within the context of the constitutional imperatives within which all spheres of government and all organs of state within each sphere are enjoined to relate with one another. The Constitution spells out principles of co-operative government and inter-governmental relations. The responsibilities of organs of state are amongst others to preserve the peace, the national unity and the indivisibility of the Republic; to secure the well being of the people of the Republic; to provide effective, transparent, accountable and coherent government for the Republic as a whole; to be loyal to the Constitution, the Republic and its people; to respect the constitutional status, institutions, powers and functions of Government in the other spheres; not to assume any power or function except those conferred on them in terms of the Constitution; to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and to co-operate with one another in mutual trust and good faith by fostering friendly

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relations, assisting and supporting one another, informing one another of and consulting one another on matters of common interest, co-ordinating their actions and legislation with one another, adhering to agreed procedures, and importantly avoiding legal proceedings against one another.

77 Another mechanism that has been woven into the Act to facilitate the work of the NPA is the creation of a Ministerial Co-ordinating Committee in terms of s. 31 of the Act. Once the DSO was to share "turf" with the SAPS in respect of certain categories of crime investigations, it was inevitable that the two agencies may duplicate their work or contradict each other's work. To resolve this, the Ministerial Co-ordinating Committee is empowered to determine policy guidelines in respect of the functioning of the DSO. It is also empowered to determine procedures to co-ordinate activities of the DSO and other relevant government institutions, including procedures for the communication and transfer of information regarding matters falling within the operational scope of the DSO and such institutions as well as the transfer of investigations to or from the DSO and such institutions. These policy guidelines and procedures

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were clearly intended to remove any conflict between the work of the DSO and that of other institutions such as the SAPS. The Ministerial Co-ordinating Committee could determine the responsibility of the DSO in respect of specific matters, as well as the procedures to be followed for the referral or the assigning of any investigation to the DSO.

78 The evidence indicating the tension between the DSO and the SAPS relating to the documents that the DSO needed for its investigations, the investigation into the murder of Mr Brett Kebble, the investigation relating to the drug investigation and the prosecution of Mr Agliotti and Mr Nassif, the discord between the DSO and the NIA relating to the vetting of DSO investigators, and the complaint relating to the unregulated interaction with foreign intelligence services could have been largely resolved by the Ministerial Co-ordinating Committee whose function it was to address these matters. There was no evidence before the Enquiry that this was done or even attempted. It is regrettable that this Committee has not functioned as contemplated in the Act.

79 The obligations resting on the office of the NDPP as the head of the NPA must be understood to include a

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responsibility on the NPA as an institution and the DSO for its part to assist and support other organs of state. The nature of the work done by the NPA, as part of the executive, must entail a co-operative approach with all other state institutions and especially those institutions that fall within the security cluster such as the South African Police Services, the National Intelligence Agency, the South African Secret Service and the Presidency to name but a few. It is only when this occurs that the constitutional obligation on all organs of state to preserve the peace and to secure the well being of the people of the Republic can be realised. The Constitution is explicit that organs of state should avoid legal proceedings against one another. The Constitution further provides that an organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and most importantly must exhaust all other remedies before it approaches a court to resolve the dispute.

80 A substantial body of evidence was presented to the Enquiry suggesting that the functioning of the

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agencies within the security cluster was not in line with the constitutional imperatives placed on these institutions. The Constitution specifically obliges these institutions to assist and support one another. As the report will demonstrate later, the co-operation and assistance between the DSO, the NIA and the SAPS was clearly unsatisfactory. In some ways the strained relationship between these institutions was also manifest during the oral hearings that were conducted by the Enquiry. It is evident that given the difficulty that the DSO had in obtaining information from the SAPS with regard to the investigation of the National Commissioner of Police, there was not just a failure of co-operation but open hostility between SAPS and the DSO.

**IRRETRIEVABLE BREAKDOWN OF THE RELATIONSHIP**

81 One of the grounds on which the Government contends Adv Pikoli is not fit to hold office is the allegation that the relationship between the Minister and Adv Pikoli has irretrievably broken down. This was given as one of the reasons for Adv Pikoli's suspension in the letter from the President dated 23 September 2007.

82 The Government filed comprehensive submissions pointing to areas of distress with regard to the relationship between the Minister and Adv Pikoli. On affidavit the Minister stated that there were conceptual differences between her and Adv Pikoli on the role of the NPA which largely centred round the nature and extent of the status and independence of the NPA. The Minister said that these differences created serious difficulties for her and impeded her ability to exercise her final responsibility over the NPA as required by the Constitution and the NPA Act. However the Minister did not draw my attention to specific examples of behaviour by Adv Pikoli that would have compromised her in the exercise of her final responsibility. An example she cites is that

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Adv Pikoli did not believe that he needed to conclude a performance agreement with her. She requested him on a number of occasions to prepare and submit to her a draft performance agreement for discussion and signature and he failed to do so.

83 The documents submitted before the Enquiry are replete with accounts of reports that Adv Pikoli gave to the Minister on a range of matters and the uncontested evidence of Adv Pikoli that he responded to the Minister's enquiries as and when those were made. Adv Pikoli states that these included reports relating to investigations with regard to Jacob Zuma, Mac Maharaj, Ngoako Ramathlodi, Parliament's 'travelgate' matter and the post-TRC prosecution matters.

84 He also says that at none of his meetings with the Minister did she express any dissatisfaction with his reports to her. For instance Adv Pikoli refers to a series of meetings from March 2006 where he gave oral reports to the Minister with regards to investigations into Operation Bad Guys ("BG") and the links between the National Commissioner of Police and Mr Agliotti. He also cites the many briefings that took place between November 2006 and September 2007.

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85 The Minister states in her affidavit that she has had extensive discussions with Adv Pikoli regarding his understanding of their working relationship and his responsibilities. The Minister states that Adv Pikoli's view was that he needed greater administrative and operational distance from the Minister. The complaint is further that Adv Pikoli failed to properly account to the DG: Justice who is the accounting officer for the NPA. The Minister concludes by stating that the various engagements between her and Adv Pikoli could not resolve the differences they had and which led to the breakdown of the relationship between them.

86 The differences in opinion over the status of the NPA and its relationship with the Department of Justice and Constitutional Development were primarily with the DG: Justice, a matter to which I will return in this Report. The DG: Justice had an incorrect understanding of his role in relation to the NPA resulting in constant conflict with Adv Pikoli and officials in the NPA. These conflicts were undoubtedly referred to in the DG: Justice's reports to the Minister, and to some extent would at least have given rise to the Minister's misplaced concerns

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that Adv Pikoli considered himself not to be accountable to the Minister.

87 The Government's allegations are that the relationship between the Minister and the NDPP were aggravated by matters such as the listing of the DSO as a public entity in terms of the Public Finance Management Act; the handling and litigation of the post-TRC cases; the procurement of warrants of search and seizure of documents in respect of the Union Buildings and Tuynhuys by the DSO; the procurement of a warrant of arrest of the National Commissioner of Police; and the warrants of search and seizure of documents in respect to the investigation of the National Commissioner of Police. I deal with these matters separately elsewhere in the report.

88 The Minister states on affidavit that Adv Pikoli was appointed on the basis of his experience and that she believed that Adv Pikoli had the requisite knowledge to effectively manage the NPA and would enhance the co-operation within the security cluster and promote greater efficiency within the criminal justice system. The Minister says her expectation was that given the experience of Adv Pikoli as the co-ordinator of the security cluster of Directors-

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General he would bring greater coherence, co-operation and efficiency in the operation of the cluster. The Minister accuses Adv Pikoli of failure to do so and says that he has in fact compounded the difficulties between the NPA and other security agencies.

89 In Government's original submission it is stated that *"the relationship between the Minister and the (NDPP) must have broken down irretrievably when the (NDPP) suggests that the Minister who has oversight over him could be obstructing the administration of justice; when all that the Minister sought to do is exercise her constitutional and legal oversight functions"*. The reference here is to Adv Pikoli's response to the letter from the Minister dated 18 September 2007 (Annexure VP12 to Adv Pikoli's affidavit). However at this stage Government chose not to disclose the contents of the letter and thereby failed to place Adv Pikoli's response in its proper context.

90 Both on affidavit and in oral evidence Adv Pikoli has vehemently denied that there was any breakdown of relationship between himself and the Minister. Adv Pikoli has pointed to several instances where the

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Minister has in public spoken favourably about him and his competence.

- 91 The account that Adv Pikoli gives regarding his relationship with the Minister is by contrast a complete denial that the relationship between them has broken down at all. He says that, apart from the telephone conversation with the Minister on 19 September 2007, until the meeting of 23 September 2007 he has always had a 'cordial relationship' with the Minister and that until then there had never been any suggestion that the Minister had any difficulties with him. In the meeting of 23 September 2007, Adv Pikoli says that the Minister asked him to resign. He asked the Minister what the reasons were for asking him to resign and the Minister said that it was because of a breakdown in the relationship between the two of them. His response to the request was to decline to resign, saying to the Minister "*but Minister you know it is not true that there is a breakdown of relationship between us*". There was no direct response to this comment, he says, but the Minister did say that "*... Vusi its all about integrity ... one day I will talk*". I do not know what this retort would have been intended to convey.

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Without the evidence of the Minister, I am unable to attribute any particular meaning to that retort. On affidavit the Minister says *"I was convinced that the working relationship between us had deteriorated to a point that there was no hope that the two of us could function effectively together"*.

92 According to the Minister the breakdown in the relationship between the Minister and Adv Pikoli could not be repaired despite the extensive discussions which the Minister says she had with Adv Pikoli regarding their working relationship and Adv Pikoli's responsibilities. I have not had the benefit of oral evidence relating to these extensive discussions: when the discussions would have occurred, what the nature of those discussions were and the reasons why the discussions did not resolve any discord that may have existed. The Minister states also that Adv Pikoli's view was that he needed greater administrative and operational distance from her. This perception that the Minister had of Adv Pikoli views was fuelled by the misguided understanding of the administrative relationship between the NPA and the Department of Justice and Constitutional Development that was prevalent in the

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mind of the DG: Justice. I deal with the implications of this later in the report. Apart from the prosecutorial independence which the Minister accepts the NDPP has under the Constitution, there are no further details furnished as to the operational distance that Adv Pikoli allegedly wanted to have from the Minister. Regarding the complaint that Adv Pikoli failed to account properly to the DG: Justice, I deal with this under a separate heading.

93 In the letter dated 23 September 2007 suspending Adv Pikoli from office, the President stated amongst others that the reason for his suspension was as a result of a report to him by the Minister of Justice that the relationship between Adv Pikoli and the Minister had broken down due to several incidents such as Adv Pikoli's testimony to the Khampepe Commission. The President did not explain what the "several incidents" are but cited as an example Adv Pikoli's testimony to the Khampepe Commission. It is common cause now that the complaint that Adv Pikoli would have perjured himself and gave contradictory evidence before the Khampepe Commission was not established and was not pursued by Government before the Enquiry.

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94 The complaint that Adv Pikoli failed to harmonise the relationship between the various entities in the security cluster has also unfortunately not been substantiated. The broad accusation is that Adv Pikoli would have in fact compounded the difficulties between the NPA and the other security agencies. The Enquiry has not been told what conduct on the part of Adv Pikoli was responsible for compounding the difficulties between the NPA and the other security agencies.

95 The relationship between the Minister and Adv Pikoli is the one area where there are sharp disputes of fact. Despite that, the Government maintained that there are no disputes of fact and felt it unnecessary to bring the oral evidence of the Minister. I must make my determinations on the material placed before me. Adv Pikoli, on the other hand was subjected to cross-examination to test the correctness of his assertions. He impressed me as a person of unimpeachable integrity and he gave his evidence honestly and I therefore have no reason to reject his version in preference to that deposed to by the Minister on affidavit where the two are in conflict.

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96 The Minister's account of the breakdown in the relationship has not been tested and probed through cross-examination. I have been unable to find Adv Pikoli not credible on these issues and do not have any reason to reject his evidence. I deal elsewhere in the report with the individual complaints that have been made by Government on the conduct of Adv Pikoli and whether those complaints impact on the determination of the breakdown in the relationship between Adv Pikoli and the Minister. I must therefore conclude that while there may have been differences of understanding of their respective roles, the Government has not established on a balance of probabilities that there has indeed been an irretrievable breakdown in the relationship between Adv Pikoli and the Minister. I do however note the Minister's opinion that working with Adv Pikoli had become impossible. The developments intervening between the establishment of the Enquiry and the reallocation of members of the Ministries renders it unnecessary to address this matter further.

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### **FAILURE TO PROSECUTE CERTAIN OFFENCES**

97 The terms of reference also require the Enquiry to determine whether Adv Pikoli, in the exercise of his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic. Under this heading falls the prosecution of the individuals involved in the attempt to overthrow the Government of Equatorial Guinea and the pending prosecution of suspects in the murder of the late Mr Brett Kebble.

98 The complaint regarding the prosecution of the mercenaries has been framed in two ways. Firstly Government contended that the NPA entered into plea and sentence agreements with three mercenaries despite the fact that, according to the SAPS, it would have been preferable to prosecute those offenders. On the other hand there is an accusation that the subsequent prosecution of the other eleven mercenaries, which later proved unsuccessful, caused the government great embarrassment and should not have been pursued.

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99 However that the plea and sentence agreements entered into with the three mercenaries were concluded in 2004 prior to Adv Pikoli taking office as the NDPP. Even if the conclusion that the plea and sentence agreements were irregular was to be made, it is difficult to see how this would be attributable to any conduct on the part of the NDPP, and more importantly how that would render Adv Pikoli not fit and proper to hold office. The subsequent prosecution of the other eleven mercenaries was conducted by the Deputy Director of Public Prosecutions based in the Priority Crimes Litigation Unit, Mr JP Pretorius, with the knowledge and authorisation of Adv Pikoli. Adv Pikoli testified that he was not in favour of further plea bargain arrangements with the rest of the mercenaries. He therefore advised Mr Pretorius not to conclude further plea bargain arrangements but to pursue prosecution. He instructed Mr Pretorius only to prosecute persons against whom there was sufficient evidence.

100 The difficulty in assessing the substance of the complaint is that the Government did not lead any evidence indicating what was wrong with the entering

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of the plea and sentence agreements with the first group of mercenaries or the prosecution of the subsequent group. The accusation seems to be one founded on a conclusion which is not supported by any facts. The opinion of the SAPS was that the mercenaries should have been prosecuted and that there was no need for plea bargains. However, there was no evidence to substantiate this.

101 I must also point out that this complaint comes very close to trespassing on the terrain that the legislature and the Constitution has reserved for the discretion of the NDPP. It would not be proper for anyone to second-guess the judgment of the NDPP without encroaching on the constitutionally guaranteed independence of the NPA. The decision to prosecute or not to prosecute the eleven mercenaries or to conclude or not to conclude a plea and sentence agreement is one which the Constitution says the NPA must take without any fear, favour or prejudice. The legislation governing the judicial review of administrative actions and decisions specifically exempts a decision to prosecute or not to prosecute from judicial review. This to me points decidedly that an enquiry such as this one must be cautious not

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to do anything that might be seen or interpreted to be a review or to second-guess a decision of the NPA to prosecute or not to prosecute.

102 It would appear to me that if Government was concerned about how prosecutorial discretion was being exercised they could have engaged with the NDPP and could also have amended or clarified the Prosecution Policy to ensure consistency in decision-making and the appropriate prioritisation of particular offences. In the absence of a policy adjustment of that nature, a decision of the NPA must be respected.

103 A further complaint is that Adv Pikoli, in exercising his discretion to prosecute some of the alleged suspects in the murder of the late Mr Brett Keble, did not take into account the threat posed by organised crime to the national security of the Republic. Government's complaint is that the NPA ought to have prosecuted all the people who are implicated in the murder.

104 Government questions the NPA's decision to enter into any plea bargains or arrangements for discharge from prosecution with any of the persons associated with

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that crime. In her replying affidavit the Minister states that in the Kebble murder investigation it is clear that Adv Pikoli had accomplice evidence against both Mr Nassif and Mr Agliotti and could have proceeded without the plea and sentence agreements with these two suspects. To date there have been no plea and sentence agreements relating to persons accused of the murder of Mr Kebble; charges are pending against some accused persons and some will act as State witnesses. The plea and sentence agreements with Mr Nassif and Mr Agliotti that the Minister refers to are agreements in relation to the drugs matter (the Paparas case) and not the Kebble murder.

105 Government has alleged that plea bargains involving the provision of information on other alleged lesser offenders are used *"to avoid co-operation with other law enforcement agencies when information may be available"*. However the affidavit by the Regional Head of the DSO, Gauteng, supports the view that there was no information in the SAPS docket in November 2006 to show that the SAPS was in a position to arrest anybody for the Kebble murder. He refers in turn to the affidavit of Ian Small Smith, the

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attorney acting for the suspects in the Kebble murder who confirms that the SAPS only contacted his clients after they had already co-operated with the DSO. The hitmen in the Kebble murder, Schultz, McGurk and Smith, provided the DSO with statements in terms of section 204 of the Criminal Procedure Act in November 2006. On the basis of these statements and Mr Nassif's affidavit, Mr Agliotti was arrested for the Kebble murder.

106 To probe this matter holds certain risks. Firstly the Enquiry was not furnished, understandably, with the details relating to the investigation of the alleged murder. Secondly, this matter is still ongoing and ventilating it before the Enquiry would hold a threat in that it could undermine the investigation and the possible prosecution of the offenders.

107 There is another reason why it is ill-advised to probe this complaint. The investigation of the complaint would have entailed the leading of evidence or obtaining evidence indicating the nature and extent of the threat posed by organised crime to the national security of the Republic. It would not have been possible to conduct a proper investigation of this matter without the evidence of some of the

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witnesses who may become material witnesses in the pending criminal trial first testifying in this enquiry. There would also probably have been a need for rebuttal evidence by persons who may yet face criminal prosecution. In engaging in this matter there would have been the danger of undermining the pending criminal trials. The government did not provide any evidence of how and the manner in which these pending prosecutions would have posed a threat to the national security of the Republic.

108 For all the above reasons, it would be inappropriate and ill-advised to probe this area; and in addition there could be the possibility of a threat to a fair trial which is guaranteed under our Constitution to accused persons. That said, I am of the view that the Government has not established the complaint that Adv Pikoli, in deciding to prosecute certain offenders, failed to take account of the national security interests of the Republic.

**IMMUNITY AND PLEA BARGAINS**

109 The terms of reference for the Enquiry also require a determination as to whether Adv Pikoli, in taking decisions to grant immunity from prosecution or to enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime as contemplated in the Act, paid due regard to the public interest and the national security interests of the Republic, as contemplated in Section 198 of the Constitution as well as the Prosecution Policy. The matters that were mentioned in the enquiry relevant to this aspect are those of Mr Agliotti, Mr Nassif and the Alexandra paedophile.

110 The section of the Constitution referred to under this heading deals with the security services and provides principles which govern national security in the Republic. These include the resolve of South Africans as individuals and as a nation to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life. Citizens are precluded from participating in armed conflict nationally or internationally except in terms of the

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law. National security must be pursued in compliance with the law including international law but national security is subject to the authority of Parliament and the National Executive. This aspect was not addressed by the parties beyond the plea and sentence agreements that were concluded with Mr Agliotti and Mr Nassif.

111 The question of negotiating and concluding plea bargains is one that is tightly bound with the constitutional preserve of the prosecuting authority to exercise its prosecutorial function to institute criminal proceedings without fear, favour or prejudice. One must be particularly circumspect to make sure that any scrutiny as to whether a plea bargain is within or *ultra vires* the power of the prosecutor does not interfere with, obstruct or hinder the prosecutor in the performance of this particular function. It is instructive that the legislation dealing with the judicial review of administrative decisions specifically excludes the review of a decision of a prosecutor to prosecute or not to prosecute a particular matter. Whether or not a decision to enter into a plea and sentence agreement was proper or not will also not be a

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competent subject for judicial review. In my view it may, in appropriate circumstances, be a subject of misconduct of a prosecutor and therefore warrant a disciplinary process, if for instance, it is established that a particular prosecution or plea and sentence agreement was inconsistent with or in violation of the prosecution policy.

112 It is necessary at this juncture to properly differentiate between and define plea and sentence agreements on the one hand, and so-called immunity or indemnity from prosecution on the other. These concepts have sometimes been used interchangeably by Government in its submissions leading to some confusion in the presentation of evidence before the Enquiry.

113 A plea and sentence agreement (commonly referred to as a plea bargain) is regulated by the Criminal Procedure Act ("the CPA") and the Prosecution Policy and Directives. This procedure is not only legislatively sanctioned but has proved to be an effective instrument in combating organised crime. It is also an effective mechanism to temper and mitigate the costs associated with running a full trial. This must not be interpreted to mean that the

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legislature has intended this instrument to override the interests of justice. To use the common parlance, the tool is not used to let the criminals "off the hook". On the contrary, the Act envisages that an accused person with whom a plea and sentence agreement is concluded is actually convicted of a competent charge and is appropriately sentenced.

114 A plea bargain is negotiated between the prosecutor in a criminal matter and the accused, in terms of section 105A of the CPA. The CPA gives a prosecutor, who is duly authorised in writing, the authority to negotiate and enter into an agreement with an accused person who is legally represented. The agreement will entail a plea of guilty to the offence that the accused person is charged with and on which such an accused person may be convicted. The agreement involving a plea of 'guilty' to a specific offence(s) as well as a defined sentence for the accused is then placed before a competent court which must satisfy itself that the agreement meets the criteria laid down in s. 105A of the CPA and the Directives issued in terms of that provision. If the court is satisfied that the agreement meets the criteria, the accused is

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duly convicted and the appropriate sentence is then passed.

115 The other control mechanism built into the CPA is that the court can only sanction such a plea and sentence agreement if it is satisfied that the accused person is guilty of the offence, and can only endorse the sentence if it is satisfied that the sentence agreement is just. The CPA has elaborate provisions regulating the negotiation and conclusion of plea and sentence agreements. Some of the measures for concluding these agreements include: obligations of the prosecutor to afford the complainant the opportunity to make representations regarding such a plea and sentence agreement; the prosecutor is to have regard to the nature of and circumstances relating to the offence; personal circumstances of an accused person; previous convictions of the accused, if any; and the interests of the community.

116 The Prosecuting Policy also provides guidelines on how the power to negotiate plea bargains is to be exercised. The policy directives provide that the plea and sentence agreements are to be utilised for those matters of substance the disposal of which will

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actually serve the purpose of de-congesting or reducing the court rolls without sacrificing the demands of justice or the public interest. The directives also caution the prosecutors that the instrument of plea and sentence agreement is not to be understood as meaning the bargaining away of a sentence of imprisonment for a non-custodial sentence where the public interest would dictate otherwise. The directives also caution against, and point out as undesirable, the use of this instrument in cases involving multiple accused persons where not all accused are offered plea bargain arrangements. In particular the directives also discourage the conclusion of a plea and sentence agreement with an accused person who may become a State witness. The policy directives also address offences for which a minimum sentence is prescribed and provide that the sentence agreement should deal with the substantial and compelling circumstances which would justify a departure from the minimum prescribed sentence.

117 A section 204 (of the CPA) arrangement on the other hand is contemplated where a witness whose evidence is self-incriminating elects to become a State witness. The prosecutor at the criminal proceedings

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will inform the court that a person to be called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor. If the court is satisfied that such a witness is a competent witness for the prosecution and is of the opinion that the witness has testified honestly and frankly in the trial, the court will discharge the witness from prosecution with regard to the offence specified by the prosecutor.

118 The CPA uses the term 'discharged from prosecution' which at times is inappropriately and colloquially referred to as an indemnity from prosecution. It is inappropriate because neither the NPA nor the court can strictly speaking grant anyone immunity from prosecution. The closest we have come to any immunity from prosecution was through the legislation relating to the Truth and Reconciliation Commission. In terms of that legislation, a person could be granted immunity from prosecution on condition that the requirements specified in that legislation were met. The CPA does not use the word 'immunity' but uses the term 'discharge from prosecution'.

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119 The discharge from prosecution also leads to another unfortunate perception. Public perception views this as an unfair process in terms of which criminals are 'let loose'. The proper appreciation for this instrument is firstly to realise that the power to grant a discharge from prosecution is not conferred on the NPA. The court is the body that would give an order that a witness is to be discharged from any specified offence if the witness has answered fully and frankly all questions put to that witness.

120 Confusion may arise when the NPA, seized with accomplice and other evidentiary difficulties, may offer a particular accomplice an opportunity to give self-incriminating evidence as well as implicating 'bigger fish'. The terms of reference may also inadvertently be referring to the section 204 discharge described in the CPA when it refers to 'immunity' from prosecution.

121 In both scenarios the court is the ultimate decision maker. So whilst the NPA negotiates the agreements, the court retains the power to reject the agreements or arrangements if appropriate prosecution policy and directives have been flouted. More importantly, if the accomplice does not answer all questions frankly

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and honestly, the court has the ultimate decision to refuse the discharge and the individual is then exposed to facing prosecution in respect of those offences.

122 Government's complaint regarding plea bargains is directed at the plea and sentence agreements involving Mr Agliotti, Mr Nassif and the Alexandra paedophile.

123 Mr Nassif was charged with the offence of dealing in drugs in contravention of section 5(b), read with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act. The plea and sentence agreement with Mr Nassif was concluded on 12 October 2007, subsequent to the suspension of Pikoli. The agreement related to drugs charges that Mr Nassif faced relating to the pending 'Paparaz matter'. Mr Nassif was convicted and sentenced to ten years imprisonment suspended for five years. He also agreed to the payment of £8 000 (eight thousand pounds) into the Criminal Asset Recovery Account as a benefit of the proceeds of the crime.

124 Mr Agliotti was charged with the offence of dealing in drugs in contravention of section 5(b), read with

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sections 13 and 17 and Schedule 2, part III of the Drugs and Drug Trafficking Act. The plea and sentence agreement with Mr Agliotti was concluded on 28 November 2007, also subsequent to the suspension of Pikoli. The agreements related to drugs charges that Mr Agliotti faced relating to the pending 'Paparas matter'. Mr Agliotti was convicted and sentenced to ten years imprisonment suspended for five years, together with a fine of R300 000.

125 On the facts Adv Pikoli could not have been responsible for the conclusion of the agreements with Mr Nassif and Mr Agliotti. The evidence is that the plea and sentence agreement with Mr Nassif was negotiated by the Regional Head of the DSO, Gauteng who had consulted the investigating officer before entering into the agreement. The plea and sentence agreement was then authorised by the Investigating Director of the DSO and the Acting NDPP, and the agreement was approved by a court in terms of the relevant legislation. Adv Pikoli acknowledged that he was in office when the negotiations for the plea and sentence agreements with Mr Nassif and Mr Agliotti commenced and further that he agreed with the terms of the final agreement even though he was no longer

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in office when the agreements were concluded. However, Adv Pikoli cannot be held legally responsible for these agreements even if they were shown to be flawed.

126 The reading of the plea and sentence agreement, however, reveals that it contained a condition that Mr Nassif will give evidence in other pending criminal trials. It was conceded by the Regional Head of the DSO, Gauteng that the imposition of this condition was 'unusual' and 'it's never happened' before. What the nature of those trials are or what evidence Mr Nassif will give are matters that have not been ventilated before the Enquiry except that Mr Nassif will testify in the pending Papparas drugs case. There would be no criminal consequence to Mr Nassif if he does not give his co-operation to the prosecution in the future. This is yet another example that shows the danger that might result from second-guessing the NPA in its decision to prosecute or not to prosecute offenders. Furthermore it was argued on behalf of Adv Pikoli that such a consideration is mentioned in the agreement as a factor that may be relevant to mitigating the sentence to be imposed.

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127 The Government has sought to point out that the plea and sentence agreements were defective in that they did not comply with various policy directives that govern and guide the negotiation and the conclusion of plea and sentence agreements. It was argued on behalf of Government that the plea bargains were likely to be overturned on appeal. However, the plea and sentence agreements with Mr Nassif and Mr Agliotti had been considered and endorsed by the courts, and it was not open to me to review a judicial decision.

128 With regard to the Alexandra paedophile's case, the complaint is that the plea bargain process was used *"not to obtain justice and ensure an efficient prosecution process, but to assist an offender 'get off' lightly for a serious offence against a boy child"*. Government also alleges that the accused was allowed to plead guilty to a lesser offence.

129 However it was later conceded on behalf of the Government that this offence did not constitute organised crime and the contention that the event constituted one such ground showing Adv Pikoli to be unfit for office was abandoned. The unchallenged evidence in any event is that the young boy who was

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the victim of the crime had made two completely contradictory statements and was not giving the investigators any assistance. The plea and sentence agreement was discussed with the Woman and Child Abuse Action Group before being submitted to the court in terms of the relevant section of the CPA. The Court found the plea and sentence agreement to be just. It would be outside my scope therefore to question the decision of the NDPP and the courts in that matter.

130 In his testimony, the Deputy Minister of Justice and Constitutional Development, De Lange, said that the policy directives are drafted in consultation with the executive so the executive can monitor plea bargains. He further stated that the Minister has a legal obligation to ensure that the directives are adhered to. If they are not adhered to *"then the Minister is fully entitled to intervene with the NDPP, engage him to make sure that they comply with the directive"*. Adv Pikoli concurred with this view and said *"The executive is entitled to complain [about plea bargains] if they are not happy with a decision and if it also happens that there was no compliance with the directives, then it's a matter*

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*that the Minister of Justice would take up with the National Director."*

131 No evidence was adduced that plea bargains were monitored by the executive or that the policy directives were amended to reflect Government concerns.

132 In the circumstances I am not satisfied that the Government has established that the NDPP is unfit for office by reason of the decisions to grant immunity from prosecution (there was for that matter no evidence tendered on who was given this immunity or indemnity) or to enter into plea bargaining arrangements and that he failed to take due regard to the public interest and the national security interest of the Republic referred to in the terms of reference.

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### **FAILURE TO ACCOUNT TO THE DG: JUSTICE**

133 Government in its original submission indicates that the DG: Justice, *"as the Accounting Officer for the Department of Justice and Constitutional Development and of the NPA exercises powers relating to the financial management of the NPA in terms of the PFMA"*; and *"to the extent that some of the delegated powers are currently delegated to the CEO of the NPA, the National Director, as the person responsible for the employees of the NPA, bears the responsibility to ensure that Public Service Regulations and the Public Finance Management Act are complied with by the NPA"*.

134 Government's complaint under this heading is that Adv Pikoli failed to comply with these obligations and thereby prevented the DG: Justice from accounting and reporting to the Minister who is the executive authority for the NPA. The DG: Justice complains that *"Adv Pikoli's failure to provide me with information or cause for it to be provided to me for some of the financial and administrative decisions, did not only result in my inability to keep the necessary accounting and other related records as I am required by the (NPA Act) but was also a source of constant*

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*disagreement between the two of us on the issues affecting the administration of the NPA". He states that Adv Pikoli's attitude has always been that the NPA is independent and is accountable to Parliament for its expenditure.*

135 In its Heads of Argument Government states that the "gravamen" of its complaint is that "Mr Pikoli, relying on the delegation of authority by the Director-General to the Chief Executive Officer (CEO) of the NPA misconstrued the meaning of the delegation and refused to comply with the provisions of the PFMA to report to the Director-General".

136 Adv Pikoli denies that the DG: Justice was unable to keep the necessary accounting and related records and confirms that all financial statements for the NPA are prepared by the NPA and signed off jointly by the CEO of the NPA and the DG: Justice. The NPA received unqualified audit reports from the Auditor-General for the period under review. Adv Pikoli however says that there were some areas of disagreement between him and the DG: Justice about the ambit of the latter's responsibilities. He says that the DG: Justice has no powers in relation to the DSO at all, and that in relation to the rest of the NPA, he is

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merely required to perform a very limited accounting function.

137 It is alleged that Adv Pikoli refused to allow the CEO of the NPA, Ms Sparg, to enter into a performance agreement with the DG: Justice, and the latter could therefore not assess the performance of the CEO of the NPA with respect to the delegated functions.

138 The DG: Justice complains that he had not been consulted on the NPA's plans to expand its corporate services and the expansion had not been approved by the Minister.

139 A further complaint is that the DSO removed its labour relations files from the Labour Relations Unit of the NPA and that the labour matters of the DSO are now dealt with by the DSO itself.

140 The DG: Justice complains that he did not receive reports from Adv Pikoli and the CEO of the DSO on the misappropriation of funds from the DSO's Confidential Fund ("the C Fund").

141 The DG: Justice complains that Adv Pikoli failed to provide him with a report on the needs for chambers by NPA prosecutors, and that the NPA proceeded to purchase a building in Johannesburg for this purpose.

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142 The DG: Justice had suggested that the Special Investigative Unit, located within the NPA, and the DSO be merged, and his complaint is that Adv Pikoli did not express support for this proposal. The DG: Justice says that this illustrates Adv Pikoli's failure at times to make the necessary interventions which ultimately impacted on the DG's own responsibilities as the accounting officer of the NPA.

143 The evidence shows that Adv Pikoli during his tenure as the DG: Justice had delegated all his powers and functions in relation to the NPA to the CEO of the NPA. This remains the case and the incumbent DG: Justice is aware of it. In his oral evidence the Deputy Minister of Justice, Hon De Lange, states that *"I don't actually know personally how far that (problems relating to the delegation of powers) has gone", but he is aware of "the fact that it has become a problem ever since I have been in the Executive in the way that people perceive that power to be exercised"*.

144 The DG: Justice conceded that he had not conveyed in writing his concerns that the CEO of the NPA was not providing him with sufficient information regarding

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the delegated powers. He also says: *"I have always felt by the way, that there is merit in having delegations... So withdrawing the delegations completely will not just solve one problem. It may, but it will create other problems. So I have never wanted and I don't support a complete withdrawal of all of the delegations"*. He states that those delegations which proved to be problematic were rescinded but only in February 2008, after the suspension of Adv Pikoli.

145 The NPA and the Department of Justice have, as far as accounting responsibilities are concerned, distinctly segregated areas. The Act provides that the national prosecuting authority shall be accountable to Parliament in respect of its powers, functions and duties, including decisions regarding the institution of prosecutions. The statute also provides that the expenses incurred in connection with the exercise of the powers, the carrying out of the duties and the performance of the functions of the prosecuting authority shall be defrayed out of monies appropriated by Parliament for that purpose. The Act in s. 36(3A) specifically provides for the CEO of the DSO to be the accounting officer for the DSO in terms

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of the PFMA. Most importantly the Act places a duty on the Chief Executive Officer of the DSO, subject to the PFMA, to account for monies received or paid out for or on behalf of the administration and functioning of the DSO and to cause the necessary accounting and other relating records to be kept. The DG: Justice therefore plays no accounting role in respect of the DSO.

146 It is correct that the DG: Justice has certain accounting responsibilities in respect of the NPA. The delegated powers relating to the NPA however seem to have transferred to the CEO these accounting responsibilities in line with the provisions of the PFMA which authorises, in appropriate circumstances, the delegation of those powers by the DG to another competent official.

147 Performance Agreement for CEO of the NPA: The DG: Justice says that he wanted the CEO of the NPA to enter into a performance agreement with him so that he could prescribe to her what he expected of her as the CEO and the basis on which he, as the DG: Justice was going to evaluate the performance of the CEO. There was already a performance agreement in place between the CEO of the NPA and the NDPP, and the DG:

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Justice conceded in cross examination that the NDPP is her "boss". The CEO of the NPA is clearly accountable to the NDPP and not to the DG: Justice. There is therefore no basis for this complaint.

148 Expansion of Corporate Services: Adv Pikoli correctly contends that he was under no obligation to consult the DG: Justice in order to expand the corporate services division of the NPA. Further, Adv Pikoli counters this complaint by alleging that the DG: Justice was giving instructions in this regard to the staff of the NPA, without consulting him or the then CEO of the NPA. The DG: Justice conceded that parts of the powers that are delegated to the CEO of the NPA are powers to alter the structure of the NPA. It is clear that the DG: Justice did not have the authority to direct or determine how the NPA was to be managed and structured, and it is clear that there is also no basis for this complaint.

149 DSO labour relations files: Given that the DSO has its own accounting officer there was nothing to prevent it from dealing with its own labour relations matters. The DG: Justice conceded in cross examination that he has no authority over the DSO and this complaint is also not valid.

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150 The Confidential Fund: Adv Pikoli states that an investigation into irregularities in the Confidential Fund was undertaken and that a member of the DSO was suspended on his recommendation which was conveyed to the Minister who in turn forwarded the recommendation to the President. The member of the DSO was also prosecuted. The DG: Justice conceded that Adv Pikoli did not have a duty to report to him on this matter, and that the CEO of the DSO was not accountable to him for the Confidential Fund. The complaint in this regard can be considered spurious and falls to be adjudged not sound.

151 Chambers for NPA Prosecutors: The DG: Justice says that he requested Adv Pikoli to provide him with a report outlining how the NPA was going to provide its prosecutors with chambers around the areas where they work. Adv Pikoli states that the building in Johannesburg referred to by the DG in his affidavit was purchased by the NPA before he took office. The DG: Justice concedes that it is for the NDPP to make a final decision on where the prosecutors are accommodated. He also concedes that it was brought to his attention that the building in Johannesburg was bought before Adv Pikoli took office and that he

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should have checked this fact before stating the contrary under oath in his affidavit.

152 Rationalisation of the NPA: The DG: Justice had suggested that the Special Investigative Unit (SIU), located within the NPA, and the DSO be merged and he complains that Adv Pikoli did not express support for this proposal. Adv Pikoli states that the DG: Justice discussed a possible merger of the DSO and the SIU with the head of the DSO and the head of the Asset Forfeiture Unit, who mentioned it to Adv Pikoli in passing. Adv Pikoli did not directly discuss the issue with the DG. It was not within the remit of the DG: Justice to make such a proposal as both the entities were created by legislation passed by Parliament.

153 In cross-examination on his role the DG: Justice was asked whether he had sought a legal opinion from senior counsel on the responsibilities of the accounting officer in relation to the NPA. Having initially denied doing so he finally admitted that he sought such an opinion. In response to a statement from Adv Pikoli's legal representative that the legal opinion received agreed in substance with Adv Pikoli's views, the DG: Justice conceded that senior

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counsel had indeed agreed with Adv Pikoli. The opinion states that *"the Director-General has no authority at all over the exercise of powers, functions and duties by functionaries of the NPA"*.

154 The DG: Justice confirms that he refused to give Adv Pikoli a copy of the opinions. Further, he confirms that he did not inform the Enquiry about these opinions he had obtained. It is clear that the DG: Justice deliberately withheld these legal opinions from Adv Pikoli and the Enquiry. By persisting in this conduct he could have misled the Enquiry. Adv Pikoli's attorneys wrote to the State Attorney on 2 April 2008 referring to the affidavit by the DG: Justice in the Tshavhungwa matter and requested copies of *"legal opinions obtained from independent counsel on the proper interpretation of the relevant provisions of the NPA Act including the meaning, scope and effect of the Minister's power to exercise final responsibility over the NPA"* mentioned therein. They also requested that copies of these opinions be made available to me. The State Attorney in his response stated *"Please be advised that the opinion you require was obtained in the course of litigation*

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*in the matter Tshavunga (sic). Our client considers it privileged and will not make it available".*

155 It is unacceptable that the DG: Justice elected not to heed the legal advice that he sought and obtained from senior counsel relating to the relationship between his office and the NPA. The legal advice furnished to him clearly shows that his accounting responsibilities over the NPA were limited and did not extend to the areas of responsibility that he claimed. Not only did he ignore this legal advice; he did not share it with Adv Pikoli and he also did not disclose it to the Enquiry when it was his responsibility to do so - not even after it was requested. He attempted to suppress the disclosure of the information that was of significance to the work of this Enquiry. He only acknowledged the existence of these legal opinions when they were presented to him by Adv Pikoli's legal representatives during his cross examination.

156 In my view, it is probable that many of the difficulties between Adv Pikoli and the Minister relating to how each was to discharge their responsibilities were based on the DG: Justice's incorrect understanding of his accounting

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responsibilities *vis-à-vis* those of the NDPP. The reports of the DG: Justice to the Minister would have probably clouded and influenced the Minister's judgment of Adv Pikoli's conduct. There is an obligation on a Director-General to provide accurate, sound and unbiased information and advice to the Minister. The Minister had every right to expect that the DG: Justice would provide her with such information and advice that she could trust and rely upon. The DG: Justice had an incorrect understanding of his role in relation to the NPA resulting in constant conflict with Adv Pikoli and officials in the NPA. I surmise that these conflicts were undoubtedly referred to in the DG: Justice's reports to the Minister, and to some extent at least must have given rise to the Minister's misplaced concerns that Adv Pikoli considered himself not to be accountable to the Minister.

157 I must also state that I have found the conduct of the DG: Justice highly irregular. His failure to include all the relevant material at his disposal in the original submission by Government was not consonant with the responsibilities of a senior state official furnishing information to an investigative

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enquiry established by the President. He had a duty to place all relevant information before the Enquiry. His testimony before the Enquiry was also not particularly helpful to me; his evidence was contradictory and I found him to be arrogant and condescending in his attitude towards Adv Pikoli.

158 The DG: Justice did not heed the legal advice he had sought and received, and continued to assert powers he did not have. His personal view informed the complaints against Adv Pikoli that formed part of Government's submissions to the Enquiry. For that reason he made statements in his evidence in chief that he was forced to retract under cross examination. Some examples are as follows:

158.1 Performance agreement with Ms Sparg: the DG: Justice conceded that the NDPP is her "boss", not the DG, and that the DG is not allowed to interfere improperly.

158.2 DSO labour relations files: the DG: Justice conceded that he has no authority over the DSO and that the DSO's decision in relation to these files was none of his business.

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158.3 Confidential Fund: the DG: Justice conceded that the NDPP did not have a duty to "report" to the DG as if he were a subordinate, and in response to questions from Adv Semanya he concedes that the CEO of the DSO was not accountable to him for the Confidential Fund.

158.4 Chambers for NPA prosecutors: the DG: Justice conceded that it is for the NDPP to make a final decision on where the prosecutors are accommodated. He also concedes that it was brought to his attention that the building in Johannesburg was bought before Adv Pikoli took office.

159 It was also only during his cross examination that it emerged that the DG: Justice prepared the letter dated 18 September 2007 from the Minister to Adv Pikoli. It is in this letter that the Minister requires Adv Pikoli to supply her with all the information that Adv Pikoli relied upon to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of Police. The letter prepared by the DG: Justice did not conform to the request from the President to the Minister dated 17 September 2007. I point out elsewhere in the report that the literal

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reading of the letter conveys a meaning that Adv Pikoli was to stop any plan to arrest and prosecute the National Commissioner of Police until the Minister was satisfied that there was sufficient information and evidence to do so. The Minister has since on affidavit said that it was not her intention to stop Adv Pikoli from discharging his duties or performing his functions as the NDPP. Assuming this is correct, the conduct of the DG: Justice in drafting the document in the manner it reads was reckless to say the least. The DG: Justice should have been acutely aware of the constitutional protection afforded to the NPA to conduct its work without fear, favour or prejudice. The contents of the letter were tantamount to executive interference with the prosecutorial independence of the NPA, which is recognised as a serious offence in the Act.

160 The DG: Justice also conceded in cross-examination that he was responsible for compiling the Government's original submission. What is curious and concerning is that these submissions deal with wider issues than those indicated in the letter of suspension as well as the terms of reference. The submissions implicate Adv Pikoli even in matters that

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occurred prior to him taking office as the NDPP. Some of the matters are, in relation to the date of suspension, so remote that the inference is that the DG: Justice must have intended to throw a wide net to try to make something stick on Adv Pikoli.

**THE LISTING OF THE DSO**

161 The complaint against Adv Pikoli regarding the listing of the DSO is that contrary to the instructions of the Minister, Adv Pikoli sought to have the DSO listed as a public entity within the meaning of the Public Finance Management Act ("PFMA"). The complaint in the original submission from Government was that Adv Pikoli failed to consult the Minister before making a direct application to Treasury for the separate listing of the NPA as a constitutional entity and the DSO as a public entity under the PFMA. The complaint was later narrowed to the DSO only, as Government conceded that Adv Pikoli did not proceed to apply for the listing of the NPA as a constitutional entity.

162 The Government argued that the conduct of Adv Pikoli in this regard demonstrated his lack of respect for the Minister and a failure to appreciate the Minister's oversight responsibility of the NPA. The Minister contends that she only became aware of Adv Pikoli's application to Treasury on reading about it in the NPA Annual Report for 2006/07.

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163 The PFMA provides that the Minister of Finance must from time to time amend the schedule to the PFMA which lists all public and constitutional entities. The PFMA also places a responsibility on the accounting authority of an unlisted public entity to notify, without delay, the National Treasury in writing if such an entity is not listed. The DSO is a public entity as defined by the PFMA because it is an entity that is established in terms of national legislation fully funded from the National Revenue Fund and accountable to Parliament.

164 It is apparent that the DSO was not listed in Schedule 3 of the PFMA as a public entity. On 24 November 2006 Pikoli sent a notification to the National Treasury indicating that the DSO was an unlisted public entity.

165 In a memorandum dated 28 March 2006 from Adv Pikoli to the Minister which Adv Pikoli delivered to the latter on 12 June 2006 [Adv Pikoli held back the memorandum from March until after he met with the Minister on 11 June to discuss the matter with her] there is a manuscript comment by the Minister recording that "*this is a huge policy matter (sic) we cannot deal with it in this manner. We can continue*

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*temporarily with the current arrangement (sic) even that move should be discussed especially in the context of Khampepe's recommendations, DG and NDPP should discuss an interim measure".* The Ministers comments are dated 21 June 2006. Adv Pikoli's evidence is that he was surprised by the Minister's inscriptions in the memorandum because that was not in line with his discussions with the Minister on 11 June 2006, the day before he handed her the memorandum. On the basis of his discussions with the Minister, Adv Pikoli felt that the Minister's reservations about policy matters only extended to the separate listing of the NPA.

166 In a subsequent memorandum from Adv Pikoli to the Minister dated 7 August 2006, dealing only with the listing of the DSO, the Minister recorded that "*this is a huge policy departure and it must be discussed by Cabinet*". The Minister's manuscript comment is dated 23 August 2006. This memorandum only dealt with the listing of the DSO, as Adv Pikoli accepted that further discussions with the Minister were necessary before proceeding with the categorisation of the NPA as a constitutional entity, especially as this would necessitate legislative amendments.

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167 On 13 September 2006 Adv Pikoli submitted another memorandum to the Minister indicating that the listing of the DSO was not a matter of a policy departure but was by law mandatory. Adv Pikoli also states that he offered to prepare a Cabinet memorandum for the Minister if she wanted to obtain an explanation of the legal imperatives of having the DSO listed as public entity to her Cabinet colleagues, as she had indicated that the matter be discussed by Cabinet.

168 Adv Pikoli states in his affidavit that *"It is clear from my memo of 13 September 2006 that we believed that it was mandatory for us to notify National Treasury. This was not a case of me consciously disregarding the Minister's authority, but rather a case of complying with a statutory obligation"*.

169 The reading of the PFMA makes it abundantly clear that there is a duty on the accounting authority to inform National Treasury of public entities that are not listed in the Schedule to the PFMA; that it is a statutory duty which is obligatory in law and requires the accounting authority to notify the Treasury without delay. I therefore cannot find fault with the conduct of Adv Pikoli in this regard.

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I do however believe that Adv Pikoli should have again advised the Minister that he was now proceeding to write to Treasury regarding the listing of the DSO before despatching his letter of 24 November 2006. This is despite the Minister not responding to his memorandum of 13 September 2006.

170 However it must be pointed out that the incident took place in November 2006 and was never raised with Adv Pikoli as a complaint until the Enquiry.

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### **THE BROWSE MOLE REPORT**

171 Another matter on which the Government has argued that Adv Pikoli is unfit to hold office relates to the manner in which he handled what is popularly referred to as the Browse Mole Report. The various complaints against Adv Pikoli are outlined hereunder.

172 In its original submission Government alleged that *"The National Director, upon receiving and processing the [Browse Mole] report, did not inform the Minister about its contents and the resultant possible threat to National Security"*.

173 Government complains that Adv Pikoli should have reported the matter to the intelligence agencies as soon as he became aware of the report. The DG: NIA states that the National Strategic Intelligence Act requires any Government agency not authorised to undertake intelligence work to immediately refer any intelligence report received to the statutory intelligence agencies.

174 Government also alleges that it was only in July 2006 after the report was completed by the DSO that Adv Pikoli advised the Directors-General of the South

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African Secret Service (SASS) and National Intelligence Agency (NIA). He also proposed that an inter-departmental task team, including the DSO, be established to further investigate the allegations. In its original submission Government states *"In effect, he [Pikoli] suggested that this matter, an intelligence operation, be carried (sic) with the participation of the DSO"*.

175 It is further alleged that Adv Pikoli failed to ensure co-operation by members of the DSO with the Presidential Task Team which was later set up to investigate the circumstances of the leak of the Browse Mole Report, and that he failed to take disciplinary action against the head of the DSO.

176 It is common cause that the Browse Mole Report is an intelligence report that identified a conspiracy by various South African and foreign individuals to overthrow the Government of the Republic. It is also common cause that the investigation in the Browse Mole Report is a matter falling within the purview of the intelligence agencies and outside the mandate of the DSO.

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177 The evidence can be summarised as follows: In March 2006 the head of the DSO, Adv McCarthy, initially gave Adv Pikoli a verbal briefing followed by a written report on the substance of the information he had received. The verbal report according to Adv Pikoli's affidavit covered the following matters:

177.1 The head of the DSO was informed by an investigating judge in Switzerland of a number of corrupt transactions that involved government officials in Angola and it appeared that some money had been laundered through South African banks;

177.2 The DSO had been monitoring the bail conditions of a senior South African politician including his international travel schedules, and noted unexplained funds coming into his bank accounts;

177.3 Having received reports from informants that could give rise to charges of money laundering, the head of the DSO asked a Senior Special Investigator in the DSO to assess the information and to provide him with a report.

178 Adv Pikoli testified that he did not advise the Minister but simply filed the preliminary report on the advice of the head of the DSO. He was told that

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the report still needed to be finalised and that it would be submitted to him when it was completed. He states that he *"did not study the preliminary report in detail. I looked through the report, I saw things that were startling"* and he conceded during cross-examination that he had read the preliminary report. He also conceded that he did not properly apply his mind to the preliminary report.

179 In July 2006 Adv Pikoli received the final Browse Mole Report from the head of the DSO. Adv Pikoli's evidence is that he discussed the final report with the head of the DSO and that he pointed out that in his opinion the report contained "raw intelligence" and he did not believe that the report should have any status in the DSO. Because of this fact he testified that he decided to set up a meeting with the Directors-General of SASS and NIA to inform them of the report. This he did in July 2006, soon after he received the final report.

180 The first complaint against Adv Pikoli is that he ought to have realised in March 2006 that the DSO was engaged in matters outside its legal mandate and should have stopped any further investigation and prevented the head of DSO from proceeding with the

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finalisation of the report. Further he should have informed the intelligence agencies of the information that had been received by the DSO. In addition he should have realised that the possibility that foreign funds were being sent into South Africa for political objectives could be a matter affecting national security, and for that reason should have immediately advised the Minister of the information that had been received.

181 I have not had sight of the preliminary report and despite my request a copy of this report could not be found. However, I see no reason not to accept Adv Pikoli's evidence of the content of the reports he received in March 2006.

182 It was also argued on behalf of Adv Pikoli that he did not immediately report the matter to the Minister in March 2006 because at that stage he was only in possession of a preliminary report which he had not studied in detail, and because he was assured by the head of the DSO that he would be furnished with a final report in due course. Adv Pikoli argues that as soon as he was in possession of the final report and had assessed the nature of the report he

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correctly raised the matter with the relevant intelligence structures.

183 Government did not lead any evidence to support its complaint that Adv Pikoli suggested to the DG's of SASS and NIA that the DSO should be part of the investigation into the Browse Mole Report. This complaint falls away.

184 The further allegation against Adv Pikoli is that he failed to discipline the head of the DSO for his conduct in authorising the Browse Mole Report as well as for his failure to fully co-operate with the enquiry established by the President to investigate the circumstances surrounding the report. This complaint was first raised during Adv Pikoli's cross-examination.

185 It was argued on behalf of Adv Pikoli that this matter to discipline the head of the DSO does not fall within the powers of the NDPP as that power vests in the President. It is correct that the head of the DSO is by law appointed by the President and is also accountable to Parliament for the functions of the DSO. Moreover the evidence of Adv Pikoli was that he did indeed instruct the head of the DSO to

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co-operate with the investigating team that was probing this issue on the instructions of the President. The argument is he could do no more. It is my view that despite lacking the authority to formally discipline the head of the DSO, it was open to him to reprimand the head of the DSO for conducting the Browse investigation and preparing an intelligence report beyond the mandate of the DSO, as well as for failing to fully co-operate with the investigation by the Task Team. The head of the DSO would then have had an opportunity, if he had a defence for the conduct, to raise such a defence or justification.

186 Adv Pikoli must be criticised for not raising this matter with the Minister or the relevant intelligence structures as soon as it came to his attention in March 2006, and for not instructing the head of the DSO not to proceed with the report. Without the benefit of the preliminary report I am not able to discern what information it contained. However in his affidavit mentioned above Adv Pikoli explains the nature of the briefing he had received from the head of the DSO which captures the essence of the report's contents. It is not beyond reason to surmise that the

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preliminary report would have indicated the gravity of the issues that were ultimately reflected in the final report and also that the issues it addressed were intelligence matters outside the mandate of the DSO.

187 With regard to the investigation by a Task Team into the Browse Report, Adv Pikoli says that on receipt of a letter from the DG: Presidency requesting the co-operation of the DSO in the investigation, he forwarded this letter to the head of the DSO under cover of a memorandum requesting him to ensure co-operation by members of the DSO. Immediately after the investigation was launched, Adv Pikoli says that he convened a meeting of all regional heads of the DSO and heads of divisions of the DSO to brief them on the report and asked them to co-operate with the investigation. He says that he first became aware of NIA's unhappiness with the co-operation from the head of the DSO at end of August or early September 2007, mere weeks before his suspension. Adv Pikoli agreed with Adv Semenya that the head of the DSO could have readily supplied the Task Team with most of the information it sought, including the identification of the sources and compilers of the report, without

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the bother of a detailed investigation. The information was available to the head of the DSO and the failure by the head of the DSO to convey this to the Task Team was evidence of his reticence to cooperate. Adv Pikoli did not ask him for the information.

188 The evidence surrounding the Browse Mole Report strongly points to the DSO having conducted itself in a manner quite inconsistent with its obligations under the law and outside its legal mandate. It is a stark demonstration that national security may be seriously hampered if institutions act outside their legal framework. I am unable however to find that the intelligence gathering exercise done by the head of the DSO in the investigation and compilation of the Browse Mole Report was done through the instruction or with the acquiescence of Adv Pikoli. That said however, Adv Pikoli was obliged to inform the Minister in March 2006 of the information gleaned as a result of the Browse Mole investigation, and to stop any further work on the report by the DSO. Had he taken this action he could have limited the damage caused by this intelligence gathering exercise.

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189 It is insightful to note that this matter enjoyed the attention of Parliament's Joint Standing Committee on Intelligence ("the JSCI") whose report on the Browse Mole matter points to the fact that the DSO went outside its legal mandate in the investigation and compilation of the Browse Mole Report. The JSCI was of the opinion that the executive ought to have acted against the head of the DSO for that infraction.

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### **THE MALAWIAN INVESTIGATION**

190 In its original submission Government alleges that Adv Pikoli failed to inform the Minister and the relevant intelligence agency of the investigation of an alleged plot to assassinate the Malawian President. The Government's complaint is that Adv Pikoli undertook investigations into the conspiracy to assassinate the Malawian President which exercise amounted to an intelligence gathering exercise falling outside the mandate of the DSO.

191 The facts relating to this complaint can be summarised as follows. On 24 May 2006 Adv Pikoli received a letter from the Director of Public Prosecutions (DPP) in Malawi requesting assistance from the South African NDPP with regard to an investigation relating to a conspiracy to overthrow the Government of Malawi and to assassinate the then State President of Malawi. Adv Pikoli duly forwarded the request to the Department of Justice. On 13 June 2006 the DPP in Malawi sent an e-mail acknowledging the response sent to him by the office of the NDPP. On 15 June 2006 Adv Pikoli received a telephone call from the DPP in Malawi requesting a meeting. Adv

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Pikoli agreed to meet with the Malawian DPP. The meeting was held on 19 June 2006 and the DG: Justice was invited to the meeting by Adv Pikoli. The formal process by which mutual legal assistance could be sought by and offered to the prosecuting authority of Malawi was then discussed. On 20 June 2006 a formal request for mutual legal assistance from Malawi was received by the DG: Justice.

192 The request was processed in terms of the International Co-operation in Criminal Matters Act, which involved the DG: Justice having to secure the approval of the Minister to render such co-operation. Having secured the approval of the Minister, the DG: Justice referred the matter to the NPA and authorised them to collate the information requested by the Malawian DPP. The DG: Justice also wrote to various magistrates requesting their co-operation in securing the information. The original submission from Government makes no reference to the fact that the request was processed by the DG: Justice under the International Co-operation in Criminal Matters Act.

193 The DG: Justice states in his affidavit that he advised Adv Pikoli prior to the meeting with the Malawian DPP that the matter should be investigated

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by SASS. He states that Pikoli advised him that the DSO was already involved in the investigation. The complaint in essence is that the interaction that the NPA had with the Malawian authorities was not the type of interaction that was within the competence of the NPA because that matter dealt with a foreign intelligence operation and should simply have been referred to the SASS without further discussion. The DG: NIA says in his affidavit that the request ought to have been handled strictly within the limits of the request made and that Adv Pikoli ought not to have investigated the conspiracy to assassinate the Malawian President.

194 The complaint is twofold. Firstly the Government contends that Adv Pikoli undertook an investigation into matters that properly belong to intelligence agencies, and secondly that Adv Pikoli did not inform the Minister of the conspiracy to assassinate the Malawian President, particularly as the conspiracy involved a South African citizen and was at least partially planned in South Africa. The assessment of the evidence reveals that both the DG: Justice as well as the DG: NIA were unable to give evidence of what investigation if any was undertaken by Adv

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Pikoli or the NPA in relation to the request from Malawi. There was no evidence of where the investigation was conducted; what shape the investigation took; who participated in the investigation and such relevant information as would assist me in making the determination whether or not the investigation went outside the mandate of the NPA. Adv Pikoli denies the allegation that the DSO was already involved in this investigation before the formal request was processed. He states that in fact the DSO was not involved at all and it was the NPA who collated information at the request of the DG: Justice.

195 The witnesses called by Government on this aspect conceded that there was a legal duty on Adv Pikoli to process the request from Malawi in terms of the legislation for mutual legal assistance. The documents submitted before the Enquiry do not point to any investigation that Adv Pikoli would have undertaken nor the involvement by Adv Pikoli in matters of intelligence. On the contrary, the documents clearly show that the request from Malawi was indeed handled strictly in accordance with the provisions of the law and that the NPA merely

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collated the information requested by the Malawian DPP. And this they did at the request of the DG: Justice who is the central authority in terms of the International Co-operation in Criminal Matters Act.

196 The DG: Justice also concedes that the Minister was informed when the formal request was processed by his officials. However there is no evidence that the DG: Justice specifically advised the Minister that there was a conspiracy in South Africa to assassinate the head of state of a neighbouring country, and there was a responsibility on the DG: Justice to bring this matter to the attention of the Minister. Similarly Adv Pikoli had such a responsibility to the Minister to alert her when he first became aware of this conspiracy, and he failed to do so. This constituted a failure to appreciate the responsibility of an NDPP to appraise the Minister on an issue that may impact on matters of national security.

197 There was also a tangential complaint that Adv Pikoli was obliged in law to immediately report the request to the intelligence structures and that he failed to do so. The relevant legislation, s.3 of the National Strategic Intelligence Act No 39 of 1994, places a duty on a department of state that comes into

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possession of national security intelligence or information that may be of value in the preparation of the national intelligence estimate to transmit such intelligence and information without delay to the national intelligence structures. It was argued on behalf of Adv Pikoli that the information sought from him by his Malawian counterpart was not national security intelligence as defined in the legislation and further that the legislation imposes that duty upon a department of state and that the NPA is not such an entity. Adv Pikoli also states that he "*might not perhaps have been conscious*" when he referred the matter to the DG: Justice and did not also act in terms of referring it to NIA. But he says that he did bring the request to the attention of the DG of SASS. The DG: NIA confirms that NIA and SASS were already working on the Malawi project and were therefore aware of the conspiracy. The evidence on the point is conflicting but it bears no value to determine which account is correct.

198 I cannot find that the Government has established that Adv Pikoli is guilty of investigating any intelligence matter or conspiracy or involved himself in an area outside his mandate. However, he ought, in

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my view, to have brought to the attention of the Minister that there was a plot to assassinate the Malawian President involving South African citizens and which was at least partially planned in South Africa. These are matters of national security which the executive is entitled to know in order to advise itself on what position to take in its global relations and international responsibilities.

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### **INTERACTION WITH FOREIGN INTELLIGENCE SERVICES**

199 A further complaint raised against Adv Pikoli's fitness to hold office is that a member of the DSO was engaged in unregulated interaction with foreign intelligence services (FIS). It is also alleged that the DSO made use of private security companies in executing its mandates.

200 The DG: NIA's accusation is that the DSO continued to interact with foreign intelligence services "*with the sanction of their management*" and after Adv Pikoli was briefed by NIA on the dangers of unregulated interaction with FIS and the use of private security companies.

201 The evidence of the DG: NIA is that Adv Pikoli was briefed on the dangers of unregulated interaction with FIS and was told about a specific member of the DSO who was suspected of leaking classified information to foreign intelligence services. The DSO member's interaction with the FIS took place between 2002 and 2004, before Adv Pikoli assumed office as NDPP.

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202 In his evidence in camera, the DG: NIA tabled two reports pointing to the continuing activity by the member of the DSO with foreign intelligence services. He conceded however that it was not his evidence that Adv Pikoli was aware of the contents of these specific reports. The DG: NIA states that NIA has the responsibility to co-ordinate interaction with FIS, and that the NPA / DSO cannot mandate liaisons with FIS.

203 Adv Pikoli's evidence is that in one meeting with the DG: NIA during August or September 2007 he specifically raised the question whether it was the contention of the NIA that the member of the DSO with whom contact with the FIS was alleged, was in fact a spy and he was told that they were not certain, and that they were still investigating the matter. It is Adv Pikoli's evidence that NIA did also not mention that they knew that the DSO member was sharing sensitive information with the FIS. The DG: NIA says that at the August or September meeting Adv Pikoli was told that the DSO member was sharing confidential information with FIS and that NIA expected Pikoli to 'take the necessary measures', including disciplinary measures and the withdrawal of the security clearance

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of that DSO member. It is common cause that Adv Pikoli did not take any such disciplinary measures against the DSO member before his suspension. It is also common cause that he was suspended close to this period of time.

204 Adv Pikoli says that he is not aware of any law that prohibits the DSO from having contact with FIS. Nor has he been given enough hard facts to say that DSO members are violating the law regarding contact with FIS. Adv Pikoli also says that it would be permissible for DSO members to interact with FIS regarding matters relating to organised crime. However he did concede that the DSO cannot competently mandate somebody in DSO to engage in intelligence activities.

205 In conducting a security assessment on the DSO member in question NIA had reason to write to the NPA in June 2006 asking whether the contacts that the DSO investigator had with FIS had been authorised by the NPA. The DSO member had disclosed these contacts in his application for a security clearance. The head of the DSO replied that these contacts were mandated by the NPA and the DSO. It was argued on behalf of Adv Pikoli that NIA did not question whether these

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liaisons had been mandated by NIA, the inference being that NIA accepted that such liaisons could be authorised by the NPA. It is abundantly clear however that the DSO could not authorise contact with FIS on matters purely related to intelligence, but could authorise investigations into specified organised crimes.

206 Government stated that that Pasco Risk Consultants, a UK-registered company, was utilised in the execution of the search and seizure warrants at the Union Buildings had no security clearances. The DG: NIA states that such private companies are often fronts for FIS. Adv Pikoli denies that Pasco Risk Consultants was involved in the search and seizure operation at the Union Buildings. The DG: NIA subsequently conceded that the private company that was involved in the execution of the search and seizure warrants at the Union Building was in fact a different company.

207 On the evidence presented before the Enquiry I can only make a finding that the member of the DSO who allegedly had unregulated interaction with the FIS may have done so inconsistent with the DSO's mandate. On the facts the interaction that seems to be

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admitted by both parties indicates that the interaction would have happened prior to Adv Pikoli taking office. The evidence that the member of the DSO was guilty of ongoing interaction with FIS does not appear to have been brought to the attention of Adv Pikoli, and he was therefore not in a position to do anything about it. I am unable to find that this aspect reflects negatively on Adv Pikoli's fitness to hold office.

208 As regards the security clearance of the private company used by the DSO in the search and seizure of documents at the Union Buildings and Tuynhuys, the evidence irrefutably points to the fact that the necessary security clearances were not sought and obtained.

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### POST - TRC CASES

209 The Government complains that Adv Pikoli's handling of the post-Truth and Reconciliation Commission (TRC) cases did not show the sensitivity to the victims and an appreciation of the public interest issues that are mandated by the Prosecution Policy. It is alleged that the NPA concluded plea bargains with Mr Van der Merwe and others (the Vlok matter) without discussing them with the task team or informing the Minister, *"notwithstanding potential impact on national security"*.

210 The evidence tendered in this regard was that of the DG: Presidency who testified about being poisoned by the security operatives of the apartheid regime. In substance the DG: Presidency expressed his outrage about the way in which the plea and sentence agreements were concluded with the former Minister Vlok and the other co-accused. The complaint is that the DG: Presidency expected that that process should have as its purpose the revealing of "the whole truth" about the clandestine poisoning and how the institutions of state were used to stifle resistance against the repressive and racist regime of the past

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order. However the prosecutorial guidelines do not provide for revealing the 'whole truth' as a requirement for prosecuting these cases.

211 The law relating to the plea and sentence agreements and the prosecution policy regarding the post-TRC matters does not have as its object revealing "the whole truth". What the law provides for is that the victims of the offence for which a plea and sentence agreement is to be concluded must be consulted by the prosecuting authority. On the evidence, the DG: Presidency was indeed consulted before the plea and sentence agreements were concluded. There were concerns articulated by the DG: Presidency about the nature of the consultation but for the purposes of this report it is unnecessary to deal with those save to say that he found the demeanour of the prosecutor insensitive to his plight as a victim in that case. This complaint also touches very closely on the constitutional guarantee of independence of the NPA to prosecute or not to prosecute, and to do so without fear, favour or prejudice.

212 Adv Pikoli says that the role of the inter-departmental task team was to provide information and advise the NPA, and that the NPA retained

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responsibility for all prosecutorial decisions. He further states that he kept the Minister fully briefed of progress with the post-TRC matters, and wrote to the Minister requesting her assistance in clarifying the role of the task team. He did not receive any response from the Minister to this request. He states that despite representations from Vlok and Van der Merwe, he refused to grant them immunity from prosecution and proceeded to charge them. The prosecution resulted in a plea and sentence agreement with the accused.

213 Moreover Government has not pursued this complaint. In closing argument before the enquiry it was stated on behalf of Government that: "*The TRC and Khampepe we have not gone into. We have not pursued the TRC complaint and the Khampepe complaint*". As a result it is my considered opinion that Government has not made out a case that Adv Pikoli is not fit for office by reason of this complaint.

**SEARCHES AT UNION BUILDINGS & TUYNHUYS**

214 In August 2005 the DSO executed search and seizure warrants at the Union Buildings and Tuynhuys as part of a range of searches related to the investigation of former Deputy President Zuma. There were simultaneous searches at approximately 20 venues across the country which took place on 18 August 2005.

215 The main complaint of Government is that the manner in which the search and seizure operation was planned and conducted did not take into account that the Union Buildings and Tuynhuys are national key-points, and further that top secret state documents including Presidency records and Cabinet papers would be housed at these premises.

216 In particular Government points to the failure of Adv Pikoli to advise the Minister of the planned operation prior to obtaining the warrant.

217 The principles of co-operative government articulated in s. 41 of the Constitution would have required that the NPA should have requested the documents at Tuynhuys and Union Buildings from the Presidency

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instead of including them in a broad search and seizure operation.

218 Government's specific complaints are as follows:

218.1 The Minister's original complaint is that she was not informed by Adv Pikoli that the warrants were to be executed at the Union Buildings and Tuynhuys, and that she first heard of the searches while they were actually in progress.

218.2 Government alleges that the manner in which the searches were conducted created the conditions for a breach of security to have materialised, e.g. the failure to ensure that all those involved in the raids were vetted and had the necessary level of security clearance, and the failure by Adv Pikoli to ensure that all documents and files collected during the operations, including electronic files, were properly secured at the time.

219 Adv Pikoli admits he did not inform the Minister that the NPA intended carrying out search and seizure operations at the Union Buildings and Tuynhuys prior to obtaining the warrants. He says he did do so shortly after obtaining the warrants on August 12 and executing them on August 18.

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220 In Government's original submission the Minister states that she "*first heard of the raid through the DG in the Presidency and at a time when the raids were in progress*". She states that the warrants were obtained without her being informed and further that "*the nature of the operation required that (he) inform the Minister of his intended action*".

221 He thereafter informed the President at the President's home in Pretoria and the President requested him to notify Deputy President Mlambo-Ngcuka and the DG: Presidency. It is Adv Pikoli's evidence that he went to the Deputy President's house and explained the warrants to her. He states that he met DG: Presidency a few days before the warrants were executed and undertook that the relevant personnel from his office would meet the DG: Presidency prior to the execution of the warrants. This evidence of Adv Pikoli is unchallenged by Government. Adv Pikoli delegated the Regional Head of the DSO, Gauteng, as the co-ordinator of the search and seizure operations to meet with the DG: Presidency.

222 The fact that Adv Pikoli did not inform the Minister of his intention to obtain the warrants of search and

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seizure of documents that were in the Union Buildings and Tuynhuys is a dereliction of duty on his part. It is a further example of his failure to consider it as his obligation to proactively inform the Minister of a high profile matter in which the NPA is involved. In this case he failed to inform the Minister in advance that he intended to obtain warrants of search and seizure especially as the searches were going to be conducted in a national key-point.

223 The responsibilities that rest with someone like the NDPP as the head of an organ of state is to avoid legal processes in accessing documents that could otherwise be obtained through co-operation with other state institutions. The Constitution places a duty on all organs of state to co-operate with one another and to assist one another and more importantly to avoid inter-governmental litigation. The DG: Presidency says that he raised the matter with Adv Pikoli during their meeting in the following terms:

*"... the National Director for Public Prosecutions made an appointment to meet me and gave me a letter that was informing me that they were going to do a search and seizure at the Union Buildings and at Tuynhuys, which means The Presidency's offices.*

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*The meeting was quite brief. I raised some questions about the matter, you know, in terms of whether or not you really need to search the Union Buildings and Tuynhuys, whether or not there wasn't another way in which you could deal with it, I mean why don't you just ask us for documents that you are looking for and because it's a State Institution it would provide the documents. I was also concerned that it is a national key-point which you don't just arrive and say I have come to search the place at any time. Then of course he said to me, I mean it's really a manner of courtesy to come and inform you but we have got warrants and we have to execute those warrants. I then asked that we be allowed to make preparations, because these are national key-points, there are (sic) sensitive material kept in those places and the police take care of that environment. We would need to make sure that there is no clash with the police when they arrive at the Union Buildings to execute the responsibility that they have to execute ... So I was making a plea that the Union Buildings and Tuynhuys be treated differently because the documents are not going to go away in those buildings. Mr Pikoli felt their plan was to*

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*do it at the same time and therefore cannot make adjustments to that".*

224 Adv Pikoli's comment to the DG: Presidency that informing him of the search and seizure operation was a 'courtesy' again displays his lack of sensitivity and awareness of his responsibility as the NDPP. However Adv Pikoli in his testimony states:

*"... I had to ensure that the environment within which the warrants were to be executed, is a conducive environment. It's a non-threatening environment. It's not an environment that is going to lead to problems. That's why I then had to inform the Minister. I had to go to the President. I had to go to the Deputy President. I had to go to Rev Chikane who is the head in The Presidency."*

225 There is no evidence to suggest that the NPA would have been refused access to any of the documents that would have been necessary for their investigation. Adv Pikoli did not furnish any evidence suggesting that he was apprehensive that access to these documents at the Union Buildings and Tuynhuys would have been frustrated had he asked for such access.

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226 The Minister in her replying affidavit sets out the legal position in respect of security clearances as regulated in terms of a Cabinet decision taken on 4 December 1996, and referred to as the Minimum Information Security Standards ("MISS"). This document clearly states that any employee of government or any person contracted to perform duties for government who would be exposed to classified information, needs to be vetted, and that such vetting is to be conducted by the National Intelligence Agency (NIA). Adv Pikoli highlights the distinction in MISS between security and national security and says that MISS should not be used to frustrate investigations into corrupt and criminal actions.

227 In his replying affidavit the DG: Presidency confirms that he enquired from Adv Pikoli whether the persons who were scheduled to conduct the searches were vetted. He testified that:

*"On that morning [of the search]... I made a call to Mr Pikoli to say: Are the people who are coming to the Union Buildings and Tuynhuys vetted? And at that point he said: Well I can't say as it is now, because I wouldn't know who is going to which*

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*place, it's an operational issue. And I indicated that I am concerned about that because this is a top secret environment. We can't get any person to arrive here and do search and seizure, gain access to top secret documents without managing them in terms of the relevant laws and regulations. He then said he will talk to ... Adv Nel, because he will be the one who is responsible for this operation."*

228 The DG: Presidency also stated in his oral evidence that:

*"The [NPA] Act says the investigators must be vetted and the reports that came out at different times within my life in government, is that that exercise was not carried out. In the Khampepe report the judge also refers to that, that many people within the DSO were not vetted in terms of the NPA Act ... When I investigated the issue of leaks after the Hefer commission, we also found again that many of the staff were not vetted. So I had a good reason to ask the question: Are the people you are sending to the Presidency vetted?"*  
*He says further that "What I expected from the National Director for Public Prosecutions is that if you are going to search an office of the*

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*president of the country, you would take responsibility and make sure that everything is done in accordance with the law."*

229 The Regional Head of the DSO, Gauteng, Adv Gerrie Nel, testified and said that he met with the Director-General in the Presidency two days before the warrants were executed to facilitate the smooth execution of the warrants. He states that the DG: Presidency did not ask whether the people who will be conducting the searches had been vetted. The DG: Presidency, in his replying affidavit, confirms that he enquired from the National Director whether the persons who were scheduled to conduct the searches were vetted. He called Adv Pikoli on the morning of the search and seizure operation to ask whether the people conducting the searches were properly vetted, and it seems that Adv Pikoli did not communicate this concern to the Regional Head of the DSO, Gauteng, who was co-ordinating the searches. The evidence of the Regional Head of the DSO, Gauteng, is that the bulk of the people (approximately 189) conducting the searches countrywide were employees of the DSO and that the 52 remaining people were from the auditing firm KPMG who were the forensic auditors in respect

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of the Arms Deal Investigations and were granted the necessary authority in writing as provided for in the NPA Act. His evidence is further that the other employees of Computer Security and Forensic Solutions (CSF) were engaged to assist the search and seizure because of their special expertise which the DSO did not have in relation to information technology matters.

230 The Regional Head of the DSO, Gauteng says at his meeting with the DG: Presidency before the search *"... there was a discussion about people should not access documents if they are not security cleared and we then informed Reverend Chikane that the DSO people, Louw and Naude, they had top secret clearance. The people from KPMG did not have top secret clearance. It was then agreed that Louw and Naude will access all classified information"*.

231 Security Screening of Private Companies. - It is established on the facts that the people from Computer Security and Forensic Solutions (CSF) and the people from KPMG did not have the security clearances required for them to have access to classified information. The people from KPMG, forensic auditors in respect of the arms deal

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investigation, and the CSF employees had been granted the necessary authority in writing as contemplated in sections 28(1) and 29(1) of the NPA Act. CSF was employed as the DSO did not have the requisite expertise to download information stored on computers. Whilst I am not satisfied that Government has established that there were in fact any security breaches during the search and seizure operation at the Union Buildings, the opportunity for such breach to occur was present as a result of the utilisation of persons without appropriate security screening. Adv Pikoli did not do enough to ensure that the security requirements of the Presidency were adequately safeguarded.

232 Failure to ensure document security: The procedure agreed between the Presidency and the DSO was that if there is any dispute about a document, and if the dispute is about relevance, then the documents would be sealed and access to the documents would be resolved later. If the dispute was about classified documents, those documents will also be sealed and access to the documents would be discussed later. The process as prescribed in Section 29(11) of the NPA Act was therefore followed.

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233 The minutes of a meeting held on 22 August 2005 attended by representatives of the Presidency and NPA tabulate four categories of documents relating to the search and seizure operation at the Union Buildings:

233.1 Documents of non-classified material that were identified by NPA as relevant, which were sealed and located at the NPA offices.

233.2 Documents of non-classified material for which the relevance was not agreed between the Presidency and the NPA. These documents were also sealed and held at the NPA offices.

233.3 Classified documents that were sealed and located in the Presidency.

233.4 Copies of hard discs containing both classified and non-classified material, which were sealed and located at the offices of the Presidency.

234 The Minister states that national security including information security was compromised as the private company (CSF) had access to classified documents, namely the computer hard drives. The DG: Presidency also states in his affidavit that the private company employed by the DSO searched computers at the Presidency and these computer technicians were not

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vetted. He expressed his concern that in the process of copying documents from computers these documents may have been covertly transmitted electronically. The DG: NIA states that the computer experts from NIA were not present when the copying of hard discs was done by members of CSF.

235 The Regional Head of the DSO, Gauteng says *"No such breach [of security at the Union buildings] has ever been brought to my attention and secondly the process that we followed excluded the possibility of a breach in that if there is any dispute about a document, the document was sealed to be discussed later"*. He refers to the minutes of a meeting on 22 August 2005 at which an agreement was reached about how contested documents and files were to be dealt with. He says that the copying of computer information by a member of CSF took place in the presence of an IT expert from the Presidency and representatives of NIA, and that the only copies of these computer records are in a safe at the Presidency and NIA has another copy. The NPA do not have a copy.

236 The Deputy DG: NIA states that NIA raised its concerns with Adv Pikoli with regard to the manner in which the search and seizure operation was carried

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out at the Union Buildings. He refers to correspondence from NIA to Adv Pikoli, letters dated 26 August 2005, and 5 and 8 September 2005 regarding the alleged breach of security during the search at the Union Buildings. Whilst the letter dated 26 August 2005 was purported to be delivered at the residence of Adv Pikoli, a letter from NIA was signed for on that date by Adv Pikoli's spouse, but it is not conclusive that it was the letter referred to by the Deputy DG: NIA. Subsequent correspondence by Adv Pikoli on this matter does not make reference to this particular letter but refers to other related correspondence dated 5 and 8 September 2005 received from the NIA at Adv Pikoli's office.

237 It would appear from the correspondence and the oral evidence at the hearings that the Presidency, DSO and NIA successfully resolved their differences regarding the searches at the Union Buildings. However it does also seem that the core issue raised in the letter of 26 August which Adv Pikoli did not receive, namely that there may have been breaches of security during the search and seizure operation, was not resolved. This would be consistent with Adv Pikoli not having received the letter of 26 August, as he deals in his

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reply of 13 September with the issues raised in the letters dated 5 and 8 September.

238 The Government does not contend that the failure of Adv Pikoli to inform the Minister about his decision to obtain the warrants of search and seizure was raised with him at the relevant time. This complaint was raised for the first time during this Enquiry.

**THE INVESTIGATION INTO THE NATIONAL COMMISSIONER  
OF POLICE**

239 There are two separate complaints relating to the investigation against the National Commissioner of Police.

240 The first complaint is that the Minister's *"ability to exercise her final responsibility was compromised"* by Adv Pikoli's failure to inform her of his intention to obtain warrants of arrest and search and seizure against the National Commissioner of Police. The Government argues that this *"shows a lack of respect and appreciation of the Minister's responsibilities ..."*.

241 The second complaint is that Adv Pikoli failed to exhaust all the options that were initiated by the Presidency to enable the DSO to access certain documents that were in the possession of the SAPS. The DSO required these documents and files for their investigation into Operation Bad Guys and the National Commissioner of Police. The allegation is that Adv Pikoli did not advise the DG: Presidency that his efforts at facilitation had come to nought and had gone ahead to obtain warrants of search and

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seizure for these and other documents. The DG: Presidency was thereby prevented from implementing an alternative strategy to secure the documents from SAPS. The assessment of this complaint is set out below.

242 Adv Pikoli has responded to these complaints by alleging that he was suspended in order to prevent the NPA from prosecuting the National Commissioner of Police.

243 I will deal with the three issues separately.

244 There is a lengthy and detailed background to these complaints which is necessary to outline before examining the complaints. In January 2006 Adv Pikoli was informed by the Director of Public Prosecutions in the Witwatersrand Local Division of the High Court, Adv Charin de Beer, that there was reason to believe that the National Commissioner of Police's role in the investigation of the Brett Kebble murder needed probing. It was alleged that the National Commissioner of Police had passed on certain information to suspects in the murder, and that these suspects were also part of the Operation Bad Guys investigation into organised crime being conducted by

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the DSO. This information gave rise to an investigation into the National Commissioner of Police by the DSO. Adv Pikoli, in his affidavit and testimony, recalls various meetings that he had with the Minister from around March 2006 through to September 2007 regarding these investigations.

### **Failure to Exhaust the Presidential Facilitating Procedure**

245 The DSO was investigating what was termed Operation Bad Guys and as part of this investigation it required access to some documents, files and video footage that were in the possession of the SAPS. These documents included informant files on Mr Stemmet and Mr Agliotti, UK activity reports relating to Mr Agliotti, and video footage of SAPS interviews with Mr Agliotti and Mr Stemmet.

246 On 19 March 2007 Adv Pikoli submitted a memorandum to the Minister of Justice stating that the DSO was not getting co-operation from SAPS with regard to the information they sought. The DSO had indicated that if there was no progress by 22 March they would have to approach a judge for the appropriate relief. Despite further attempts through the involvement of

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the Minister, SAPS refused to provide the necessary information. On 7 May 2007 Adv Pikoli submitted a report to the President stating that despite the involvement of the Minister and the Minister of Safety and Security there had been no progress in getting the information from SAPS. The President acted by tasking the DG: Presidency to facilitate access to information and documents required by the DSO through the Deputy Commissioner of SAPS.

247 However, various disagreements ensued between the DSO and SAPS. The first dispute centred on the removal of documents from police custody. The SAPS argument was that they were directed to allow the DSO to view the files and make notes but not to copy or remove files. The Deputy National Commissioner of Police says in his affidavit that there were meetings with the DSO where the DSO requested further documents. He says on 4 June 2007 the SAPS conveyed its concerns to the DSO, namely that in their understanding there was no agreement for the removal of any material and that the DSO was only entitled to peruse and make notes on any material that was in the possession of the Police. The DSO needed at least copies of these documents and videos to properly prepare their

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prosecution of suspects in the Bad Guys investigation.

248 A further dispute, according to the Deputy National Commissioner of Police, was that the SAPS had asked for a full understanding of precisely what allegations and against whom the DSO investigation was directed in order to access any available and relevant intelligence which may be provided to the DSO. SAPS enlisted the services of the State Attorney, Pretoria, to engage with the DSO in this regard. The DSO view was that the President had intervened in this matter so it was not necessary to provide this information. They were also concerned that as the investigation related to erstwhile police informers as well as members of the SAPS there was a risk that the documentation they needed would be destroyed. The Regional Head of the DSO, Gauteng, testified that he had responded to a letter from the State Attorney asking inter alia for the grounds on which their clients claim privilege, and whether there was any other prohibition against disclosure. In reply the State Attorney said that their client (SAPS) was awaiting instructions from the executive

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as well as the National Commissioner on how to further deal with this matter.

249 The involvement of the National Commissioner of Police himself in this process was another serious impediment in accessing the information from SAPS. Adv Pikoli says that in a meeting of 17 March 2007 with the Minister, the Minister of Safety and Security and the National Commissioner of Police, the latter told the Ministers that the NPA was not going to get that information. Of this meeting Adv Pikoli says:

*"He [Selebi] told me, he told the Minister of Safety and Security, he told the Minister for Justice that we are not going to get that information. That is the man responsible for the security of the country and we are not going to get the information that we wanted. So the meeting was fruitless."*

Based on that attitude he realised that their efforts to obtain the documents were going to be frustrated.

250 In his testimony the Head of the DSO, Gauteng, Adv Nel, states that in his meeting with Commissioner Williams of the SAPS on 4 June 2007, the latter made

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it clear that the National Commissioner of Police was "still part of the process" and "must be informed" about the requests from the Presidency. Commissioner Williams indicated that he needed a mandate from the National Commissioner of Police to hand over the documents despite the request from the Presidency. Adv Nel says that:

*"Commissioner Williams indicated to us [the DSO] that we should go to High Court. 'Take the legal route, go to the High Court, I am not handing over documents'. He also says 'I am going back to the commissioner, I am going to brief him. I will tell him that the president wants us to hand over... The commissioner is still part of the process, he must be informed'."*

251 Adv Nel testifies that after this meeting with SAPS the Exco of the NPA met and decided to proceed with securing warrants of search and seizure and the prosecution of the National Commissioner of Police. This then led to the briefing of the Minister by the BG investigation team on 25 June 2007.

252 Adv Pikoli details a series of meetings where he informed the Minister, and in some of those meetings

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the President as well, about the difficulties the DSO continued to encounter in obtaining the documents from the SAPS. He testified that it could not have come as a surprise to the Government that he ultimately went to seek the warrants for the search and seizure of those documents.

253 The DG: Presidency testified that he was advised in July 2007 by the head of the DSO that the attempts to facilitate the exchange of documents had not been completely successful and that the DSO needed to approach the President again. At that stage the DG: Presidency had not received any reports from either DSO or SAPS regarding disagreements, nor was he aware of the DSO seeking to obtain warrants. The DG: Presidency's evidence is that he felt slighted by the request to see the President without either the Deputy Commissioner of Police or the head of the DSO advising him about any difficulties that were experienced.

254 The DG: Presidency testified, that he only heard of the problems in obtaining documents when Adv Pikoli informed the President on 15 September 2007 that warrants for search and seizure and arrest of the Commissioner had already been obtained. Hence both he

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and the President were surprised. He was also surprised to learn that the SAPS had refused to hand over copies of the documents to the DSO.

255 The assessment of the evidence shows a patient and elaborate attempt by the DSO to obtain the documents from the SAPS. These attempts did not meet with any great success. It is evident that part of what rendered co-operation difficult must have been the fact that the documents that the DSO wanted related to the investigation around the National Commissioner of Police. This suspicion is strengthened as the Deputy National Commissioner of Police said one of the impediments was the desire on the part of the SAPS to know "*what and against whom the DSO investigation relates*". The DSO must also have harboured a clear suspicion that by disclosing their full hand that they were investigating the National Commissioner of Police would have held a risk that the documents were either not made available or were destroyed.

256 I can understand the frustration of the DSO at the difficulties being placed in their way which prevented them gaining access to documents that were necessary to facilitate their investigations. I am

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therefore not able to find fault with the fact that the DSO ultimately decided that the warrants for search and seizure was the only available avenue. However, there is no reason why Adv Pikoli did not inform the DG: Presidency that his intervention was unsuccessful before proceeding to obtain the warrants. When probed on this, Adv Pikoli did not provide a satisfactory answer. Informing the DG: Presidency of this might have yielded other alternative strategies to access the documents. The Constitution expects that organs of state must assist one another and that every reasonable effort to settle a dispute between two organs of state by means of mechanisms such as the one devised by the President must be exhausted before approaching a court of law.

### **Failure to Inform the Minister and the President before Proceeding to Obtain Warrants for Search and Seizure and Arrest of Commissioner Selebi.**

257 It is not disputed that Adv Pikoli met with the Minister and briefed her on the investigation into the National Commissioner of Police on 13 separate occasions: In March 2006, in August 2006, on 9

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November 2006, on 16 November 2006, on 11 March 2007, on 13 March 2007, on 17 March 2007, on 28 March 2007, on 8 May 2007, on 25 June 2007, on 11 September 2007, on 18 September 2007 and on 23 September 2007. Following these meetings he furnished the Minister with two written reports on 19 March 2007 and 19 September 2007.

258 It is also common cause that Adv Pikoli met and briefed the President on the investigation against the National Commissioner of Police on 10 occasions: In March 2006, in August 2006, on 9 or 10 November 2006, on 14 November 2006, on 20 November 2006, on 11 March 2007, on 9 May 2007, on 20 May 2007, on 15 September 2007 and on 16 September 2007. The evidence is that he gave the President written reports on 7 May 2007 and 16 September 2007.

259 On 25 June 2007 Adv Pikoli arranged for the DSO team investigating the National Commissioner of Police to meet with the Minister and to give the Minister a full and comprehensive briefing on the investigation. Whilst it was disputed whether the DSO advised the Minister that an arrest warrant for the National Commissioner of Police would be sought, it is common cause that the decision to prosecute was conveyed to

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the Minister at this briefing, and that she did not indicate any opposition to the continuing investigation. In his testimony the Regional Head of the DSO, Gauteng quoted from a colleague's contemporaneous note of the meeting where the Minister responds as follows: *"This will be a huge trauma for the country. The level of casualties will be very high. How do we then deal with SAPS? Can we tear them down? We are in a crisis. This will shake the foundations of this country. We must not have a long drawn-out trial. Let us resolve quickly"*.

260 On 31 August 2007 Adv Pikoli gave instructions to his investigating team to obtain the search and seizure and arrest warrants against the National Commissioner of Police. The warrant of arrest was obtained on 10 September 2007. On the following day Adv Pikoli met with the Minister and informed her of the warrant of arrest for the National Commissioner of Police. Adv Pikoli states that *"Contrary to what I had expected, given her reaction when we briefed her, or rather the team briefed her on the 25th June she was very calm about it ..."*. Adv Pikoli asked her to inform the President as well as to arrange for him to meet with the President to brief him on the developments.

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261 On 14 September 2007 the investigating team obtained the search and seizure warrants against the National Commissioner of Police.

262 Adv Pikoli's evidence is that on the following day, 15 September 2007, he met the President and the DG: Presidency and reported to them that the arrest and search and seizure warrants had been obtained against the National Commissioner of Police. Adv Pikoli says the President was surprised by this news. The President said that he had been unaware that the SAPS had refused to co-operate with the DSO in handing over documents relating to the investigation into Operation Bad Guys and the National Commissioner of Police. In May 2007 the President had mandated the DG: Presidency, Rev Chikane, to facilitate access by the DSO to information in the hands of the SAPS, which information the DSO was being prevented from accessing.

263 The DG: Presidency then asked Adv Pikoli to prepare a written report for the President *"to enable the President to apply his mind as to what he needed to do about Selebi"*. Adv Pikoli prepared a report and met with the President and the DG: Presidency on the following day, Sunday 16 September 2007, at which

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meeting Adv Pikoli handed the President the report. The President indicated to him that he would need to call a meeting with the National Security Council (NSC) to brief them on the prosecution of the National Police Commissioner. While Adv Pikoli says that he was asked if he would attend this meeting, he was never called to a meeting of the NSC.

264 On 17 September 2007 the President addressed a letter to the Minister stating: *"I have been informed that the National Director of Public Prosecutions has taken legal steps to effect the arrest of and the preference of charges against the National Commissioner of the Police Service"*. The letter went on: *"In view of the constitutional responsibilities of the President with regard to the office of the National Commissioner of the Police Service, I deem it appropriate that you obtain the necessary information from the National Director of Public Prosecutions regarding the intended arrest and prosecution of the National Commissioner. This would enable me to take such informed decisions as may be necessary with regard to the National Commissioner. Kindly keep me informed"*.

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265 This letter became a matter of some unnecessary contention between the parties during the work of the Enquiry. When Adv Pikoli had asked for a copy of the letter, the Government claimed that it was privileged, leading to speculation that the letter may have been an instruction by the President to prepare the ground for Adv Pikoli's dismissal from office. At my request the letter was made available during the public hearings. Contrary to the earlier speculation, as the extract above indicates the President merely asked the Minister to get the necessary information to enable the President to execute his constitutional responsibilities.

266 On receipt of this letter from the President, the Minister in turn wrote a letter to Adv Pikoli on 18 September 2007. This letter states: *"In order for me to exercise my responsibilities as required by the constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the Police Service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any*

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*activity that constitutes a crime in terms of the laws of South Africa ... In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account, including the public interest. Therefore I must be satisfied that indeed the public interest would be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the Police Service, you shall not pursue the route that you have taken steps to pursue".*

267 I will return to a consideration of this letter in paragraphs 285 to 289 below. I have also made reference to this letter in paragraph 159 above.

268 On the next day Adv Pikoli replied indicating that he was not opposed to the Minister's request for information. He concluded by saying: *"Finally your letter may be construed as an instruction to the NPA not to proceed with the arrest and preferring of charges against Mr Selebi until you have satisfied*

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*yourself that sufficient information and evidence exist to warrant such steps and that such prosecution would be in the public interest. I wish to point out respectfully that if indeed it were an instruction, it would be unlawful. It would place me in a position where I would have to act in breach of the oath of office I took and of my duties under the constitution and the NPA Act... From my interaction with you in the past I am confident that this is not your intention and that you understand that you and I have a constitutional obligation to protect and promote the independence of the prosecuting authority. I would urge that we meet urgently to discuss this matter and to clarify it".*

269 The Minister responded to Adv Pikoli's letter on 19 September stating: "Clearly when you took the decision to take the legal steps aforesaid, you must have based it on information or evidence in totality, taking into account the whole investigation. It is on this basis that I require a full report in this regard with the necessary evidence... Please provide this report containing the facts and evidence on which you have based your decision. In the

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*circumstances I expect to receive this report today, before close of business".*

270 Adv Pikoli responded by compiling as detailed a report as he could to comply with the Minister's request. The Minister states in her original submission that the information provided to her in this report was not sufficient to enable her to properly advise the President.

271 The same submission merely says that the Minister wrote to Adv Pikoli seeking "full particulars" on the warrants, and complains that *"The attitude of the National Director was that he does not have to give the Minister full information on this matter"*. Initially the Government did not disclose to the Enquiry the full text of the letter from the Minister to Adv Pikoli dated 18 September 2007. This letter was only made available to the Enquiry by Adv Pikoli in his answering submissions.

272 On 20 September 2007 Adv Pikoli called the DG: Presidency requesting him to arrange a meeting with the President and was advised the following day (21 September) that the President would meet with him on Sunday 23 September 2007 at 19h45.

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273 On 21 September 2007 Adv Pikoli received another letter from the Minister. In that letter the Minister confirmed that she had read the report that Adv Pikoli had filed with her but in her view there was nothing substantially different to the information that Adv Pikoli had previously provided to her. The Minister indicated to Adv Pikoli that she would make herself available to meet with him on the afternoon of 23 September 2007.

274 Adv Pikoli met with the Minister on 23 September 2007 at 17h20. At this meeting the Minister asked Adv Pikoli to resign and alleged the reason to be that there had been a breakdown of trust between them. Adv Pikoli testified that he was shocked by that statement of the Minister's because in his opinion the relationship with the Minister had been cordial all along. He refused to resign, and in his testimony he says:

*"In response to the Minister, I had said that I am not prepared to resign for two reasons. One, because of the rule of law and the independence of the prosecutors. And furthermore I indicated to her that I would be lying to the nation if I were to resign. Because on being asked I would have to*

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*say that I have resigned voluntarily, when in fact this would have been imposed on me by somebody else..."*

275 On the same day at 19h45 Adv Pikoli met with the President. The President also asked Adv Pikoli to resign and he intimated that he was not prepared to resign. The President then arranged for a letter to be prepared which he gave to Adv Pikoli informing him of his suspension.

276 The letter of suspension offers two reasons that explain the conduct of the President. After describing the centrality of the Prosecuting Authority in the criminal justice machinery and the Government's fight against crime, the letter refers to the information that has come to the attention of the President that Adv Pikoli entertained the granting of immunity to members of organised crime syndicates in instances where the prosecution of such people would, in Government's view, be in the public interest given the fact that there would be no reason why the prosecuting authority would not proceed against all persons implicated in the alleged offences. The President says that upon evaluating the information he reached a conclusion that Adv

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Pikoli failed to appreciate the nature and extent of the threat posed by members of organised crime syndicates to the national security and that such lack of appreciation in itself amounts to a threat to our national security.

277 The second reason offered for the suspension of Adv Pikoli is that it had come to the attention of the President that there was a breakdown of relations between the office of the NDPP and that of the Minister due to several incidents. The letter refers by way of example to the evidence of Adv Pikoli at the Khampepe Commission of Inquiry.

278 On 24 September 2007 the Government issued a public statement explaining the suspension from office of Adv Pikoli and gave as a reason for it an irretrievable breakdown in the working relationship between the Minister of Justice and Adv Pikoli. On 25 September 2007 the DG: Presidency, in briefing opposition parties in Parliament, explained that the breakdown in the relationship between the Minister and Adv Pikoli was not personal but something had "gone wrong" in the exercise of reporting to the Minister as required by law. This explanation is

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repeated in the initial submissions that Government made before the Enquiry.

279 Adv Pikoli in response paints a completely different picture. His evidence is that he has throughout the process made available to the Minister all the information relating in particular to the DSO's investigation into the possible criminal conduct of the National Commissioner of Police. As indicated elsewhere in the report, Adv Pikoli refers to 13 occasions where he briefed the Minister relating to the investigation around the National Commissioner of Police, and he furnished the Minister with two written reports. His evidence was also that he reported to the President on the DSO's investigation around the National Commissioner of Police on 10 occasions and also submitted two written reports.

280 Adv Pikoli says that he had always received the co-operation and assistance of the President and that of the Minister relating to the investigation into the alleged criminal involvement of the National Commissioner of Police, until he obtained the warrants for the arrest and for search and seizure of documents relating to the National Commissioner of Police. Adv Pikoli cites a series of meetings with

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both the President and Minister culminating in the events of 23 September 2007.

281 At the meeting on 23 September 2007 Adv Pikoli says the Minister requested him to resign. He then asked the Minister what the reasons for the request were and the Minister said there was a breakdown in the relationship between the two of them. His retort to the Minister was *"but Minister you know this is not true"* and the Minister said *"Vusi, it's about integrity and one day I will speak"*.

282 In argument, it was submitted on behalf of Adv Pikoli that none of the reasons that had been offered by the Government as the reasons for his suspension can really stand scrutiny. It was argued that his suspension was *"to put a spoke in the wheels of the investigation and prosecution of the National Commissioner of Police, Mr Jackie Selebi"*. I can understand why Adv Pikoli may see that as a plausible reason to explain his suspension. There are however objective elements surrounding the investigation which point in a different direction.

283 Adv Pikoli admitted that at no stage until his suspension did he have any impression that the

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Minister intended to frustrate his investigation of the National Commissioner of Police. On the contrary, during one of the report-backs to the Minister relating to the possible prosecution of the National Commissioner of Police, the Minister exclaimed that that course of events must, given its ramifications, be expedited. It was also Adv Pikoli's evidence that he did not experience anything but assistance from the office of the President in his investigation of the alleged involvement of the National Commissioner of Police in organised crime. It was in fact the President who created a channel through the DG: Presidency to enable Adv Pikoli to access documents that were in the possession of the SAPS. It is now common cause that these documents were not handed over, unrelated to the effort of the President to help secure those documents for the DSO.

284 There is an additional factor that refutes the hypothesis that the suspension of Adv Pikoli may have been instigated by the Minister and/or the President to stop the prosecution of the National Commissioner of Police. It is a fact that the National Commissioner of Police, despite the suspension from office of Adv Pikoli, is still facing criminal

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prosecution relating to his alleged involvement in those offences. The prosecution of the National Commissioner of Police is still ongoing. I am satisfied that whilst Adv Pikoli has impressed me as a man of unquestionable integrity, with passion to execute his constitutional responsibilities without fear, favour or prejudice, his suspicion that he was suspended to frustrate the investigation and prosecution of the National Commissioner of Police is incorrect. I deal elsewhere in the report with whether or not Government has established the reasons it also offered as justification for the suspension of Adv Pikoli from office.

### **The Minister's Letter of 18 September 2007**

285 On 18 September 2007 the Minister gave a letter (see also paragraphs 159 and 267 above) to the NDPP which in part reads:

*"I am advised that you have taken legal steps to effect the arrest and the preference of charges against the National Commissioner of the police service. I presume that in making this decision, you have taken time to consider the seriousness and gravity of your intended course of action.... In*

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*the light of the above and in order for me to exercise my responsibilities as required by the Constitution, I require all of the information on which you rely to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service.... Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue".*

286 The legislation governing the work of the NPA imposes very harsh fines and imprisonment sentences or both where an organ of state or a member or an employee of an organ of state or any person who improperly interferes with, hinders or obstructs the prosecuting authority or any member thereof in the exercise, carrying out or performance of its duties and functions. The literal reading of the Minister's letter would point to an infraction of the statute.

287 In her affidavit, the Minister explains that it was not her intention to interfere with the NDPP in the performance of his functions. This may well be the

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case, but the perception held by Adv Pikoli that his suspension was directly related to the idea reflected in the letter may not, on the reading of the letter, be without the context and other objective evidence be misplaced. In his testimony before the Enquiry the DG: Justice confirmed that he helped draft the letter. Whilst a Minister is entitled to expect that the DG would not submit draft documents that contravened the Constitution, it does not absolve the Minister as the letter bears her signature.

288 In his reply to the letter referred to as the Minister's letter to Adv Pikoli dated 18 September 2007 ('VP12'), Adv Pikoli left open the opportunity for the Minister to state that the literal meaning of the letter was not intended. The Minister did not take the opportunity to clarify her intent with regard to the letter.

289 Adv Pikoli maintains that the letter constitutes an unlawful and unconstitutional instruction. Government has not put forward any cogent argument to dissuade me from a literal interpretation of the Minister's letter, which was an attempt to unlawfully interfere with Adv Pikoli's prosecutorial independence.

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290 In his evidence Adv Pikoli addressed an issue I had raised with the parties, namely that they should deal with the nature of the environmental assessment that needs to be conducted in respect of the arrest and/or search of high profile persons. When asked what he thought the President could do to create that enabling environment he said:

*"I had in mind one, a possible suspension of the National Commissioner so that when the warrants are executed, he is no longer in office, therefore he is not in command of men under arms. I also had thought that the president might want to consider calling a meeting of SAPS management informing them that the NPA, or rather the DSO, has obtained warrants of arrest and search that the SAPS management would then cooperate in the execution of those warrants. These are some of the things that I thought the president could possibly address."*

291 He said that on 16 September 2007 when advising the President about the warrants against the National Commissioner of Police, the President asked him to delay the execution of the warrants by two weeks to enable the President to prepare the environment for the action against the National Commissioner of

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Police. Adv Pikoli was of the view that a delay of two weeks would be too long because there were, according to him, certain cases that were coming before the courts and he needed to have the warrants executed sooner. He then indicated to the President that he could delay the execution of the warrants for one week. Adv Pikoli says that the President responded by saying:

*"Vusi do you know how angry the police are? Do you know that the police officers are prepared to defy any court order? ... My response then to the President was that Mr President I fail to understand the anger on the side of the police, because we are not acting here against the police as an institution of state, we are acting against certain individuals within SAPS. Even if that means the most senior person within SAPS."*

292 The DG: Presidency says it was obvious to them that Adv Pikoli had come to tell them of a *fait accompli* in relation to these matters. He uses the following language regarding the attitude of Adv Pikoli on the warrants and their execution:

*"... We spent time to say: How are you going to*

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*enter that place and deal with it, you still need the President to do it, you need the security services to assist you to undertake that responsibility and we had a meeting the following day when Mr McCarthy was there as well to deal with those particular matters. It was almost like saying to the President I don't need your assistance, I can do without you. I mean that's how you felt as you sat in that meeting. But the President has got a responsibility as the head of the state to make sure that there is no crisis created in Government, so that everybody can execute their responsibilities..."*

293 Upon being questioned during the hearings Adv Pikoli states that his prosecutorial independence would not have been compromised if he delayed the execution of the warrants for two weeks. An exchange during his examination by counsel for the Enquiry went as follows:

ADV SEMENYA: *Now I am trying to understand how in assisting and supporting one another as organs of state in your various capacities, how the deadlock resolves? You are of the view that your prosecutorial independence would, in those*

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*circumstances, have prevailed?*

ADV PIKOLI:           *No at that stage it was not so much of the question of the prosecutorial independence. That was not the issue because that decision was already taken as the prosecutors to prosecute the National Commissioner. So I didn't see that as an area of prosecutorial independence. I saw it as an area that was to make sure that we don't have a crisis in our hands perhaps. We don't have an embarrassment to the country, that I say that let us then perhaps look at how we can then agree on these issues.*

294 Adv Pikoli was asked a hypothetical question by Mr Gihwala on behalf of the Enquiry and he said that if need be he may have defied the President if the President insisted on a longer period of time before the warrants were executed.

MR GIHWALA:           *But the question I put to you Mr Pikoli, had the president insisted on the extended period of time, would you have acquiesced?*

ADV PIKOLI:           *Reluctant to answer this but I would say that perhaps I might have defied the president.*

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MR GIHWALA: I am sorry?

ADV PIKOLI: I am saying I am very reluctant to answer this question, but if I have to answer it, I must say that perhaps I might have defied the president but I was just hoping that such a thing would never happen.

295 It was argued on behalf of Government that there was no discussion between Adv Pikoli and the President with regard to a delay of one or two weeks, and that this was a fabrication by Adv Pikoli which first surfaced during his evidence at the hearings. Government's closing argument contended that -

*"even having assumed that Mr Pikoli did indeed tell the President about this two week latitude that he was going to give the President, that even then it shows a lack of appreciation. He accepts and concedes that he does not know how long it would take to get systems in place. He does not know how long it would take to talk to the police. He does not know how long it would take to engage Interpol on these issues. However he gives the President one week. We say even on his version, he is impertinent and he is disrespectful."*

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296 I accept the version of the discussion with the President that is put forward by Adv Pikoli. I do not believe that this testimony was a fabrication. It is supported by the evidence of the DG: Presidency. Moreover Adv Pikoli impressed me as a person of unimpeachable integrity and credibility. He gave his evidence honestly even to the point of disclosing facts from which adverse inferences could be drawn against him.

297 In his Heads of Argument Adv Pikoli says that he subsequently realised that it was the Minister's unlawful order on Tuesday 18 September 2007 and his refusal to comply with it on Wednesday 19 September 2007, that were the turn of events which culminated in his suspension on Sunday 23 September 2007. In his evidence Adv Pikoli also says:

*"I must say that up until the letter of the 18th there was no indication which suggested that there was an intention to stop the prosecution."*

298 Adv Pikoli was not able to explain why he did not inform the Minister or the President that he had come to a decision to obtain the warrant of arrest of the National Commissioner of Police. Nor did he provide

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any reason for not informing the Minister on 11 September 2007 that the DSO was applying for the warrants of search and seizure against the National Commissioner of Police three days hence. In his evidence Adv Pikoli merely says it was his "call" not to inform the Minister.

299 It is clear that in the circumstances of the impending prosecution of a state official as senior as the National Commissioner of Police, Adv Pikoli was obliged to inform the Minister at every step of the way. It was necessary that he do so in order to enable the Minister to exercise her final responsibility, namely to report to the President and to Cabinet on such matters especially if they may affect national security. This duty would specifically include informing the Minister of the DSO's intention to apply for warrants of arrest and search and seizure against the National Commissioner of Police.

300 It is no excuse for Adv Pikoli to say that in his view the warrant of arrest would not have been executed before his say-so and until after he had informed the President.

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301 The request by the President for a delay of two weeks in September 2007 was not unreasonable. Adv Pikoli's attitude in relation to the President's request for an extension of two weeks evinces a lack of appreciation for the sensitivities that are attendant on matters that may impact on national security. It illustrates a lack of respect for the President's constitutional obligation to maintain stability and national security, and it suggests that Adv Pikoli believed his own assessment of the security environment superior to that of the President.

302 On the strength of the sequence of events described above it was argued on behalf of Adv Pikoli that the sole reason why he was suspended was his decision to arrest and prosecute the National Commissioner of Police. He says in his evidence *"I was suspended in order to stop the investigation and prosecution of the National Commissioner of Police, Mr Jackie Selebi"*. In Adv Pikoli's Heads of Argument it is stated that *"the real and only reason for his suspension was to frustrate the plan to arrest and prosecute Mr Selebi and to search his home and office"*. The argument was that the Government was bent on protecting the National Commissioner of

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Police from arrest and prosecution. The reasons for the suspension of Adv Pikoli appear from the letter of suspension and no such reasons are offered that point to the Government's intention to interfere with the arrest and prosecution of the National Commissioner of Police. With regards to a reason for the suspension the DG: Presidency says:

*"There were only two options, either you let the National Director of Prosecutions do it [execute the warrants], and (sic) or you suspend. Because if you said do it without making the arrangements to make sure it is done properly you are going to have problems."*

I do not have access to all the information available to the President and am unable to assess the potential threat to stability and national security if Adv Pikoli had continued to pursue his course of action. Nor would it be appropriate for me to try and do so. It had to be a Presidential decision.

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### CONCLUSIONS

303 This Enquiry into the fitness of Adv Pikoli to hold office as the NDPP was established by the President acting in terms of s. 12(6)(a) of the National Prosecuting Authority Act ("the Act").

304 This was the first Enquiry in terms of this legislation. It was envisaged as neither a judicial nor a disciplinary hearing. I was not bound to apply the rules of evidence integral to a judicial process. It was necessary to establish the procedures and the rules which I did with the agreement of the parties.

305 The terms of reference for this Enquiry, published on 3 October 2007, require a determination of whether Adv Pikoli is a fit and proper person to hold the office of NDPP. It required an examination of the exercise of discretion by Adv Pikoli in the decision to prosecute alleged offenders, or grant immunity from prosecution to suspects allegedly involved in organised crime, with particular regard to the public interest and the national security interests of the Republic of South Africa. It also called for an examination of the alleged breakdown of the relationship between the Minister and Adv Pikoli in

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the context of the legislative and constitutional obligation placed on both the Minister and the NDPP. The Enquiry was also obliged to consider such other matters as may relate to the fitness and propriety of Adv Pikoli to hold office as the NDPP.

306 The letter of suspension handed to Adv Pikoli on 23 September 2007 outlined two reasons for his suspension, namely:

- The granting of immunity to members of organised crime syndicates where the prosecution of those alleged offenders would be in the public interest;
- A breakdown in the relations between the office of the NDPP and that of the Minister due to several incidents, such as the evidence of Adv Pikoli at the Khampepe Commission of Enquiry.

307 In seeking to establish that Adv Pikoli is no longer a fit and proper person to hold office as the NDPP, the Government made various written submissions to the Enquiry and presented the oral evidence of witnesses at hearings that were conducted. For his part Adv Pikoli responded to the allegations contained in these submissions by also tabling a

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detailed written response and giving oral evidence, and calling the evidence of the Regional head of the DSO, Gauteng, Adv Nel.

### **Irretrievable Breakdown in the Relationship between the Minister and Adv Pikoli**

308 Addressing the complaint that there had been an irretrievable breakdown in the relationship between the Minister and Adv Pikoli, the Minister's affidavit points to the conceptual differences between her and Adv Pikoli on the role and status of the NPA, which she argues aggravated the relationship. Adv Pikoli strenuously denied that there has been a breakdown in the relationship, and his oral evidence disputes the allegations made on affidavit by the Minister.

309 The differences arose from their differing understanding of their respective responsibilities and the line of demarcation between the Minister's final responsibility over the prosecuting authority as provided for in the Constitution and the Act, and the constitutional guarantee of independence accorded to the NDPP to execute his functions without fear, favour or prejudice. The differences in their respective understandings were aggravated by the DG:

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Justice's misconception of his authority over the NPA, which influenced his reports to the Minister.

310 No evidence was submitted of specific disagreements, nor of attempts to discuss and resolve them. The Presidents letter of suspension refers to the fact that he was advised by the Minister that there was an irretrievable breakdown citing as an example Adv Pikoli's testimony before the Khampepe Commission. However, no evidence of the problem with Adv Pikoli's testimony was submitted and the subject was not pursued by Government during the Enquiry.

311 Government has not established on a balance of probabilities that there has been an irretrievable breakdown in the relationship between the Minister and Adv Pikoli. The differences that were evident were not of such a nature that they could not be resolved by discussion between the Minister and Adv Pikoli.

### **Failure to Prosecute Offenders**

312 Government alleged that Adv Pikoli, in the exercise of his discretion to prosecute offenders, did not have sufficient regard to the nature and extent of the threat posed by organised crime to the national

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security of the Republic. The prosecution of some of the mercenaries involved in the attempted *coup d'etat* in Equatorial Guinea, and the alleged failure to prosecute some of the suspects in the murder of the late Mr Brett Kebble were cited as examples. Government did not lead sufficient evidence in respect of either of these cases to cause me to make an adverse finding against Adv Pikoli. The complaints were also not supported by the facts in these cases. Moreover, any assessment of these decisions by the NDPP would encroach on the constitutionally guaranteed independence of the NPA to determine whether or not to prosecute.

313 The complaint by Government was not substantiated.

### **Immunity and Plea Bargains**

314 The terms of reference for the Enquiry require a determination as to whether Adv Pikoli in taking decisions to grant immunity from prosecution or to enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the national security interests of the Republic, as

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contemplated in Section 198 of the Constitution as well as the Prosecution Policy. Matters relating to Mr Agliotti, Mr Nassif and the Alexandra paedophile were raised in this regard.

315 Mr Agliotti and Mr Nassif concluded plea and sentence agreements in relation to the charge of dealing in drugs. These agreements were concluded after the suspension of Adv Pikoli and he can therefore not be held responsible for them. Whilst it is acknowledged that the plea and sentence agreements were unusual in that they contained conditions that the offenders would testify in other pending matters, Government did not produce any evidence to show that the plea and sentence agreements that were concluded violated the prosecution policy. The agreements were accepted by the court, and I refused to entertain the governments claim that they would be over-ruled on appeal. Government's argument was flawed because a plea and sentence agreement is not subject to an appeal.

316 The complaint with regard to the plea and sentence agreement with the Alexandra paedophile was abandoned by Government. Hence the matters raised in this complaint were not proven.

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### **Failure to Account to the DG: Justice**

317 Government complained that Adv Pikoli failed to comply with his obligations under the Public Service Regulations and the Public Finance Management Act (PFMA), and thereby prevented the DG: Justice from accounting and reporting to the Minister.

318 The DG: Justice had an incorrect understanding of his accounting responsibilities under the PFMA, despite being in possession of legal opinions from senior counsel explaining the ambit of his responsibilities. He allowed the Minister to continue with an incorrect understanding of the responsibilities of the NDPP.

319 Adv Pikoli had not failed to provide the DG: Justice with information necessary for him to execute his duties.

320 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

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agreement 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.

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

322 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 the DG: Justice's disregard and lack of appreciation and respect for the import for an Enquiry established by the President.

### **The Listing of the DSO**

323 The Minister complained that Adv Pikoli sought to have the DSO listed as a public entity within the meaning of the PFMA, despite the Minister's view that it was a policy matter that needed to be discussed by

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Cabinet. There was extensive consultation by Adv Pikoli with the Minister on this and the related matter of the listing of the NPA as a constitutional entity. In heeding one of the Minister's concerns, Adv Pikoli refrained from pursuing the listing of the NPA as a constitutional body. However he went ahead and advised the Treasury that that the DSO was not listed as a public entity in the schedule to the PFMA as he was statutorily obliged to do so under the PFMA.

324 It was necessary however, for Adv Pikoli to have informed the Minister that he was in fact proceeding to advise the Treasury of the fact that the DSO was not listed as a public entity.

### **The Browse Mole Report**

325 Government alleged that Adv Pikoli is unfit to hold office due to the manner in which he handled the Browse Mole Report.

326 After being briefed by the head of the DSO about the investigation and being presented with a preliminary report in March 2006 it was incumbent on Adv Pikoli to advise the Minister of the gravity of the information that had emerged. In addition, as the

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matter was outside the legal mandate of the DSO, he should have ordered that any further involvement by the DSO cease immediately. He should also have alerted the intelligence agencies to the information that the DSO had received. He only informed the intelligence agencies after he received the final Browse Mole Report in July 2006.

327 It was also claimed by Government that Adv Pikoli should have done more to ensure that the head of the DSO fully co-operated with the Task Team set up by the President to look into the circumstances around the Browse Mole report. It is common cause that the Head of the DSO is appointed by the President and that the ability of the NDPP to take disciplinary action against the Head of the DSO is therefore constrained.

328 The behaviour of Adv Pikoli in dealing with the Browse Mole Report is indicative of his lack of sensitivity in dealing with matters of national security. This is of particular concern when the matters are of a politically sensitive nature and such as may impact on South Africa's relations with other countries.

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### The Malawian Investigation

329 Government alleged that Adv Pikoli failed to inform the Minister and the relevant intelligence agency of the investigation of an alleged plot to assassinate the Malawian President, a plot which involved South African citizens and was partially planned in this country. The NDPP had been approached by his counterpart in Malawi requesting assistance with the Malawian investigation into an alleged conspiracy to assassinate the President of Malawi. The request was handled in compliance with the International Co-operation in Criminal Matters Act in terms of which the DG: Justice is the central authority. The NPA, on the instruction of the DG: Justice, collected information pertaining to the investigation. The NPA did not investigate an intelligence matter or otherwise act outside its mandate.

330 However Adv Pikoli was obliged to inform the Minister of the assassination plot when he first became aware of it, as this may have had potential implications for national security and for the conduct of South Africa's international relations. This is a further example of his lack of sensitivity in dealing with matters of national security as referred to above.

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331 The DG of Justice also had a duty to bring these aspects to the attention of the Minister. However, this does not detract from Adv Pikoli's own responsibility

### **Unregulated Interaction with Foreign Intelligence Services**

332 With regard to the complaint that a member of the DSO was engaged in unregulated interaction with foreign intelligence services (FIS) Government relied on the evidence of the DG: National Intelligence Agency ("NIA"). Adv Pikoli had been briefed by NIA on the dangers of unregulated interaction with FIS. The evidence points to the fact that the DSO member's unregulated interaction with FIS occurred before Adv Pikoli took office as the NDPP, and any further interaction was not sanctioned by Adv Pikoli and nor was it specifically brought to Adv Pikoli's attention.

333 Adv Pikoli could therefore not be held responsible for these engagements by the DSO member with FIS.

### **Post-TRC matters**

334 The Government alleged that Adv Pikoli's handling of the post-TRC cases did not exhibit the sensitivity to

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the victims and an appreciation of the public interest issues that the Prosecution Policy requires to be taken into consideration. Government relied on the evidence presented by the DG: Presidency who testified on his personal experience of being poisoned by operatives of the apartheid regime.

335 Government did not tender any further evidence and stated that they have not pursued this complaint before the Enquiry. The complaint therefore falls away.

### **Searches at the Unions Buildings & Tuynhuys**

336 Government stated that the manner in which the search and seizure operations relating to the investigation of former Deputy President Zuma were planned and conducted did not take into account that the Union Buildings and Tuynhuys are national key-points housing classified documents. The searches took place in August 2005. Adv Pikoli did not inform the Minister prior to obtaining the warrants that the NPA intended carrying out search and seizure operations at the Union Buildings and Tuynhuys.

337 His failure to do so amounts to a dereliction of duty, and demonstrates a lack of sensitivity and

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appreciation of the entire dimensions of the responsibilities as the NDPP.

338 He informed the Minister as well as the President, Deputy President Mlambo-Ngcuka and the DG: Presidency before the searches were conducted. He delegated the Regional Head of the DSO, Gauteng to liaise with the DG: Presidency to make the necessary arrangements for the searches.

339 However Adv Pikoli failed to ensure that all necessary security measures were taken to prevent any potential breach of security at the Union Buildings and Tuynhuys. Adv Pikoli and the DSO did not obtain the necessary security clearances for the security company that assisted with the search and seizure operation at the Union Buildings.

### **The Investigation into the National Commissioner of Police**

340 Governments raised two complaints in relation to the manner in which Adv Pikoli pursued the investigation into the National Commissioner of Police, namely:

- That he did not exhaust the process established by the President to facilitate access to documents and evidence in the possession of SAPS;

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and

- That he did not inform the Minister or the President prior to obtaining warrants for search and seizure and for the arrest of the National Commissioner.

341 Due to the difficulties that the DSO experienced in accessing information from the SAPS in relation to Operation 'Bad Guys' and the related investigation of the National Commissioner of Police, the intervention of the President had been sought by Adv Pikoli. The President intervened to assist the DSO to obtain the information in the possession of the SAPS relating to the investigation of the National Commissioner of Police. The President requested the DG: Presidency to facilitate access to this information by the DSO. Despite the efforts of the DG: Presidency the information was not forthcoming from SAPS.

342 Adv Pikoli then authorised the securing of warrants of search and seizure against the National Commissioner of Police without first reverting to the Presidency.

343 Adv Pikoli did not exhaust all the options presented by this intervention by the Presidency before

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applying for warrants of search and seizure of this evidence. Although he was frustrated by the SAPS in his efforts to obtain the information in their possession, and was entitled to seek the information through a warrant of search and seizure, he should have informed the DG: Presidency that his intervention had been unsuccessful before resorting to the Courts and seeking warrants. This would also have afforded the DG: Presidency the opportunity to pursue other options to gain access to the information.

344 Since he was dealing with the impending prosecution of a state official as senior as the National Commissioner of Police, Adv Pikoli was obliged to keep the Minister informed at all times in order to enable her to exercise her final responsibility, and also to report to the President and to Cabinet on a matter that could impact on national security. This duty would specifically include informing the Minister prior to applying for warrants of arrest and search and seizure against the National Commissioner of Police.

345 Adv Pikoli failed in his duty to keep the Minister informed. He did not recognise he was obliged to do

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so, indicating simply that it was his call and he had not considered it as necessary.

346 I did not find any substance in Adv Pikoli's assertion that the reason for his suspension was to stop the prosecution of the National Commissioner of Police. Adv Pikoli confirms in his evidence that he received assistance from the Presidency and the Minister in his investigation of the National Commissioner of Police, and that there had not been any earlier attempts to stop him proceeding.

347 However, Adv Pikoli has argued that the Minister's letter to him dated 18 September 2007 (VP12) constituted an unlawful and unconstitutional instruction to him to desist from pursuing the matter against the National Commissioner of Police. Whilst the Minister states that she did not intend to interfere with the NDPP in the exercise of his prosecutorial discretion, the literal reading of the letter leaves no room for doubt that that this is what it conveyed. However, at that time, the opinion of Adv Pikoli was that given the history of their relationship he was satisfied that the Minister could not have intended to give an unlawful instruction.

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348 The theory that Adv Pikoli gives as the reason for his suspension is belied by another probable reason that his suspension may have been precipitated by the need to avert the possible threat to national security that may have resulted if the warrants were executed before an enabling environment was created. The enabling environment according to the judgement of the President would have required a period of two weeks which Adv Pikoli was not willing to concede. Adv Pikoli did not appreciate that the President would need to obtain comprehensive assessments of the possible adverse reaction by members of SAPS and the potential threat to the stability of the country, as well as to determine what measures needed to be put in place to contain the situation.

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349 Having considered all the matters above, the basis advanced by Government for the suspension of Adv Pikoli has not been established through the evidence submitted to the Enquiry.

350 However in the course of this Enquiry some deficiencies in the capacity and understanding of Adv Pikoli to fully execute the range of responsibilities

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attached to the office of the NDPP became apparent. I feel it incumbent to draw attention to these. They centre in the main on the lack of understanding by Adv Pikoli of his responsibility to operate within a strict security environment and to ensure that the NPA, and the DSO, operate in a manner that takes into account the community interest and does not compromise national security. Some examples include the following:

- His failure to timeously inform the Minister and the President prior to resorting to the courts to obtain warrants in cases that could have an impact on national security;
- His failure to recognise that the integrity of official documents could only be maintained through strict compliance with the Minimum Information Security Standards (MISS);
- His failure to ensure that all DSO investigators and other relevant NPA staff had the requisite security clearances, and that renewals of such security status is conducted regularly; and
- His failure to ensure that third party service providers, especially private security companies

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were vetted.

351 It is also of concern that Adv Pikoli does not fully appreciate the sensitivities of the political environment in which the NPA needs to operate, and his responsibility to manage this environment. Adv Pikoli needs to always recognise the final responsibility of the Minister and should have proactively made her aware of all matters of a sensitive nature that the NPA became aware of in the course of its functions, and fully and regularly briefed her on the progress of high profile investigations and prosecutions.

352 I have serious concerns arising from the evidence of the discussion at the meeting between the President and Adv Pikoli prior to the suspension. As I have indicated, I accept the testimony of Adv Pikoli as truthful.

353 Adv Pikoli appears to have given little thought to the difficulties that he might have encountered in executing the warrants and should have prepared for possible difficulties. The DG: Presidency has testified that the President was presented with a *fait accompli* and Adv Pikoli's attitude indicating

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that he did not believe he needed any assistance from the President.

354 Adv Pikoli also did not give due consideration to the actions the President might need to take in order to defuse a potential security crisis and instability and to preserve the country's international reputation. He did not take seriously the President's concerns about the mood of the SAPS and their possible reaction to the arrest of the National Commissioner; and even challenged the President's assessment of the time he would require to manage the situation.

355 The Head of State is inevitably privy to information that is not available to others, and it was incumbent on Adv Pikoli to respect the President's assessment of the time that would be necessary; the more so as Adv Pikoli admitted that the request did not undermine his prosecutorial independence in any way. Even more disturbing was Adv Pikoli's response to the question on whether he would have acquiesced to the request if the President had insisted on a two week delay. Adv. Pikoli said:

*"I am saying I am very reluctant to answer this*

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*question, but if I have to answer it, I must say that perhaps I might have defied the president but I was just hoping that such a thing would never happen."*

356 This is most startling, particularly if he would have still been in a position to execute the warrants after the two weeks. His judgment that the two weeks delay would have compromised the matters that were pending is not supported, even by the historical events. Those matters were ultimately addressed in court in November 2007 well beyond the two weeks period the President had requested.

357 Had these facts been presented as the reason for the suspension, when the conduct would have held a real risk of undermining national security, I would not have hesitated to find the reason to be legitimate. However, these were not the reasons put forward by Government.

358 It is encouraging to note that all the parties appreciate the constitutional imperative of respecting the NPA's right to discharge its functions without fear, favour or prejudice as well as the

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final responsibility entrusted by the Constitution to the political head.

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### RECOMMENDATIONS

- I. As the Government has failed to substantiate the reasons given for the suspension, Adv Pikoli should be restored to the office of NDPP. Adv Pikoli needs to be sensitised to the broader responsibilities of his office and in particular to enhance his understanding of the security environment in which that office should function.
- II. Due consideration should be given to all the other concerns raised in this Report and appropriate action taken.
- III. The South African Constitution and legislation uniquely provide for both political accountability through the Ministers final responsibility as well as for prosecutorial independence. Until this relationship is established through practice over time, it will be necessary for any incumbent or incoming Minister and incumbent or incoming NDPP to discuss and try and reach a mutual understanding of their responsibilities and the parameters of their relationship.

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- IV. Further there should be a structured engagement and interface between the Minister and the NDPP on an on-going basis to clarify their respective functions and responsibilities and lines of communication. This relationship is key to the proper functioning of the NPA and the office of the NDPP as well as to ensure that there is democratic political oversight over this key organ of state.
- V. It is an anomaly that the head of the DSO, which is part of the NPA, has not been directly accountable to the head of the NPA. This is an institutional practice that should not be repeated.
- VI. The Ministerial Co-ordinating Committee envisaged under s. 31 of the Act or such similar structure needs to function effectively to ensure that organs of state in the security sector do not come into conflict with each other. The failure of co-ordination dissipates resources and has inhibited the effectiveness of law enforcement strategies.
- VII. The constitutional instruction that all organs of state must co-operate with one another, and must

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exhaust all measures reasonable to resolve their disputes before litigating with one another, must be respected and adhered to.

VIII. Most of the complaints directed against Adv Pikoli relate to events that took place a long time before his suspension. It is the responsibility of the Minister to ensure that any transgressions are addressed at the time. This would avoid festering misunderstanding and a recurrence of the same violations.

**DR F N GINWALA**

4 November 2008